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# Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child

*Admark Moyo*[*]
Lecturer in Law, Midlands State University, Gweru, Zimbabwe; PhD Candidate, University of Cape Town, South Africa

## Summary

*This article laments the individualistic construction of the best interests of the child principle. Decision making in a family context goes beyond a mere trumpeting of the interests of the individual child and involves balancing various competing interests. Decisions often claimed to be made in the interests of children are not just about children – they are an attempt to balance the competing interests of family members. A child's best interests are often limited by the broad interests of the community (especially in communitarian societies) and the rights of others, particularly the rights and interests of parents, siblings, caregivers and other persons exercising parental responsibilities. Consequently, decisions made in a family context usually seek to balance different family members' rights and interests. Drawing inspiration from literature on the subject, the article advocates the adoption of a holistic approach to the welfare principle. It is shown, towards the end of the article, that the South African courts and legislature have rightly endorsed the notion that the fact that the best interests of the child are 'paramount' does not mean that it is not limitable. Much depends on the competing interests at stake, the factors that must be weighed in the process of making a value judgment and the weight to be accorded to each factor in light of the facts of each case.*

* LLB (Fort Hare), LLM (Cape Town); admarkm@gmail.com. I am indebted to the two anonymous reviewers for their scholarly and detailed comments on a draft of this article. I also wish to thank Dr Amanda Barratt, Prof Jonathan Burchell and other members of the Department of Public Law at the University of Cape Town for their comments on earlier drafts of the article.

# 1 Introduction

> 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.[1]
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> In all actions concerning the child undertaken by any person or authority the best interests of the child shall be *the primary* consideration.[2]
>
> A child's best interests are of *paramount importance* in every matter concerning the child.[3]
>
> In all actions concerning the care, protection and well-being of a child the standard that the best interest of the child is of *paramount importance*, must be applied.[4]

Generally, the provisions referred to above reflect the seriousness with which the law treats children's interests. The term 'paramountcy principle' is used loosely to refer to what is commonly known as the best interests of the child. Therefore, the terms 'paramountcy principle' and the best interests of the child are used interchangeably in the article. The article argues, firstly, that the 'paramountcy principle' casts such an individualistic and 'bossy' image of the child as to suggest that when decisions affecting children are made, nothing except the best interests of the child matters.[5] Narrowly constructed, the 'paramountcy principle' requires decision makers to religiously follow what the child needs or wants without reference to other competing interests. Secondly, it is shown that the paramountcy principle may be of limited relevance to communitarian societies. These societies are built on the importance of group solidarity and collective interests. Thirdly, parental rights and interests are very important in family relationships and it is argued by the author that parents and other holders of parental responsibilities have a wide discretion when making decisions affecting children.

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1 Art 3(1) United Nations Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990.

2 Art 4(1) African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999.

3 Sec 28(2) Constitution of the Republic of South Africa, 1996.

4 Sec 9 South African Children's Act 38 of 2005.

5 In the juvenile justice context, Cameron J in *Centre for Child Law v Minister of Constitutional Development (Centre for Child Law)* Case CCT 98/08 [2009] ZACC 18, para 29, interprets the provision that the 'child's best interests are of paramount importance' to mean that the child's interests are 'more important than anything else'. However, Cameron J acknowledges that a wide spectrum of factors is relevant in determining the interests of the child.

Decisions claimed to be made in the interests of children often reflect what parents want of their children and may not necessarily be in the interests of children. It is argued in the article that we need to go beyond individualistic conceptions of child welfare rights towards an appreciation of relational rights and responsibilities between children and others, especially in a family context. According to Minow and Shanley,[6]

> [a] conception of relational rights and responsibilities ... would not regard 'rights' as belonging to individuals and arising from the imperative of self-preservation, but rather would view rights as claims grounded in and arising from human relationships of varying degrees of intimacy.

An adequate theory of family law must simultaneously view an individual as a distinct individual as well as a person fundamentally involved in relationships of dependence, care and responsibility with other family members. Relational rights and responsibilities draw our attention to the claims that arise out of relationships of human interdependence. This may turn out to be very important for children who, as part of the human family, live in a world framed and influenced by practices and decisions of the larger society, including the state. Accepting the reality that rights are by 'nature' relational may turn out to be important when exercising the onerous responsibility of balancing competing rights and interests, especially those of children, parents and the family. Lastly, it is argued that the codification of informal, non-confrontational and inquisitorial dispute-resolution mechanisms in South Africa's Children's Act reflects an emerging acceptance by the South African legislature that the interests of the child are limitable. The trend towards a holistic and non-individualistic approach to the paramountcy principle is also evident from statutory provisions which require decision makers to listen to children, parents, caregivers and other holders of parental rights and responsibilities before making major decisions in respect of the child.

## 2 The 'paramountcy' principle is unduly individualistic

It may be argued that the paramountcy principle casts such an individualistic and 'bossy' image of the child as to suppose that nothing matters except that child's best interests. First, the paramountcy principle (if not its interpretation) is unduly narrowly individualistic and fails to reconcile the rights of children and those of parents. Those who argue for children's liberation tend to construe human rights protection as a zero-sum game in which children's gains are adults' losses, rather than as a uniform enterprise in which children's rights

6 See M Minow & ML Shanley 'Relational rights and responsibilities: Revisioning the family in liberal political theory and law' (1996) 11 *Hypatia* 4 23.

add value to the existing body of parental rights.[7] Lord Nicholl remarks that 'the principle must not be permitted to become a loose cannon destroying all else around it'.[8] Interpreted strictly, the paramountcy principle requires decision makers to do what is best for the child, no matter how marginal the benefit or the interests of others. It requires that only the interests of the child be considered, nothing more, nothing less. The African Charter on the Rights and Welfare of the Child (African Children's Charter) heightens this individualism by boldly claiming that the best interests of the child are 'the' primary consideration in all actions concerning the child undertaken by any person or authority.[9]

Once made 'the' primary or 'the' paramount consideration, the principle risks becoming a loose cannon destroying all else around it. In theory, this may be the case, but in practice, the paramountcy principle is not the sole consideration in deciding matters affecting the child and may even play a subordinate role in other contexts. For instance, it can be hypothesised that it is in the best interests of the child to be brought up by both parents living together as husband and wife. In fact, this proposition has been turned into a presumption under international law. One could argue that making the best interest standard legally 'paramount' could literally coerce parties to a marriage to live together in a broken marriage 'for the sake of the children'. In reality, this does not often obtain even in countries in which legislation requires parents and other professional agents to ensure that custody arrangements are finalised prior to the issue of a decree of divorce.[10] In determining whether to grant a divorce to warring parents in a broken marriage in which one or both parties clearly want out, the best interests of the child are not pivotal as children are not parties to the marriage contract. The child's best interests may be relevant to the determination of post-divorce custody arrangements, but no one should be denied divorce just because it is in the best interests of the child for the parties to remain together. If the parties are going through lengthy and acrimonious litigation, it is often the case that one of the parties would have left the matrimonial home well before the issuance of the decree of divorce and the law can hardly do anything about that.

When exercising their common responsibility for the upbringing and development of the child, parents or legal guardians should

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7 See BB Woodhouse 'The constitutionalisation of children's rights: Incorporating emerging human rights into constitutional doctrine' (1999-2000) 2 *University of Pennsylvania Journal of Constitutional Law* 1.

8 See *Re L (Minors (Police Investigation: Privilege)* [1997) AC 16 33B.

9 Art 4 African Children's Charter.

10 See eg the Divorce Act 70 of 1979 and the Mediation in Certain Divorce Matters Act 24 of 1987.

ensure that the 'best interests of the child will be their basic concern'.[11] Admittedly, 'will' is aspirational and 'the' is obligatory. In terms of article 9(1) of the United Nations (UN) Convention on the Rights of the Child (CRC), 'a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine that such separation is *necessary for the best interests of the child*'. Article 9(3) states that children 'separated from one or both parents [shall] maintain personal relations and direct contact with both parents on a regular basis, *except if it is contrary to the child's best interests'*. Article 20(1) of CRC refers to 'a child in whose own best interests cannot be allowed to remain in' the family environment. Article 37(c) refers to the right of every child deprived of their liberty to be separated from adults *unless it is considered in the child's best interest not to do so'*. Article 40(2)(b)(iii) entrenches the child's right to have a matter determined in the presence of parents unless it is considered not to be in the best interests of the child. The word 'paramount' in respect of the child is mentioned only in article 21 which understandably deals with matters relating to adoption. Article 21 requires states that allow adoption 'to ensure that the *best interests of the child shall be the paramount consideration*'. Save for this provision, other CRC provisions which mention the best interests of the child do not characterise them as 'the paramount consideration', but use very neutral language to point decision makers to the relative importance of children's interests. Even if the paramountcy of the best interests of the child is considered as a cardinal principle running throughout CRC and colouring all other provisions including the ones mentioned above, it can be argued that CRC leaves room for more or less weight to be attached to other competing interests in certain deserving circumstances. In my view, the intention of the framers of CRC was to ensure that the paramountcy principle does not become an exacting standard for private and state action.

Unsurprisingly, CRC states that the best interests of the child shall be 'a' primary consideration in order to avoid the elevation of the paramountcy principle beyond the reach of other important interests.[12] The wording 'shall be a primary consideration' in article 3 of CRC 'indicates that the best interests of the child will not always be the single overriding factor [to be considered] as there may be [other] competing or conflicting human rights interests ... between different groups of children and between children and adults'.[13] Given the importance of the community in African societies and the fact that children are required to make sacrifices for the benefit of the family

11 See art 18(1) CRC.

12 See art 3(1) CRC.

13 R Hodgkin & P Newell 'Best interests of the child' in R Hodgkin *et al* (eds) *Implementation handbook for the Convention on the Rights of the Child* (2007) 35 38.

and the group to which they belong, it is regrettable that the African Children's Charter envisions that the best interests of the child shall be 'the' as opposed to 'a' primary consideration.[14] Herring argues that we need to shift our focus from an individualistic version of welfare to an inclusive one that accommodates the interests of children, parents and others.[15] The reasons he gives are that as social actors involved in relationships with others, children should be altruistic to the extent of not requiring from parents excessive sacrifices in return for minor benefits. Further, he argues that this approach enables decision makers to consider the problem not as a clash between the interests of parents and those of children, but as an invitation to decide what a proper parent-child relationship would be in the circumstances of each case.[16]

A 'relationship-based' approach to the 'paramountcy principle' would accommodate the rights of parents and other family members. In a recent judgment,[17] the South African Constitutional Court held that determining whether the removal of a child (in need of care and protection) from the family environment is in the best interests of the child requires an evaluation of the views of parents and the child affected. Such a determination requires, 'as a minimum, [that] the family, and particularly the child concerned ... be given an opportunity to make representations on whether removal is in the child's best interests'.[18] A relationship-based approach to family relations envisages an evaluation of competing interests and seeks to ensure that both parties are heard before determining where the interests of the child lie. Herring explains this approach thus:[19]

> A relationship based on unacceptable demands on a parent is not furthering a child's welfare ... The child's welfare is promoted when he or she lives in a fair and just relationship with each parent, preserving the rights of each, but with the child's welfare at the forefront of the family's concern.

There is a great deal of 'give and take' in family relationships and we should not be ashamed to say that parents too have rights and interests which deserve legal protection. In fact, international law does

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14 See art 4(1) African Children's Charter.

15 J Herring 'Welfare principle and the rights of parents' in A Bainham *et al What is a parent? A socio-legal analysis* (1999) 89 101.

16 Herring (n 15 above) 101-102. For a critique of the individualistic nature of human rights, see K Marx 'On the Jewish question' in J Waldron (ed) *Nonsense upon stilts: Bentham, Burke and Marx on the rights of man* (1987) 146-147; K Marx 'On the Jewish question' in D McLellan (ed) *Karl Marx: Selected writings* (1971) 54; CR Sunstein 'Rights and their critics' (1995) 70 *Notre Dame Law Review* 727 732.

17 *C & Others v Department of Health and Social Development, Gauteng & Others* 2012 2 SA 208 (CC).

18 *C* (n 17 above) para 27; see also para 36,

19 J Herring 'The Human Rights Act and the welfare principle in family law – Conflicting or complementary?' (1999) 11 *Child and Family Law Quarterly* 223 225.

recognise the responsibilities, rights and duties of parents (or members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child) to provide, in a manner consistent with the evolving capacities of the child, *appropriate direction and guidance* in the exercise by the child of the rights recognised in the Convention.[20] Whereas parental direction and guidance must be appropriate and given to enable the child to exercise all rights in the Convention, parents have a considerable discretion in making decisions they consider to be best for their children. Thus, parents decide what kind of education (religious or secular) their child should receive, what values the child should be socialised to accept and how the child should generally view the world. This is discussed in great detail below.

It may even happen that the best interests of other children supersede or compete with the best interests of a particular child. This may be unavoidable even where the adult or competent authority making the decision listens to all the children affected by the decision. In the process of making decisions concerning the allocation of parental rights and responsibilities or the granting of custody and access rights or those concerning residence and education, a competent authority may decide that the interests or preference of a particular child should not be decisive in order to ensure that other compelling interests and rights are protected and promoted. These decisions are usually based on, among other factors, the fitness and propriety of a particular person to ensure that the child receives adequate support, attains an education and develops a well-rounded personality. Contrary to the picture painted by the law and other disciplines, these decisions are not always based on the best interests of the child, which interests cannot be indisputably and scientifically determined in the first place.[21]

In *MS v M*,[22] the Constitutional Court of South Africa held that the 'expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular'.[23] It proceeded to hold that 'the word "paramount" is emphatic' and that, if interpreted literally, the phrase 'in all actions concerning the child' would virtually embrace all laws and forms of public action, since very few measures would not have a direct

20 See art 5 CRC.

21 On the indeterminacy of the welfare principle, see RH Mnookin 'Child custody adjudication: Judicial functions in the face of indeterminacy' 1975 (39) *Law and contemporary problems* 226; R Mnookin *In the best interests of children* (1985) 257; J Goldstein *et al Beyond the best interests of the child* (1980); S Parker 'The best interests of the child – Principles and problems' in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1994) 26-41.

22 *MS v M* 2008 3 SA 232 CC.

23 *MS v M* (n 22 above) para 23.

or indirect impact on children and thereby concern them.[24] Such a sweeping construction of the paramountcy principle could not have been intended by the framers of the Constitution since all rights therein are limitable. The Court observed that the paramountcy principle should not be applied in a manner that could unduly obliterate other valuable and constitutionally-protected interests.[25] It held that the welfare principle is not an 'overbearing and unrealistic trump of other rights' and that it is 'capable of limitation'.[26] Consequently,[27]

> [t]he fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights ... their operation has to take into account their relationship to other rights, which might require that their ambit be limited.

The paramountcy principle does not mean that where family or state action has the potential to affect children negatively, then the principle would necessarily override other considerations.[28] In other words, the best interests of the child, like other rights in the Bill of Rights, are subject to limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[29]

In the absence of other interests competing for protection and imposing limitations that meet the required constitutional standard of reasonableness and justifiability, the best interests of the child prevail. In Madala J's words,[30]

> [r]endering the child's best interests paramount does not necessitate that other competing constitutional rights may be simply ignored or that a limitation of the child's best interest is impermissible.

Albeit in a different context, the South African Constitutional Court, in *MS v S*,[31] held that the paramountcy of the best interest standard does not require courts to protect children from the negative consequences of being separated from their caregivers. The furthest the courts are constitutionally required to go is to pay 'appropriate attention to the interests of the child and to take reasonable steps to minimise damage'[32] in all matters that have an impact on the child. It is the constitutional obligation of the Court to ensure that a

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24 See para 25 of the judgment.

25 As above.

26 See para 26 of the judgment.

27 As above.

28 As above.

29 See sec 36 of the South African Constitution; see also A Skelton 'Constitutional protection of children's rights' in T Boezaart (ed) *Child law in South Africa* (2009) 280-282.

30 *MS v M* (n 22 above) para 112.

31 Case CCT 63/10 [2011] ZACC 7; *MS v S (Centre for Child Law as Amicus Curiae)* 2011 2 SACR 88 (CC) para 35.

32 As above.

balancing exercise that considers all the competing interests is taken and to consider the circumstances of the child when weighing up the importance of the child's interests against the interests of society and the rights of others.[33] Sachs J views the constitutional position of the best interests of the child as follows:[34]

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

If the child is to be constitutionally imagined as a person who lives in a context where his or her interests compete with and may even be limited by social interests and the interests of other individuals, it cannot be defensibly argued that the child's interests are 'more important than anything else' or that anything else is less important than the child's best interests. Communitarianism and parental rights pose an enduring challenge to the individualistic conception of the paramountcy principle often taught and revered by mainstream thinkers.

## 3 Communitarianism's challenge to the paramountcy principle

Communitarian cultures and societies pose a serious challenge to the individualistic nature of the 'paramountcy' principle. For instance, the 'paramountcy' principle conflicts with African ideology because the latter emphasises collectivism, reciprocal duties of support and restraint on individual liberty. The Asante proverb 'I am because we are and therefore we are because I am' captures the core of African political thought and traditional conceptions of social order. While the last part of the proverb can go either way and be interpreted to suggest that individualism is an inherent part of communitarian cultures, it is arguable that the phrase 'we are because I am' suggests that individuals play a pivotal role in constructing social values. As will be seen below, the phrase shows that the interests of the individual are not entirely, if at all, ignored, but are considered in light of communal interests. Nhlapo argues that group solidarity was never construed to mean a blanket disregard for individual liberty.[35] He observes that '[t]raditional society's concern with the primacy of the collective does

33 n 31 above, para 37.

34 *MS v M* (n 22 above) para 42.

35 See T Nhlapo 'Cultural diversity, human rights and the family in contemporary Africa: Lessons from the South Africa constitutional debate' (1995) *International Journal of Law, Policy and Family* 208.

not compel the conclusion that there was a total absence of human worth divorced from social role'.[36] Nonetheless, indigenous African communities are built on the four principles of respect, restraint, responsibility and reciprocity.[37] Under this conception, the interests of the child and those of the community are symbiotic. Hence, the preservation of group identity is thought to be in the interests of the child and the interests of the family. In patrilineal Africa, relationships are constructed along the extended family model. Parenthood is largely social and all decisions concerning children should be taken after consulting all members of the kinship group, not just the child's biological parents. The child stands not as an individual but as a family member; she serves the family and the family serves her.[38] The individual interests of the child and those of the family are inseparably interwoven.

Since the family is a resource for the child, it is thought in her interests for her to support it and to maintain family bonds.[39] This stands in sharp contrast to international law which emphasises the primacy of the child's individual interests. 'Living' customary law (namely the customs, traditions, beliefs and values by which people govern themselves and not customary law as applied by the state apparatus) perceives children's interests as consistent with and articulates them with reference to the interests of the group. This overcomes the theoretical challenges that come with viewing the child as an atomistic individual living outside the realm of relationships with others. True, the emphasis on the group may cause the interests of the child as an individual to assume subordinate status, but the ultimate purpose behind African collectivism is to ensure the protection of the interests of the group as a whole, including children.

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36 Nhlapo (n 35 above) 221.

37 For a detailed discussion of reciprocal support obligations, respect and restraint, see BA Rwezaura 'Changing community obligations to the elderly in contemporary Africa' (1989) 4 *Journal of Social Development in Africa* 5; A Twum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent child-child relationships in Ghana and the implications for children's rights' (2009) 17 *International Journal of Children's Rights* 415; NA Apt 'Ageing and the changing role of the family and the community: An African perspective' (2002) 55 *International Social Security Review* 39 44; NA Apt & M Grieco 'Urbanisation, caring for elderly people and the changing African family: The challenge of social policy' (1994) *International Social Security Review* 111-22; TN Nhongo 'Impact of HIV/AIDS on generational roles and intergenerational relationships' paper presented at the workshop on HIV/AIDS and Family Wellbeing, Namibia, 28-30 January 2004; E Goody *Context of kinship: An essay in the family sociology of the Gonja of Northern Ghana* (1973).

38 A Armstrong *A child belongs to everyone: Law, family and the construction of the best interests in Zimbabwe* Innocenti Occasional Papers, Child Rights Series 11 1995 5; T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 114.

39 Armstrong (n 38 above) 7.

Armstrong observes:[40]

> Usually, the child's individual interests will not be ignored, even when the child is expected to help meet family needs. This is because it is in the best interests of the family that the child be developed to her full potential, since the child is a resource for the future ... Thus the interests of the family are thought to lie in supporting, protecting and developing the child's potential as a family member who will support other family members in the future.

Similarly, Minow once wrote that 'when [a] system assigns rights to individuals, it actually sets in place patterns of relationships'.[41] Human rights claims go beyond a mere trumpeting of individual interests and embody a sacred promise that a viable structure of relational responsibilities can be established to house the interests of others.[42] Clearly, the proposed primacy of the principle and its bias towards the child's individual rights should not become a 'loose cannon' destroying all collective rights around it. If other compelling interests are more urgent than the interests of the child, the latter's interests may be sacrificed. Given that the 'paramountcy' principle is 'inextricably linked to cultural context', it is important for reformers to understand indigenous African persons in their own terms rather than impose on them standardised versions of child welfare.[43] This enables the legal process to accept that the paramountcy principle is sufficiently flexible to embrace communitarian values; to recognise that the choice of what is best for a child is inherently value-laden and culture-bound; and to note that individualism itself is a reflection of Western cultural values.[44] This is not to argue for the abandonment of the paramountcy principle, but to defend its inevitable moderation should it conflict with other competing interests such as social justice, minority rights, indigenous rights and the rights of other individuals.

While fully aware that culture is not static, that culture evolves in response to internal and external factors, is negotiated and constructed

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40 Armstrong (n 38 above) 8. This argument ties in well with Cohen's contention that 'corporate kinship in which individuals are responsible for the behaviour of their group members is a widespread tradition. *But in addition, the individual person and his or her dignity and autonomy are carefully protected in African traditions, as are individual rights to land, individual competition for public office, and personal success'*. R Cohen 'Endless teardrops: Prolegomena to the study of human rights in Africa' in R Cohen *et al* (eds) *Human rights and governance in Africa* (1993) 1 14.

41 M Minow *Making all the difference: Inclusion, exclusion and American law* (1990) 277.

42 J Waldron 'The role of rights in practical reasoning: "Rights" versus "needs"' (2000) 4 *The Journal of Ethics* 115 124 132.

43 See art 5 of CRC, stating that parental rights and responsibilities must be exercised in a manner consistent with local custom.

44 See P Alston 'The best interests principle: Towards a reconciliation of culture and human rights' in Alston (n 21 above) 1-25; A An-Na'im 'Cultural transformation and normative consensus on the best interests of the child' in Alston (n 21 above) 62-81.

and may be political, my point is that our quest for normative consensus should not come at the expense of cultural diversity and that a closer look at communitarianism reveals its realistic link with the child's best interests. To perceive group interests not as in conflict with children's interests, to characterise the child not as an atomistic individual divorced from the kinship group and to allow marginalised persons and cultures to – as far as possible – order their families along their own philosophical lines, is to permit them to exercise dignity rights and cultural freedoms denied them by colonialism, apartheid and racial segregation.[45] It has been stated that, in assessing the paramountcy principle, decision makers must consider the collective cultural rights of the child. It is beyond doubt that the implementation of children's individual rights in indigenous communities – including the 'paramountcy' principle – requires the consideration of how these rights relate to collective cultural rights. Experts have it that indigenous children 'have not always received the distinct consideration they deserve [and children's] individual interests cannot be neglected or violated in preference of the best interests of the group'.[46]

In assessing best interests, state parties should factor in indigenous children's cultural rights and the need to exercise those rights with other members of the group.[47] While acknowledging that there may be a difference between the best interests of the individual child and those of children as a group,[48] the Committee on the Rights of the Child (CRC Committee) holds that a consideration of the collective cultural rights of the child forms part of establishing the best interests of the child.[49] States should adopt legislative, administrative and judicial measures (including professional training and awareness-raising programmes) to ensure the systematic, culturally-sensitive application of children's rights and interests.[50] However, General Comment 11 does not explain how collective interests can be reconciled with the child's individual welfare and why collective interests should be factored in when deciding an individual child's 'distinct' best interests. It is sufficient here to state that the ambivalence and ambiguity echoed

45 Davis writes: 'People are not meant to be socialised to uniform, externally imposed values. People are to be able to form families and other intimate communities within which children might be differently socialised and from which adults would bring different values to the democratic process.' PC Davis 'Contested images of family values: The role of the state' (1994) 107 *Harvard Law Review* 1348 1371.

46 United Nations Committee on the Rights of the Child General Comment 11 (2009) 'Indigenous children and their rights under the Convention' 12 February 2009, CRC/C/GC/11 para 30.

47 General Comment 11 (n 46 above) para 31.

48 The CRC Committee maintains that where the child's interests as an individual are affected, courts and administrative bodies should consider only the affected child's interests as primary.

49 General Comment 11 para 32.

50 General Comment 11 para 33.

in the Committee's analysis fully demonstrate the complexity of the task of reconciling not only individual interests and group interests but philosophical dimensions of universality and cultural relativism to the human rights debate.

The author is mindful that the tension between, on the one hand, the interests of the group and, on the other, the individual interests of the child, is, to some extent, a universal problem. It does not obtain only in communitarian societies but is well recognised even in individualistic Western societies. In the final analysis, it is a matter of degree. Conversely, predominantly communitarian societies – whether in Africa, Asia or Eastern Europe – do recognise the importance of individual interests in all facets of life, including decision making within the family. However, an undiluted emphasis on group interests may perpetuate the subordinate status of children and their exclusion from the domain of decision making – a problem which this article seeks to challenge. Scholars in African customary law have pointed out that the prominence of group interests over individual interests tend to mean that the former will trump children's interests in the event of a disharmony between the two.[51]

Group-orientation bureaucratises (and slows down) decision making, enables adults to articulate what they consider to be best for children (children are not members of traditional decision-making bodies such as the family council) and suppresses children's contribution to decision making.[52] 'Facing it together', argues Kaime, 'negates the idea of children's interests being the primary consideration.'[53] In fact, there is an array of evidence showing that the focus on group interests gives adults the opportunity to claim the labour time of young members of the family and to socialise children to submit to the authority of elders.[54] Historically, this gave birth to the concept of 'wealth in people' to explain claims which individuals were permitted to make on other people's time and resources. Thus, the family head or the paternal family had rights in the person, labour time and the property of their children.[55] The family head had the

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51 Kaime (n 38 above) 118; C Himonga 'The right of the child to participate in decision making: A perspective from Zambia' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 95.

52 Kaime (n 38 above) 117-118.

53 Kaime (n 38 above) 115.

54 See generally RS Rattray *Ashanti law and constitution* (1956) 13; H Kuper *Kinship among the Swazi* (1962) 96.

55 B Rwezaura *et al* 'Parting the long grass: Revealing and reconceptualising the African family' (1995) 35 *Journal of Legal Pluralism* 25 32-33, explaining that 'a wife's agricultural work was institutionalised into a wife's service to her husband and his family'; 'a man's agricultural or other productive work was institutionalised into the labour obligations of kinship'; and 'women and children were considered to be resources which men wanted to amass ... as illustrated by the fact that ... a man's wealth did not draw a distinction between people and material possessions'.

right to create relationships of obligation and dependency with subordinates as a way of ensuring personal security during old age and group survival after death.[56] Interpreted narrowly and especially by persons with vested interests, group interests will no doubt crowd out both the best interests of the child and the individual rights of persons within the group.[57] While communitarianism overemphasises the importance of tradition and social context in shaping individuals and their relationships, it risks further marginalising perspectives of disempowered groups – women and children – that have not historically had strong political representation. This problem *must be conceded*, but the best interests of the child must mean something more than always meeting the child's individual needs at all costs. It is beyond doubt that there is an important individual core element of the best interest of the child which cannot be overridden by collective claims, but the latter will inevitably – and indeed should – temper the way in which the individual right is exercised and interpreted. Denial of this interplay flies in the face of empirical evidence in case studies such as those contained in some book volumes.[58]

In the context of custody and access, Bosman-Swanepoel *et al* have been tempted to contend that[59]

> [i]n customary law the interests of the child ... play no part in terms of custody or access. They are believed to be irrelevant issues. If bride wealth (seduction damages) is paid, the child belongs to the father's family and may be demanded by them. If it has not been paid, the child belongs to the mother's family and may be demanded by them.

Although *lobola*, illegitimacy and maintenance played or perhaps still play an important role in deciding who gets custody of children, the weight Bosman-Swanepoel *et al* attach to these factors is somehow off the mark. No doubt, the purpose of *lobola* and other traditional institutions was to involve the entire group, through negotiation and sharing of the proceeds, in the process by which the family was to lose its child to the other family. At stake were the interests of the group and, to a limited extent, the individual liberty of the woman or girl to be married. While custody on divorce depended on whether *lobola* was paid and, in that sense, limited the interests of the child, the

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56 See C Bledsoe *Women and marriage in Kpelle society* (1980) 55.

57 See generally P Jones 'Group rights and group oppression' (1999) 7 *Journal of Political Philosophy* 353-377; C Bentley 'Whose right it is anyway? Equality, culture and conflicts of rights in South Africa' Democracy and Governance Research Programme; Occasional Paper 4.

58 P Alston 'The best interests principle: Towards a reconciliation of human rights and culture' in Alston (n 21 above) 1 21.

59 H Bosman-Swanepoel *et al Custody and visitation disputes: A practical guide* (1998) 48-49.

interests of the child were not absolutely negated.[60] Himonga argues that[61]

> [i]t is indisputable that *lobola* plays a vital role in the affiliation of children under customary law. But it is questionable that it has such a dominant position as to leave no room whatsoever for considerations of the welfare of the child or for the joint responsibility of the families of the two parents for the support of the child.

Himonga argues that in patrilineal societies, even if *lobola* has not been paid, the child's paternal family remains a 'reserve' family and may be called upon to provide for the child in times of need. Similarly, she insists that[62]

> there appears to be no customary rule that denies the importance of the welfare of the child nor justifies the family of the natural father to deny the child support or to abandon him or her merely because he or she is illegitimate.

Apart from communitarianism, it is shown below that the twin concepts of family autonomy and parental rights, even in the context of largely individualistic societies such as Western Europe and the United States, impose extensive limits on the theoretical paramountcy of the best interests of the child.

## 4 Parental rights, family autonomy and the 'paramountcy' principle

One finds in CRC and the European Convention on Human Rights (European Convention)[63] an enduring protection of family and parental rights which helps us to accurately draw the boundaries of the best interests of the child. Much of the protection of the rights and interests of others is entrenched in the provisions codifying family and parental autonomy in decisions concerning children. It is provided that[64]

> the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children,

60 See DS Koyana *et al Customary marriage systems in Malawi and South Africa* (2007) 39, arguing that '[a] dispute over child custody would be resolved not by reference to a particular system of customary law, but by applying the principle of the best interest of the child'; see also TW Bennett *A sourcebook of African customary law for South Africa* (1991) 291 and *Hlope v Mahlalela & Another* 1998 1 SA 449.

61 C Himonga 'Implementing the rights of the child in African legal systems: The *Mthembu* journey in search of justice' (2001) 9 *The International Journal of Children's Rights* 89 109.

62 Himonga (n 61 above) 110.

63 See eg art 8 European Convention.

64 Preamble CRC. See also arts 3(2), 5, 7, 9, 10 & 16.

> should be afforded protection and assistance so that it can fully assume its responsibilities within the community

and that 'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.

Parents, members of the extended family and the community *as provided for by local custom* and other persons responsible for the child, have the responsibilities, rights and duties to provide (*in a manner consistent with the child's evolving capacities*) appropriate direction and guidance in the exercise by the child of the rights in CRC.[65] State parties to CRC have an obligation to 'respect the rights and duties of the parents and legal guardians, to provide direction to the child ... *in a manner consistent with the evolving capacities of the child*'.[66] Under article 18(1) of CRC, the state has an obligation to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.[67] Further, the state should render appropriate assistance to parents and guardians to ensure that they adequately perform their child-rearing responsibilities and should also develop institutions, facilities and services for the care of children.[68]

These provisions confer on parents considerable autonomy to educate, direct and guide their children as they see fit and in the absence of child abuse, the state should refrain from interfering with family autonomy and privacy.[69] In the last two decades of the twentieth century there was a flurry of academic writing advancing the view that parents should not be at liberty to raise their children the way they see fit; that parents have rights only inasmuch as those rights enable them to further the rights and interests of their children;[70] and that parents should be licensed before they may

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65 Art 5 CRC.

66 Art 14(2) CRC.

67 This is a presumption (couched as a principle) that it is in the best interests of the child for parents who never married or who later divorce, to have access to the child and to contribute towards her upbringing.

68 Art 18(2) CRC.

69 See also art 17(1) of CCPR prohibiting unlawful and arbitrary interferences with family privacy and art 17(2) promising everyone the right to protection against such interference; see also art 16(3) of the Universal Declaration of Human Rights and art 23(1) affirming that 'the family is the natural and fundamental group of society and is entitled to protection by the state'. See also art 10(1) of ICESCR.

70 J Eekelaar 'The emergence of children's rights' (1986) 6 *Oxford Journal of Legal Studies* 161; 'The eclipse of parental rights' (1986) 102 *Law Quarterly Review* 4; BB Woodhouse 'A public role in the private family: The Parental Rights and Responsibilities Act and the politics of child protection and education' (1996) 57 *Ohio State Law Journal* 393; P Montague 'The myth of parental rights' (2000) 26 *Social Theory and Practice* 47; D Archard 'Child abuse: Parental rights and the interests of the child' (1990) 26 *Journal of Applied Philosophy* 183-194.

assume the responsibilities associated with parenthood.[71] While the idea that parents have no rights outside their duties to further the interests of the child existed in the eighteenth century (this can be traced way back to Locke), it was the holding in *Gillick* which opened the floodgates to the myth that parents have no rights divorced from parental obligation.[72] However, the pendulum has swung and the emerging trend shows that the twin concepts of the best interests of the child and parental responsibility have not – as was initially thought – spirited away parents' independence to exercise discretion in directing and guiding their children.[73] Interpreting the best interests of the child in the context of parental care, former justice of the South African Constitutional Court, Sachs J, held:[74]

> Indeed, one of the purposes of section 28(1)(b) is to ensure that parents serve as the most immediate moral examplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cell phones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.

It is the parent's right and duty to direct and guide children to develop an understanding that their interests and rights are part of a broad scheme of relational rights and responsibilities for the protection of important family or social interests. Whatever content is ascribed to it, the best interests of the child never implies that the child and its needs be considered in isolation but, on the contrary, envisions the child in the context of a system of relationships – the totality of the familial arrangements in which the child finds herself or himself. When legal practitioners and judicial officers speak of the interests of the child, they are always speaking about the relationship between family members – the child and the parents, the father and the mother, the child and the family. More often, what matters most is not the status, competences and role of the child, but rather that of adults (especially the immediate caregiver) in ensuring that the child's needs are met.

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71 H LaFollette 'Licensing parents' (1980) 9 *Philosophy and Public Affairs* 182-97; HB Eisenberg 'A "modest" proposal: State licensing of parents' (1994) *Connecticut Law Review* 1415-1452.

72 *Gillick v West Norfolk and Wisbech AHA and Department of Health and Social Security* [1986] 1 AC 112 170D-E.

73 See A Bainham 'Is anything now left of parental rights' in R Probert *et al* (eds) *Responsible parents and parental responsibility* (2008) 23-42; S Gilmore *et al* 'Introduction: Parental responsibility – Law, issues and theses' in Probert *et al* (above) 1-22; S Gilmore 'The limits of parental responsibility' in Probert *et al* (above) 63-83; H Reece 'The degradation of parental responsibility' in Probert *et al* (above) 85-102.

74 *MS v M* (n 22 above) para 134.

Hence, the assumption in international and South African law[75] is that it is in the interest of children to live in their families, whether or not the family is deprived of one of its parents.

The term 'child', unlike the term 'individual', does not stand independently but necessarily connotes a relationship.[76] Kennedy states that in certain contexts 'it might turn out that pursuing [protection, provision and] *emancipation as entitlement* could reduce the capacity and propensity for collective action'.[77] This is usually so in the family context, where attempts to pursue a purely adversarial approach to dispute resolution invariably led to the complete withdrawal of family support and queries the family's role in shielding its members against possible harm from external forces. The term 'child' connotes a relationship with a family member of the preceding generation and emphasises that the child is seen as an integral component of the family. As such, the child is subject to the authority of the family (historically the *paterfamilias*) and this relationship supposes obligations of different types on the side of the child and the family.[78] While the best interest criterion claims to exclude the needs, interests and rights of parents or families, in reality it does not and it would be naive to suppose that repeated reference to the criterion shows greater attention to the plight, rights and interests of children.

It may be useful to recall that the best interest standard is not applicable to the day-to-day relationship between the parent and the child outside the context of litigation, for instance.[79] Lowe and Douglas observe that 'parents are not bound to consider their children's welfare in deciding whether to make a career move, to move house or whether to separate or divorce'.[80] In considering whether a parent is a fit and proper person capable of exercising the responsibilities associated with post-divorce parenting, the character and even wishes of the parents usually play a role. Lucker-Babel remarks that 'in the case of divorce or visiting rights, the child's views [and interests] would have a less severe effect as the judge is generally entitled to consider the interests and needs of all the members of the family' concerned.[81]

Further, the primacy of the paramountcy principle under CRC is limited to decisions taken by courts of law, administrative authorities

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75 See sec 7 Children's Act.

76 T Ezer 'A positive right to protection for children' (2004) 7 *Yale Human Rights and Development Law Journal* 1.

77 D Kennedy 'The dark side of virtue' in H Steiner *et al* (eds) *International human rights in context*: *Law, politics and morals* (2008) 494.

78 For the codification of children's responsibilities, see art 31 of the African Children's Charter and sec 16 of the South African Children's Act.

79 See J Herring *Family law* (2007) 395-396.

80 N Lowe & G Douglas *Bromley's family law* (1998) 326.

81 MF Lucker-Babel 'The right of the child to express views and to be heard: An attempt to interpret article 12 of the UN Convention on the Rights of the Child' (1995) 3 *The International Journal of Children's Rights* 391 400.

and legislative bodies, public or private social welfare institutions.[82] This is also evident from the stipulation in international law that parents have the primary responsibility for the upbringing and development of the child,[83] and that the best interests of the child 'will' – 'not shall' – be their 'basic concern', not 'primary consideration'.[84] However, parental separation and divorce should be done in a manner that guarantees future reconciliation between child and family, since the 'mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life'.[85] Personal relations and contact with family are deemed in the interests of children[86] and may override the child's view unless this places the child at risk.[87]

From their child's birth, parents have the right, above all others, to raise their biological children in their own home or to authorise another person to raise them instead.[88] Where it is intentional, the act of procreation is adult-centred and designed to serve adult interests in having children. In many cases, it is the consenting adults (and sometimes children) who choose to have a child because they want a child for their own reasons. Macleod remarks:[89]

> Those who accept the responsibility of raising children frequently do so because the project of creating and raising a family is an important ... element of their own life plans. *Viewed from this perspective, parents cannot be seen as mere guardians of their children's interests. They are also people for whom creating a family is a project from which they derive substantial value. They have an interest in the family as a vehicle through which some of their own distinctive commitments and convictions can be realised and perpetuated.*

It cannot be sensibly claimed that parents plan to bear children for the latter's benefit or that parents have no independent interests and rights outside the ambit of the 'paramountcy principle'. Provided

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82 See art 3(1) CRC.

83 See arts 18(1), 27(2), (3) & (4).

84 See art 18(1) of CRC and compare with art 3(1) of CRC.

85 See European Court of Human Rights in *B v United Kingdom* judgment of 8 July 1987, para 60.

86 Art 9(3) CRC.

87 Hence, art 9(1) states that 'a child shall not be separated from her parents against *their* will ... [unless] separation is necessary for the best interests of the child'. It is not clear whose 'will', but read with art 9(2), it seems the 'will' is that of both parents and the child.

88 M Guggenheim *What is wrong with children's rights* (2005) 20.

89 See CM Macleod 'Conceptions of parental autonomy' (1997) 25 *Politics and Society* 117 119; see also D Archard *Children, family and the state* (2003) 97, arguing that '[b]eing a parent is extremely important to a person. Even if a child is not to be thought of as property or even as an extension of the parent, the shared life of a parent and child involves an adult's purposes and aims at the deepest level ... parents have an interest in parenting – that is, in sharing a life with, and directing the development of their child. *It is not enough to discount the interests of a parent in a moral theory of parenthood. What must also merit full and proper consideration is the interest of someone in being a parent.*'

there is no threat of harm to the child, the right to have one's family life respected and protected insulates families from unwarranted voyeuristic intrusion by the state. In the United States, the Supreme Court has repeatedly and firmly held that parents have independent rights; recently affirmed alongside children's rights.[90] Guggenheim, rightly so in my view, writes that parental rights 'have come to be regarded in American constitutional law as among the most protected and cherished of all constitutional rights'.[91] Under the European Convention, 'everyone has the right to respect for his private and family life, his home and his correspondence' and 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... and for the protection of the rights and freedoms of others'.[92] The protection of family autonomy and parental rights in this provision shows that it is unlawful for the state to limit parental discretion unless the parent causes or threatens to cause harm to the child. Where the rights and freedoms of others (children included) dictate that the state interfere with the parent's discretion to decide the lifestyle and even fate of the child, the concept of parental autonomy potentially and practically authorises limits to the individual interests of children.

It often happens that parents and other persons with identifiable interests in the life of the child seek to further their own interests in the guise of the best interests of the child. It is no surprise, then, that many disputes which are theoretically constructed as being just about children are not just about children. In reality, the majority of legal actions concerning children are instituted by adults, even as many countries are extending *locus standi* to children themselves. Consider, for instance, the position of a non-resident father with regard to contact with his child. He may insist and the court may hold, much to the disappointment of a resident mother, that physical contact between him and the child is in the best interests of the child. Yet, it is patent that the father is more concerned with his self-serving interests and self-esteem. The fact that both the father and the child may derive independent or mutual benefit from contact should not deceive the observer to believe that the father's behaviour was motivated by the child's welfare and well-being in the first place.[93] Bainham recently

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90 See *Meyer v Nebraska* 262 US 390 (1923)*; Pierce v Society of Sisters* 268 US 510 (1925); *Wisconsin v Yoder* 406 US 205 (1972).

91 Guggenheim (n 88 above) 23.

92 Arts 8(1) & (2) European Convention.

93 See A McCall Smith 'Is anything left of parental rights?' in E Sutherland & A McCall Smith (eds) *Family rights: Family law and medical advance* (1990) 10, arguing that '[t]he right to the society of the child is a parental right and it is appropriately considered as a parent-centred right, and it has nothing to do with any consideration of the welfare of the child. This right is accorded to thoroughly disagreeable parents in exactly the same way as it is accorded to those who are more congenial company from the child's point of view.'

argued that 'parents do have independent interests which are not referable exclusively to promoting their children's welfare and that the legal system should explicitly and unapologetically endorse them'.[94] Beyond their legal obligation to provide their children with the bare essentials of life (clothing, food, health care and an education), parents wield extensive control on how they are to provide these goods and services.

While parents are under the coercive power of the state to ensure that their children have access to an education and to essential medical care when sick, parents choose the kind of education (private or public, religious or secular) and hospital they send their children to. In the same vein, the parent's right to provide religious direction to the child enables the parent, usually to the exclusion of all others, to instil the adoption of religious values of their choice. Decisions concerning education, clothing, food and religion usually depend on the 'sort of child' the parents wish to raise and are rarely solely shaped by the best interests of the child. Bainham, for two reasons, proposes that the law should openly recognise that children's interests may be limited by the interests of parents. First, doing so would reflect honesty and transparency in the private and social ordering of families. It would dissipate the fallacy that every action that parents, caregivers and persons with parental responsibilities take constitutes a furtherance of the best interests of the child and it would reflect that the welfare principle is of decidedly limited application in the context of private law relationships.[95] It is in this context that Bainham contends that it will be a blatant distortion of the truth of family life if society and the law were to insist that in taking decisions relating to such matters as where and when to go shopping; 'where the child is to live, go on holiday, spend weekends or which friends and relatives the child should visit and when', parents have to be guided solely by the best interests of children.[96] These are family decisions and they reflect the way in which parents or persons with parental responsibilities wish to spend their time.[97] The law supports parents in such cases and children are required to co-operate regardless of the directions to which their interests may point.

Second, causal parents have rights and interests independent of their children's because they have responsibilities to care for their children. In other words, the 'burdens and sacrifices associated with pregnancy, the birth itself and the beginnings of life for the child ... fall disproportionately' on the biological parents (particularly the mother)

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94 Bainham (n 73 above) 23-42.

95 Under art 3 of CRC, the welfare principle – while broad – is not applicable to family relationships. The closest CRC comes is to recognise the application of the principle to private social welfare institutions.

96 Bainham (n 73 above) 31.

97 As above.

to warrant an unequivocal consideration of their interests.[98] As such, the state should refrain from removing a child from the care of a parent unless it can establish that the child is either suffering, or at risk of suffering significant harm attributable to a standard of care which is not that of the reasonable parent.[99] If children's best interests and parental autonomy are perceived as being on a continuum and not necessarily mutually exclusive, the duty of the state will be to ensure that the degree of support, coercion and compulsion materialise at the right point in that continuum. Lindley has argued that the best interests of the child, parental autonomy and state intervention can best be reconciled if there is thorough consultation between the state and families with children identified as in need of care. She observes that to address the tension in this triangular relationship, the British Children's Act is[100]

> firmly based on the principle that a child's welfare is likely to be best promoted by services being provided for him/her (whether on a voluntary or compulsory basis) which involve consultation with his/her family in the decision-making and planning process. Such involvement is particularly important given the evidence ... that contact between children in care and their families is the key to children returning home from the care system; and the evidence that by far the majority of children who are looked after in the care system (both on a voluntary or compulsory basis), return to their families or home communities when they leave the care system (86 per cent within the first five years and an estimated 92 per cent eventually) ... The principle of the state working in partnership with families to [identify children in need of care and] provide services to children is central to the philosophy underpinning the public law provisions of the Act. *This principle seeks to respect parental autonomy, without compromising the child's welfare and need for protection (if any*).

The CRC provisions referred to above, underlining the importance of parental autonomy and family stability in a child's upbringing, embody a legal presumption that parents are best placed to evaluate the interests of the child. Although there exist really bad parents, this appears to be a sound presumption given the limited number of children who end up in institutional or alternative care.[101] The development of the concept of family stability is consistent with the image of the 'normal home' and the idea that the child needs a major point of orientation for him or her to develop optimally into a fully-fledged citizen. Further, family stability connotes the stability of a child's way of life (particularly the emotional, social, educational and psychological aspects of life) as well as the building of important relationships that are necessary to

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98 Bainham (n 73 above) 33.

99 Bainham (n 73 above) 37.

100 B Lindley 'State intervention and parental autonomy in children's cases: Have we got the balance right?' in A Bainham *et al* (eds) *What is a parent? A socio-legal analysis* (1999) 197 199-200.

101 Of course, many other cases go unreported.

meet the child's 'need' to enjoy 'a childhood' or to settle in school between the child and those performing parenting roles.

Where parents agree on custody arrangements after divorce, the best interests of the child are 'scarcely indistinguishable from the parental interest' and are often assimilated to whatever parents agree.[102] Since the decision is made against the background of a solution which best suits the parties, it does not matter an iota what the separate needs, views and interests of the child are. Although the parental interest is often cast as a formal reference point which does not indicate a point of view independent of that relating to the child, 'it in fact conflates the child's needs with the options, choices and wishes of the parents'.[103] These cases rarely come before the courts and when they do, the judge is likely to give effect to the agreement between parents. It can be argued that the court has an obligation to ensure that the parental agreement is not contrary to the objectives of parental responsibility (namely to protect the child's education, welfare, development and morality), but the truth of the matter is that this process of verification is a mere formality.[104] Thery observes that '[t]he judge only has at his disposal the version of facts presented by the parties and in any case has no power to oversee the enforcement of a judgement imposed on the parents contrary to their joint wishes'.[105]

However, family autonomy and privacy should not be interpreted to perpetuate the private/public divide in ways that mask existing socio-economic inequalities and unjust power relations that have confronted women and children for centuries. Nor does family autonomy mean that children are the property of their parents to be abused at their parents' whim. Like the paramountcy principle, parental autonomy is subject to permissible legal limits, especially where the child has suffered or is likely to suffer harm. Further, the paradigm shift from parental authority to parental responsibilities and rights cannot be ignored. The importance of this shift finds expression in the terms 'guide' and 'direct' (in article 5 of CRC) which connote a shift from the parent as 'sanctioner' to parent as 'enabler'.[106] This has important implications for the way in which we understand the welfare principle and parental rights. Finally, there is a need to re-emphasise that, in terms of article 5 of CRC, parental autonomy, responsibilities and rights must be exercised in a manner consistent with the child's age and

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102 I Thery 'The interest of the child and the regulation of the post-divorce family' in C Smart & S Sevenhuijsen (eds) *Child custody and the politics of gender* (1989) 78 92.

103 As above.

104 As above.

105 As above.

106 G van Bueren *The international rights of the child* (1995) 73 77-86.

evolving capacities, and that decision makers should have regard to the views of the child in constructing the best interests of the child.

In other words, the degree to which parents are entitled to exercise paternalistic oversight of children should reflect the degree to which children, based on their level of maturity, need such oversight. As the child grows up and his or her capacities develop, the interests of the child can be equated with his or her wishes, views and preferences. In *Thoughts*, Locke proposes that the child's treatment as a rational being should be relative to the child's capacities and age, given that the ability to reason develops with one's maturation.[107] Parental guidance originates from the child's lack of reason as well as an inability to provide for her or his own self. However, the concepts of welfare and protection intrinsic in the best interests of the child necessitate some level of parental intrusion into the domain of child autonomy, especially if there are factors (including age and lack of maturity) suggesting that implementing the child's view will be detrimental to the child's best interests.

## 7 Best interests decision making under the Children's Act

South African courts have long recognised that a determination of the best interests of the child depends on a host of factors which do not constitute an exhaustive list. In *McCall v McCall*,[108] King J observes that, in determining what is in the best interests of the child, regard must be had to the following factors:[109]

(a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
(b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
(c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
(d) the capacity and disposition of the parent to give the child the guidance which he requires;
(e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;

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107 J Locke *Some thoughts concerning education* (1693) para 81 and J Locke *Two treatises of government* (P Laslett ed Cambridge 1988) (1690) (*First or second Treatise*), *Second Treatise,* paras 55-57, 304-05 and paras 58, 61 & 63, 306-309. For a similar approach, see LM Purdy *In their best interest? The case against equal rights for children* (1992).

108 1994 3 SA 201 (C).

109 *McCall* (n 108 above) 205A-F.

(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
(g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
(h) the mental and physical health and moral fitness of the parent;
(i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
(j) the desirability or otherwise of keeping siblings together;
(k) the child's preference, if the Court is satisfied that in particular circumstances the child's preference should be taken into consideration;
(l) the desirability or otherwise of applying the doctrine of same-sex matching, particularly here, whether the minor children should be placed in the custody of their father; and
(m) any other factor which is relevant to the particular case with which the court is concerned.

The decision on what is best for the child involves balancing multifarious factors and competing interests. In making this decision, a court should 'draw up a balance sheet ... to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses'.[110] Save for the need to consider the views and preferences of the child, many of the factors mentioned in *McCall* have been largely codified in the South African Children's Act.[111] Considering the factors enumerated in section 7 of the Children's Act,[112] South Africa arguably has one of the world's most realistic

110 *Re A (Male Sterilisation)* [2000] I FLR 549.

111 Act 38 of 2005.

112 Sec 7 reads: '(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely (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 parent, towards (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child; (c) the capacity of the parents, or any specific parent, or of any other 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 of 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 difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis; (f) the need for the child (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition; (g) the child's age, maturity and stage of development; gender; background; and 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

legislative schemes revealing the holistic nature of the concept of the best interests of the child. There are indications that the child is not viewed as an island unto herself, but as part of the larger community in which he or she lives. In determining whether a particular decision is in the best interests of the child, reference must be had to the nature of the personal relationship between (i) the child and the parents, or any specific parent; and (ii) the child and any other caregiver or person relevant in those circumstances.[113] The relevance of the behaviour of other persons to determining what is in the interests of the child is fully acknowledged in this provision. Where there is a history of abuse and neglect of the child (or any other person close to the child) by a parent or any other caregiver, it will not be in the interests of the child to leave the child in the care or custody of the abusive person.[114] In this respect, the capacity of parents, or any specific parent, or of any other caregiver or person, to provide for the needs (emotional, moral, physical and intellectual) of the child,[115] weighs heavily. Granting full parental responsibilities to an abusive caregiver compromises the child's physical and emotional security and his or her intellectual, emotional, social and cultural development in contravention of the Children's Act[116] and the South African Constitution.[117] Parents and other decision makers in the public and private sectors have a duty to protect the child from any physical or psychological harm that may be caused by subjecting the child or by subjecting another person to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour.[118]

More importantly, however, statutory law perhaps for the first time unambiguously accepts that parents wield a great deal of power in shaping and deciding what constitutes the best interests of the child. Section 7 states that the attitude of parents, or any specific parent, towards the child, and towards the exercise (by themselves and by others) of parental responsibilities and rights in respect of the child,

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be caused by (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; (m) any family violence involving the child or a family member of the child; and (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.'

113 Sec 7(1)(a) Children's Act.

114 See sec 7(1)(m) Children's Act.

115 Sec 7(1)(d) Children's Act.

116 Sec 7(1)(k) Children's Act.

117 Sec 28(1) entrenches children's rights '(d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required to perform work or provide services that (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health spiritual, moral or social development'.

118 Sec 7(1)(l) Children's Act.

should also play an important role in deciding what is best for their children.[119] To bolster this claim, it must be mentioned that the Children's Act requires a person holding parental responsibilities and rights in respect of a child to give due consideration to the views and wishes expressed by a co-holder of parental responsibilities and rights before making any major decision involving the child.[120] A major decision involving the child is 'any decision which is likely to change significantly or to have a significant adverse effect on the co-holder's exercise of parental responsibilities and rights in respect of the child'.[121] Where a holder of parental responsibilities and rights decides to relocate to another country, he or she should give due weight to the views and wishes of a co-holder of parental responsibilities and rights even when it becomes patent that the relocation is in the best interests of the child. It is clear, from this section, that the interests of parents (defined broadly to include social parents),[122] siblings and any person with whom the child has developed an emotional attachment, are also important and should play a pivotal role in defining the best interests of the child.

That the interests of other persons, particularly those exercising parental responsibilities and rights, are relevant in adjudicating children's best interests is evident from the section of the Children's Act which requires the decision maker to consider the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis.[123] Depending on the circumstances of the case, decisions regarding relocation and inter-country adoption usually affect the child's right to maintain personal relations and disrupt the child's direct contact with the parents. Accordingly, the views and interests of the parent who remains in the country where the couple were habitually resident play a pivotal role in constructing the child's best interests. Further, section 24(1) requires any person having an interest in the care, well-being and development of a child to apply to the High Court for an order granting guardianship of the child to the applicant. It further states that when considering an application contemplated in subsection (1), the court must take into account (a) the best interests of the child; (b) the relationship between the applicant and the child, and any other

119 Sec 7(1)(b) Children's Act.

120 Sec 31(2)(a) Children's Act.

121 Sec 31(2)(b) Children's Act.

122 Sec 7(2) states that 'parent' includes any person who has parental responsibilities and rights in respect of a child.

123 Sec 7(1)(e) Children's Act.

relevant person and the child; and (c) any other factor that should, in the opinion of the court, be taken into account.[124]

The wording of section 24 indicates that the best interest of the child is just one of the factors that must be taken into account in determining whether to grant guardianship of a child to the applicant. Traditionally, the other factors mentioned in this provision are construed as aids to the analysis of the best interests of the child, and not as independent considerations which, together with the best interest of the child, compete for value, recognition and application. However, much depends on whether the applicant or the person who already has guardianship of the child is a fit and proper person to be granted guardianship or to continue acting as the child's guardian.[125] While this does not mean that the best interests of the child pale into insignificance, it does show that such interests are limitable and require a delicate balancing exercise between the interests of the child and the interests of, say, guardians. Such a proposal rightly questions the forceful image of the welfare principle often portrayed in academic literature and some court judgments. In *MS v M,*[126] Sachs J held: 'Thus, in *Fitzpatrick*[127] this Court held that "it is necessary that the standard should be flexible as circumstances will determine which factors secure the best interests of the child".'[128] He further states:

> To apply a predetermined formula for the sake of certainty, irrespective of circumstances, would in fact be contrary to the best interests of the child concerned. This Court, far from holding that [the welfare principle] acts as an overbearing and unrealistic trump of other rights, has declared that the best interests injunction is capable of limitation. Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute.[129]

Determining what is best for the child also includes an analysis of the likely effect on the child of any change in the child's circumstances, whether caused by relocation; removal from an abusive caregiver; separation from siblings and friends; and parental separation and divorce.[130] A change in the circumstances of the child may either require the child to make huge sacrifices or, in serious cases, cause developmental damage to the child, especially where the child has been living with a sibling, parent, caregiver or person towards whom the child has developed emotional attachment. Moreover, the Children's Act emphasises the need for the child to (i) remain in

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124 Sec 24(2) Children's Act.

125 See sec 4(3) of the Children's Act.

126 *MS v M* (n 22 above).

127 *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 3 SA 422 (CC); 2000 7 BCLR 713 (CC).

128 Para 18 of the judgment.

129 *MS v M* (n 22 above) paras 24 & 26.

130 Sec 7(1)(b) Children's Act.

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.[131] This provision mirrors the variety of family models, value systems and traditions that presently obtain in South African society. Any determination of what is best for the child must factor in 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.[132] These provisions underline the importance of stability in the upbringing of the child and the assumption that it is in the best interests of the child to remain in the care of one parent, family and extended family. What emerges as particularly striking from this proposal is the recognition that, while children's best interests remain important, the interests of parents, the nuclear family and the extended family should be considered and may be important in the analysis of what constitutes the child's best interests. To this end, children's right to have their best interests considered as 'paramount' may be sacrificed for the family good in special circumstances.

However, the main point is that the Children's Act emphasises that the extent to which children have the right to grow up in the context of their families and culture should shape the way we think about individual and state responsibility towards children. To King, the child's right to grow up in the context of a family and culture is based on the fundamental truth that this can be crucial to the 'basic dignity, survival and development' of each one of us.[133] The paramount place of family unity and the doctrine of non-intervention evident in CRC[134] and the Children's Act[135] may not be ignored in the context of the child's best interests. Even where the neglect or abuse of parental responsibilities have been or are likely to be established, public interventions meant to rescue the children affected must not be aimed at dividing children and their families, but must have the ultimate aim of re-uniting children and their families.

One telling omission from this scheme pertains to the role the views and preferences of the child should play in deciding what is best for the child. While section 7(1)(g) refers to the child's age, maturity and stage of development, gender, background and any other relevant characteristics of the child, it does not refer to the views and wishes of

131 Sec 7(1)(f) Children's Act.

132 Sec 7(1)(k) Children's Act.

133 S King 'Competing rights and responsibilities in inter-country adoption: Understanding a child's right to grow up in the context of her family and culture' in C Lind *et al* (eds) *Taking responsibility, law and the changing family* (2011) 257 259.

134 See the Preamble and arts 3(2), 5, 7, 9, 10 & 16 CRC.

135 See secs 6(3), (4) & (5); 7(1)(a)-(f), (k) & (n); 31(2)(a), 33(1), (2) & (3) & 70-73 Children's Act.

the child. However, child participation in decision making – including decisions determining the best interests of the child – is codified as a general principle[136] and in many other sections in which decisions that directly affect the child are contemplated. Given the growing concern about the exclusion of children from the decision-making process, it would have been beneficial to include explicitly the views and preferences of the child as part of the criteria to be considered in determining the province of the paramountcy principle.

## 9 Beyond individualism and towards a more perfect union

Besides portraying children as citizens, the Children's Act portrays parents and children not as foes but as partners who should assume joint responsibility for the harmonious development of the child's personality. Accordingly, the child and his or her family are no longer viewed as adversaries contesting for control of the child's life, but as partners in the enterprise of promoting and making the best decisions for the child. To this end,[137]

> *a child*, having regard to his or her age, maturity and stage of development, *and a person who has parental responsibilities and rights* in respect of that child, where appropriate, *must be informed of any action or decision taken in a matter concerning the child which significantly affect the child.*

Under section 31(2)(a), children's views must also be given due consideration before taking any major decision concerning the child. A major decision in respect of the child includes a decision concerning consent to the child's marriage, consent to the child's adoption, consent to the child's departure or removal from the Republic, consent to a child's application for a passport and consent to the alienation or encumbrance of any immovable property of the child.[138] It also includes a decision affecting contact between the child and a co-holder of parental responsibilities and rights or a decision regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27, or any decision which is likely to significantly change or adversely affect the child's health, education, living conditions or personal relations with a parent or family member.[139] Arguably, decisions concerning a change of residence and educational arrangements for the child squarely constitute major decisions provided they substantially change or adversely affect the child's health, education, living conditions or personal relations with

136 See sec 10 Children's Act.

137 Sec 6(5) Children's Act (my emphasis).

138 Secs 31(1((b)(i) & 18(3)(c) Children's Act read together.

139 Sec 31(1)(b) Children's Act.

a parent or family member. The fact that the Children's Act requires decision makers to elicit the views of the child, parents and other holders of parental responsibilities and rights shows that the interests of all the parties involved must be considered before making major decisions affecting the child.

Since the child is viewed in the context of his relationship with others, the Act also requires decision makers to consider the views of all holders of parental responsibilities and rights before making decisions that significantly or adversely affect the latter's rights. Section 31(2)(b) of the Children's Act states that before taking any decision which is likely to substantially change or adversely affect the exercise by co-holders of parental responsibilities and rights of such rights and responsibilities, a co-holder of parental responsibilities and rights must give due weight to the views and wishes of other co-holders of such responsibilities and rights.[140] Strictly speaking, views are not synonymous with interests, but it is submitted that the reason behind requiring co-holders of parental responsibilities to air their views before a decision is made is not just to ensure that the interests of the child are protected, but also to give co-holders of parental responsibilities an opportunity to promote their interests and those of the child. The obligation imposed on a holder of parental responsibilities and rights to listen and give consideration to the views of both the child and co-holders of parental responsibilities and rights shows both the need to ensure that the child is protected from irrational and self-serving decisions by holders of such rights, and the desire of the framers of the Act to ensure that children, parents and significant others view each other not as potential suspects, but as partners forever bound to promote the interests of the child in a manner that does not ignore other important competing interests.

Further, it is mandatory for the state to give the child's family an opportunity to express their views in any matter concerning the child if this serves the child's best interests.[141] The legal drive towards non-confrontational means of promoting children's rights is also apparent in section 6(4) which provides that 'in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided'. Thus, while it remains very important to give due consideration to children's views, it is as important to give due consideration to the views of co-holders of parental responsibility and to give the child's family a voice before making any decision concerning child care and parenting. Clearly, the most important goal is to ensure that the views of those involved – especially where they represent competing versions

140 Sec 31(2)(b) Children's Act; see also sec 18(5).

141 Sec 6(3) Children's Act.

of what is best for the child – be reconciled in a non-confrontational manner.

Adjudicators are bound to consider the nature of the personal relationship between the child and the parent; the attitude of the parent(s) towards the child or towards the manner in which parental responsibilities are exercised by other persons; and the likely effect on the child of any change in the circumstances (including changes caused by separation from any or both of the parents or siblings or relatives or persons with whom the child has been living and the child's right to remain in the care of or maintain a connection with her parents, family, extended family, culture or tradition).[142] Viewed through the lens of sections 6, 7 and 9 of the Act, the concept of the best interests of the child embodies a bundle of specific needs and rights associated with childhood as a stage. As a result, an informed analysis of the concept should factor in all aspects of the child's life, including the right to education; the right to adequate housing, clean water and medical treatment; the right to intellectual, social, emotional and psychological development and stability; the right to maintain contact with one's parents, siblings, family and friends; the family's views about what is in the child's interests; and the child's perspective of what would best increase his or her life chances. It may also be that emotional attachment between the child and each of the caregivers is an indicator of where the best interests of the child lie. Arguably, the breadth and indeterminacy of the best interest principle mean that there is a host of factors, including parental and social interests, relevant to the decision-making process.

A consideration of the interests of both parents in post-conflict situations would likely provide the best possibility of co-operation in broken families in which divorce is usually both a factor and a result. Where parents agree on parenting after divorce, it is important that the law accepts their proposals unless the private arrangement is clearly detrimental to the children affected. For instance, post-divorce mediation has been shown to enable parties to accept the final outcome of the case, to obviate the evaluation and comparison of the personal characteristics of the parents (thereby lessening competition), to reduce the stigma associated with 'losing' a case in adversarial litigation, to discourage the parties from looking at the extent to which their interests influenced the decision and to give parties an opportunity to concentrate on the development of a harmonious triangular relationship that gives the child an opportunity to benefit from the contribution of both parents. Being an informal and private process not bound by rules of procedure, child-centred mediation is capable of accommodating various cultural and religious value systems in a manner which enables parties to participate in

142 Secs 7(1)(a), (b), (d), (f), (g), (h) & (k) read with sec 9.

culturally-appropriate ways. All the parties have the opportunity to present their cases to the mediator and to[143]

> exercise greater control over the consequences of their disputes as it is up to them to reach their own joint decisions – they formulate their own agreement and make an emotional investment in its success. They are therefore more likely to support the agreement than they would be if the terms were negotiated by their legal representatives or ordered by the court.

When parents feel that their interests have not been considered or that the other parent has used the best interests of the child to get care or contact rights, it can be difficult for the 'losing' parent to keep a natural relationship with the child.[144] Whilst the attitudes of the parents may not be the responsibility of the law, the evaluation of such attitudes is of vital importance to the process of reconciling them and ensuring joint responsibility for the welfare of their children.[145] Constructed in this fashion, the best interests of the child 'influence the possibility of obtaining an agreement between the parties ... and thus of preventing the case from being brought to court'.[146] The desire to influence parents and families to engage each other in parenting pre- or post-divorce is combined with yet another desire to induce the willingness of the child and the parents to co-operate with each other in making joint decisions affecting the child.

Proceedings in the Children's Court must be held in a room that is, among other things, conducive to the informality of the proceedings and *participation of all persons involved.* The room should not be ordinarily used for the adjudication of criminal trials and should be accessible to people with disabilities and special needs.[147] However, the Act does not envisage the resolution of many disputes through litigation and is designed to promote out-of-court solutions to such disputes. It is one of the objects of the Act to 'strengthen and develop community structures which can assist in providing care and protection for children'.[148] Thus, a children's court may choose to order a lay forum hearing in an attempt to settle the matter out of court. Such informal dispute resolution may include (a) 'mediation by a family advocate, social worker, social service professional or other suitably qualified person'; (b) a family group conference contemplated in section 70; and (c) mediation contemplated in section 71.[149] Section 70 grants the Children's Court the discretion to 'cause a family group conference

143 M de Jong 'Child-focused mediation' in Boezaart (n 29 above) 112 114.

144 See K Sandberg 'Best interests and justice' in Smart & Sevenhuijsen (n 102 above) 100 107.

145 As above.

146 As above.

147 Sec 42(8) Children's Act.

148 Sec 2(e) Children's Act.

149 Sec 49(1) Children's Act.

to be set with the parties involved in a matter brought or referred to the children's court'. The conference must include members of the children's family and must be targeted at framing an out-of-court solution to the problem involving the child.[150]

Decisions made at family group conferences and other lay forums,[151] while not necessarily conclusive, are likely to be endorsed by the Children's Court when the matter in question comes before such court. It is instructive to note that the Children's Act unequivocally states that matters can be decided out of court and that where this has been done, the out-of-court decision may either be accepted and be made an order of court or be rejected or be referred back for consideration of specific issues.[152] In making the decision whether to 'divert' the matter away from the civil justice system, the court should consider the 'vulnerability of the child, the ability of the child to participate and the power relationships within the family'.[153] Clearly, the Children's Act seeks to minimise confrontation between children and parents even where proceedings are decided in court. When it becomes necessary for proceedings to be launched in the Children's Court, such 'proceedings must be conducted in an informal manner and as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved'. The emerging trend towards co-operation and family reunion reveals that, while parents and families are neither faultless nor always supportive of the best interests of the child, they should not necessarily be viewed as potential oppressors who do not care about the interests of the child.

More importantly, regard should be had to the need to consider which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child in matters such as care, where the paramountcy principle is applicable. However, the child's interests should not be lost in the desirability of a non-confrontational approach. If anything, the child's interests must be considered together with the interests of members of the child's extended family, taking into account the child's cultural development and the communitarian ideals that define relationships in the extended family context. The child remains a member of the community, but is certainly an individual with interests and not a mere extension of her parents.[154] Nonetheless, there are common themes running through all the provisions of the Children's Act.

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150 Sec 70(1) Children's Act.

151 See secs 70 & 71 Children's Act.

152 Sec 72 Children's Act.

153 Sec 49(2) Children's Act.

154 *MS v M* (n 22 above) paras 18-19; holding that a child should be 'constitutionally imagined as an individual with distinctive personality, and not merely as a miniature adult waiting to reach full size'.

First, the Act does not view children and parents as belligerents competing for the power to control the lives of children, but as partners tasked with making the best decision for the good of the child as well as the family. Second, the codification of informal, inquisitorial, non-confrontational and, where possible, out-of-court dispute resolution mechanisms is intended to counter and reduce the negative impact on children of formal, adversarial and confrontational judicial proceedings. Third, even where the child is heard, the child's voice does not make much of a difference since the Children's Act invariably requires that the decision maker gives parents, siblings, caregivers and the family an opportunity to be heard before a decision is made. Both participation and decision making are joint (family) projects. These measures are intended to reduce the dire effects (such as family breakdown and the removal of the child from the family home) of litigation and to send a signal that the best interests of the child would be better promoted if the decisions made also promote family unity and the interests of other family members. The emphasis is on relationships rather than individual rights and interests.[155]

Against this background, one is forced to endorse Herring's proposal that the only way to curb the imaginary and individualistic construction of the 'paramountcy principle' is to adopt 'a relationship-based welfare approach' in which a child's interests are perceived in the context of the parent-child relationship, 'preserving the rights of each, but with the child's welfare at the forefront of the family's concern'.[156] Noting that Herring's proposal considers the interests of parents and the child who is directly affected, but not those of siblings, Inwald fashions an approach which recognises that the interests of a young child are difficult to separate entirely from the interests of other close family members. Inwald terms this a family-based approach to the welfare principle.[157] Such an approach, interpreted properly, is not an argument for the abandonment of the best interests of the child, nor is it a case for allowing parents to always have a final say in all decisions concerning their children.[158] It is a case for the inevitable qualification of the paramountcy principle and an attempt to dilute the

155 Bonthuys argues, eg, that in cases of relocation by a custodian parent, the child's right to parental care should be balanced with the parent's right to care for the child and to have a relationship with him or her. In deciding the child's interest, the court should weigh parental rights to care for the child, to free movement and to a profession against the rights of the child and of the non-custodian parent. See E Bonthuys 'The best interest of children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and the Family* 23 39.

156 Herring (n 19 above) 223.

157 D Inwald 'The best interest test at the end of life on PICU: A plea for a family centred approach' (2008) 98 *Archives of Disease in Childhood* 248 250.

158 For an argument for the abandonment of the welfare principle, see H Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 267.

extreme individualism that would result from its literal conception and application. It is in the best interests of the child to know not only that they form part of a complex social web of interpersonal relationships, but also that social demands can limit and broaden their autonomy, rights and goals.

## 10 Conclusion

Individualistic welfare rights and interests negate the dimension of sociality. They, too, negate the role parents, significant others and persons with parental responsibilities and rights play in the development of the child's character and personality. Living practices in communitarian societies view the promotion of the child's individual interests as inherently linked to the interests of the family and society as an entirety. Whereas the interests of the community should somehow define the boundaries of the child's interests, one must be wary of using a standard that will completely wipe out the interests of the child as an individual member of the community. Beside the brakes applied by communitarianism to the individualism that characterises a narrow construction of the paramountcy principle, it must be emphasised that parental rights and the doctrine of family autonomy confer considerable discretion on persons seized with parental responsibilities. As such, decisions made from day to day are family decisions reflective of the way in which parents intend to spend their time. In making these decisions, families rarely give determinative regard to the individual interests of a particular child. The South African legislature and courts have accepted that, although the best interests of the child are paramount, it does not mean that they are absolute. What is best for the child depends on the factors competing for the core of the 'paramountcy principle' and the relative importance of each factor in light of the circumstances of each case. Whichever factors the decision maker considers relevant, regard must be had to both the individual interests of the child and the social realities and relations that form a complex web of interpersonal relationships. It is my view that no other model could better contextualise human relationships than a family-based approach to the welfare principle.