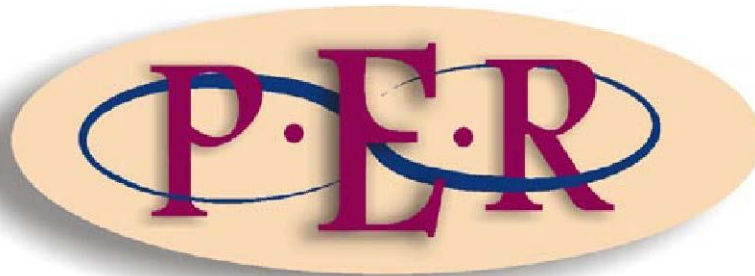


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THE SEXUAL ORIENTATION OF A PARENT AS A FACTOR WHEN CONSIDERING CARE

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Every child in South Africa is protected by the *Constitution of the Republic of South Africa*, 1996,¹ and more importantly, by the provisions of section 28. Section 28(2) of the *Constitution* states that a child's best interests are of paramount importance in every matter concerning the child. The principle of the best interests of the child is also contained in section 9 of the *Children's Act*,² which provides that in all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance must be applied.

Section 9 of the *Constitution* contains the equality clause, which establishes the legal equality of all persons in South Africa. According to this section, everyone is considered equal before the law and has the right to equal protection and benefit of the law. Several grounds are listed in this provision relating to the unfair discrimination of persons, either directly or indirectly, by the State or any natural person. One of these grounds is a person's sexual orientation.

The fundamental guiding principle concerning care disputes and all matters involving children is that a child's best interests are of paramount importance.³ Determining

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¹ *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the *Constitution*) which came into force on 4 February 1997.

² *Children's Act* 38 of 2005 (hereafter referred to as the *Children's Act*).

³ *DM v SM* 2008 2 NR 704 (HC) 705G-I (hereafter referred to as *DM v SM*). See also *Christian Education South-Africa v Minister of Education* 2000 10 BCLR (CC) para 41; *Minister for Welfare Population Development v Fitzpatrick* 2000 7 BCLP 713 (CC) para 17; *Du Toit v Minister of Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) para 20; *Bannatyne v Bannatyne* 2003 2 SA 363 (CC); *De Reuck v Director of Public*

what care arrangements will serve the best interests of the child involves the court in making a value judgement based on its findings of fact in its exercise of inherent jurisdiction as the upper guardian of minor children.⁴ In divorce proceedings where children are involved, it is the duty of the court to decide on the refuge of the children after the dissolution of the marriage. The final decision in the granting of care lies with the court, and it is here that principle of the best interests of the child⁵ is strictly applied. The decision taken by the court in granting care to a parent or other person has a significant impact on the lives of children and can influence their future substantially, not only in the short term but also in the long term.

The best interests of every child cannot be determined absolutely, and several factors or criteria to be taken into account in a range of matters relating to the well-being of children have been developed over time by means of case law⁶ and legislation.⁷ These includes factors such as the ability of a parent to provide the basic needs of a child, such as food, clothes, shelter and other material needs, and the love, affection and other emotional ties that exist between the parent and the child.

A question that arises in the determination of the best interests of the child is whether equal attention should be given to every possible aspect and consideration pertaining to the child's life, or whether certain considerations could be of less concern.⁸ Should the court take into account factors such as the significantly higher salary of one party, and therefore the ability to provide better schooling, medical

Prosecutions 2003 12 BCLR 1333 (CC) para 55; and *S v S (Centre for Child Law as Amicus Curiae)* 2011 7 BCLR 740 (CC).

⁴ *DM v SM* 705G-I.

⁵ For a discussion of whether the best interest principle is a standard or a right see Boezaart "General Principles" 2-10 to 2-14.

⁶ In *McCall v McCall* 1994 3 SA 201 (C) a comprehensive, open-ended list of guiding factors or criteria was set out.

⁷ Section 7 of the *Children's Act* contains a closed list of factors to be taken into account.

⁸ Mahlobogwane 2005 *Codicillus* 31-32.

care and a less dangerous environment?⁹ Or should other factors such as the parties' sexual orientation, race, religion or ethnical origin be preferred?¹⁰

The issue of the sexual orientation of a parent as a factor for consideration in the granting of care has, over the years, brought forward several problems. A range of rights could potentially be prejudiced, and a possibility arises that unfair discrimination against a parent on one or more grounds, including his/her sexual orientation, may occur.¹¹ By contrast, a child's best interests should also be taken into account, and every child must be given the opportunity to be brought up in the best environment possible. Several positive as well as negative debates pertaining to the issue of homosexuality have risen, and although the vast majority of them have related to the religious aspects thereof, surveys have shown that the majority of the South African population is uncomfortable with the idea of homosexuality.¹² The Zulu King, Goodwill Zwelithini,¹³ has described homosexuality as "un-African", and stated that it confuses children. It has also been argued that traditional, essential family values are being diminished, and a home in which persons of the same sex live together is not the most suitable environment in which to raise a child.¹⁴

In the pre-1994 case of *Van Rooyen v Van Rooyen*,¹⁵ a mother who was involved in a lesbian relationship and shared a home and room with her partner approached the court for an order granting her access to her children.¹⁶ The children, at that stage,

⁹ Mahlobogwane 2005 *Codicillus* 31-32.

¹⁰ Mahlobogwane 2005 *Codicillus* 30. See Heaton 2009 *JJS* 1-18 for an evaluation of the individual factors that are taken into account when determining the best interest of the child.

¹¹ Section 9(3) of the *Constitution*.

¹² Wynchank 2006 *SAPR/PL* 69.

¹³ Wynchank 2006 *SAPR/PL* 69.

¹⁴ Lubbe 2007 *SAJP* 267.

¹⁵ *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) 325H-J, 326H (hereafter referred to as *Van Rooyen v Van Rooyen*).

¹⁶ In several of the cases that will be discussed throughout this contribution, specifically *Van Rooyen v Van Rooyen* and *V v V* 1998 4 SA 169 (C) (hereafter referred to as *V v V*), the issue before the court was the right of a homosexual parent to access (to contact) his or her minor child. It is noted, however, that although the right of a parent to contact a minor child falls beyond the scope of the study, it may serve as an useful indicator as to the objective of the study, as the principle of the best interests of the child applies equally in both care and contact matters. Further it is noted that the common-law terms of "custody" and "care" are not used in the *Children's Act*. Even though they appear to have replaced the terms "access" and "contact", the court found in *WW v EW* 2011 6 SA 53 (KZP) (hereafter referred to as *WW v EW*) that

were living with their father, who had been granted sole custody in the divorce from their mother. The court stated that the children were still of a young age and accordingly it was in their best interests if they did not get wrong ideas regarding sexuality and the ways in which a man and a woman should live together. The applicant was permitted to exercise reasonable rights of access to her minor children subject to the condition that she would not share a room with her lesbian partner when her children slept over at their home.¹⁷

Since the introduction of the new constitutional era, the changes in approach taken by the courts in the making of care decisions have been significant. In the post-1994 case of *V v V*,¹⁸ the issue before the court related to the custody and access arrangements regarding the concerned parties. An order was sought by the plaintiff not only for custody of the children, but also to allow the defendant access under supervision and a provision granting that whenever the defendant exercised her access to the children, no third person would share the same residence or sleep under the same roof as the defendant and the children.¹⁹ The reason for this condition became apparent only after it was submitted that the children were being subjected to the allegedly harmful influence of a lesbian relationship between the mother and her partner.²⁰ The plaintiff's objection was that the children would be mentally, emotionally and spiritually harmed by the influence of the lifestyle their mother and her lesbian companion shared, and stated that he did not wish to have his children exposed to what he regarded as unhealthy practices in their mother's home.²¹ The court stated that it was clear that the court in *Van Rooyen v Van Rooyen*²² made a moral judgement about what is normal and correct insofar as sexuality is concerned, and that the judge clearly regarded homosexuality as being *per se* abnormal.

while the concepts correspond broadly, they are not synonymous. Therefore, since the decision in *Van Rooyen v Van Rooyen* and *V v V* is dated before the new *Children's Act* came into force, the courts still refer to the terms as "custody" and "access" instead of "care" and "contact".

¹⁷ *Van Rooyen v Van Rooyen* 331E-G-I.

¹⁸ *V v V* 173H-I.

¹⁹ *Van Rooyen v Van Rooyen* 173I-J, 174B.

²⁰ *Van Rooyen v Van Rooyen* 174C-D.

²¹ *V v V* 174F-G.

²² *Van Rooyen v Van Rooyen* 188F-H.

Since the coming into operation of the *Children's Act*, certain common-law terms that existed in the amended *Child Care Act*,²³ such as "custody", have been supplemented with "care", and "access", which has been supplemented with "contact". The court found in *WW v EW*²⁴ that even though the statutory concepts correspond broadly with the common-law concepts, they are wider than the latter. The effect of the court's interpretation of the Act is that the term "custody" can be used interchangeably with "care", and "access" with "contact".²⁵

The term "custody", before it was supplemented²⁶ for the term "care", related to the parent's control and supervision over the person and day-to-day life of a child.²⁷ It related to control over the child in most areas of his/her life, such as the control of religion and religious education, and the restriction of the people with whom the minor could associate. The *Children's Act*, on the other hand, introduced the doctrine of "parental responsibilities and rights", which include to a certain extent the common-law doctrine of "parental authority".²⁸ The parental responsibilities and rights include the duty to care for the child, maintain contact with the child, act as guardian to the child, and contribute to the maintenance of the child.²⁹ The concept of care therefore entails a more comprehensive notion of a parent's daily life in relation to the child, and the powers and duties that are expected to ensure the general protection, well-being and best interests of the child. All decisions and actions regarding the child should generally be performed in the child's best interests, in a manner appropriate to the child's age, maturity and stage of development.

²³ *Child Care Act* 74 of 1983 (hereafter referred to as the *Child Care Act*).

²⁴ *WW v EW* para 21.

²⁵ *WW v EW* para 21.

²⁶ The word "substituted" has also been used. See Skelton "Parental Responsibilities and Rights" 66; and Heaton "Responsibilities and Rights" 3-4.

²⁷ Skelton "Parental Responsibilities and Rights" 66.

²⁸ Which included custody, access and guardianship. Also referred to as "parental power". For a discussion of the doctrine see Van Heerden "Parental Power" 313-325 and the authority quoted in n 17.

²⁹ Section 18(2) of the *Children's Act*.

When courts interpret the rights as set out in the *Constitution*, they are obliged to consider international law.³⁰ South Africa has ratified international and regional instruments, including the *United Nations Convention on the Rights of the Child*,³¹ and the *African Charter on the Rights and Welfare of the Child*.³² Article 2(1) of the CRC provides that States Parties are obliged to respect and ensure the rights set forth in the Convention to each child, irrespective of the race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status of the child, *or his or her parents or legal guardians*.³³ The non-discrimination clause of the ACRWC is entrenched in article 3. Article 3 provides that every child shall be entitled to enjoy the rights and freedoms set out in the Charter, irrespective of the child's *or his or her parent's or guardian's*³⁴ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

The aim of this contribution is to discuss the sexual orientation of a parent as a factor for consideration in the granting of care in respect of children, and the extent to which courts may give consideration to such a factor. The article will also address the question of whether or not the role of a parent's sexual orientation in determining the best interests of the child has changed since care replaced custody as a concept in the *Children's Act*. In this article, care and the best interests of the child will be discussed first. International law will be considered thereafter, followed by a discussion of the approach of our courts, pre- and post-1994, in order to come to a conclusion and make recommendations.

2 Care and the best interests of the child

The effects on children of divorce and care disputes are enormous.³⁵ This is usually due to the fact that parents are motivated to protect their children's emotions, and

³⁰ Section 39(1)(b) of the *Constitution*.

³¹ June 1995. Hereafter referred to as the CRC.

³² January 2000. Hereafter referred to as the ACRWC.

³³ Own emphasis.

³⁴ Own emphasis.

³⁵ Mahlobogwane 2005 *Codicillus* 30.

as a result the antagonism between the parents often becomes so strong that they cannot reach consensus as to the best interests of the children.³⁶ One might argue that when a parent's sexual orientation is an additional factor in child care disputes, this adds to the antagonism between parents and therefore also adds to the impact such disputes have on children.

The guiding principle in all matters involving children is that the best interests of the children are paramount.³⁷ Courts are compelled to place emphasis on the standard of the best interests of the child, not only due to their role as upper guardians of all minors, but also due to the fact that this provision is entrenched in section 28(2) of the *Constitution*, as well as sections 7 and 9 of the *Children's Act*. What is in the best interests of a specific child cannot be determined with absolute certainty, and one needs to make use of the guidelines and factors set out in case law and legislation, such as in the case of *McCall v McCall* and section 7 of the *Children's Act*. The following section of this article includes a comprehensive discussion of the definition of the new concept of "care" and the old concept of "custody", and the factors and criteria set out in case law and legislation regarding the standard of the best interests of the child.

2.1 Care

Children have become the main focus where parental responsibilities and rights are concerned.³⁸ The *Children's Act* introduced the doctrine of "parental responsibilities and rights" in section 18 and it includes, to some extent, the common-law doctrine of "parental authority".³⁹ Unlike the concept of parental authority,⁴⁰ which was

³⁶ Mahlobogwane 2005 *Codicillus* 33.

³⁷ *HG v CG* 2010 3 SA 352 (ECP) 354D-E (hereafter referred to as *HG v CG*). See also *Christian Education South-Africa v Minister of Education* 2000 10 BCLR (CC) para 41; *Minister for Welfare Population Development v Fitzpatrick* 2000 7 BCLP 713 (CC) para 17; *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) para 20; *Bannatyne v Bannatyne* 2003 2 SA 363 (CC); and *De Reuck v Director of Public Prosecutions* 2003 12 BCLR 1333 (CC).

³⁸ SALC *Review of the Child Care Act* para 8.3; Skelton "Parental Responsibilities and Rights" 62.

³⁹ In *V v V* 176C-D Judge Foxcroft stated the following: "There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children had shifted from a concept of parental power of the parents to one of parental responsibility and children's rights. Children's rights are no longer confined to the

located in the common law, the *Children's Act* incorporates the concept of parental responsibilities and rights within its statutes,⁴¹ and therefore it has not been codified from the term parental authority. It can further be noted that the *Children's Act* refers to the phrase "parental responsibilities and rights" rather than "parental rights and responsibilities". Skelton⁴² argues that the reason for this less common construction of the phrase is to emphasise the importance of a parent's responsibilities towards a child first, and only thereafter the importance of a parent's rights towards a child.⁴³ The doctrine of parental responsibilities and rights includes the right of the parents to care for the child, maintain contact with the child, act as his or her guardian and contribute to his or her maintenance.⁴⁴

Since this article discusses the granting of care to a homosexual parent in divorce proceedings, it is necessary to establish initially what was expected of parents in relation to the old concept of "custody" and what is expected of them in relation to the new concept of "care".

The common-law definition of the term "custody" has been described as "relating to the control and supervision of the daily life and person of the child".⁴⁵ A custodial parent had to care for, support and guide the child, and take responsibility for the health, education, safety and general welfare of the child.⁴⁶ The court in *Kastan v Kastan*⁴⁷ described the custody of a child as the taking of day-to-day decisions regarding children as well as decisions of longer and more permanent duration

common law, but also find expression in s 28 of the *Constitution of the Republic of South Africa Act*, 1996, not to mention a wide range of international conventions." Judge Foxcroft (at 176E) further stated that: "parental power ... is made up of two distinct elements. The one is guardianship and the other is custody. Guardians take decisions regarding a child's property and person, whereas custodians have control over the day-to-day life of the child."

⁴⁰ For an overview of the historic development of parental authority see Kruger 2004 *Fundamina* 84-112.

⁴¹ Sections 18-21, 27, 30, 31 and 40 of the *Children's Act*.

⁴² Skelton "Parental Responsibilities and Rights" 63.

⁴³ These rights should be regarded not only as in the best interest of the child, but should also be performed in his or her best interest, and no parental right will be enforced if it is in conflict with the child's interests.

⁴⁴ Section 18(2) of the *Children's Act*.

⁴⁵ *Engar and Engar v Desai* 1966 1 SA 621 (T) 625A-B.

⁴⁶ Heaton "Responsibilities and Rights" 3-5.

⁴⁷ *Kastan v Kastan* 1985 3 SA 235 (C) 236E-F.

involving their education, training, religious upbringing, freedom of association and generally the determination of how to ensure their good health, welfare and happiness. Custody is not defined in the *Children's Act*, although there are numerous references to the concept.⁴⁸

The definition of the term "care" can be found in section 1 of the *Children's Act*. The definition of the new term, "care", includes what used to be referred to as "custody", although the term is defined more broadly.⁴⁹ According to this section of the Act, the person having the duty of care in relation to a child should be able to provide the child with a suitable place to live, provide living conditions that are conducive to the child's health, well-being and development, and provide the necessary financial support for the child. The person should generally be able to safeguard and promote the well-being of the child and to protect him or her from any maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards to which the child may be exposed. The person must not only ensure that the fulfilment of the child's rights as set out in the Bill of Rights in the *Constitution* and Chapter 2 of the *Children's Act* are realised, but also guide, direct and secure the child's education and upbringing in a manner appropriate to the child's age, maturity and stage of development. The person must further guide, advise and assist the child in decisions that are taken by the child in a manner that is appropriate to the specific child's age, maturity and stage of development; guide the behaviour of the child in a humane manner; maintain a sound relationship with the child; and accommodate any special needs that the child may have. The person must finally ensure that in general, the best interest of the child is the paramount concern in all matters affecting the child.⁵⁰

⁴⁸ See ss 35(1), 35(2)(a), 39(5)(a) and 150(1)(g) of the *Children's Act*. S 1(2) states: "In addition to the meaning assigned to the terms 'custody' and 'access' in any law, and the common law, the terms 'custody' and 'access' in any law must be construed to also mean 'care' and 'contact' as defined in this Act."

⁴⁹ Skelton "Parental Responsibilities and Rights" 65-66. In *J v J* 2008 6 SA 30 (C), Judge Erasmus acknowledged the fact that "care" appeared to have a broader scope than the term "custody". The court found in *WW v EW* para 21 that while the statutory concepts of care and contact correspond broadly to the common-law terms of custody and access, they are not synonymous. The court was of the opinion that the common-law concepts have been given a wider meaning. See *WW v EW* para 26.

⁵⁰ Section 1(1) of the *Children's Act*.

It is noted, however, that although the duty of care expects more of a parent, both concepts (care and custody involve similar requirements. Custody has to do with a parent's day-to-day power over decisions regarding their children, such as the supervision and control of the child, and the persons with whom the child may associate, and basic duties such as ensuring the child's good health, welfare and happiness.⁵¹

The parent must ensure that the child's rights as set out in the *Constitution* and the *Children's Act* are respected, protected, promoted and fulfilled,⁵² and must guide the child's upbringing and development. As the term "care" suggests, a parent's duties regarding a child as set out in the *Children's Act* mostly involve responsibilities rather than rights in respect of a child, whereas the effect of the term "custody" is to emphasise the authority that a parent has over a child.⁵³ It remains to be seen if the South African court's approach to the concept of "care" will differ from their approach to the concept of "custody". Proudlock and Skelton⁵⁴ are of the opinion that the South-African courts will have to adapt the previous concepts to the new definitions of care and contact.

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

⁵¹ *Kastan v Kastan* 1985 3 SA 235 (C) 236E-F.

⁵² Section 7(2) of the *Constitution*, Preamble to the *Children's Act*.

⁵³ Heaton "Responsibilities and Rights" 3-4.

⁵⁴ Proudlock and Skelton "Interpretation" 1-29.

The *Children's Act* places great emphasis on the relevant international human rights and children's rights instruments.⁵⁵ The next section will include a discussion of the relevant international instruments.

3 International law

Section 39(1) of the *Constitution* states that:

(1) When interpreting the Bill of Rights, a court, tribunal or forum- (a) must promote the values that underlie an open and democratic society based on human dignity, quality and freedom; (b) *must consider international law*;⁵⁶ (c) may consider foreign law.

When courts interpret the rights as set out in the *Constitution*, they are thus obliged to consider international law.⁵⁷ This is a significantly important measure, as it ensures that all legislation is interpreted in the same way, on national and international level. Further, when a state becomes a signatory to a convention, this indicates its intention to become a party to the treaty, and although the convention may not yet be legally binding, the state is obliged to refrain from acts that would defeat the object and purpose of such a convention.⁵⁸ When a state ratifies a convention, it is bound under international law to respect the rights and duties set out in the convention.⁵⁹

South Africa has ratified various international and regional instruments, including the CRC and the ACRWC. The CRC can be described as the most important and successful international convention to deal with children's rights. It was adopted unanimously by the General Assembly of the United Nations on 20 November

⁵⁵ Preamble to the *Children's Act*.

⁵⁶ Own emphasis.

⁵⁷ Section 233 of the *Constitution*. See also *S v Makwanyane* 1995 3 SA 391 (CC) (hereafter referred to as *S v Makwanyane*) para 35; Jansen van Rensburg and Lamarche "Right to Social Security and Assistance" 209; In *S v Makwanyane*, the Constitutional Court held that, in the context of s 39(1)(b) of the *Constitution*, the phrase "public international law" refers to international law whether it is binding on South Africa or not. Further, the Court emphasised the fact that the courts had to consider both "hard" and "soft" law in the interpretation of the Bill of Rights.

⁵⁸ Rosa and Dutschke 2006 *SAJHR* 3.

⁵⁹ Rosa and Dutschke 2006 *SAJHR* 3.

1989.⁶⁰ As was stated by Doek,⁶¹ the former Chairperson of the UN Committee on the Rights of the Child:

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

The CRC represents a vast and comprehensive list of children's rights, covering not only civil and political rights, but also economic, social and cultural rights. The central theme of this Convention is that children need priority care as they are a vulnerable group and are in the developmental phase of their lives.⁶² As is identified by the CRC Committee, the so-called "four pillars" of the CRC are considered general principles of fundamental importance for the implementation of the CRC.⁶³ These four pillars accord children significantly important rights, such as the right against any discrimination,⁶⁴ the right to have their best interests a primary consideration in all actions concerning them,⁶⁵ the inherent right to life⁶⁶ and the right of a child who is capable of forming his or her own views to express those views in all matters affecting the child.⁶⁷

Mezmur⁶⁸ emphasises the fact that it was in order to give the CRC specific application within the African context, and accordingly the ACRWC, that the first regional treaty on the human rights of the child was adopted on the 11 July 1990⁶⁹ by the OAU Heads of State and Government (now the African Union or AU). The

⁶⁰ Entered into force on 2 September 1990. See Mezmur 2008 *SAPR/PL* 3. Although the CRC is the youngest of seven human rights treaties, it is the most successful, as it took less than ten months to enter into force and was ratified by 100 State Parties within two years. The CRC has thus far been ratified by 193 of 195 of the world's states, but excluding Somalia and the United States of America.

⁶¹ Doek 2003 *Saint Louis University Public Law Review* 235; Van der Walt 2010 *Obiter* 715: "That the international community ratified this treaty so soon after its proposal is indicative of the fact that it considered this treaty as one of major importance".

⁶² Van der Walt 2010 *Obiter* 715.

⁶³ Mezmur 2008 *SAPR/PL* 3-4.

⁶⁴ Article 2 of the CRC.

⁶⁵ Article 3 of the CRC.

⁶⁶ Article 6 of the CRC.

⁶⁷ Article 12 of the CRC.

⁶⁸ Mezmur 2006 *AHRLJ* 550. See also Mezmur 2008 *SAPR/PL* 6. The ACRWC was, however, not quick to receive support from African countries, as it took nine years for 15 countries to ratify the Charter and bring it into force.

⁶⁹ Entered into force on 29 November 1999.

ACRWC, which was adopted nine years after the CRC, contains provisions very similar to those of the CRC, and is intended to be complementary to other international and regional conventions. This is also applicable to other international conventions. They thus need to be read and interpreted together.⁷⁰

When States Parties ratify the CRC as well as the ACRWC, they are required to undertake a review of their domestic legislation and administrative measures in order to ensure that they comply with the obligations set out in the treaties.⁷¹ These obligations are provided for in article 4 of the CRC and article 1 of the ACRWC. This process, which has been referred to as "domestication", is performed under the country's constitutional provisions in the enacting and amending of legislation, and therefore gives international law the same status as domestic law.⁷²

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

3.1 United Nations Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child

The adoption of the CRC has brought about a significant shift in how the global community thinks of and treats children, as the fundamental requirement for the

⁷⁰ Rosa and Dutschke 2006 *SAJHR* 7-10.

⁷¹ Mezmur 2008 *SAPR/PL* 15.

⁷² Mezmur 2008 *SAPR/PL* 15; A 4 of the CRC states that: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

implementation of the CRC can be described as the recognition of the child as a full human being and respect for the rights they hold.⁷³ Since the South African government ratified the CRC it has committed itself to and assumed the responsibilities of achieving the goals set out in the CRC.⁷⁴ Signing and ratifying a treaty such as the CRC creates a presumption in international law that the courts will not give rulings that are contrary to the international treaty obligations of the State, and that a State Party assumes an obligation to give effect to the treaty in domestic law.⁷⁵

The preamble of the CRC refers to certain rights and freedoms that are of significant importance to the central theme of this study. These rights and freedoms are important as they emphasise the fact that children have certain material, emotional and psychological needs, and should grow up in a family environment filled with happiness, love and understanding. This should happen in an environment where everyone in the family is treated equally and with dignity and respect.

In its preamble the ACRWC also refers to certain rights and freedoms that are of significant importance to children, such as:

Recognising that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of *happiness, love and understanding*.⁷⁶

This contributes to the argument that children have certain material, emotional and psychological needs and should grow up in a family environment filled with happiness, love and understanding.⁷⁷

⁷³ Mezmur 2008 *SAPR/PL* 1.

⁷⁴ Gallinetti 2002 *ESR Review* 12-14.

⁷⁵ Sloth-Nielsen 2002 *ICRJ* 138.

⁷⁶ Own emphasis.

⁷⁷ The *Children's Act* states in its preamble: "it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of *happiness, love and understanding*."

3.1.1 Non-discrimination

The non-discrimination clause of the CRC is entrenched in article 2.⁷⁸ Article 2(1) of the CRC provides that States Parties are obliged to respect and ensure and extend the rights set forth in the Convention to each child, irrespective of the race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status of the child, *or his or her parents or legal guardians*.⁷⁹ Article 2(2) further provides that States Parties are obliged to take all appropriate measures to ensure that a child is protected from discrimination based on the status, activities, expressed opinions or beliefs of the child's parents or legal guardians. It is noteworthy that the CRC protects not only the child (from discrimination on the listed grounds) but also his or her parents or legal guardians. The non-discrimination clause makes provision for a non-exhaustive list of grounds by including the words "or other status of the child, or his or her parents or legal guardians". Of further importance is the fact that the CRC does not include a person's sexual orientation as a ground of non-discrimination, as does the South-African Constitution. The Committee on the Rights of the Child has, however, dealt with this situation in its General Comment No 4 of 2003.⁸⁰ The Committee emphasised the fact that according to article 2, States Parties have the obligation to ensure that all human beings under the age of 18 enjoy all of the rights provided for in the Convention, without any discrimination. These include non-discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. The Committee further states that these grounds also include adolescents' sexual orientation and health status.⁸¹

It is submitted that since these rights are applicable not only to children but also to their parents, and the grounds of non-discrimination include the sexual orientation of

⁷⁸ For a general discussion of a 2 of the CRC, see Hodgkin and Newell *Implementation Handbook* 17-33; Mower *International Support* 24-25; and LeBlanc *United Nations Lawmaking* 94-107.

⁷⁹ Own emphasis.

⁸⁰ *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003) 2 (*General Comment No 4*).

⁸¹ *General Comment No 4* 2.

an adolescent, it can be argued that a parent's right to non-discrimination on the grounds of sexual orientation is also protected by the CRC.

The non-discrimination clause of the ACRWC is entrenched in article 3. Article 3 provides that every child shall be entitled to enjoy the rights and freedoms set out in the Charter, irrespective of the child's *or his or her parent's or guardian's*⁸² race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status. The non-discrimination clause makes provision for a non-exhaustive list of grounds by including the words "or other status". Again, as in the CRC, a person's sexual orientation is not listed among the grounds of non-discrimination. When taking into account the grounds for non-discrimination as listed in the South-African *Constitution*, as well as the fact that the Committee on the Rights of the Child explained in their General Comment No 4 that the term "or other status" does in fact include an adolescent's sexual orientation, one can argue that the ACRWC, due to its open-ended list of factors included for non-discrimination, includes the sexual orientation of a person, although this is not stated explicitly.⁸³

3.1.2 *The best interest*

In recognising the vulnerability of a child and the lack of provision for the protection of children's rights in general, the standard of the best interests of the child is protected by means of article 3, and is described by Mezmur⁸⁴ as "the yardstick by which to measure all the actions, laws and policies affecting children". It can also be described as one of the most significant accomplishments of the CRC, as it applies to all actions concerning children, thereby including both individuals and groups.⁸⁵ It is an accepted fact that the standard of the best interests of the child underpins all

⁸² Own emphasis.

⁸³ *General Comment No 4* 2. The non-discrimination grounds as listed in s 9(3) of the *Constitution* are: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

⁸⁴ Van der Walt 2010 *Obiter* 715; Mezmur 2008 *SAPR/PL* 18.

⁸⁵ Mezmur 2008 *SAPR/PL* 18.

decisions relating to children, and the ratification of the CRC by South Africa and other countries has further confirmed this. Article 3 provides that in all actions concerning children, the best interests of the child shall be a primary consideration, whether such action be undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.⁸⁶ The importance of this standard is further reinforced in article 4 of the CRC, which states that all governments must undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention.⁸⁷ The CRC does not directly provide any specific criteria to be taken into consideration in the determination of the best interests of the child. South Africa has done this by incorporating the said criteria in national legislation, namely in section 7 of the *Children's Act*. Over the years the courts have developed certain guidelines or factors to be considered when determining what is in the best interests of the child, and it was only in 1994 that the court in *McCall v McCall* established a comprehensive list of factors that was deemed relevant in determining the best interests of a child.

Article 4(1) of the ACRWC emphasises the best interests of the child, providing that in actions taken by any person or authority concerning a child, the child's best interest shall be the primary consideration. One can note that the CRC only makes provision for the phrase "a primary consideration", whereas the ACRWC makes provision for the phrase "the primary consideration".⁸⁸ Even though the difference is

⁸⁶ Article 3 of the CRC states that: "(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (3) States Parties shall ensure that the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

⁸⁷ Article 4 of the CRC states that: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

⁸⁸ Mezmur 2008 *SAPR/PL* 17.

only one word, it creates a large difference in the amount of weight to be applied to the principle. Whereas "a primary consideration" as provided for in the CRC implies that the standard of the best interest of the child is to be afforded equal weight along with other considerations, the phrase "the primary consideration", as contained in the ACRWC, implies that the standard of the best interests of the child must carry a greater weight than competing rights and provisions.⁸⁹

Article 27 of the CRC provides that States Parties must recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Further, the parents or other persons responsible for the child have the primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child's development.⁹⁰ Article 27 is of significant importance in relation to the provisions made for the best interests of the child in section 7 of the *Children's Act*, including the capacity of a parent or care-giver to provide for the needs of the child, including his or her emotional and intellectual needs,⁹¹ the child's physical and emotional security, and his or her intellectual, emotional, social and cultural development,⁹² and the need for a child to be brought up within a stable family environment or an environment resembling as closely as possible a caring family environment.⁹³

⁸⁹ Skelton 2009 *AHRLJ*482.

⁹⁰ Article 27 of the CRC states that: "(1) States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. (2) The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. (3) States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and sport programs, particularly with regard to nutrition, clothing and housing. (4) States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the States Party and abroad, in particular, where the person having financial responsibility for the child lives in a state different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements as well as the making of other appropriate arrangements."

⁹¹ Section 7(1)(c) of the *Children's Act*.

⁹² Section 7(1)(h) of the *Children's Act*.

⁹³ Section 7(1)(k) of the *Children's Act*.

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

Article 20 of the ACRWC reaffirms the responsibilities of parents, providing that parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child, and to ensure that the best interests of the child is their primary concern at all times. They further have the duty to secure conditions of living necessary to the child's development, within their abilities and financial capabilities.⁹⁴ The sexual orientation of a person will not influence these responsibilities.

3.1.3 The views of the child

The CRC further makes provision in article 12 for a child who is capable of forming his or her own views to express those views freely in all matters that concern him or her, and that such views be given due weight in accordance with the child's age and maturity. Further, the child shall be given the opportunity to be heard in all judicial and administrative proceedings affecting the child, either directly or by means of a representative body.⁹⁵ Children are empowered by this provision to express their

⁹⁴ Article 20(1) of the ACRWC states that: "(1) Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty: (a) to ensure that the best interests of the child are their basic concern at all times- (b) to secure, within their abilities and financial capabilities, conditions of living necessary to the child's development; and (c) to ensure that domestic discipline is administered with humanity and in manner consistent with the inherent dignity of the child."

⁹⁵ Article 12 of the CRC states that: "(1) States Parties shall ensure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

views freely and also to communicate them in judicial and any other proceedings where their interests are at stake.⁹⁶ This provision creates certain standards against which the law can be measured and is of great importance in divorce litigation where it is necessary for courts to gain an understanding of the views and wishes of the children concerned in the particular matter.⁹⁷ The goal of hearing the voice of a child is not to treat their views as decisive factors in divorce decisions, but rather to take the views into consideration where possible.⁹⁸ Accordingly, it can be argued that in the divorce of their parents, children can express their views in the matter of with which parent who they wish to reside, either directly or by means of a representative, and the court can give consideration to these views with regards to the child's age and maturity.

Further, according to article 4(2) of the ACRWC, a child who is capable of communicating his or her views shall be afforded the opportunity for his/her views to be heard in all judicial or administrative proceedings concerning the child. This opportunity will be afforded either directly or through an impartial representative.⁹⁹ The participation rights of children stem from the expanding recognition of the autonomy of every child and children's right to have a say in matters that concern them.¹⁰⁰ A positive aspect of the phrasing of the ACRWC is the fact that it does not include the internal limitation of "in accordance with the age and maturity of the child", as does the CRC.¹⁰¹ The difference between the CRC and the ACRWC in the phrasing of a child's participation right must be noted. Whereas the CRC refers to a child who is "capable of forming" his or her views, the ACRWC refers only to a child who is "capable of communicating" his or her views. The effect of this difference is that the ACRWC is more restrictive than the CRC towards children who are not able

⁹⁶ Pillay and Zaal 2005 *SALJ* 684.

⁹⁷ Pillay and Zaal 2005 *SALJ* 684.

⁹⁸ Pillay and Zaal 2005 *SALJ* 684.

⁹⁹ Article 4 of the ACRWC states that: "(1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration. (2) In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law."

¹⁰⁰ Gose *African Charter* 124.

¹⁰¹ Gose *African Charter* 127.

to communicate their views.¹⁰² It can therefore be argued that in the divorce of their parents, children can express their views in the matter of which parent with whom they wish to reside, either directly or by means of a representative, and the court can give consideration to these views with regards to the child's view without taking onto consideration the internal limitation of age and maturity.

3.2 Concluding remarks

It is clear from the above discussion on the CRC and the ACRWC that they emphasise the importance of growing up in a family environment filled with happiness, love and understanding in order that the child should experience a full and harmonious development. If one includes the right to non-discrimination on the basis of sexual orientation, as was done in the South-African *Constitution*, and as is regarded as included in the CRC by General Comment No 4 of the Committee on the Rights of the Child, one can argue that children have the right to grow up in a family environment without any discrimination, regardless of the sexual orientation of the parents. The ACRWC makes provision for the best interests of the child to be the primary consideration in all actions taken by an authority or person.¹⁰³ Further, a child who is capable of communicating his or her own views shall be afforded the opportunity to have his or her views heard in all judicial and administrative actions concerning the child, either directly or through an impartial representative. It can be argued that in the divorce of their parents, children can express their views in the matter of which parent they wish to reside with, either directly or by means of a representative, and that the court can give consideration to such views without limitation of age and maturity. As in the CRC, the ACRWC makes no mention as to a specific sex orientation of the parents that would be in the best interests of the child, such as having two parents of a different gender as against two parents of the same gender. The ACRWC also makes no mention of whether or not a parent's particular sexual orientation would be detrimental to the well-being of the child. Rather, it can be argued that the parents of the child should have the financial capability to

¹⁰² Gose *African Charter* 125.

¹⁰³ Own emphasis.

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

The role of the South-African courts in their approach towards homosexuality and the suitability of homosexuals as parents has been significant. The position pre-1994 and post-1994 will consequently be discussed further.

4 Case law

It is accepted that the interests of children will be best served within the family environment.¹⁰⁴ Advances and changes in globalised culture compel people to take cognisance of the wide variety of ways in which families are formed and in which children grow up. Such new family arrangements are bringing about a new notion of what a family is.¹⁰⁵ The *Constitution* does not explicitly refer to familial or parental rights, nor does it protect the family, particularly as a social institution.¹⁰⁶ The Constitutional Court has, however, pointed out in a number of cases that the family is indirectly protected by means of the right to dignity of its members.¹⁰⁷ The *Children's Act* recognises that a wide range of family forms exists, and that different kinds of care arrangements can be made regarding children.¹⁰⁸ In the Supreme

¹⁰⁴ Robinson 2005 *JJS* 110.

¹⁰⁵ Lubbe 2007 *SAJP* 260-261. One of these non-traditional family forms that has challenged society's traditional notion of what a family is, as she explains, is the same-gendered family.

¹⁰⁶ Bonthuys 2005 *IJLPF* 24.

¹⁰⁷ *Ex Parte Chairperson of the Constitutional Assembly. In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 98-102; *Booyesen v Minister of Home Affairs* 2011 7 BCLR 654 (CC) para 3-4.

¹⁰⁸ Section 23 of the *Children's Act*; Skelton "Parental Responsibilities and Rights" 63.

Court of Appeal case of *Fourie v Minister of Home Affairs*,¹⁰⁹ Judge of Appeal Cameron¹¹⁰ stated that:

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

Furthermore, one can refer to a comment made by Judge O'Regan in *Dawood v Minister of Home Affairs*.¹¹¹

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

Furthermore, the approach of courts as well as members of society towards homosexuality and the suitability of homosexuals as parents is progressively changing. This is clearly reflected in jurisprudence in which constitutional norms and values are applied to the issue of homosexuality.¹¹²

Since South-Africa's shift to a democratic dispensation in 1994 major changes in the South-African private law has taken place.¹¹³ Several constitutional provisions have brought about changes in the way in which courts will decide to grant a duty of care to a parent in divorce proceedings where the homosexuality of a parent is a consideration.¹¹⁴ The courts are obliged to assume an approach different from that taken prior to 1994 in considering the relationship between homosexual parents and their children.¹¹⁵ As will be illustrated in the discussion of *Van Rooyen v Van Rooyen*, the views and decision of the court regarding the sexual orientation of a parent and consequently the best interests of the child would clearly have been in conflict with

¹⁰⁹ *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA) (hereafter referred to as *Fourie v Minister (SCA)*).

¹¹⁰ *Fourie v Minister (SCA)* 439D-E.

¹¹¹ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) 960B-D (hereafter referred to as *Dawood v Minister of Home Affairs*).

¹¹² *Fourie v Minister (SCA)*; *V v V*; *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *P v P* 2007 5 SA 94 (SCA).

¹¹³ Robinson 2005 *JJS* 108.

¹¹⁴ These important provisions includes ss 8, 9, 36 and 39 of the *Constitution*.

¹¹⁵ Robinson 2005 *JJS* 108.

the provisions of the *Constitution* had the decision been made after the *Constitution* came into force. The different views of the court in *V v V*, as will be discussed further in the section, are clearly in line with the provisions of the Constitution, and are indicators of the change that has taken place in the legislature prior to 1994 as well as beyond this date.

4.1 Pre-1994

In *Van Rooyen v Van Rooyen*¹¹⁶ the applicant was seeking a definition of her right to access her two minor children. The applicant had enjoyed her right of access liberally for a period of six years after her divorce from the respondent, the father of the children.¹¹⁷ The issue before the court arose after the respondent remarried and had a change of mind in terms of the access arrangements regarding the mother of the children.¹¹⁸ The issue did not involve capability or the suitability of the applicant to be a mother to her children, but rather the fact that she was a lesbian. She was not only involved in a lesbian relationship, but also shared a house and room with her partner.¹¹⁹ The question before the court related to the desirability of the lesbian mother to have access to her minor children. The court stated that the issue simply came down to the fact of the style of living, the attitude towards living, the activities, the behaviour and whatever else was involved in the context of lesbianism.¹²⁰ This issue, according to the court, did however raise certain difficulties. The first problem was that the applicant could live in whichever way she liked. She had an interest that the court should try to respect and protect. But, insofar as the interests of the children were concerned, she would have to make a choice between persisting in those activities or part thereof and having access on a wider basis than would otherwise be permitted. The court further stated that the choice with regards to her bedroom life would remain hers, but she could not make a choice that limited what

¹¹⁶ *Van Rooyen v Van Rooyen* 325I-J.

¹¹⁷ *Van Rooyen v Van Rooyen* 326G-H.

¹¹⁸ *Van Rooyen v Van Rooyen* 327A.

¹¹⁹ *Van Rooyen v Van Rooyen* 326G-327A. See also Mosikatsana 1996 *Acta Juridica* 114. The author argues that this statement made by Deputy Judge President Flemming clearly reveals the judicial attitudes in South Africa towards parenting by gay and lesbian persons.

¹²⁰ *Van Rooyen v Van Rooyen* 329E-F.

should be appropriately done with regards to the children.¹²¹ The second difficulty, as raised by the Court, was that the access had thus far been on the basis of an undertaking that she would "stay away from sexuality" as far as the children were concerned, and therefore that certain "things"¹²² should not take place in their presence.¹²³ The Applicant argued that no explicit sexual intimacy had taken place in front of or in the presence of the children, but the court stated that confusing signals encompassed much more than that. The signals that were given to the two minor children, contrary to what they should be taught as being normal and correct, was that two females shared a bed and obviously not for reasons of lack of space on a particular night, but as a matter of preference and mutual emotional attachment.¹²⁴ The court argued that this was detrimental to the children because it sent the wrong signal, and that one should take cognisance of the inadvisability of sending wrong signals.¹²⁵ Further, Deputy Judge President Flemming¹²⁶ stated that:

What the experts say to me is so self-evident that, even without them, I believe that any right-thinking person would say it is important that the children stay away from confusing signals as to how the sexuality of the male and of the female should develop.¹²⁷

The court ordered the Respondent to permit the applicant to exercise reasonable rights of access to her minor children, subject to the condition that, when the children slept at the Applicant's residence, the Applicant was not to share a room with her partner. The court further ordered that when the children spent school

¹²¹ *Van Rooyen v Van Rooyen* 329E-H

¹²² The parties were not in agreement as to what these "things" were.

¹²³ *Van Rooyen v Van Rooyen* 329 G-H.

¹²⁴ The court described signals of emotional attachment not only as kissing and hugging, but also as a way of speaking, the words of endearment used, and the manner in which people looked at each other.

¹²⁵ *Van Rooyen v Van Rooyen* 330A.

¹²⁶ *Van Rooyen v Van Rooyen* 328I-329A.

¹²⁷ In *V v V* 188F-189B Judge Foxcroft stated that: "It is so that the Court (in *Van Rooyen v Van Rooyen*) made a moral judgement about what is normal and correct insofar as sexuality is concerned...the learned Judge regarded homosexuality as being *per se* abnormal. The present equality clause (s 9) in the Constitution makes it quite clear that the State may not unfairly discriminate, directly or indirectly, on one or more grounds, including sexual orientation...In law, it is therefore wrong to describe a homosexual orientation as abnormal."

holidays with the applicant, the mother's partner was not to share the same residence or sleep under the same roof as the applicant and the children.¹²⁸

Although the decision of the court in *Van Rooyen v Van Rooyen* was made in the pre-1994 period, it has been severely criticised, mainly on the grounds that the court made a moral judgement as to what was correct and normal in so far as the sexuality of the mother was concerned,¹²⁹ and that it promoted homophobic bias by basing its findings on false stereotypes or perceived community intolerance.¹³⁰ The decision has also been described as demonstrating that legal prescriptions in the pre-1994 period had become outmoded.¹³¹ Pertaining to the fact that the court regarded the homosexuality of the mother as abnormal, it can be argued that the court's pre-conceived conviction led to its decision that the children would be negatively affected if they were to be exposed to it.¹³² If section 8 of the Constitution is read with section 39(2) of the *Constitution*, it can further be argued that the views of the court in *Van Rooyen v Van Rooyen* would have been in clear conflict with its constitutional obligation to develop the common law and accordingly to bring it in line with the provisions of the Constitution, had the decision been made after the *Constitution* came into force.¹³³ Van Heerden¹³⁴ explains that:

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

Lubbe¹³⁵ argues that "people automatically assume that being gay means being sexual". A line of argument that clearly runs in the course in *Van Rooyen v Van Rooyen* is the assumption that sexual activity might take place in the presence of the children. One can argue that to assume that homosexual couples would

¹²⁸ *Van Rooyen v Van Rooyen* 331E-I.

¹²⁹ Robinson 2005 *JJS* 109.

¹³⁰ Mosikatsana 1996 *Acta Juridica* 118.

¹³¹ Robinson 2005 *JJS* 108.

¹³² Robinson 2005 *JJS* 109.

¹³³ Robinson 2005 *JJS* 110.

¹³⁴ Van Heerden *et al Boberg's Law of Persons and Family* 545.

¹³⁵ Lubbe 2007 *SAJP* 271.

automatically act any differently from any heterosexual couples due to their sexual orientation is also the product of homophobia, and (in the context of section 9(2) of the *Constitution*) clearly amounts to discrimination on the ground of sexual orientation.

In the Supreme Court of Appeal case of *Fourie v Minister (SCA)*, Judge Cameron¹³⁶ stated that:

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

One can clearly derive a homophobic stance from the court's views and judgement regarding the homosexuality of the mother and the undesirability of having her children exposed to it. The court not only judged the mother's sexual orientation, but its decision was also solely based on the grounds of her "abnormal" sexual orientation and the wrong signals that it would give to her children. This is a clear infringement of the mother's right to non-discrimination in terms of section 9(3) of the *Constitution*, had the decision been made after the *Constitution* came into force. The Court further would have failed to promote the spirit, purport and objectives of the Bill of Rights by developing the common law or legislation, as it is obliged to in terms of section 39(2) of the *Constitution*.

The following case will give a clear indication as to the changes that certain provisions have brought to parents in divorce proceedings, where their sexual orientation is a factor for consideration in the granting of child care.

¹³⁶ *Fourie v Minister (SCA)* 439E-440C.

4.2 *Post-1994*

In the case of *V v V*, the issue before the court related largely to the divorce of the parties, the custody of the children and the access arrangements.¹³⁷ The plaintiff, the father of the children, sought an order for custody of the children, and was prepared to allow the defendant, the mother of the children, access under the supervision of the plaintiff or his nominee. The plaintiff claimed a further provision granting that whenever the defendant exercised her right to access to the children, no third person would share the same residence or sleep under the same roof as the defendant and the children.¹³⁸

One reason for the request for the inclusion of this condition was that the plaintiff feared that the children would be subjected to the allegedly harmful influence of a lesbian relationship between the mother and her partner. The other reason for this request was the state of mind of the defendant.¹³⁹ A number of medical specialists supported his view that she suffered from a condition known to psychiatrists as "borderline personality disorder", resulting from trauma experienced in her teenage years.¹⁴⁰ The plaintiff feared that the children would be mentally, emotionally and spiritually harmed by the influence of the lifestyle their mother and her companion shared.¹⁴¹ He further made it clear several times during the trial that he was concerned that his children could grow up with a homosexual orientation if subjected to the influence of a home where their mother openly lived with a lesbian partner, and stated that he did not wish to have his children exposed to what he regarded as unhealthy practices in their mother's home.¹⁴² It was for that reason that he insisted that their mother have free access to the children only when her lesbian companion was not physically present.¹⁴³

¹³⁷ *V v V* 173H-J.

¹³⁸ *V v V* 173I-174C.

¹³⁹ *V v V* 174C-E.

¹⁴⁰ *V v V* 174G-H; Judge Foxcroft stated that: "In the end, it became clear that the plaintiff's prime objection to joint custody was his wife's sexual orientation."

¹⁴¹ *V v V* 174F-G.

¹⁴² *V v V* 174C-D and 181F-G.

¹⁴³ *V v V* 181F-G.

The court considered several decisions in the course of arguments, two of them being *McCall v McCall* and *Van Rooyen v Van Rooyen*.¹⁴⁴ With regards to *McCall v McCall*, the court referred to the list of criteria that Judge King had set out in the matter to make a decision that would be in the best interests of the child. The court stated that a number of similar "checklists" were used in situations such as the present, but that they represented accumulated case law and therefore served only as guidelines.¹⁴⁵ Each case was different and had to be determined on its own facts. The court stated that it was clear that the court in *Van Rooyen v Van Rooyen* made a moral judgement about what was normal and correct insofar as sexuality was concerned, and that there could be no doubt that the judge regarded homosexuality as being *per se* abnormal.¹⁴⁶ Further, the court emphasised the fact that the present equality clause enshrined in section 9 of the *Constitution*, clearly stated that the State or any other person might not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds. Therefore it was wrong in law to describe a homosexual person as being abnormal.¹⁴⁷ Equally important, the court expressed the opinion that the difficulty in cases relating to the custody of children was that one was only indirectly dealing with the rights of parents. The child's rights were of paramount importance and needed to be protected, and certain situations would arise where the best interests of the child required that action be taken for the benefit of the child, effectively cutting across the parents' rights.¹⁴⁸ De Vos¹⁴⁹ reasons that:

There is nothing inherently wrong or abnormal about a lesbian relationship. But while the child is growing up, there will be strong recrimination from peers and

¹⁴⁴ *Van Rooyen v Van Rooyen*, as discussed above, regarded a decision that was given before the *Interim Constitution of the Republic of South Africa* 200 of 1993 came into force. Deputy Judge President Flemming, who presided in the matter, commented as follows in a situation very similar as the present one, as to what he perceived as the "wrong signals": "The signals are given by the fact that the children know that, contrary to what they should be taught as to what they should be guided as to be correct (that is male and female who share a bed), one finds two females doing this...as a matter of preference and as a matter of mutual emotional attachment...It is detrimental to the child because it is a wrong signal."

¹⁴⁵ *V v V* 187E-F.

¹⁴⁶ *V v V* 188F-G.

¹⁴⁷ *V v V* 188J-189B.

¹⁴⁸ *V v V* 189B-E.

¹⁴⁹ De Vos 1994 *SALJ* 691.

other parents against the child as it becomes known that his or her mother is a lesbian. The child might also become confused and distressed by his or her mother's unwillingness to conform to a generally accepted norm. It might therefore be in the best interest of the child to discriminate against the lesbian mother, because that will be the only way in which her children could be spared unnecessary suffering.

The court referred to the article of De Vos, stating that there may well be situations where a court will override the equality clause in the best interest of protecting the child, but that would only be in cases regarding the meaning of the reasonableness of such limitation, such as in the Canadian case of *R v Oakes*.¹⁵⁰ The court further referred to the conclusion drawn by De Vos, namely:¹⁵¹

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

Against this background, the court came to the conclusion that there was no doubt from the evidence before the court that the defendant was a good and suitable mother, and by compelling her to exercise access rights to her children in the position of a visitor to the father's home would be unjust. The image of a mother being permitted to visit her children only under supervision would be unfair to her and also to her children, and the children would feel that their mother was being punished because of the underlying risk that her lifestyle would influence them in the wrong direction. The court reasoned that the best protection it could grant the children was to allow a continuing lifestyle with both parents under joint custody and to allow them to decide for themselves whether the lifestyle of the mother or that of the father was more harmful.¹⁵²

¹⁵⁰ *R v Oakes* 1998 4 SA 169 (C) 189I-190 (hereafter referred to as *R v Oakes*).

¹⁵¹ De Vos 1994 *SALJ* 691.

¹⁵² *R v Oakes* 192B-E.

In the Supreme Court of Appeal case of *P v P*,¹⁵³ Judge of Appeal Van Heerden¹⁵⁴ made a statement that was agreed with by four other judges:

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

4.3 The application of case law to "care" in the Children's Act

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

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

One can, however, note that the arguments before the court in both cases involved the ability of the mother to provide living conditions that were conducive to the child's health, well-being and development; to protect the child from emotional or

¹⁵³ *P v P* 2007 5 SA 94 (SCA) 101J-102B (hereafter referred to as *P v P*).

¹⁵⁴ *P v P* 101J-102B.

moral harms or hazards; to guide, direct and secure the child's education and upbringing, including its religious and cultural upbringing, in a manner appropriate to the child's age, maturity and stage of development; and to ensure that the best interests of the child were the paramount concern in all matters affecting the child. This is due to the fact that the court in *Van Rooyen v Van Rooyen* explicitly stated that the problem before them did not arise from a question as to the capability or the suitability of the applicant to be a mother to her children, but from the fact that she was a lesbian and shared a home and room with her partner.¹⁵⁵ The court further emphasised that the issue was the style of living, the attitude towards living, the activities, behaviour and whatever else was involved in the context of lesbianism.¹⁵⁶ The court regarded the (undesirable) signals that the children might receive from observing that two females were living together, which the court characterised as being contrary to what should be taught as normal and correct, and expressed the opinion that the receipt of such signals would be detrimental to the children.¹⁵⁷ The issue before the court in *V v V* also related to the children's subjection to the alleged harmful influence of the mother and her partner's lesbian relationship.¹⁵⁸ The second reason for the issue before the court related to the state of mind of the defendant, as she was said to suffer from a condition known as "borderline personality disorder" pertaining from trauma experienced in her teenage years.¹⁵⁹ It later became apparent, however, that the plaintiff's primary objection to joint custody with the mother arose from his wife's sexual orientation.¹⁶⁰ The plaintiff's objection was that the children would be mentally, emotionally and spiritually harmed by the influence of the lifestyle their mother and her companion shared.¹⁶¹ He was further concerned that his children would grow up with a homosexual orientation if they were to grow up in a home where their mother lived in an open lesbian relationship.¹⁶² Furthermore, he made it clear that he regarded

¹⁵⁵ *Van Rooyen v Van Rooyen* 325G-I, 326G-H.

¹⁵⁶ *Van Rooyen v Van Rooyen* 329E-F.

¹⁵⁷ *Van Rooyen v Van Rooyen* 328I-329A, 329D-330D.

¹⁵⁸ *V v V* 174C-E.

¹⁵⁹ *V v V* 174G-H.

¹⁶⁰ *V v V* 174C-E.

¹⁶¹ *V v V* 174F-G.

¹⁶² *V v V* 174C-D, 181F-G.

the practices in his wife's home as unhealthy, and that he did not wish to have his children exposed to it.¹⁶³

In the light of the previous discussion of the constitutional provisions relating to equality and human dignity, and of the *Children's Act*, it is now clear that a parent may not be regarded as unable to care for a child solely because of his/her sexual orientation. When one applies the current definition of care as provided for in the *Children's Act* to the case of *Van Rooyen v Van Rooyen* and *V v V*, one may argue that in both cases the court would have perceived the mother as a good and suitable parent to care for her children, regardless of her sexual orientation. One might also argue that in the light of the facts of both cases and the criteria required of a parent to care for a child, the court would not have been able to deny any of the mothers care over her children. Both parents were able to provide their children with living conditions conducive to the child's health, well-being and development; to protect the child from any type of harm, including physical, emotional and moral harms and hazards; to guide, direct and secure the child's education and upbringing in a manner appropriate to the child's age, maturity and stage of development; and to ensure that the best interests of the child were of paramount concern in all matters affecting the child. Upon consideration of the views and judgement of the courts it becomes apparent that the transformation brought about by the *Constitution* and its provisions relating to equality in respect of homosexual parents and the extent to which courts should or should not consider parents' sexual orientation in the granting of childcare has been remarkable. It has also been shown that courts in general view the best interests of the child as interlinked with the rights of other members of the family and society as a whole.¹⁶⁴ One can further note that the role of a parent's sexual orientation in determining the best interests of the child has changed to a great extent in response to the coming into operation of the *Constitution* rather than in response to the change of concept from custody to care since the coming into operation of the *Children's Act*. The change of term has done

¹⁶³ *V v V* 181F-G.

¹⁶⁴ Bonthuys 2005 *IJLPF* 35.

little more than to simplify the court's task in establishing the content of the duty of care.

5 Conclusion

The object of this article has been to investigate the legal position as to whether the sexual orientation of a parent should be a considering factor in the granting of care of children, as well as to establish to what extent courts should give consideration to such factor. The question that arose from the article is: has the role of a parent's sexual orientation in determining the best interests of the child changed since the change in concept from custody to care after the coming into operation of the *Children's Act*?

Section 9 of the *Constitution* very clearly prohibits unfair discrimination against persons, either directly or indirectly, by the State or any natural person, on several grounds. Of special relevance to this study is the right not to be discriminated against on the ground of one's sexual orientation.

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

The protection of the best interests of the child is one of the guiding principles in all matters relating to children, and has been enshrined in national legislation and international treaties, such as section 28(2) of the *Constitution*, sections 7 and 9 of the *Children's Act*, article 3 of the CRC and article 4 of the ACRWC. Although the different provisions in legislation refer to the standard of the best interests of the child in different ways, all of them relate to the simple fact that a child's best interests are of paramount importance in all actions concerning the child. This

standard has specific importance in care disputes, as it would be a guiding and fundamental principle and most probably the basis on which the decision of the court will be made. The standard of the best interests of the child does not reference the specific sexual orientation of a parent. It is argued that even though a parent applying for the care of a child is homosexual, his or her sexual orientation as a sole factor would not carry any weight in the light of the guiding factors provided in section 7 of the *Children's Act*. Provided that the applicant satisfies the court that he or she complies with the criteria set out in section 7 of the *Children's Act*, the person would be regarded as a suitable parent to care for the child.

The decision of the court in *V v V* was clearly in line with the provisions of equality and dignity as provided for in the *Constitution*. The court gave consideration to the factors listed in section 7 of the *Children's Act* to determine what would be in the best interests of the child. The court emphasised the fact that the judgement of the court in *Van Rooyen v Van Rooyen* was one of a moral nature about what is normal and correct insofar as sexuality is concerned, and that there could be no doubt that the judge regarded homosexuality as being *per se* abnormal.¹⁶⁵ Further, the court emphasised the fact that the equality clause found in section 9 of the *Constitution* clearly states that the State or any other person may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds, one such being sexual orientation. Therefore it was wrong in law to describe a homosexual person as being abnormal. The court regarded the mother as a good and suitable mother to her children, despite the fact that she was homosexual, and allowed the children to decide for themselves which lifestyle they wanted to pursue. *V v V* could be regarded as a landmark case, illustrating the transformation brought about by the *Constitution* and its provisions on equality, and the extent to which the courts can give consideration to the parents' sexual orientation in the granting of child care.

Accordingly, with regards to the non-discrimination clause contained in section 9 of the *Constitution*, the right of every person to inherent dignity, and the judgement

¹⁶⁵ See s 4.1 of this contribution regarding the judge's moral judgment and the effect it had on the child's best interest.

handed down in *V v V*, one can come to the conclusion that the courts can no longer deny parents care and contact with their children based solely on their sexual orientation. When one interprets section 1 of the *Children's Act*, which defines the concept of care, with section 7 of the *Children's Act*, which defines the standard of the best interests of the child, one notes that the courts have a detailed list of factors to apply in granting care to a parent. It is submitted that the role of a parent's sexual orientation in determining the best interests of the child has changed to a great extent due to the coming into operation of the *Constitution*,¹⁶⁶ and to a lesser extent due to the change of concept from custody to care since the coming into operation of the *Children's Act*. It is further argued that the change of term has not changed matters in consideration of the sexual orientation of a parent in relation to granting the care of a child, but has merely simplified the court's task in establishing the content of the duty of care.

¹⁶⁶ Changes in society's perception regarding homosexuality fall outside the scope of this contribution.

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List of abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
CRC	Convention on the Rights of the Child
ICRJ	International Children's Rights Journal
IJLPF	International Journal of Law, Policy and Family
JJS	Journal for Juridical Science
SAJP	South African Journal of Psychology
SAJHR	South African Journal for Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SAPR/PL	South African Public Law
SAPR	South African Psychiatry Review

THE SEXUAL ORIENTATION OF A PARENT AS A FACTOR WHEN CONSIDERING CARE

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SUMMARY

Section 28(2) of the Constitution states that a child's best interest is of paramount importance in every matter concerning the child. Section 9 further provides that every person is considered equal before the law and has the right to equal protection and benefit of the law. Several grounds are listed relating to the unfair discrimination of persons, including their sexual orientation. The concept of care is incorporated in the Children's Act, and it entails a comprehensive description of parents' daily life regarding children and the powers and duties expected to ensure the general protection, well-being and best interests of the child.

The aim of this contribution is to discuss the sexual orientation of a parent as a factor when considering care and the extent to which courts may give consideration to such a factor. The article will also address the question of whether or not the role of a parent's sexual orientation in determining the best interests of the child has changed since the common law concept of custody was *replaced* by the concept of care in the Children's Act. In this article, care and the best interests of the child will be discussed first. International law will be considered thereafter, followed by a discussion on the approach of our courts, pre- and post-1994, in order to come to a conclusion and make recommendations.

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KEYWORDS: Care; Custody; Sexual orientation; Best interests of the child; African Charter on the Rights and Welfare of the Child; Convention on the Rights of the Child