

# The Best Interests of Children in the South African Constitution

Elsje Bonthuys\*

Associate Professor, University of the Witwatersrand, South Africa

## 1 Introduction

The criticisms of the best interests principle, famously set out by Mnookin in 1975, still hold true thirty years later. He pointed out that

[d]eciding what is best for a child poses a question no less ultimate than the purposes and values of life itself.<sup>1</sup>

In the context of this article it is especially useful to remember that the indeterminacy and judicial discretion which the best interests standard invites can easily lead to prejudice and discrimination. A predominant focus on children's interests may obscure the interests of other parties and thus cause unjust results in family law cases.<sup>2</sup> However, despite the shortcomings of the welfare principle, Reece notes that the ideological power of this concept is so entrenched in family law that it is used even to justify arguments for the abolition of the best interests standard.<sup>3</sup>

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<sup>1</sup> Robert H Mnookin 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' 1975 (39) *Law & Contemporary Problems* 226 at 260.

<sup>2</sup> Mnookin 1975 (39) *Law & Contemporary Problems* 269-270; John Eekelaar 'Beyond the Welfare Principle' 2002 (14) *Child & Fam LQ* 23 at notes 3-8; Jon Elster 'Solomonic Judgments: Against the Best Interest of the Child' 1987 (54) *U Chi L Rev* 1 at 16-20.

<sup>3</sup> Helen Reece 'The Paramountcy Principle: Consensus or Construct?' 1996 (49) *Current Legal Problems* 267 at 274.

The best interests standard originates in and has long formed part of South African common law.<sup>4</sup> Despite the criticisms justly levelled against it, this principle has also been included in our Constitution<sup>5</sup> as section 28(2), which determines that

‘A child’s best interests are of paramount importance in every matter concerning the child.’<sup>6</sup>

In addition, section 28(1) also sets out a relatively extensive list of specific children’s rights which include rights to parental care, family care or alternative care, rights to be protected against abuse and ill-treatment, socio-economic rights to shelter, healthcare, nutrition and rights to have legal practitioners assigned to them under certain circumstances. Apart from these special rights, children are also entitled to all other constitutional rights insofar as the context allows them to apply to children’s lives.<sup>7</sup> The Constitution does not contain explicit family rights or parental rights, nor does it specifically protect the family as a social institution. However, the Constitutional Court has indicated that the family is indirectly protected via the right to dignity of its members.<sup>8</sup>

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<sup>4</sup> In Roman-Dutch law, from which much of the South African common law is derived, custody of children was regarded as a matter for the discretion of judges. Voet The Commentary on the Pandects (Gane’s Translation) (1965, originally published in 1698) 25.3.20. This discretion was generally based on what judges perceived as being in the best interests of children. See for instance *Simey v Simey* (1881) 1 SC 171 at 176.

<sup>5</sup> Act 108 of 1996.

<sup>6</sup> The equivalent provision in the Interim Constitution, Act 200 of 1993 determines that ‘in all matters concerning such child his or her best interest shall be paramount.’

<sup>7</sup> Children do not, for instance, have rights to vote or stand for political office, but older children may obtain rights to freedom of religion and conscience.

<sup>8</sup> *In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC), paras 98—102. See also *Dawood, Shalabi & Thomas v Minister of Home Affairs & Others* 2000 (1) SA 997 (C); *Dawood, Shalabi, Thomas v Minister of Home Affairs & Others* 2000 (8) BCLR 837 (CC); *Patel and Ano v Minister of Home Affairs & Ano* 2000 (2) SA 343 (D); *Makinana, Keelty & Others v Minister of Home Affairs & Ano* 2001 (6) BCLR 581 (C); *Booyesen & Others v Minister of Home Affairs & Others* 2001 (7) BCLR 654 (CC).

From the inclusion of the best interests principle and detailed children's rights in the Constitution, two sets of tensions emerge. The first arises between the case-by-case application of the best interests principle and the general, principled application of human rights and constitutional norms. Current applications of the best interests principle stress the fact that the best interests of a particular child would depend on the surrounding circumstances and that each case should be decided on its own merits.<sup>9</sup> In the context of the Human Rights Act which incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms into English law, Herring has classified the main difference between an approach based on the welfare principle and one which takes fundamental human rights as its starting point as follows:<sup>10</sup>

'First, less evidence is required to rebut the factual presumption of welfare than to demonstrate that the breach of a right is necessary in a democratic society. Secondly, the nature of the question is different. It is essentially an evidential question in the welfare approach. The law is clear – the order which should be made is that which best promotes the child's welfare. The question is then a factual one – which order will actually promote the child's welfare? Whereas in the European Convention approach, it is a question of judgment – whether the harm to the child is sufficient to make the breach 'necessary' as understood by the law.'

The second set of tensions arise from the need to balance the rights and interests of children with the rights and interests of other family members and the needs of society in general. The inclusion of children's rights, and particularly the best interests standard in the Constitution has inspired in some South African academics the hope that the parent- or family-centered systems of common and indigenous law would be replaced with child-centered legal rules, and that courts would use children's fundamental constitutional rights to improve their legal and social circumstances.<sup>11</sup> This means that, within a rights-based paradigm, courts should consider both the rights of children and the rights of other family members. This, in turn, raises the question of whether children

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<sup>9</sup> For instance *V v V* at 187F.

<sup>10</sup> Jonathan Herring 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary?' 1999 (11) *Child & Fam LQ* 223 at note 73-74.

<sup>11</sup> Tshepo L Mosikatsana 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution' 1998 (3) *Michigan J of Race and Law* 341 at 345, 354, 355 392.

should have the status of litigants in matters which affect them and whether independent legal representatives should be engaged to protect their fundamental rights.

In a review of recent trends across different family law systems Dewar noted an international tendency to move from indiscriminate, discretionary norms like the best interests standard towards more detailed authoritative legal rules.<sup>12</sup> One of the reasons for this move can be found in the influence of human rights standards in constitutions and international instruments which lead to a more ‘rights-based’ and therefore more predictable form of legal reasoning. The issues which arise when the interests of children must be adjudicated in a human rights context are therefore also likely to occur in other common law jurisdictions which adopt Constitutions containing fundamental human rights or which accede to international instruments which create justiciable human rights in the family context.

This article will consider the ways in which South African courts have addressed, or failed to address these two sets of tensions. In doing so, I hope to provide an example and some ideas about the ways in which the common law concept of the best interests of the child could be used to enhance the effectiveness of fundamental human rights. I intend to show what could happen when a broad common law principle, which is generally applied on a case-by-case basis, becomes a constitutional right or value which should ideally be applied to all cases in a principled and general manner.

The first part of this article will investigate the basic question of whether the best interests principle in the Constitution functions as a legal rule, a fundamental constitutional right, a value or a principle of interpretation. I will argue that although courts call it ‘a right,’ they do not treat it like they do other constitutional rights and that its cannot function as a right in itself.

Thereafter I will survey the ways in which the best interests is used, or ignored, when courts develop the common law and customary law. My point is that some courts ignore the best interests ‘right’ completely, that other courts simply assume that the common law as it currently stands accurately reflects the best interests of the child and

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<sup>12</sup> John Dewar ‘Family Law and Its Discontents’ 2000 (14) IJLP & F 59, text with notes 32 – 37.

that a third category of courts use the best interests principle to revise or drastically change the rules of our common law.

I will then address the ways in which courts resolve the contradictions between children's rights and their welfare on the one hand, and between children's rights and the rights of other family members. My argument is that in general, courts fail systematically to analyse the meaning of the best interests of the child, or indeed any of the other children's rights contained in the Constitution. In the final section I will suggest some ways in which the best interests principle in its constitutional guise can play a meaningful role in the development of family law. I will not deal with statutory developments in family law,<sup>13</sup> but courts' interpretations of legislation may form part of my discussion.

## ***2 The best interests: A value, a principle of interpretation, a rule, or a right?***

What courts can do with a fundamental constitutional right and how they must go about it, differs from what can be done with a mere value or a principle of interpretation. Before trying to make sense of what the courts have done with the best interests principle in the South African Constitution, it is therefore necessary to identify what it is.

Friedman and Pantazis identify three possible uses of the best interests principle. They are firstly as an aid to interpret the other children's rights in section 28, second to determine the scope of other fundamental rights and thirdly as a fundamental right in itself.<sup>14</sup> I would add three further possible uses, namely as a constitutional value, similar to the values of dignity, equality and freedom in section 7(1) of the Bill of Rights or as a rule of law, similar to the provisions relating to the compensation for the expropriation of

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<sup>13</sup> See for an overview of some of these Brigitte Clark 'A "Golden Thread"? Some Aspects of the Application of the Standard of the Best Interest of the Child in South African Family Law' 2000 (11) Stellenbosch LR 3.

<sup>14</sup> Adrian Friedman & Angelo Pantazis 'Children's Rights' in Chaskalson, Kentridge, Klaaren, Marcus, Spitz & Woolman Constitutional Law of South Africa 2<sup>nd</sup> ed (2005) at 47-22.

property<sup>15</sup> and rights of arrested and detained persons to be brought before a court.<sup>16</sup> It is also possible that the best interests principle may be only be a ‘general guideline’ with a meaning and content identical to that in the common law.<sup>17</sup>

The Constitutional Court jurisprudence is confusing. However, starting in 2000 with *Christian Education South Africa v Minister of Education*<sup>18</sup> and *Minister for Welfare and Population Development v Fitzpatrick*<sup>19</sup> there has been a tendency to hold that the best interests creates an independent right for the child.<sup>20</sup> Yet, in some of the very same cases, the best interests of the child is also called a ‘standard’<sup>21</sup> or a ‘principle.’<sup>22</sup> In the remainder of this section contend that the way in which the best interests principle is generally used by the courts argues against it being an independent constitutional right. I also maintain that it is not necessary to regard the best interests as a right, since there are other constitutional rights of children which apply more directly in the decided cases.

When a South African court is faced with an argument that a fundamental constitutional right has been infringed, the enquiry should follow these two stages:

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<sup>15</sup> Section 25(3).

<sup>16</sup> Section 35(1)(d).

<sup>17</sup> Suggested in *Jooste v Botha* 2000 2 SA 199 (T) at 210C-E and apparent from those cases which either ignore the Constitution completely or which assumes that the best interests principle is adequately reflected in the common law.

<sup>18</sup> 2000 10 BCLR 1051 (CC) par 41. The case dealt with the constitutionality of Government’s ban on corporal punishment in non-government religious schools.

<sup>19</sup> 2000 7 BCLR 713 (CC) par par 17, dealing with the constitutionality of a provision which prohibits adoption of South African children by people who are not citizens of this country.

<sup>20</sup> *Sonderup v Tondelli* 2001 1 SA 1171 (CC) assumes that the best interests provision is a right, because it subjects it to a section 36 limitations analysis; *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) par par 20; *Bannatyne v Bannatyne* 2003 2 SA 363 (CC); *De Reuck v Director of Public Prosecutions* 2003 12 BCLR 1333 (CC) par 55.

<sup>21</sup> *Minister for Welfare and Population Development v Fitzpatrick* par 18.

<sup>22</sup> *Du Toit v Minister of Welfare and Population Development* par 22.

'first, an enquiry as to whether there has been an infringement of the ...guaranteed right; if so, a further enquiry as to whether such infringement is justified'<sup>23</sup>

In the case of the best interests of a child the first stage would involve an interpretation of the best interests criterion to determine whether the conduct or legal rule in question infringes on the right, while the second stage, called the limitations analysis, would test whether the infringement on the right is constitutionally allowed.<sup>24</sup> It is noticeable that the Constitutional Court cases describing the best interests of the child do not follow these steps. Instead of analysing and interpreting the contents of the best interests as they would have done with other fundamental rights, the courts simply assert that a particular rule or practice infringes the best interests of the child.<sup>25</sup> Given the notorious uncertainty of the concept and the fact that people could be expected to disagree strongly about what is good for children in general, this is curious. Furthermore, once the conclusion is reached that the best interests of the child have been infringed, the Constitutional Court has not, with the exception of the *Sonderup* case, embarked on a full limitations enquiry.<sup>26</sup> The fact that the Constitutional Court has not dealt with the best interests as it normally treats other rights creates the impression that, contrary to their rhetoric the best interests is not really a fundamental right, or at least not a right like all the others in the Bill of Rights.

More importantly, in none of these cases was it really necessary for the court to use the best interests as a right, since there were other children's rights which applied

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<sup>23</sup> *Ferreira v Levine NO 1996 1 SA 984 (CC)* par 44.

<sup>24</sup> Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (2001) 4<sup>th</sup> ed 28-31.

<sup>25</sup> See for instance *Du Toit* par 22. In this case many people would argue that allowing children to be adopted by two parents of the same sex would not be in their interests. In *Fitzpatrick* par 20 the court held that precluding non-citizens from adopting children is not in their best interests. However, it could be argued that it is not in the best interests of children to be removed from their country and their cultural roots. In *De Reuck* the Court mentions the best interests 'right' but actually focuses on children's rights to dignity and bodily integrity.

<sup>26</sup> In this case the Court essentially holds that the infringement upon the 'short-term best interests of the child in jurisdictional matters' is justified by the purpose of protecting the long-term best interests of children. See par 28-37. The limitation of a right by itself is strange and unusual.

more directly. *Christian Education* dealt with a challenge to legislation prohibiting corporal punishment in schools on the basis that it infringed parents' freedom of religion. In addition to mentioning the best interests 'right,' the Court holds that the child's rights to dignity and freedom and security of the person to limit the parents' rights to freedom of religion.<sup>27</sup> The constitutionality of legislation which prohibited adoption by non-citizens were at issue in the *Fitzpatrick* case. This matter could have been decided on the basis of the child's right to 'family care or parental care, or to appropriate alternative care when removed from the family environment,'<sup>28</sup> since an absolute ban on adoptions by non-citizens would leave some children in institutions when they could have been adopted. In the case of *Du Toit* lesbian parents challenged the constitutionality of legislation which prevented both of them from adopting children as parents. Apart from briefly indicating that the legislation infringed upon the best interests of the children,<sup>29</sup> the court focused on the parental rights to equality and dignity. This case could also have been decided on the basis of the children's rights to parental care. The same right could have been invoked in *Bannatyne* where the court had to decide whether there were common law remedies in addition to those provided in the legislation dealing with non-payment of child support. In *De Reuck* the rights to privacy and freedom of expression of an adult who was found in possession of child pornography were limited by children's rights to dignity<sup>30</sup> in addition to the best interests 'right.'<sup>31</sup> Children's rights to bodily integrity and to be protected from abuse or degradation<sup>32</sup> would also have limited adults rights. *Sonderup v Tondelli* is the exception, since a challenge to the Hague Convention was directly centered on the argument that it did not give effect to the best interests of children. However, even in this case it was not necessary to classify the best interests as

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<sup>27</sup> Paragraph 47.

<sup>28</sup> Section 28(1)(b).

<sup>29</sup> Paragraphs 21, 22.

<sup>30</sup> Paragraph 63.

<sup>31</sup> Par 55.

<sup>32</sup> Section 28(1)(d).

a right to come to the conclusion that the Convention was intended actually to serve children's interests in returning them to the jurisdiction of their countries of origin.

It is also significant that other Constitutional Court cases involving children do not refer to the best interests as a right. These include the *Grootboom* case,<sup>33</sup> where it was argued that homeless parents should be provided with accommodation together with their children on the basis of the children's rights to shelter and *Fraser v Children's Court, Pretoria North* about the constitutionality of legislation which dispensed with the father of a child born out of wedlock's permission for an adoption.<sup>34</sup> The Constitutional Court also failed to mention the best interests 'right' in *President of the RSA v Hugo*<sup>35</sup> about the constitutionality of a presidential pardon to prisoners who were the mothers, but not the fathers, of young children and the recent case of *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA*<sup>36</sup> which held the customary rule which favours first born men as heirs to be unconstitutional. In all of these cases the disputed legal rules would clearly impact on the best interests of any children involved. If the best interests were indeed a right, the omission of this right from the cases would be a grave oversight indeed.

One question which has thus far not been answered in the Constitutional Court is, if there is indeed a best interests right, what would its contents be? The wording of section 28(2) suggests that that the *interests* of the child, and not the *rights* of the child, should be weighted favourably against the *rights* of other parties. This would be a very strange right, for it would import into the constitutional analysis a whole set of interests in addition to children's rights. It would mean that, in deciding whether to limit the best

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<sup>33</sup> 2001 1 SA 46 (CC).

<sup>34</sup> 1997 2 BCLR 153 (CC) par 19-23.

<sup>35</sup> 1997 4 SA 1 (CC). The case discusses gender discrimination and discrimination on the basis of marital status, but not the interests of the children of the prisoners.

<sup>36</sup> 2005 1 BCLR 1 (CC). The case was decided on the basis that the existing rule discriminated against women and against extra-marital children.

interests of the child, courts should weight the rights of children and other parties against children's interests.

If courts use the terminology of rights to refer to the best interests of the child but do not treat the best interests as a right, what is the best interests principle then? In the following section I investigate the ways in which courts use the best interests to develop the common law. I then examine the use of the best interests principle to give party status to children who are the subjects of court cases and then I investigate how courts use it to articulate and accommodate the rights and interests of parents.

### **3 *The best interests and development of the common law***

Given the lack of clarity about the meaning and status of the best interests of the child in the Constitutional Court jurisprudence, the confusion in the High Courts which have to apply the best interests test more regularly is probably not surprising. The High Courts are sometimes confronted with arguments that common law rules are incompatible with the best interests of the child and should therefore be developed. In the remainder of this section I argue that High Courts have used the constitutional best interests principle in three ways when called upon to develop the common law. Some courts have ignored the existence of the principle, or at least its constitutional manifestation. Other courts have assumed that its inclusion in the Constitution has made no legal difference since existing common law rules adequately cater for the best interests of children, while a last category of cases enthusiastically use the best interests principle to change the common law. What courts have not done, however, is to analyse the meaning of the concept or to consider other constitutional rights of children.

Existing common and customary family law rules have survived the advent of the Constitution, but only to the extent to which they can be reconciled with the Bill of Rights.<sup>37</sup> Litigants can therefore challenge these rules on the basis that they offend constitutional rights or values and common law rules which fail this test can be abolished

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<sup>37</sup> Constitution s 8(1), 8(3), 39(3).

or developed in line with the ‘spirit, purport and objects of the Bill of Rights.’<sup>38</sup> In *Carmichele v Minister of Safety and Security and Another*<sup>39</sup> the Constitutional Court held that, in developing of the common law,

‘there are two stages to the inquiry a court is obliged to undertake. The first stage is to consider whether the existing common law...requires development. This inquiry requires a reconsideration of the common law in the light of section 39(2).<sup>40</sup> If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.’

Like the Constitutional Court cases which fail to mention the best interests principle,<sup>41</sup> some High Courts continue to apply contentious common law and customary rules as if the Constitution and the best interest principle it contains did not exist. Examples can be found in judgments dealing with intestate succession in customary law like *Mthembu v Letsela*<sup>42</sup> and the recent Supreme Court of Appeal case, *Van Zijl v Hoogenhout*,<sup>43</sup> dealing with the prescription of civil claims of people who had been sexually abused as children. In the latter case the Court considered the constitutional rights of access to justice, but not the effect of extending the prescription period on children who are victims of sexual abuse.

A different line of cases mentions the best interests principle, but fails to consider the fact that it is now also a constitutional principle. These courts may or may not mention its inclusion in the Constitution, but they generally just assume that the common law meanings and interpretations of the best interests principle continue to operate unchanged. Included in this category are the High Court and Supreme Court cases on

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<sup>38</sup> Constitution s 39(2).

<sup>39</sup> 2001 10 BCLR 995 (CC) par 40.

<sup>40</sup> It reads: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

<sup>41</sup> See the discussion in par 2 above. Of the cases cited there, the *Bhe* case dealt with a rule of customary law and the other cases dealt with statutes or executive action.

<sup>42</sup> There are two judgements reported as 1997 2 SA 936 (T) and 1998 2 SA 675 (T).

<sup>43</sup> [2004] 4 All SA 427 (SCA).

relocation of custodian parents after divorce<sup>44</sup> and access and custody rights of biological parents.<sup>45</sup>

By way of contrast there are other courts which use the inclusion of the best interests principle in the constitution to change the common law drastically. What is noticeable here, is the failure of some of these courts to consider clearly whether and how the existing common law rules conflict with the constitutional values as set out in *Carmichele*. Instead, in cases like *Heysteck v Heysteck*<sup>46</sup> and *Krugel v Krugel*<sup>47</sup> courts simply assert that the present common law does not accord with the best interests of the children, that they are constitutionally bound to develop the common law and that a particular new rule would be better for children. Probably the most astonishing example is to be found in *Laerskool Middelburg v Departementshoof Mpumalanga Departement van Onderwys*.<sup>48</sup> The governing body of an Afrikaans school challenged the decision by the Department of Education to change the school into a dual medium school to accommodate certain pupils. Even though the administrative action was clearly illegal because the statutory procedures were ignored, the court held that the constitutional best interests principle meant that the rights of those pupils who had already been admitted to

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<sup>44</sup> For instance *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C), *Godbeer v Godbeer* 2000 3 SA 976 (W), *Jackson v Jackson* 2002 2 SA 303 (SCA).

<sup>45</sup> *Jooste v Botha, B v S* 1995 3 SA 571 (A), *Van der Linde v Van der Linde* 1996 3 SA 509 (O), *Ex Parte Critchfield* [1999] 1 All SA 319 (W), *Tyler v Tyler* [2004] 4 All SA 115 (NC).

<sup>46</sup> [2002] 2 All SA 391 (T) which declares at 404 f-g that ‘the constitutional notion of parental care and the paramountcy of the best interests of the child require an attitudinal shift from an antiquated Germanic parental and child relationship, which formed the substratum of the common law, to the rights of the child which includes parental and family care. Common law needs to be aligned to serve the constitutional imperatives of the child in a heterogeneous democratic society.’ However, the case contains no analysis of the implications of the common law rule that stepparents are not obliged to maintain their stepchildren and simply disregards authority to the contrary.

<sup>47</sup> 2003 6 SA 220 (T). Disregarding strong authority against the award of joint custody in cases which entail strong parental animosity, the court held at 228B that ‘I do not believe that general hostility between the parents should be a bar to a joint custody order.’

<sup>48</sup> 2003 4 SA 160 (T).

the school should outweigh the interests of the school, the application of administrative law and single language schools in general.<sup>49</sup>

On a positive note, a very few High Court cases do approach changes to the common law carefully and attempt to weigh role of the best interests principle against other constitutional rights. In *Petersen v Maintenance Officer*<sup>50</sup> the common law rule that paternal grandparents cannot be liable to maintain a grandchild born out of wedlock was measured against the rights and dignity of children born out of wedlock and found to be unconstitutional. The court considered the historical justifications for the rule, its contemporary effects, the balance between the rights of parents and the interests of justice before developing the common law rule.<sup>51</sup>

What also becomes clear from this survey is what High Courts *do not do* with the best interests principle. Firstly, the cases do not generally contain any analysis of the other constitutional rights of children or any attempt to balance the best interests or the rights of children against the constitutional rights of other family members like parents. It seems that other constitutional rights are regarded as largely irrelevant to the development of the common law.

Secondly, even those cases in which the principle is used to justify changes to the common law do not contain any authoritative analysis of what it is that is in the best interests of children and why. Courts simply assert that certain situations are either good or bad for children. Kurki-Suonio calls this a ‘cultural consensus’ about what is likely to

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<sup>49</sup> at 178H-I.

<sup>50</sup> 2004 2 SA 56 (C).

<sup>51</sup> See also *Mngadi v Beacon Sweets & Chocolates Provident Fund* 2003 2 All SA 279 (D) and *Magewu v Zozo* 2004 4 SA 578 (C) for cases holding that according to the common law, a court may authorize the retention of pension benefits to ensure that a parent will meet future child maintenance obligations. These cases relied on the Constitutional Court dictum in *Bannatyne v Bannatyne* to the effect that courts have a duty to develop common law remedies in relation to maintenance to ensure that the interests of children are served.

benefit children.<sup>52</sup> In custody matters, for instance, the accepted wisdom that young children should remain with their mothers is being replaced by an emerging consensus in favour of joint custody.<sup>53</sup> This social and legal consensus is a product of judges' worldviews,<sup>54</sup> current psychological theories about children, gender roles in families and views about the nature and effects of divorce.<sup>55</sup> If it is true that decision makers generally agree about what is good for children, then it would explain why the inclusion of the best interests test in the Constitution would not necessary challenge this social consensus and why the common law rules would remain mostly unchanged. On the other hand, if the concept is understood as incorporating other fundamental rights, as I will argue,<sup>56</sup> then perhaps constitutional arguments could prompt courts to interrogate current assumptions and beliefs.

I would therefore say that it appears as if High Courts do not use the constitutional best interests as a rule (which would have applied consistently). This raises the question of why, if they do not use the best interests of the child as a right or a rule, courts use it at all. Possible reasons could include the fact that it is far easier to assert that a specific state of affairs is or is not conducive to the nebulous notion of the best interests of the child than it is to define such difficult concepts as rights to 'parental care' or 'abuse' and 'degradation.' In these circumstances the mantra of the best interests could absolve courts from dealing with constitutional rights. In cases where the focus is primarily on the rights of parents, the best interests offers courts a way of reassuring themselves that, despite not having considered the rights of children in detail, they have paid sufficient attention to their needs. The best interests principle could also offer a

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<sup>52</sup> Kirsi Kurki-Suonio 'Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective' 2000 (14) IJLPF 183 at par 3.

<sup>53</sup> Carol Smart & Bren Neale family fragments? (1999) 33-36.

<sup>54</sup> Julie E Artis 'Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine' 2004 (38) Law & Soc Rev 769 at 791-797.

<sup>55</sup> Kurki-Suonio 2000 (14) IJLPF at note 40-43.

<sup>56</sup> See par 6 below.

relatively easy way of deciding cases where it is difficult to choose between competing parental rights or societal interests.

#### **4 *The best interests and children as autonomous bearers of rights***

I have pointed out above that one of the issues raised by a human rights-paradigm in relation to children is whether that would entail that children have full legal status as rights bearers in cases which concern them. Does, for instance, the fact that children have rights to parental care mean that they can assert these rights in child protection matters or in divorce proceedings between their parents and would they have independent rights to legal representation to do so?

Internationally there is an increase in social science research advocating the recognition of children's moral agency<sup>57</sup> and supporting an argument that children should, taking account of their age and stage of development, participate in decisions about their future. This conclusion could be strengthened by the creation of specific rights for children in the Constitution, since it can be assumed that the bearers of constitutional rights should generally have some degree of autonomy to assert their rights against others.<sup>58</sup> In addition, the section dealing with children's rights in the South African Constitution also contains the right

'to have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.'<sup>59</sup>

However, increased autonomy in litigation and decision-making could be seen as undermining the best interests of the child, since it is generally assumed that children do not have the capacity to act in their own long-term welfare. Conversely, the best interests

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<sup>57</sup> See for instance Carol Smart, Amanda Wade & Bren Neale 'Objects of Concern? Children and Divorce' 1999 (11) *Child & Fam LQ* 365 at note 19 and the research cited by Felicity Kaganas & Alison Diduck 'Incomplete Citizens: Changing Images of Post-Separation Children' 2004 (67 (MLR) 959 at 963-964.

<sup>58</sup> Mosikatsana 1998 (3) *Mich J of Race & Law* at 359-360, 386.

<sup>59</sup> Section 28(1)(h).

principle could be seen as inimical to increased autonomy for children, since decisions based on their welfare would typically not give effect to children's wishes.<sup>60</sup> On the other hand, it could also be argued that 'hearing' and taking account of older children's wishes is in itself good for them.<sup>61</sup>

For the most part, this tension between the welfare of children and their rights to autonomy has not yet been fully addressed by South African courts and is often not even acknowledged. Although some cases indicate that it is wise to take cognisance of the wishes of children<sup>62</sup> and that curators should be appointed for them in certain situations,<sup>63</sup> other courts will only hear children when requested to do so<sup>64</sup> and still others consider it unwise to solicit children's opinions, especially on the issue of custody.<sup>65</sup> There are therefore contradictory decisions about children's status as parties to litigation, although the weight of past practise points toward a conclusion that children have no rights of participation.

The recent case of *Soller NO v G*<sup>66</sup> which authorised the appointment of a lawyer for a fifteen year old boy who refused to obey a custody order in favour of his mother is therefore significant. The judgement mentions both the child's right to a legal representative and the best interests principle in the Constitution.<sup>67</sup> However, it stops

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<sup>60</sup> Kurki-Suonio 2000 (14) IJLP&F at note 62-65; Kaganas & Diduck 2004 (67) MLR at 980.

<sup>61</sup> Anne Griffiths 'Hearing Children in Children's Hearings' 2000 (12) Child & Fam LQ 283 at notes 34-35. Michael Freeman 'Whither Children: Protection, Participation, Autonomy?' 1994 (22) Man LJ 307 at par 29-44 argues that a certain level of autonomy favours the long-term interests of children of developing into full adult decision-making capacity.

<sup>62</sup> *Ford v Ford* 403c-f.

<sup>63</sup> *D v K* 1997 2 BCLR 209 (N) at 221D.

<sup>64</sup> *Van Rooyen v Van Rooyen* [2001] 2 All SA 37 (T) at 40b.

<sup>65</sup> *V v V* at 187H-I; *Hlope v Mahlalele* 1998 1 SA 449 (T) 461G.

<sup>66</sup> 2003 5 SA 430 (W).

<sup>67</sup> Paragraphs 8-11, 64.

short of actually giving the child party status in the parents' custody dispute, holding that the legal representative should

'also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece.'<sup>68</sup>

The function of the legal representative is thus both to convey the views of the child and at the same time to protect his best interests. Despite holding that the court should not merely give effect to the will of a child, the result of the judgement is to allow the child to live with his father, thus effectively allowing the child to participate in the decision-making process without affording him party status. The judgement is interesting in its attempt to reconcile the best interests of the child with the appointment of a legal representative.

## **5 *The best interests of the child and other rights and values***

One of the tensions arising from the best interests principle is the relationship between the interests and rights of the child on the one hand and the interests and rights of other family members and the legitimate interests of society on the other hand.

Whether as a result of the fundamental human rights in the Constitution or as a response to changing discourse around the topic internationally, South African courts have increasingly started to use the terminology of 'children's rights' even in cases which simply apply existing common law rules and standards. For instance, in *B v S* the Supreme Court of Appeal reformulated the common law rights of parents to access as follows: 'it is thus the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted.'<sup>69</sup> The focus on children's rights is accompanied by a change in terminology from parental rights to parental

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<sup>68</sup> Paragraph 27.

<sup>69</sup> At 582A, followed in *T v M* 1997 1 SA 54 at 57J, *Wicks v Fischer* 1999 2 SA 504 (N) at 508B, 509F-G.

responsibilities, even though the contents of these ‘responsibilities’ are exactly the same as the parental rights of old.<sup>70</sup>

However, despite the reluctance to use the term ‘parental rights’ judges still regard these entitlements as important. Instead, therefore, parental rights are now increasingly articulated as part of the best interests of children.<sup>71</sup> For instance, the *Tyler* case dealt with a situation in which a man and his second wife had removed a baby from the man’s teenage daughter and argued that they would be better able to care for the child. There was no evidence that the teenage mother was inadequate, but she could clearly not provide the level of care which her father and stepmother could. According to common law the mother had rights of custody unless this could be shown to be detrimental to the child. However, this rule was recast as follows:

‘the biological bond between a child and his or her natural parent [is] one of the most important factors still to be considered when the issue of what is in the best interests of the child is under consideration.’<sup>72</sup>

Other cases focusing on the child’s right to have a relationship with its biological parents generally deal with the rights of fathers of children born out of wedlock.<sup>73</sup>

This use of the best interests principle to articulate the rights of parents is necessary because the Constitution does not contain explicit family rights<sup>74</sup> or parental rights. However, parents have other ‘general’ fundamental rights which may be relevant in the family context. These include the rights not to be discriminated against, rights to bodily and psychological integrity, freedom of religion, freedom of movement and residence, rights to practice their language and culture, rights to just administrative action

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<sup>70</sup> *Heystek v Heystek* at 757B-G; *Tyler v Tyler* par 24; *Krugel v Krugel* at 223D. In *Ford v Ford* [2004] 2 All SA 396 (W) at 407 f the court even held that parental obligations ‘should include not underestimating the importance of the child’s relationship with the non-custodian parent.’

<sup>71</sup> Elster 1987 (57) U Chi L Rev 29; Eekelaar 2002 (14) Child & Fam LQ at note 3.

<sup>72</sup> At 128b-c. Accordingly, custody was awarded to the biological mother.

<sup>73</sup> See *T v M*, *Wicks v Fischer*, *Bethell v Bland* 1996 2 SA 194 (W).

<sup>74</sup> See the cases which determine that the right to family life is protected via the right to dignity in note 8 above.

and fair public hearings and privacy rights.<sup>75</sup> In addition, all children would have the same constitutional rights so that the rights of one child may need to be balanced against the rights of other children.

One could seek clues about the relationship between the best interests of the child and the rights of other family members in the wording of section 28(2). Unlike the wording of the Convention on the Rights of the Child which determines that the best interests of children are of 'primary' importance, the Constitution uses the words 'paramount importance.' This would literally suggest that children's interests trump all other rights and interests<sup>76</sup> and this interpretation has been adopted in some South African cases.<sup>77</sup> However, such an interpretation is unpalatable to most commentators, who have suggested various reasons why it should not be followed. Some argue that 'paramount importance' does not necessarily mean that the best interests of the child is the only consideration.<sup>78</sup> Moreover, such an interpretation would mean that it becomes pointless to even consider the rights and interests of other parties, thus defeating all rights claims and with them the purpose of including the best interests principles in human rights instruments and constitutions.<sup>79</sup>

This has generally also been the approach of South African courts which have attempted to recognise that the best interests of children are interwoven with the rights

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<sup>75</sup> Constitution sections 9, 12(2), 15, 21, 30, 31, 33, 34, 14 respectively.

<sup>76</sup> Reece 1996 (49) Current Legal Problems 267, Mosikatsana 1998 (3) Mich J of Race & L 390.

<sup>77</sup> It was explicitly said in *Laerskool Middelburg v Departementshoof: Mpumalanga Departement van Onderwys* 756b-c and implied in other cases, like those which prefer the interests of the child to have a relationship with her biological parents to the rights and interests of custodian parents. See also *Ford v Ford* at 415e-f and *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2002 12 BCLR 1285 (W) at par 45, 55, 71. The dictum in the last case was rejected by the Constitutional Court in the *De Reuck* case at par 55 where it held that children's rights and best interests are not absolute, but that they could be limited in accordance with the limitations clause in s 36 of the Constitution.

<sup>78</sup> Friedman & Pantazis 'Children's Rights' 47:23; Elster 1987 (57) U Chi L Rev 16.

<sup>79</sup> Helen Fenwick 'Clashing Rights, The Welfare of the Child an the Human Rights Act' 2004 (67) MLR 889 at 891, 916; Eekelaar 2002 (14) Child & Fam LQ at note 15.

and interests of other family members, particularly parents. In *V v V*, for instance, the High Court held that ‘access is therefore not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child.’<sup>80</sup> The idea of the best interests of the child as part of a set of relationships can also be found in the Constitutional Court judgements in *Hugo*<sup>81</sup> and *Bannatyne*<sup>82</sup> which acknowledged the effects which childcare duties have on the lives of primary caretakers.<sup>83</sup> On the other hand, the minority judgement of Kriegler J in *Hugo*<sup>84</sup> and the Constitutional Court case of *Grootboom* seem to indicate a reluctance to use the best interests of children in order to award rights or privileges to their parents. However, it should be emphasised that, apart from the cases dealing with gay and lesbian parents,<sup>85</sup> courts do not generally articulate or analyse the independent human rights of parents fully in cases involving common law rules.

A related question is whether the best interests of children can be limited by the public interest in general, and other constitutional rights and values in particular. Elster suggests that the best interests of children are currently applied subject to public values. For example, even though it may be best for children to live in the best possible economic conditions there is no rule which requires custody to be awarded to the wealthiest parent at divorce.<sup>86</sup>

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<sup>80</sup> At 189D-E.

<sup>81</sup> Par 110.

<sup>82</sup> Par 29.

<sup>83</sup> See also *Ex Parte Critchfield* at 330a and some relocation cases like *Godbeer* at 983A and *Latouf v Latouf* [2001] 2 All SA 377 (T) at 387a-b.

<sup>84</sup> *Hugo* par 83 describes the presidential pardon to mothers of young children as ‘merely a favour to child minders,’ while par 71 of the *Grootboom* case points to the danger that ‘children could become stepping stones to housing for their parents instead of being valued for who they are.’

<sup>85</sup> See *Du Toit* and *J and Another v Director-General, Department of Home Affairs and Others* 2003 (5) BCLR 463 (CC).

<sup>86</sup> Elster 1987 (57) U Chi L Rev 26-28.

Apart from the *Laerskool Middelburg* case this also seems to apply in South African cases. *Howell v S* raised the role of the best interests of children in sentencing of parents found guilty of crimes. The court held that the interests of children and their rights to parental care can be outweighed by societal interest in effective punishment of crime.<sup>87</sup> Issues of constitutional rights to equality and non-discrimination were weighed against the interests of children, albeit indirectly in *V v V* where the court held that the their mother's sexual orientation could not be described as 'abnormal' and could not be regarded as detrimental to the children.<sup>88</sup> It is also clear from the Constitutional Court judgement in *De Reuck* that, where the best interests of the child is regarded as an independent right, it can be limited by other constitutional rights.<sup>89</sup>

In this paragraph I have shown that South African courts view the best interests of the child as interlinked with the interests of other family members and society as a whole. However, instead of separately analysing the rights of family members, including children, the best interests of the child is often used as the vehicle for giving effect to parental rights. On the other hand, courts generally do not view children as the independent bearers of constitutional or common law rights. Instead, their rights and interests are seen as being adequately protected by existing common law rules which give rights mainly to parents.

## **6 Suggested role for the best interests principle**

Having set out the courts' approach to the best interests principle it remains to offer my suggestions towards improving the currently confusing situation. My argument is not that the best interests principle should be abolished. Apart from the fact that it would be unrealistic to expect the Constitution to be amended to remove this popular concept, I believe it to be a valuable goal and commitment in the Constitution, as it is in the common law. However, to cure the deficiencies associated with indeterminacy and

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<sup>87</sup> [1999] 2 All SA 233 (C) at 240.

<sup>88</sup> At 189A-B.

<sup>89</sup> See note 77 above.

injustice mentioned at the beginning of this article and on the basis that its constitutional formulation should have some effect in addition to mere rhetoric, I suggest two things. First, that the best interests principle in the Constitution play a limited role, operating mainly where there are no other fundamental children's rights and secondly that it be interpreted to provide an avenue for the consideration of fundamental rights of family members and constitutional values in family law.

## **6.1 Welfare approach versus rights approach**

Family law systems' preference for the case-by-case welfare approach over the rights based approach stems from a perception that rights are inadequate and inappropriate in the family setting where the rights of family members are complementary, rather than competing, as is usually the case in other contexts. A liberal understanding of a fundamental rights paradigm struggles to accommodate rights of people who are not isolated, competitive individuals, but who have intimate relationships with one another and whose interests are usually intertwined.<sup>90</sup> According to this understanding of rights, awarding rights to parents would necessarily diminish the rights of children and it is therefore understood as necessary, in order to protect the interests of children, to include something like the best interests standard which would allow children's rights to trump adult rights.<sup>91</sup> Another method of allowing the interests of children to triumph is found in the rhetorical device of allowing rights only to children, but no rights to parents.

I agree with the Canadian writers who argue that the rights of family members do not necessarily have to be understood in this competitive, individualistic way, but should focus instead on the relationships between them. In such an understanding, the rights of parents and the rights of children could complement and facilitate the exercise of one another. Thus, for instance, the child's right to access to her parents should generally be

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<sup>90</sup> Susan B Boyd 'The Impact of the Charter of Rights and Freedoms on Canadian Family Law' 2000 (17) Can J Fam L 293 at par 7-8.

<sup>91</sup> DA Rollie Thompson 'Why Hasn't the Charter Mattered in Child Protection?' 1989 (8) Can J Fam L 133 at par 6.

accompanied by a reciprocal parental right of access to the child.<sup>92</sup> Furthermore, the interpretation of constitutional rights in the family context should take relationships rather than individualism as their starting point. In such a scenario rights to privacy would foster and protect the relationships between family members, unless they are exploitative or detrimental.<sup>93</sup>

Subject to the development of this kind of ‘relationship oriented’ understanding of rights, I am in favour of a rights approach rather than a purely welfare approach to cases which involve children. My reasons are firstly the need to articulate and properly consider the constitutional rights of all family members and secondly the necessity to consider issues of equality, discrimination and societal values in family law judgments. Family law, at least where it concerns children should not, as a result of the application of the best interests principle, become the only area of the law which is immune to the basic rights and values contained in the Constitution. Ultimately this will not benefit families and, given the important role which families play in society, it will also operate to the detriment of society as a whole.

## **6.2 The role of the best interests in a rights approach**

Given the fact that I prefer a rights approach in family law, what role should the best interests play? I do not think that the best interests of the child should be regarded a right in itself because the content of this right is even more vague and subject to individual judicial discretion than other constitutional rights. Moreover, if it were to be regarded as a right, the question remains whether its ‘paramount’ status would allow it to trump the rights of other family members and the interests of society as a whole. However, there are other ways in which the best interests principle could play a constitutional role.

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<sup>92</sup> Boyd 2000 (17) Can J Fam L at par 7; Thompston 1989 (8) Can J Fam L at par 63, 63.

<sup>93</sup> Stephen J Toope ‘Riding the Fences: Courts, Charter Rights and Family Law’ 1991 (9) Can J Fam L 55 at par 36. The minority judgment in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 CC at par 116-119 adopts this interpretation of the right to privacy.

Herring suggests a model called ‘relationship-based’ welfare in which it is assumed that accommodating the rights of parents and other family members are in the best interests of a child. The reason for this assumption is that

‘[a] relationship based on unacceptable demands on a parent is not furthering a child’s welfare...The child’s welfare is promoted when he or she lives in a fair and just relationship with each parent, preserving the rights of each, but with the child’s welfare at the forefront of the family’s concern.’<sup>94</sup>

Another description of the same idea is put forward by Fenwick who suggests that an analysis and balancing of parental rights may provide a way of better understanding the best interests of the child.<sup>95</sup> Toopes suggest a different version in which parental rights play a less direct role. His argument is that ‘constitutional tests of fairness, equality and justice’ should inform the exercise of judicial discretion required by the best interests test and that common law principles like the best interests test should be developed in accordance with other constitutional values.<sup>96</sup>

All of these suggestions basically do two things. They allow the consideration of the fundamental rights of parents and other family members, but limit them by reference to the best interests of the child. This is explicitly done by the South African Constitutional Court in the *De Reuck* case.<sup>97</sup>

Although these suggestions are far more attractive than a welfare model which does not incorporate constitutional rights of parents at all, I have two reservations about this model. First, it requires that the rights of parents and others are seen through the prism of the best interests of the child, instead of being considered valuable in themselves. This could tempt courts to interpret parental rights restrictively. Moreover, the rights of children are not directly considered in this model, while their interests are. Comparing the rights of parents with the interests of children (which are presumably much broader than their rights) involves the comparison of apples with pears and could

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<sup>94</sup> 1999 (11) Child & Fam LQ at note 83-84.

<sup>95</sup> 2004 (67) MLR at 926.

<sup>96</sup> 1991 (9) Can J Fam L par 20, 24.

<sup>97</sup> Paragraph 55. See also Friedman & Pantazis ‘Children’s Rights’ at 47-22.

lead to all kinds of difficulties. In particular, limiting relatively circumscribed constitutional *rights* by reference to a relatively wide concept such as *interests* could considerably erode parental rights.

The previous models all operated on the assumption that it is in the best interests of children to have relationships in which the fundamental rights of other family members are also protected. I would advocate a broader assumption. The extent of children's rights in the South African Constitution and in international law allows us to agree that it is in the best interests of children to have their fundamental human rights considered and protected on a par with the rights of other family members. What the best interests principle would do in this model would be to force courts explicitly to consider both the special children's rights in section 28 and the general human rights which apply to children in all matters concerning children.

This does not sound very effective or revolutionary, but it is clear from the cases that it has not yet been attempted for fear that parental rights would outweigh the rights of children. In many of the decided matters the constitutional rights of children were not in fact carefully considered, mostly because the adult parties who instituted and defended the cases failed to consider the interests of children or articulated their own concerns as the best interests of the children involved. The courts then used the best interests principle *instead of* a proper analysis of children's rights. According to my suggestion the rights of children should always be fully argued, as should the rights of adults and other societal interests. This is particularly necessary because matters involving children are almost invariably brought by adult parties who can be tempted to use the interests of children for their own benefit.

When there are multiple constitutional rights, I have suggested that courts should first attempt to interpret the fundamental rights of all family members in a way which accommodates and facilitates relationships, rather than as individualistic, competing entitlements. A second possible use of the best interests principle could be in mandating a generous interpretation of all the children's rights in section 28 and also of all other

constitutional rights.<sup>98</sup> This would discourage narrow interpretations of rights which exclude children from their ambit.<sup>99</sup>

In this model the best interests of the child would not be a separate right, but something like the fundamental values underlying the constitution. It would not be used to replace a careful analysis of other constitutional rights, whether those of children or adults. An additional benefit of this approach is that it implies that children are the autonomous bearers of constitutional rights, thus strengthening the extent of children's participation in legal matters concerning them.

In applying this model to a difficult problem like relocation by a custodian parent, courts should consider the rights of children to parental care which includes care from both the custodian and non-custodian parent. However, this right of the child should also be understood as involving a concomitant parental right to care for children and to have relationships with them – thus accommodating common law parental rights of access and custody. In addition, a court should also weigh other parental rights like the rights of custodian parents to move freely, to practice their trades or occupations and discrimination issues in relation to restricting the custodian parents' freedom of movement, but having no corresponding limitation on the movement of non-custodian parents. A common law rule about relocation which takes account of all these fundamental rights would be more balanced and fair, but also more predictable than a rule which depends on an individual judge's perception of the best interests of the particular children involved.

## **7 Conclusion**

I have provided a survey of the South African courts' treatment of the best interests provision in the Constitution and I hope that I have succeeded in showing up the

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<sup>98</sup> See Friedman & Pantazis 'Children's Rights' at 47-22.

<sup>99</sup> An example could be the right to freedom of religion which should be extended to older children at least, but which should recognize the fact that children generally 'learn' religion from their parents and which does not prevent parents from instructing their children in their own religions.

extent of the confusion and disagreement about this fundamental concept. Courts, including the Constitutional Court, are not certain whether it is a rule, a right or a principle. This leads to High Courts using the principle in widely different ways and some even ignoring its existence as a constitutional, rather than a common law principle.

Most often the best interests principle has been used either to articulate parental rights and interests or to disguise the fact that the fundamental constitutional rights of children have not been properly considered. Like other writers on the topic I have argued in favour of a consideration of the rights of parents and other family members alongside those of children. However, my suggestion is that the best interests principle not be used to mediate the rights of other family members, but to compel the full and proper consideration of the constitutional rights of children alongside of the rights of other family members. Despite the popularity and ubiquity of children's human rights, this has not been done in South African courts, partly because the adult litigants have failed to argue the rights of children separately from their own interests, and partly because the best interests principle itself has made this omission possible. It is likely that a full consideration of children's human rights alongside those of other family members may be as effective in protecting their interests as the best interests, but without the uncertainty involved in case-by-case decisionmaking.