

Do Children in South Africa have a Right to a Family? An Exploration of the Development of the Concept “a Right to a Family” in South African Law.

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Abstract

In this paper the development of the recognition of children’s right to a family in South African law is explored. This is done by paying attention to the contents of international documents, including the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The relevant provisions of the Children’s Act are also dealt with. The provisions of the South African Customary Marriages Act; Civil Unions Act and Muslim Marriages Bill are also mentioned where relevant. Lastly, South African case law, including decisions of the Constitutional Court, are explored. The paper concludes that although children in South Africa do not have an explicit right to a family in legislation that their right to a family does indeed exist and is protected in various ways in South African law and that the South African courts continue to protect children’s right to a family.

Keywords: Family law; right to a family; South African law; Private law.

1. Introduction

In South Africa, The exercise of guardianship, custody and access usually takes place within a family relationship, of some sort.¹ The concept of the “family” can be used in a narrow as well as a wide sense.² In a wide sense it means all people who are blood relations or

¹ The Oxford Advanced Learners Dictionary defines a family as a “group consisting of parents and their children” and says that it can also consist of “close relatives”.¹

² Cronje and Heaton *South African Family Law* 2nd ed. (2004) Lexis Nexis Butterworths 3. Family law in South Africa is a subdivision of Private law and regulates legal relationships between spouses; life partners; parents, guardians and children and relatives related through blood or affinity: Robinson *et al Introduction to South African Family Law* (2012) 7.

who have become related through marriage, or through adoption. It can also mean the family unit which is created when people enter into a marriage-like relationship. In the narrow sense the term means spouses in a valid marriage and their children. The term can also be used to mean children living together in a child-headed household, or parties living together who are not biologically related but have an emotional, psychological or social bond. If a child has a right to a family, then the institution of the family would have to be respected, and, expressly, protected in South African law. I will be discussing the developments in this regard, with particular reference to the Children's Act³ and case law.

2. International Documents

The child's right to a family is emphasized in various international documents⁴. Article three of the Convention on the Rights of the Child states that the rights and duties of parents must be taken into account. Article five refers to the "extended family". Article seven refers to "parents" and article eight to "family relations". Article nineteen of the African Charter on the Rights and Welfare of the child refers to "parental care". The term family is not defined in either the Convention on the Rights of the Child nor in the African Charter on the Rights and Welfare of the Child. Any definition of family would have to be flexible as family life can vary greatly depending on cultural, social and economic conditions and such diversity must be respected in any definition of a family. A definition of family would have to, at the very least, include close relatives of the child, as well as unmarried parents.⁵ In article eight family relations are seen as forming a part of the child's identity.⁶ The right of the child to maintain personal relations and direct contact with parents when separated from them is also recognized.⁷ A child also has the right to information concerning the whereabouts of an absent family member where such absence has resulted from an action initiated by the State.⁸ Article ten deals with the rights of parents and children to enter and leave States for the purpose of family reunification.⁹ The Convention also specifies that both parents have the primary responsibility for the upbringing and development of their child.¹⁰ Articles place a burden on

³ Children's Act 38 of 2005.

⁴ These International Conventions will only be discussed here within the context of the child's right to a family.

⁵ Smith "Parenthood in Modern Society" in Eekelaar and Sarcevic (eds) *Parenthood in Modern Society: Legal and Social Issues for the 21st Century* (1993) 447.

⁶ Article 8(1).

⁷ Article 9(3).

⁸ Article 9(4).

⁹ Article 10(1) and (2).

¹⁰ Article 18(1).

the State to provide the necessary protection and assistance of the family. It is clear that the Convention fully recognizes the right to a family and that such right is protected by the Convention.¹¹ The African Charter on the Rights and Welfare of the Child specifies in the preamble that “for the full and harmonious development of his personality the child should grow up in a family environment in an atmosphere of happiness, love and understanding”. Article eighteen of the African Charter specifies that “the family shall be the natural unit and basis of society; it shall enjoy the protection and support of the state for its establishment and development.” Article nineteen stipulates that every child has the right to parental care and protection and that, where possible, they should reside with their parents.¹² Article 20(2) provides that parents and other persons responsible for caring for children should be assisted by the State. Article 31 of the Charter stresses the responsibilities that children have towards their families. Clearly the family enjoys special protection¹³ under the African Charter and that the child has a right to a family. The State’s duty to protect the family, as well as support the establishment and development of the family is emphasized.¹⁴ In the Draft Provisional Outcome Document: a World Fit For Children¹⁵ South Africa affirmed its obligation to safeguard the rights of all children, by means of national action and international cooperation, utilizing the maximum available resources.¹⁶ Unicef has now stipulated that South Africa has a strong framework to support children’s rights but that it is not sufficient.¹⁷ Various other documents emphasize the role of the family and the need for protection of the family. For example, the United Nations document *Emerging Issues for Children in the Twenty First Century*¹⁸; the Universal Declaration of Human Rights¹⁹; the European Convention for the

¹¹ In order to give effect to the child's right to live in a family the state must adopt preventative measures to improve the living conditions so that families can raise and educate their children: Grossmann "Argentina-Children's Rights in Family Relationships: the Gulf between Law and Social Reality" in *Children's Rights: a Comparative Perspective* Freeman (ed) (1996) 11. Although Grossmann focuses on the relevance of the Convention in Argentina, her comments are relevant to the South African situation. Grossmann She stresses that it is necessary to consider what the state and the community must do so that social rights become effective policies for employment, living, culture and education that is rooted in family life: Grossmann "Argentina-Children's Rights in Family Relationships: the Gulf between Law and Social Reality" in Freeman(ed) (1996) 29.

¹² Article 19 also regulates what should happen when a child is separated from his or her parents. It stipulates that every child has the right to maintain personal relations and direct contact with both parents on a regular basis. Article 19(3) stipulates that if the separation results from the action of a state party the child shall be provided with information regarding the absent member of the family.

¹³ See especially Article 18 and Article 20(2) of the Charter.

¹⁴ The duty of the State to provide material assistance and support programs is subject to the available means of the state to fund such programs: Article 20 (2).

¹⁵ 4 December 2000.

¹⁶ Par I6.

¹⁷ Par 34(b). Unicef Child’s Rights in South Africa <http://www.unicef.org/rightsite/sowa/pdfs/panels/ch>, accessed 2015/01/27.

¹⁸ 4 April 2000.

¹⁹ 1948. Article 12.

Protection of Human Rights and Fundamental Freedoms²⁰ (a regional document); the International Covenant on Economic, Social and Cultural Rights²¹; the International Covenant on Civil and Political Rights²² and the African Charter on Human and People's Rights²³. The Concluding Observations of the Committee on the Rights of the Child: South Africa²⁴ recommended that the state provide support, such as training, for parents.²⁵ The committee also stated its concern that the law still does not reflect the principles and provisions of the Convention on the Rights of the Child and that the state must continue to reform its domestic legislation.²⁶ However, to date, the right to a family is still not contained in the Children's Act.

3. The Children's Act

The Children's Act sees a family as been wider than the narrow definition of a family, as a family member includes "any other person with whom the child has developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship." The preamble of the Act also states that "... the child, for the full and harmonious development of his or her personality should grow up in a family". Some of the objects of the Act are to promote and strengthen families and to give effect to the constitutional right that children have to family and parental care or appropriate alternative care when removed from the family environment. Section seven of the Children's Act deals with the best interests of the child and specifies factors that must be considered when determining what is in the best interests of the child. These include, the nature of the relationship between the child and parent; the effect of separation from the parent/s or brother and sisters or care-giver with whom the child is living; the practical difficulty of having contact; the need for the child to remain in the care of parents, family and extended family and to maintain contact with family, extended family, culture or tradition; as well as the need for the child to be brought up in a stable family environment (and, where this is not possible an environment that resembles as close as possible a caring family environment). Section sixteen of the Act (as is also found in the African Charter) states that "every child has

²⁰ 1950.

²¹ 1966. Article 10 and 11.

²² 1966. Article 23(1) and article 24(1).

²³ 1981. Article 18(1); article 18(2); article 27; article 29. Other declarations include Art 4 of the Declaration on Social Progress and Development (1969) and the Declaration of the Family Rights (1994).

²⁴ 28 January 2000.

²⁵ Paragraph D5 22.

²⁶ Paragraph D1 10.

responsibilities appropriate to the child's age and ability towards his or her family, community and the state." Section eighteen of the Act stipulates that a person can either have full or specific parental responsibilities and rights in respect of a child and that the term parental responsibilities and rights includes the responsibility and right to care for the child, maintain contact with the child, to act as guardian of the child and to contribute to maintenance of the child.²⁷ The position of unmarried fathers has improved somewhat and is contained in S21. Provision is made in S22 for parental responsibility and rights agreements. Parenting plans²⁸ can also be drawn up.

4. South African Case Law

In the case of *In re: Certification of the Constitution of the Republic of South Africa, 1996*²⁹ the court dealt with³⁰ marriage and family rights. An objection was made that international instruments and the constitutions of various countries contain provisions recognizing the family as the basic unit of society or protecting the right to marry whereas the South African constitution does not.³¹ The Court looked at various international instruments on Human rights, which expressly protect the right to family life³² and concluded that the duty on States to protect family life had been interpreted in a multitude of different ways³³ The court also stated that there is no "universal acceptance of the need to recognize the rights to marriage and family life as being fundamental in the sense that they require express constitutional protection."³⁴ Many foreign constitutions do not contain such express protection. However International instruments such as the African Charter expressly protect the right to family life. The Constitution in its current form states in section 39 that international law must be considered and foreign law may be considered when interpreting the Bill of rights. The court also stated that families are constituted and dissolved in a variety of

²⁷ Where more than one person is guardian of a child, the consent of all guardians is required for the child's marriage, adoption, departure or removal from the Republic, application for a passport and consent to alienation or encumbrance of immovable property of the child: S18(3)(c). McCarney states that the Children's Act has improved the legal position of children in South Africa. For a discussion of the changes that took place in the parent-child relationship see Boniface "Revolutionary Changes to the Parent-Child Relationship in South Africa" in Sloth-Nielsen and Du Toit 2008 *Trials and Tribulations Trends and Triumphs: Developments in International African and South African Child and Family Law*.

²⁸ S33.

²⁹ 1996(10) BCLR 1253(CC).

³⁰ Amongst other things.

³¹ par 96.

³² par 97.

³³ par 98.

³⁴ Ibid.

ways and that “the possible outcomes of constitutionalizing family rights are uncertain”³⁵. The court also stated that disagreements would be prevented over the definition of a family if this right were not expressly included in the Constitution.³⁶ This seems to be an easy way out. Why not constitutionalize such a right? The court further stipulated that the provisions in the then proposed constitution “either directly or indirectly support the institution of marriage and family life.”³⁷ The court also said that the right to parental or other appropriate care is guaranteed.³⁸ The court concluded that the Constitutional Assembly followed a “middle road”³⁹ and that the objection could not be sustained. Is there insufficient protection and enshrinement of a child’s right to family in the Constitution? Should the Constitutional Assembly and the court have followed the provisions of international instruments in this regard?

In the case of *Jooste v Botha*⁴⁰ the court considered, amongst other things, what is included in a child’s right to family or parental or appropriate alternative care⁴¹. The court stipulated that the family means a father, mother and child or it can mean the extended family, which includes grandparents, aunts and uncles. The court interpreted the term “parental care” to mean care supplied by a custodian parent. The court interpreted the term to mean that the natural father of an illegitimate child who does not have custody (term used now is “care”) falls outside of the scope of section 28(1) (b) of the Constitution.⁴²

The matter of *Dawood; Shalabi; Thomas v the Minister of Home Affairs*⁴³ dealt with the provisions of the Aliens Control Act⁴⁴ which stipulated that an immigration permit can only be issued if the applicant concerned is outside of the Republic at the time of the

³⁵ Par 99.

³⁶ Ibid.

³⁷ Par 101. An example is given in Par 102 of the right of a detained person to be visited by their spouse. I submit that the current provisions of the Constitution, that indirectly protect the right to a family are inadequate. Van Schalkwyk and Van der Linde “Die Reg van die Kind op Kontak met Beide Ouers, Opmerkings na Aanleiding van Onlangse Ontwikkeling in die Nederlandsereg” 2011 Potchefstroom Electronic Law Review state that a child has a right to contact but that South African law also indirectly protects the rights and obligation of a parent to have contact with their child.

³⁸ Par 102.

³⁹ Par 103: that between those states that expressly protect the family in their constitutions and those that do not. Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 121 state that although the right to family life is not expressly protected, principles of dignity; equality and concern for marginalized groups have heralded a wide-ranging revision of the legal meaning of family and law.

⁴⁰ 2000 (2) SA 199 (T).

⁴¹ S28(1)(b).

⁴² 208F. See also Van der Linde 81-83.

⁴³ 2000 (1) SA 997 (CPD).

⁴⁴ 96 of 1991, particularly S25(9) (b).

authorization of such a permit and that the only exemption is if she or he is in possession of a temporary residence permit at the time of the authorization of the issue of the permit.⁴⁵ The applicants applied for an order declaring this, and certain other provisions, to be in conflict with the Constitution. The court held that S25 (9)(b) of the Act “fell foul of the right to human dignity protected in S10 of the Constitution, both of South African permanent residents who were married to alien non-resident spouses, as also such alien spouses”.⁴⁶ The court said that this would result in a violation of a core element of the alien spouses’ right to family and thus their right to human dignity.⁴⁷ In this judgement a right to family life, at least in so far as spouses have the right to live together as man and wife was recognized by our courts.⁴⁸ Judge Van Heerden admitted that the right to family is not expressly enshrined in the Constitution and thus he had to view this right as falling within the ambits of human dignity⁴⁹. The respondents stated that this was “overshooting”⁵⁰ the purposes of S10 of the Constitution and the Court proved that this was not the case. Whether we agree or disagree that this was proved, in order to protect the Applicants right to family there was no other choice but to follow this route. Due to the Court allowing the Constitutional Assembly to take the “middle ground” previously when deciding whether or not to include a right to family in our constitution, a situation has arisen where such express protection of a right was necessary, but such protection had not been expressly stipulated in the Constitution. Already in 1996 Robinson⁵¹ spoke of the omission of family protection measures in the Constitution and that it was only political expediency which led to the omission of such measures and that the insertion of such a right would bring about a positive obligation on the State to preserve and further the family institution. If a child’s right to family was jeopardized and in need of protection the court may well have followed the same route of interpretation as was followed in this case. This court decision demonstrates that our courts believe that a right to family

⁴⁵ See pg 997-1000 in this regard.

⁴⁶ 999 par I.

⁴⁷ 1000 par A.

⁴⁸ Cronje and Heaton 2004 *South African Family Law* 227-228 stipulate that this case recognised that the family is a social institution of vital importance and that families come in different shapes and sizes, and that care should be taken not to entrench certain forms of family at the expense of other forms. The legal concept of what a family is should change as society changes. See also *Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC).

⁴⁹ 1033-1034 for the reasoning behind the judgement.

⁵⁰ 1036 Par I-J.

⁵¹ 231 Robinson “Some remarks on the Constitution of the Republic of South Africa concerning the protection of families and children” in Lowe N and Douglas G (eds) *Families across Frontiers* (1996) 229. Robinson clearly states that not protecting the family as an institution is a major flaw in the Constitution and that the insertion of such a right would bring about a positive obligation on the state to preserve and further the family institution.

exists but they have to be creative when interpreting the constitution in order to protect such right.⁵²

In South African law the position of fathers of children born out of wedlock has improved dramatically. Previously these fathers had no right of access to their children⁵³. S 21 of the Children's Act now makes provision for unmarried fathers. In certain instances, such as where an unmarried father has acknowledged paternity and is contributing towards the maintenance of the child, the father has automatic parental responsibilities and rights. If the father does not meet the requirements he may apply to the court to be granted parental responsibilities and right. The court will only grant such an application if it is in the best interests of the child. However, the right to a family life is not the basis for such an application.

Since the 15 November 2000 the Customary Marriages Act⁵⁴ has recognized customary marriages in South Africa. Muslim marriages will also soon be recognized. A number of cases have already recognized the legal consequences resulting from a Muslim marriage.⁵⁵ In *Daniels v Campbell*⁵⁶ the court held that the term "spouse" in the Intestate Succession Act⁵⁷ and the Maintenance of Surviving Spouses Act⁵⁸ includes parties to a Muslim marriage.

The position of parties of the same sex who want to found a family has also changed. In the case of *J v Director General, Department of Home Affairs*⁵⁹ The court specified that children born as a result of assisted reproduction⁶⁰ are seen to be the same-sex life partner's

⁵² For a discussion of regulating domestic partnerships see Goldblatt "Regulating Domestic Partnerships- A necessary step in the Development of South African Family Law" 2003 SALJ 610. Recognition of domestic partnerships would support recognition of the right to a family.

⁵³ This position is well-explained in *TvM* 1997 1 SA 54 (A) 57-58. This was improved by the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 which enabled them to apply for a court order granting guardianship; care or contact. See further Boniface "Revolutionary Changes to the Parent-Child Relationship in South Africa: End of the Revolution for the "Unmarried" Father? 2009 *Speculum Juris* 1.

⁵⁴ 120 of 1998.

⁵⁵ *Ryland v Edros* 1996 (4) SA 557 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA).

⁵⁶ 2004 (5) SA 331 (CC).

⁵⁷ 81 of 1987.

⁵⁸ 27 of 1990. In the interim Imams have been recognized as marriage officers, if they undergo a training course, for the purposes of civil marriages in South Africa, but such marriages must be performed in terms of civil law and may only be monogamous. The Children's Act, in its definitions, however recognizes "marriage" as also being a marriage concluded in terms of religious law.

⁵⁹ 2003 5 BCLR 463 (CC). This case is discussed in Cronje and Heaton 233.

⁶⁰ The ovum of the one woman was fertilized with donor sperm and then implanted into the other woman, who gave birth to the children.

legitimate child and that the child can be registered under the surname of either parent or a double-barrel surname consisting of both life partner's surnames. This case clearly demonstrated the recognition of a right to family by our courts.⁶¹ The Constitutional court recognized the right to same-sex marriages, in the case of *Minister of Home Affairs v Fourie*⁶². Here the court held that same-sex couples should enjoy the same entitlements and responsibilities of marriage law as applies to heterosexual couples. Although the court did not refer to a right to a family, the court stated that same-sex couples are entitled to get married based on their right to dignity and their right to equality. Now the Civil Union Act 17 of 2006 allows two persons, regardless of gender, to marry each other.

In recent case law, in *C and others v Department of Health and Social Development* (2012 (2) SA 208 CC) stated that Children's courts must automatically review the removal of children from parents or caregivers. Boezaart stresses that the courts must be vigilant as to the effect a decision could have on children, when sentencing primary caregivers. In the *Centre for Child Law v the Minister of Social Development* (2014 (1) SA 577 (GSJ)) the court stated that "[s]ection 28(1)(b) of the constitution provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment". An interpretation of the aforesaid sections of the Act in such a way which permits the adoption by step-parents in the circumstances mentioned, promotes this constitutional right." The best interests of the child were also stressed by the court. Reference was also made to the importance of the decision in *S v M (centre for child law as amicus curiae)* 2008 (3) SA 232 CC, where the Constitutional Court stated that law enforcement must be child-sensitive and that statutes must be interpreted and the common law be developed in a manner which favours protecting and advancing the interest of children

5. Conclusion

Throughout the Children's Act the importance of the family as the ideal environment for a child to exercise their rights in, and to be cared for, is stressed. Unfortunately the Children's Act does not state implicitly that the child has a right to family life. However, due to the

⁶¹ In *Du Toit v Minister of Welfare and Population Development* 2002 10 BCLR 1006 (CC), it was found that s 1(2) of the guardianship act and certain provisions of the Child Care act are unconstitutional as they do not make provision for same-sex life partners as adoptive parents and thus not only discriminate against such parties but also do not take the best interest of the child into account. See also *Satchwell v President of the Republic of South Africa* 2002 9 BCLR 986 (CC).

⁶² Constitutional Court- CCT 60/04, judgement date: 1 December 2005.

amount of emphasis that is placed on the family throughout the Children's Act, the child does indeed have a right to family life in South Africa and will be able to enforce this right. In general ratification of or accession to international instruments creates obligations on state parties to take action to bring law and practice into line with the relevant international instrument. It is clear from the above discussion that not even our Constitution is completely in line with international instruments, which South Africa has ratified. The insertion of a right to family in South Africa's constitution will mean, "the legislature would be under an obligation to enact legislation furthering the different aspects of family life".⁶³ The challenge facing South Africa is the cost of implementing programs. Health programs and feeding schemes are priorities⁶⁴ and other rights may have to take a backseat until more resources are available for their implementation. What could the effects be of a right to family? Aside from the obvious such as not to be removed from the family without just cause⁶⁵ others could be that a child's parent who is an alien to South Africa would possibly have the right to come and stay in South Africa if his or her child is lawfully here; children who have been separated⁶⁶ from parents or other caregivers will have the right to reunited. Programs will have to be implemented to ensure unification of families. Since a child has a right to nutrition; shelter etc. as well as a right to family this may be interpreted to mean that the child's family will also be entitled to for example shelter, as the child may not be separated from the family unless completely necessary and unavoidable (see for example the case of *Grootboom v Oostenberg municipality*⁶⁷). This right may even change the way that the Court approaches care orders in divorce matters.

The Convention on the Rights of the Child states that the State must undertake measures implementing rights "to the maximum extent of their available resources."⁶⁸ State parties should be bound to set objectives with a specified budget in order to avoid using the excuse of poverty too often.⁶⁹ There are various ways in which resources can be made increasingly

⁶³ Lowe and Douglas 231.

⁶⁴ Not only in South Africa but worldwide. See the plan of action for implementing the world declaration of the survival; protection and development of children, where emphasis is placed on health and education.

⁶⁵ For example the abuse of the child.

⁶⁶ This could be as a result of war or even poverty. Eg. Street children

⁶⁷ [2000] 3 BCLR 277 (C): where the court held that the primary obligation to maintain a child rests on the child's parents but if the parents are unable to provide shelter, then the State must do so. However, the children were not to be separated from their parents.

⁶⁸ Article 4

⁶⁹ Ledoger "Realising rights through National Programs of Action for Children" 55in Hinnes JR (ed)

Implementing the Convention on the Rights of the Child: Resource Mobilisation in Low-Income Countries (1995). Ledoger specifies that the National Program of Action has great potential for this purpose.

available for children such as the use of non-traditional resources and using existing resources to their maximum potential.⁷⁰ South Africa will require additional funding for programs and this will have to come from foreign donors as well as the private sector.⁷¹ South Africa's children indeed have the right to a family but the implementation of this right to its fullest extent will require resources; funding; patience as well as the passage of time. Van der Linde⁷² proposed that a specific right to a family be incorporated into the constitution. This proposal is still relevant today. It is clear from case law that South Africa has come a long way in recognizing that a child's has a right to a family, but it would still be advisable to expressly state that the child has a right to a family in order to simplify enforcement of this right and in order to avoid any confusion in this regard. To start this process our Legislature can enact legislation (or amend the Children's Act) to specifically protect the right to a family and mechanisms to enforce this legislation can start to evolve.

⁷⁰ Parker 40-48 "Resources and Child's Rights: an Economic Perspective" in Hinnes (ed) (1995) provides and indepth discussion of this aspect.

⁷¹ For a detailed discussion of financing see Parker 48 in Hinnes (ed) (1995).

⁷² 491 "Grondwetlike erkenning van regte ten aansien van die gesin en gesinslewe met verwysing na aspekte van artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens" LLD thesis (2001) UP (Department of Private Law).

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