

The Best Interest of the Child

The principle of the best interests of the child is one of the four pillars of the United Nations Convention on the Rights of the Child (CRC) together with non-discrimination (article 2), survival and development (article 6) and child participation (article 12). Article 3(1) of the CRC provides that

In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.

The best interests principle is also included in the African Charter on the Rights and Welfare of the Child (ACRWC). In the ACRWC, the best interests of the child is not only *a* primary consideration, but *the* primary consideration setting a higher standard than the CRC.

The best interests principle is mentioned in various articles in the CRC. For instance, article 18(1) obliges the parents or legal guardians to have the best interests of the child as their basic concern; article 21 provides that the best interests of the child should be the primary consideration in the adoption process; article 9 prohibits the separation of the child from his or her parents against his or her will unless 'such separation is necessary for the best interests of the child'; and Article 37 stipulates that child in the criminal justice system should be held in custody separately from adults unless the separation is against the best interests of the child.

In South Africa, the best interests of the child is a constitutional right of every child. Article 28(2) provides that

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

The recent Children's Act stipulates in section 9 that the child's best interests is of paramount importance in all matters concerning the care, protection and well-being of a child.

The fundamental importance of the best interests of the child is clear and prioritizing the best interests of the child seems straightforward. However, what does the 'best interests' mean? What are the criteria to determine the best interests of the child?

Factors to be considered when determining a child's best interest

Prior to the Children's Act of 2005, the Court considered the list of factors developed in *McCall v McCall*¹ to determine the best interests of the child. In *McCall*, Justice King listed 13 factors, which are linked to the determination of the best interests of the child.

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

Section 7 of the Children's Act provides a similar but more detailed lists of factors.

- (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parents, towards-
 - (i) the child; and

¹ *McCall v McCall* 1994 (3) SA 201 (c)

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

Although section 7 is similar to the list developed in the *McCall*, there are a few differences. First, section 7 has a wider application compared with the *McCall* list. Its application is not limited to parents but apply equally to a care-giver or any relevant person in the child's life. Secondly, unlike the *McCall* list, section 7 does not include 'same sex matching'.² However, one still has to bear in mind that section 7(a) stipulates the importance of the nature of the personal relationship between the child and parent, any other care-giver or person relevant. Thirdly, section 7 does not specify the ability to provide economic security but puts a strong emphasis on the emotional, intellectual and spiritual well-being and stability of the children.

Fourth, unlike the *McCall* list, section 7 does not include 'child preference'. Section 7(g) does include the child maturity and developmental stage, which are often the criteria to consider when taking children's wishes into account, to be considered but it does not specifically mention the wishes of the child. However, section 10 which states that every child must be given the opportunity to participate in any proceedings regarding that child is a separate, self-standing rights accorded to every child and not merely a subsection of best interests. One is therefore under an obligation to take section 10 into consideration with section 7 in all proceedings concerning the child.

Lastly, the *McCall* list was not exhaustive, it was not a closed list of factors and the court could consider any other factors it deemed relevant. Section 7, on the other hand, does not state that the court may consider any other factors, nor does it list the factors by starting with the word "including" which normally indicates that a list is not exhaustive. However, the Constitutional Court recently held that the principle of the best interest of a child should not be applied to a 'predetermined formula'³. It may be argued then that interpreting section 7 to indicate a closed list of factors to be considered when determining a child's best interest would amount to a predetermined formula contrary to the Court's finding. In light of this argument a further argument can be made that a High Court sitting in a matter as upper guardian of a minor must consider all the relevant factors including but not limited to those listed in section 7 when determining the best interest of a child.

Meaning and application of the best interest principle

The application of the best interest principle found particular consideration by the

² T Davel, 'Chapter 2: General Principles' in C J Daval & A M Skelton (eds) *Commentary on the Children's Act*, JUTA (2007) 2-8.

³ *S v M (Centre for Child law as Amicus Curiae)* 2008 (3) SA 232 at para 24.

Constitutional Court in the last two years. In the case of *AD and Another v DW and Others*⁴ the Court had to look at the best interest of a baby girl who was at the centre of an adoption application. One of the highlights in the decision is the Courts express confirmation that the best interest of a child who is the subject of adoption proceedings is best protected by following the correct judicial procedures when bringing adoption applications. Another important finding of the court was regarding the relationship between the principle of subsidiarity as applied in intercountry adoptions and the best interest principle. The Court made it clear that the subsidiarity principle was subsidiary to the best interest principle.

In *S v M*⁵ the Court had to consider the application of the best interest principle by a sentencing court when dealing with a primary care-giver. The Court emphasized the need to take a child-centred approach when determining the best interest of the child and held that section 28 required that '*[S]tatutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and courts must function in a manner which at all times shows due respect for children's rights*'⁶

Although the Court acknowledged problems which could be created by the expansiveness of the principle that the best interest of a child is a paramount consideration in matters affecting the child it held that such expansiveness made section 28 flexible and that such flexibility constitutes the source of its strength. Thus when determining the best interest of a child courts must focus on the individual child and examine '*the real life situation of the particular child involved*'⁷

In essence the Constitutional Court found that although the best interest principle is not absolute and not without problems its purpose is to safeguard the interests of children individually and collectively. Thus the best interest principle is a child-centred approach aimed at protecting the needs and entitlements of children. The unique circumstances of a particular child will then determine the different factors to consider in order to secure the best interest of that child.

⁴ *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* 2008 (3) SA 183 (CC).

⁵ *S v M (Centre for Child law as Amicus Curiae)* 2008 (3) SA 232.

⁶ *Id* at para 15.

⁷ Above note 5 at para 24.

