

Local child relocation in South Africa: a comparative legal analysis

by

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TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION TO THE STUDY	8
1.1 INTRODUCTION.....	8
1.1.1 <i>Research problem and purpose of the study</i>	8
1.1.1.1 Research Problem	8
1.1.1.2 Purpose of the study.....	9
1.2 HYPOTHESIS	11
1.3 RESEARCH QUESTIONS.....	11
1.4 POINT OF DEPARTURE	12
1.5 RESEARCH METHODOLOGY.....	12
1.6 STRUCTURE OF DISSERTATION.....	12
CHAPTER 2: LOCAL CHILD RELOCATION IN SOUTH AFRICA.....	16
2.1 INTRODUCTION.....	16
2.2 BRIEF HISTORICAL BACKGROUND OF CHILD RELOCATION	17
2.2.1 <i>Pro-relocation approach</i>	17
2.2.2 <i>Neutral approach</i>	18
2.3 CURRENT LEGISLATIVE FRAMEWORK REGARDING CHILD RELOCATION IN SOUTH AFRICA	19
2.3.1 <i>International Child Relocation</i>	19
2.3.2 <i>Local Child Relocation</i>	20
2.4 VARIOUS COMPETING INTERESTS IN RELOCATION.....	22
2.4.1 <i>The rights of the child</i>	23
2.4.1.1 Best interests principle	23
2.4.1.2 Arguments against the best interest of the child principle	24
2.4.1.3 International and regional treaties regarding the best interests principle	24
2.4.1.4 Views of the Child in relocation	25
2.4.1.5 Factors applicable in relocation cases	26
2.4.2 <i>The rights of the parents</i>	27
2.5 VARIOUS COURT JUDGMENTS REGARDING LOCAL CHILD RELOCATION WITHIN SOUTH AFRICA.....	29
2.5.1.1 ADB v BAK	29
2.5.1.2 G v G	31
2.5.1.3 LW v DB	32
2.5.1.4 Hinds v Hinds.....	33
2.5.1.5 Mabule v Mabo	33
2.5.1.6 Joubert v Joubert	34
2.5.1.7 F v F	34
2.5.1.8 Cunningham v Pretorius	35
2.5.1.9 DJB v DJB.....	35
2.5.1.10 CG v NG	36

2.5.1.11 A v A	37
2.5.1.12 Jackson v Jackson	37
2.5.1.13 Girdwood v Girdwood.....	38
2.6 ISSUES TO CONSIDER IN TERMS OF CHILD RELOCATION	38
2.6.1 <i>Definition of relocation</i>	38
2.6.2 <i>Major decisions and notice of intention to relocate</i>	39
2.7 LOCAL DOCUMENTS AND INTERNATIONAL INSTRUMENTS REGARDING CHILD RELOCATION.....	42
2.8 NON-BINDING LAW	43
2.8.1.1 The American Academy of Matrimonial Lawyers.....	43
2.8.1.2 The Hague Conference on Private International Law	44
2.9 COMMISSION FINDINGS	45
2.10 CONCLUSION	46
CHAPTER 3: ALTERNATIVE DISPUTE RESOLUTION IN FAMILY LAW MATTERS.....	47
3.1 INTRODUCTION.....	47
3.2 ADVERSARIAL SYSTEM OF LITIGATION IN FAMILY LAW MATTERS	47
3.2.1 <i>Family law disputes in the adversarial system</i>	47
3.2.2 <i>'Best interest' principle in the adversarial system</i>	48
3.3 ALTERNATIVE DISPUTE RESOLUTION IN FAMILY LAW MATTERS: WITH SPECIFIC REFERENCE TO FAMILY MEDIATION	50
3.3.1 <i>Commission Findings</i>	51
3.4 WESTERN MEDIATION.....	52
3.4.1 <i>Mediation</i>	52
3.4.2 <i>Important cases regarding mediation</i>	52
3.4.2.1 MB v NB.....	52
3.4.2.2 Townsend-Turner v Morrow.....	53
3.4.3 <i>Family Mediation</i>	53
3.4.4 <i>Compulsory family mediation</i>	56
3.5 AFRICAN IDEOLOGY OF MEDIATION	57
3.5.1 <i>Brief History</i>	57
3.5.2 <i>Living and codified customary law</i>	58
3.5.2.1 Codified/ official customary law	58
3.5.2.2 Living customary law.....	58
3.5.3 <i>Important issues to consider in terms of customary law in general</i>	58
3.5.4 <i>Customary law and family matters</i>	59
3.5.5 <i>African Dispute resolution</i>	60
3.5.5.1 Compulsory African Mediation	61
3.5.6 <i>Legislation and African Mediation</i>	61
3.5.7 <i>Best interests of the child principle and customary law</i>	62
3.6 CHILDREN'S COURTS.....	63

3.7	VARIOUS OTHER TYPES OF ADR PROCESSES AVAILABLE	64
3.7.1	<i>Parenting coordination</i>	65
3.7.1.1	Is parenting coordination an unlawful delegation of judicial decision-making authority?.....	66
3.7.2	<i>Collaborative practice</i>	68
3.7.3	<i>Arbitration</i>	69
3.7.3.1	The positive elements of arbitration:	69
3.7.4	<i>Rule 41A of the Uniform Rules of Court</i>	70
3.7.4.1	Problems with Rule 41A.....	71
3.8	THE OFFICE OF THE FAMILY ADVOCATE AND PARENTING PLANS	72
3.8.1	<i>The Office of the Family Advocate</i>	72
3.8.1.1	Purpose of the Family Advocate	72
3.8.1.2	Problems with the Office of the family Advocate:	73
3.8.2	<i>Parenting plan</i>	74
3.8.2.1	Current legislative guidelines in the Children’s Act regarding parenting plans in South Africa.....	74
3.8.2.2	Relocation Clause in the Parenting Plan	75
3.8.2.3	ADB v BAK and a non-relocation clause.....	75
3.9	CHILD RELOCATION AGREEMENT PRIOR TO RELOCATING.....	76
3.10	LAW COMMISSION DISCUSSION AND FINDINGS.....	77
3.10.1.1	Commission findings on Parenting Plans.....	77
3.10.1.2	Commission finding on Mediation.....	77
3.11	CONCLUSION	78
CHAPTER 4: COMPARATIVE LEGAL ANALYSIS OF AUSTRALIA.....		79
4.1	AUSTRALIA.....	79
4.2	INTRODUCTION.....	79
4.3	THE CURRENT LEGISLATIVE FRAMEWORK OF RELOCATION IN AUSTRALIA	80
4.3.1	<i>Relocation</i>	80
4.3.2	<i>Child relocation</i>	80
4.3.3	<i>Relocation Order</i>	80
4.3.4	<i>Consent to Relocate</i>	81
4.3.5	<i>Equally shared parental responsibility</i>	81
4.4	VARIOUS COMPETING INTERESTS.....	82
4.4.1	<i>Determining the child’s best interests</i>	82
4.4.2	<i>Freedom of movement of the parents</i>	83
4.5	COURT JUDGMENTS REGARDING RELOCATION WITH A MINOR CHILD WITHIN AUSTRALIA	83
4.6	ALTERNATIVE DISPUTE RESOLUTION FOR FAMILY MATTERS IN AUSTRALIA	84
4.6.1	<i>Adversarial versus dispute resolution approach</i>	84
4.6.2	<i>Voluntary or compulsory mediation</i>	85
4.6.3	<i>Family Dispute Resolution (FDR)</i>	86

4.6.3.1	Process of FDR.....	87
4.7	FAMILY RELATIONSHIP CENTRES.....	88
4.8	AUSTRALIAN INDIGENOUS CUSTOMARY LAW.....	88
4.8.1	<i>Recognition of Customary Law</i>	88
4.8.2	<i>Western-style mediation in Aboriginal communities</i>	89
4.9	CONCLUSION	90
CHAPTER 5: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS.....		91
5.1	SUMMARY	91
5.2	RECOMMENDATIONS	92
5.3	CONCLUSION.....	94

DECLARATION

I CAMILLA HUNKIN, student number 57131872 declare that LOCAL CHILD RELOCATION IN SOUTH AFRICA: A COMPARATIVE LEGAL ANALYSIS is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

CAMILLA HUNKIN

SIGNATURE

January 2023

DATE

SUMMARY

The Children's Act 38 of 2005 lacks a detailed guideline that governs the local relocation of a co-parent and child, post-divorce or separation, within the borders of South Africa. Local relocation could either be relocation outside the province or to a place far within a province. This research assesses whether the current legislation adequately protects the child's rights in the event that one of his or her parents relocates with him or her. Relocation, whether locally or internationally, is a major decision. Local relocation still affects care and contact arrangements and has legal implications that need to be considered. The role of mandatory mediation can be beneficial in any matter relating to a child. Therefore, this research will look at the African ideology on mediation to see what lessons if any, the South African legal system may draw from customary law. Australian legislation in terms of local relocation within the borders of Australia will be referred to as the comparative part of this study. Australia deals with many local relocation cases because of the vast distances involved. In Australia the legal guidelines for local and international relocation are the same. Australia's compulsory Family Dispute Resolution will be reviewed to see what lessons, if any, the South African legal system can draw from Australia's compulsory mediation in any family law situation. Indigenous Australian Customary law in terms of the resolution of family disputes will be compared. Therefore, the aim of this research will be to provide solutions to the highlighted shortcomings in the Children's Act.

KEY TERMS:

Local child relocation; child; co-parent; co-parents; post-divorce; separation; rights of the child; freedom of movement; best interests of the child; Children's Act; child relocation agreement; Australian local relocation; interstate relocation; Australia's child relocation; Australia's compulsory family dispute resolution; family mediation; African-style mediation; customary law; 'semigration'; mediation; voluntary mediation; mandatory mediation; parenting; proposed interstate relocation; diminished relationship; relocation refused

CHAPTER 1: INTRODUCTION TO THE STUDY

1.1 INTRODUCTION

This study seeks to investigate South Africa's current legislative framework regarding the local relocation of a co-parent, post-divorce or separation, with his/her child 'within' the borders of South Africa. For the purposes of this study, local relocation could either be relocation outside the province or to a place far within a province in South Africa. This research assesses whether the current legislation adequately protects the child's rights in the event that one of his or her parents relocates with him or her.

1.1.1 Research problem and purpose of the study

1.1.1.1 Research Problem

The Children's Act¹ lacks a detailed guideline that governs the local relocation of a co-parent and child within the borders of South Africa.² Local relocation could either be outside the province or to a place far within a province.³ The lack of a detailed legislative framework can have an impact on the rights of the co-parents and specifically the child because relocation, whether locally or internationally, is a major decision.⁴ The Children's Act makes provision for international relocation. Section 18(3)(c)(iii) of the Children's Act requires the parent or person who acts as guardian to 'consent to the child's departure or removal from the republic'. The Act does not give clear guidelines for local (interprovincial) relocation. It also does not mention any consent procedures for local child relocation in South Africa.⁵ Although international relocation is more drastic than interprovincial relocation, the latter has legal implications that need to be considered as well. Stahl⁶ states that relocation affects care and contact arrangements and the relationship between the non-relocating parent and the child (that has to relocate with another parent) because the move changes the existing parent-child relationship.

¹ Children's Act 38 of 2005 (herein after the Act or the Children's Act).

² Domingo, "For the sake of the children": South African Family Relocation Disputes' 149.

³ Domingo, "For the sake of the children": South African Family Relocation Disputes' 166.

⁴ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 41.

⁵ Domingo, "For the sake of the children": South African Family Relocation Disputes' 166.

⁶ Philip M. Stahl, 'Emerging Issues in Relocation Cases' (2013) 25 *Journal of the American Academy of Matrimonial Lawyers* 425, 425.

1.1.1.2 Purpose of the study

The purpose of this research is to provide solutions to the highlighted shortcomings in the Children's Act by learning from Australia's jurisdiction in terms of the local relocation of one co-parent and his/her child. Australian legislation in terms of local relocation will be looked at to see whether there are any lessons that the South African legal system can learn from Australian law. Australia deals with many local relocation cases because of the vast distances involved and it is interesting to note that in Australia the legal guidelines for local and international relocation are the same. Australia's compulsory Family Dispute Resolution will be analysed to see what lessons, if any, the South African legal system can draw from Australia's compulsory mediation in any family law matter. Understanding the similarities and differences between approaches in South Africa and other legal systems is important because relocation, where children are involved, is a complex issue.⁷ Australia was chosen as a comparative study in this research because relocation 'within' Australia happens more frequently because of the vast distances involved.⁸

This research will further investigate whether Alternative Dispute Resolution (herein after ADR) such as mediation prior to relocating with a child can be beneficial. It will assess whether mediation should be voluntary or mandatory. This research will advocate for the establishment of a compulsory Child Relocation Agreement post-divorce or separation or before relocation takes place. The Child Relocation Agreement will have guidelines that each parent can follow before relocating or guidelines agreed upon in case of the future relocation of one of the parents.⁹ This research will further investigate whether a relocation clause should be a mandatory requirement in a Parenting Plan. As part of the comparative study, this research will analyse Australia's compulsory Alternative Dispute Resolution process called Family Dispute Resolution. The African ideology on mediation will be discussed to see what lessons, if any, the South African legal system may draw from customary law. As part of the comparative study, Australia's indigenous customary law in terms of dispute

⁷ Brigitte Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' (2017) 134 SALJ 80, 82.

⁸ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 81.

⁹ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 41.

resolution in family matters will be analysed to see what lessons, if any, South Africa can draw from Australia.

The rate of divorce is increasing each year which means that relocation is possibly going to be a probability after divorce.¹⁰ Most marriages do not reach their tenth anniversary, therefore children born of the marriage are minors at a time the marriage between their parents is ended.¹¹ When couples divorce, one may decide to relocate with their minor child. People relocate for many reasons, which include: better job opportunities; moving closer to family; the country's economy; a new location; relationship; new life to begin afresh; better schooling; crime; safety and lifestyle opportunities to name a few.¹² The parent who will not be relocating will be deprived of regular and daily access to their child.¹³ A relocation dispute involving children occurs when one co-parent wishes to relocate with the children and the other co-parent opposes the move.¹⁴ Relocation disputes between divorced or separated parents occur frequently in courts.¹⁵ Relocation is a major decision that should not be taken lightly and proper planning prior to relocating should take place.¹⁶ The rise of divorce and child relocation is inevitable, therefore, the law in South Africa needs to adapt to the changing needs of the family. Divorce can have an on-going emotional and psychological effect on children, especially when parents use them to further their own battles.¹⁷ Children are very vulnerable and need to be protected against the invasion of their rights to integrity and dignity, to name just a few.¹⁸

¹⁰ Statistics South Africa Mid-year population estimates <<https://www.statssa.gov.za/publications/P0302/P03022019.pdf>> accessed 22 December 2021 (hereinafter Stats SA).

¹¹ Stats SA, 2019.

¹² Wesahl Domingo, "For the sake of the children": South African Family Relocation Disputes' (2011) 14 PER 148, 148.

¹³ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 82.

¹⁴ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 81.

¹⁵ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 81.

¹⁶ Rollie Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 40, 41.

¹⁷ Trynie Boezaart, 'The Position of Minor and Dependent Children of Divorcing and Divorced Spouses or Civil Union Partners' in Jacqueline Heaton (ed), *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2nd edn, JUTA 2017) 171.

¹⁸ Michael Freeman, 'Taking children's rights more seriously' (1992) 6 International Journal of Law 52, 55.

The Constitutionally entrenched right to freedom of movement for the primary caregiver is an important fundamental right.¹⁹ However, it is notable that this right may have an impact on the right of the child and those of the non-primary caregiver. These competing rights and interests of the parents and the child in relocation will be considered in more detail in chapter 2. Furthermore, it will be investigated how the courts strike the balance when confronted by such competing interests.²⁰ In *Godbeer v Godbeer*,²¹ Nugent J, as he then was, noted that:

[T]he welfare of all children is best served if they have the good fortune to live with both their parents in a loving and united family. In the present case that was not to be. The respondent and the applicant considered that it was in the best interests of themselves, and no doubt the children, that they should live separate lives, thereby anticipating that their lives might take them on different paths. I do not think that the applicant can be expected to tailor her life so as to ensure that the children and their father have ready access to one another. That would be quite unrealistic. The applicant must now fend for herself in the world and must perforce have the freedom to make such choices as she considers best for her and her family.

1.2 HYPOTHESIS

The Children's Act does not provide adequate detailed guidelines that govern the local relocation of a co-parent with his/her child within the borders of South Africa and this lack of a detailed legislative framework can have an impact on the rights of the co-parents and the concerned child.

1.3 RESEARCH QUESTIONS

This study considers whether South Africa's current legislative framework, the Children's Act, provides adequate legislative guidelines for the local relocation of a co-parent with his/her child 'within' the borders of South Africa.

This research further considers whether compulsory mediation prior to relocating will be beneficial. It will further investigate what lessons, if any, the South African legal system can draw from customary law in terms of the African ideology on mediation.

This research will consider whether South Africa can learn from the Australian legislative framework regarding local child relocation within the borders of Australia.

¹⁹ Section 21 of the Constitution of the Republic of South Africa, 1996.

²⁰ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 86.

²¹ 2000 (3) SA 976 WLD24 981J-982C.

Lastly, this research will consider whether South Africa can learn from Australia's compulsory form of dispute resolution called Family Dispute Resolution. This research will lastly consider what lessons, if any, South Africa can learn from Australia's Indigenous Australian Customary law in family matters.

1.4 POINT OF DEPARTURE

The child's best interests should be considered and applied in all relocation disputes. The Constitution and the Children's Act promote the best interests of the child in every matter concerning the child. The High Court is the upper guardian of children and courts should act in the best interests of the child in all matters involving the child.

This study is limited to the rights of children of divorced or separated parents. It explores the lack of local relocation legislation in the Children's Act and how mandatory mediation (prior consultation) where a Child Relocation Agreement is entered into can help. Child abductions under the 1980 Hague Convention on the Civil Aspects of International Child Abduction will not be considered in this study.

1.5 RESEARCH METHODOLOGY

This research is based on a desktop qualitative study of the relevant literature available, by interpreting primary and secondary sources. Primary sources will include legislation, case law, and relevant international law instruments, treaties and conventions. Secondary sources will include textbooks, books, journal articles and internet sources. A comparative study of Australian law will be done in order to consider the similarities and differences between Australian and South African law to see where we are lacking. Furthermore, the purpose of conducting a comparative analysis of Australian law will be to draw lessons to address any lacuna within South African law regarding the area of local relocation involving minor children.

1.6 STRUCTURE OF DISSERTATION

This dissertation is divided into five chapters. Chapter 1 is the introduction and background to the study. It sets out the problem statement and research objectives of the study. Chapter 1 concludes with limitations and structure of the dissertation.

Chapter 2 analyses South Africa's legislative framework regarding local child relocation within the borders of South Africa. It assesses the lack of adequate and

detailed legislative guidelines in the Children’s Act in terms of the local relocation of the co-parent and the child. It further briefly assesses the relevant international instruments ratified by South Africa and gives a brief historical background to the development of child relocation. South African case law is considered because relocation cases are decided on a case-by-case basis.²² This chapter analyses the various competing interests in terms of relocation because according to Clark²³ the word paramount suggests that the child’s best interests will always ‘trump other rights’, but case law suggests that the child’s best interests do not always outweigh other competing rights.²⁴ Therefore, the Constitutionally entrenched right to freedom of movement for the primary caregiver is an important fundamental right but this right can have an impact on the right of the child and those of the non-primary caregiver.²⁵ Case law is considered regarding the above.²⁶ International instruments and non-binding law are also looked at in this chapter. Recommendations by the South African Law Reform Commission are looked at.²⁷

Chapter 3 discusses the role that Alternative Dispute Resolution (hereinafter ADR) can play in terms of child relocation in South Africa.²⁸ Various forms of ADR are looked at briefly. According to Marumoagae²⁹ over the past few years there has been a concerted effort to use Alternative Dispute Resolution to resolve family disputes first. The African ideology on mediation is looked at to see what lessons, if any, the South African legal system may draw from customary law. Cases which dealt with mediation in South Africa are considered.³⁰ A Child Relocation Agreement before Relocating

²² *McCall v McCall* 1994 3 SA 201 (C) 204J-205F; *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 (21 August 2008)(Unreported case); *Jackson v Jackson* 2002 (2) SA 303 (SCA); *B v M* [2006] 9 BCLR 1034 (W); *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C); *Godbeer v Godbeer* 2000 (3) SA 976 (W); *Joubert v Joubert* 2008 JOL 219229 (C) (unreported); *ADB v BAK* (15944/22P) [2023] ZAKZPHC 1 (9 January 2023); *G v G* (32377/12) [2015] ZAGP JHC [13]; *LW v DB* 2015 JR 2617 (GJ) [13]; *Hinds v Hinds* [2016] ZAKZPHC 92 [72];

²³ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 86.

²⁴ *S v M* 2008 (3) SA 232 (CC).

²⁵ Thompson, ‘Presumptions, burdens, and the best interests in relocation law’ (2015) 53 Family Court Review 40.

²⁶ *Jackson v Jackson* 2002 (2) SA 303 (SCA).

²⁷ South African Law Reform Commission *Family Dispute Resolution: Care and Contact with children* Issue Paper 31 of 2015 (Project 100D)..

²⁸ South African Law Reform Commission *Family Dispute Resolution: Care and Contact with children* Issue Paper 31 of 2015 (Project 100D).

²⁹ Motseotsile C Marumoagae, ‘Does collaborative divorce have a place in South African divorce law?’ (2016) 49 *De Jure* 41, 56.

³⁰ *Townsend-Turner v Morrow* 2004 1 All SA (C), *Van den Berg v Le Roux* 2003 All SA 235 (C), *MB v NB* 2010 (3) SA (SGJ).

(Prior Consultation) with children is considered in this chapter which could potentially help with child relocation issues that arise between the co-parent's.³¹ Proper planning before relocation should be required by legislation.³² Recent case law in South Africa suggests that mediation should be considered first before litigation.³³ In South Africa, parties can enter into voluntary mediation whereas in Australia mediation is compulsory.³⁴

Chapter 4 is a comparative analysis of Australia. It analyses Australia's legislative framework regarding local child relocation within the borders of Australia.³⁵ In Australia, relocations are generally made locally because of the vast distances involved.³⁶ Australian case law regarding relocation within the borders of Australia is looked at.³⁷ Australia's compulsory dispute resolution called Family Dispute Resolution is analysed.³⁸ In South Africa, parties can enter into voluntary mediation whereas in Australia mediation is compulsory.³⁹ This research considers how the child's best interests and voice of the child are considered in relocation cases in Australia.⁴⁰ Recent research in Australia suggests that the 'best interests' approach in relocation law is a failure because it leads to unpredictable and expensive conflict which ends in a settlement arrangement that leaves parents unhappy.⁴¹ Australian case law regarding freedom of movement of parents is examined to see how the courts balance the parents' rights to freedom of movement with the rights of the child.⁴²

³¹ Rhona Schuz, 'The Hague Child Abduction Convention and re-relocation disputes' (2021) 35 *Int J Law Policy Family* 1, 36

³² Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 *Family Court Review* 41.

³³ *MB v NB* 2010 (3) SA 220 (GSJ).

³⁴ South African Law Reform Commission *Family Dispute Resolution: Care and Contact with children* Issue Paper 31 of 2015 (Project 100D).

³⁵ Family Law Act 1975 (Herein after the Family Law Act).

³⁶ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 81.

³⁷ South African Law Reform Commission *Family Dispute Resolution: Care and Contact with children* Issue Paper 31 of 2015 (Project 100D).

³⁸ Gillian Coote and Gary Yan, 'International relocation of children in Australia: overview' (Thomson Reuters Practical Law, 2021) < [https://uk.practicallaw.thomsonreuters.com/3-622-3385?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-622-3385?transitionType=Default&contextData=(sc.Default)&firstPage=true) > accessed 10 December 2021.

³⁹ South African Law Reform Commission *Family Dispute Resolution: Care and Contact with children* Issue Paper 31 of 2015 (Project 100D).

⁴⁰ Gillian Coote and Gary Yan, 'International relocation of children in Australia: overview'.

⁴¹ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 *Family Court Review* 40.

⁴² *U v U* (2002) 211 CLR 238.

Indigenous Australian Customary law in terms of the resolution of family disputes is analysed.

Chapter 5 focuses on the findings, recommendations and conclusion of the study.

CHAPTER 2: LOCAL CHILD RELOCATION IN SOUTH AFRICA

This chapter discusses the current legislative framework regarding the local relocation of a co-parent with his/her child within the borders of South Africa. A brief historical background of the various approaches adopted by our courts in child relocation disputes is done. Various decided cases in South Africa regarding local relocation and relocation in general are analysed. This chapter further considers the various competing interests between the child and the child's parents in terms of local relocation. Possible solutions to the highlighted shortcomings in the Children's Act⁴³ are provided at the end of chapter 2.⁴⁴

2.1 INTRODUCTION

We live in a world where people relocate a lot more than they did in the past.⁴⁵ Even a change of job can mean moving to another province. Across South Africa, there have been reports of increasing 'semigration' (a move from one part of the country to another) post covid-19 as more people are aiming to work from home, while living in a new location.⁴⁶ A survey was done mid-2021 after the Covid-19 pandemic where 1,017 job seekers across South Africa were surveyed.⁴⁷ The purpose of the survey was to get an understanding of the new ways of thinking about work and lifestyle expectations of professionals and organisations after being forced to work from home.⁴⁸ In the survey, it was seen that 11% of the respondents said they relocated since the pandemic started; 53% said they were planning a move to relocate; 12% said they were going to relocate within the next 12 months; and 41% said they were

⁴³ 38 of 2005 (herein after the Act or the Children's Act).

⁴⁴ Wesahl Domingo, "'For the sake of the children": South African Family Relocation Disputes' (2011) 14 PER 148, 149.

⁴⁵ Yildiz M Béréños, 'Time to Move on? The international State of Affairs with Respect to Child Relocation Law' (2012) 8 Utrecht Law Review 1, 1.

⁴⁶ 'More South Africans are semigrating right now – here's where they are moving to' (Business Tech, 14 May 2022) <https://businesstech.co.za/news/property/582576/more-south-africans-are-semigrating-right-now-heres-where-they-are-moving-to/> accessed 9 November 2022.

⁴⁷ Michael Page, 'One Year Post-Covid, how do Job Applicants in Africa feel about Remote Working and Relocation' (Michael Page) <https://www.michaelpageafrica.com/advice/in-sights/latest-insights/one-year-post-covid-how-do-job-applicants-africa-feel-about-remote> accessed 6 November 2022.

⁴⁸ Michael Page, 'One Year Post-Covid, how do Job Applicants in Africa feel about Remote Working and Relocation'.

thinking of moving sometime in the future.⁴⁹ As seen above, relocation within South Africa is on the rise.

In South Africa, relocation is governed by the Children's Act, and the key consideration in any relocation dispute is the child's best interests. Relocation cases are said to be the most difficult and challenging types of situations that judges, attorneys, and mediators have to deal with.⁵⁰ According to Stahl,⁵¹ the biggest challenge with relocation cases is its 'potential impact on children and families'. South Africa currently does not have legislation or a section in the Children's Act that specifically deals with child relocation, nor does it specifically define what a relocation is especially where minor children are involved.⁵² As seen above, there is an increase in relocating locally within the borders of South Africa. Co-parents need clear guidelines in the Children's Act regarding relocation with children.

2.2 BRIEF HISTORICAL BACKGROUND OF CHILD RELOCATION

The different approaches adopted by our courts in child relocation dispute cases are discussed below.

2.2.1 Pro-relocation approach

Before the standard of the 'best interest's principle', our courts preferred the pro-relocation approach (traditional custody approach).⁵³ In a pro-relocation approach courts viewed the wishes and rights of the primary caregiver as the most important consideration in a relocation dispute.⁵⁴ A decision by the primary caregiver was favoured, unless the non-primary caregiver could prove that the relocation would be detrimental to the child.⁵⁵ Finally, in *Shawzin v Laufer*,⁵⁶ the court rejected the pro-relocation approach and instead moved towards giving effect to 'the predominant interests of the child'. It is interesting to note that the best interests principle was

⁴⁹ Michael Page, 'One Year Post-Covid, how do Job Applicants in Africa feel about Remote Working and Relocation'.

⁵⁰ Philip M Stahl, 'Critical issues in relocation cases: A custody evaluators response to Parkinson and Cashmore (2015) and Thompson (2015)' (2016) 54 Family Court Review 632, 632.

⁵¹ Stahl, 'Critical issues in relocation cases: A custody evaluators response to Parkinson and Cashmore (2015) and Thompson (2015)' 632.

⁵² Domingo, "For the sake of the children": South African Family Relocation Disputes' 149.

⁵³ *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 439G-H.

⁵⁴ Latiefa Albertus, 'Relocation Disputes: Has the long and winding road come to an end? A South African Perspective' (2009) 23 *Speculum Juris* 70, 71.

⁵⁵ Domingo, "For the sake of the children": South African Family Relocation Disputes' 153.

⁵⁶ 1968 4 SA 657 (A) at 662H-663A.

gradually applied in South Africa in the 1940s before the promulgation of the Constitution of the Republic of South Africa, 1996⁵⁷ and the Children's Act and that Section 28(2) of the Constitution ensured that the best interests principle is now applied in all aspects relating to law that affects children compared to its limited applicability in the 1940s.⁵⁸

Scott JA created a precedent in *Jackson v Jackson*⁵⁹ by stating that in relocation disputes: 'the interests of the children are the first and paramount consideration' and that 'a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable.'⁶⁰ He further stated that each case regarding relocation should be decided on its own merits and that past decisions only provide useful guidelines.⁶¹ Therefore, the approach shifted to the 'best interests of the child' being of first and paramount consideration in relocation cases.⁶²

2.2.2 Neutral approach

Today, South African courts prefer the neutral approach compared to the pro-relocation approach where each case is decided on its own merits and there is no presumption for or against the relocation but the proposed move is evaluated in terms of the child's welfare and interests.⁶³ In *Cunningham v Pretorius*⁶⁴ it was stated that courts should try to be fair when looking at the facts of each case and that the facts must be equally balanced and considered in the best interests of the child.

In the past, there were no legislative guidelines regarding local child relocation as can be seen by section 1(2)(c) of the now repealed Guardianship Act⁶⁵ which provided for international relocation in that a custodian parent may not remove a child in his or her custody from South Africa without the consent of the other parent, in the absence of a

⁵⁷ Constitution of the Republic of South Africa, 1996 (herein after the Constitution).

⁵⁸ Ann Skelton, 'Children' in Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th edn, Juta 2016) 619.

⁵⁹ *Jackson v Jackson* 2002 (2) SA 303 (SCA).

⁶⁰ 2002 (2) SA 303 (SCA) [60].

⁶¹ *Jackson v Jackson* 2002 (2) SA 303 (SCA).

⁶² 2002 (2) SA 303 (SCA) [2]; 2001 (3) SA 623 (C) at 627H-628G. *Rooyen* 1994 (4) SA 435 (C) at 439G-H;

⁶³ Domingo, "For the sake of the children": South African Family Relocation Disputes' 156-157.

⁶⁴ (31187/08) [2008] ZAGPHC 258 [5] (21 August 2008)(Unreported case).

⁶⁵ Guardianship Act 192 of 1993 (herein after the Guardianship Act).

court order.’ The children’s Act still does not have legislative guidelines for local child relocation.

2.3 CURRENT LEGISLATIVE FRAMEWORK REGARDING CHILD RELOCATION IN SOUTH AFRICA

2.3.1 *International Child Relocation*

The Children’s Act provides clear guidelines for the relocation of a co-parent with his/her minor child outside the borders of South Africa. Section 18(3)(C)(iii) of the Children’s Act states that subject to subsections (4) and (5) a parent or other person who acts as the guardian of the child must give or refuse any consent required by law in respect of the child which includes the consent to the child’s departure or removal from the Republic of South Africa.⁶⁶

Section 45(3) of the Children’s Act states that High Courts and Divorce Courts have exclusive jurisdiction over the following matters contemplated in this Act:

- (a) the guardianship of a child;
- (b) the assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child;
- (c) artificial fertilisation;
- (d) the departure, removal or abduction of a child from the Republic;
- (e) application requiring the return of a child to the Republic from abroad;
- (f) the age of majority or the contractual or legal capacity of a child;
- (g) the safeguarding of a child’s interest in property;
- (h) surrogate motherhood.

Section 45(4) of the Children’s Act states that ‘Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children.’ According to section 22(7) of the Children’s Act ‘only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child’ Section 24(1) of the Children’s Act provides that any person who has an interest in the child’s well-being and care may apply to the High Court for an order granting guardianship of the child to the applicant.⁶⁷ The court will take into account the child’s best interests, the relationship between the applicant and the child and any other fact that is necessary to take into account.⁶⁸

⁶⁶ Skelton A and Hansungule Z, ‘Parental responsibilities and rights’ in Van Heerden B *and others*, *Family Law in South Africa* (2nd edn, Oxford University Press 2021) 303.

⁶⁷ Section 24(1) of the Children’s Act 38 of 2005.

⁶⁸ Section 24(2) of the Children’s Act 38 of 2005.

A child relocation dispute occurs when the non-relocating parent refuses to give the required consent for the relocating parent to relocate with the minor child.⁶⁹ In the past, only High Courts had exclusive jurisdiction to deal with any matter relating to a child but today, Family Courts and Children's Courts can also be approached. Section 45(3)(d) of the Act states that pending the establishment of family courts by an Act of parliament, the High Courts and Divorce courts have exclusive jurisdiction over 'the departure, removal or abduction of a child from the Republic'. Although High Courts are regarded as the upper guardian of all children within South Africa, magistrates Courts (also known as Children's Courts) may now also be approached in any matter relating to the child. The Regional Courts Amendment Act 31 of 2008 came into effect in 2010 and parties can now institute proceedings in Regional Courts, which act as Family Courts.

In a child relocation dispute, courts will make a decision based on what is in the best interests of the child and will generally only permit relocation if it decides that the plan of the relocating parent is reasonable.⁷⁰ In the case *Ford v Ford*⁷¹ a mother wanted to relocate from South Africa to the United Kingdom (hereinafter the UK) with their minor child but the father applied for a variation of the custody order if the mother relocated to the UK. Weiner AJ dismissed the application, on grounds that although such a move would provide the child with a good standard of living, education and new lifestyle, it would not be in the best interests of the child because such a move would be prejudicial to the child's emotional and psychological well-being as it would disrupt the child's emotional bond to the father. The mother appealed the case, but her appeal was not successful. Therefore, the court did not allow the child to relocate as it was not in the best interests of the child to do so.

2.3.2 Local Child Relocation

This study focuses on local child relocation 'within' the borders of South Africa. For relocation within the borders of South Africa, the situation is less well defined in the Children's Act. There is a disparity between local and international relocation in the

⁶⁹ Skelton and Hansungule, 'Parental responsibilities and rights' 303.

⁷⁰ Skelton and Hansungule, 'Parental responsibilities and rights' 303.

⁷¹ [2004] 2 All SA 396 (W).

Act. The Act does not provide clear guidelines or consent provisions for the local relocation of a co-parent with his/ her minor child within South Africa.⁷²

In terms of parental responsibilities and rights, section 18(3)(c)(iii) of the Children's Act states that subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must give or refuse consent required by law in respect of the child including consent to the child's departure or removal from the Republic. Section 18(4) of the Act states that 'whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship. Section 18(5) of the Act states that 'unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection 3(c). Section 18(3)(c)(iii) of the Children's Act only applies to the departure or removal of a child from the Republic.

In *LW v DB*⁷³ the court stated that relocation of parents whether outside or within South Africa is a continuing fragmentation of the original family unit and consists of the same distress.⁷⁴ The facts of the case are the following: the mother wanted to relocate from Gauteng to Cape Town with her child and sought an order to that effect. This case is important because it involved relocation within the borders of South Africa and both parents had joint care and contact of the child.⁷⁵ The court stated that the following are applicable in terms of relocation with children:⁷⁶ the interests of children are the first and of paramount importance; each case must be decided on its own facts; both parents have joint responsibility in raising children; where a parent with residence of the child wishes to relocate, the court will not lightly refuse leave for the child to be taken out of the country if the decision of the relocating parent is found to be *bona fide*; courts remain sensitive to the interests of the left-behind parent.⁷⁷ The court found that the proposed relocation with the child is *bona fide* and reasonable and the order was

⁷² Domingo, "For the sake of the children": South African Family Relocation Disputes' 162.

⁷³ 2015 JR 2617 (GJ) [13].

⁷⁴ 2015 JR 2617 (GJ) [16].

⁷⁵ 2015 JR 2617 (GJ) [16].

⁷⁶ 2015 JR 2617 (GJ) [17].

⁷⁷ 2015 JR 2617 (GJ).

granted.⁷⁸ A key point in this case is that relocation of parents, whether outside or within South Africa, is a continuing fragmentation of the original family unit and consists of the same distress.⁷⁹ Relocation with children, whether locally or internationally, should be handled in the same way by legislation.

Section 31 of the Children's Act states that a co-holder of parental responsibilities and rights must consult and give due consideration to the views and wishes of the other co-holders of parental responsibilities and rights as well as the child when making decisions that are likely to have a significant or adverse effect on the co-holders exercise of parental responsibilities and rights in respect of the child. In *Joubert v Joubert*,⁸⁰ Erasmus J held that a failure to consider the views of the other parent and failure to inform the other parent of the relocation did not mean the decision by the primary caregiver to relocate is void or invalid but rather subject to review.

2.4 VARIOUS COMPETING INTERESTS IN RELOCATION

The problem with the competing interests in relocation cases is that there is no perfect formula available to balance the intricate competing rights and interests involved. The competing interests of the child, the relocating parent and non-relocating parent is like a three-legged chair. If one leg is taken away, the chair will fall over. Courts do not have a set formula to follow when balancing the various competing interests in relocation with a minor child as seen in the following case of *S v Daniel Makibi*⁸¹ where various court judgments were analysed on whether any relocation is really in the best interests of the minor child. It was found that the move was in fact not necessarily in the best interests of the child, but that the life of the one parent had to continue because a parent also has the right to freedom of movement.⁸² In relocation cases, different competing interests of the parties and the child should be taken into account and balanced by courts. In *K v K*⁸³ it was stated that the central consideration should be that the best interests of the child are of paramount importance in matters such as relocation but that the views and interests of the custodial parent seeking relocation must also be given due weight and this includes the views of the children who are of

⁷⁸ 2015 JR 2617 (GJ) [101].

⁷⁹ 2015 JR 2617 (GJ) [16].

⁸⁰ 2008 JOL 219229 (C) (unreported to date) [35].

⁸¹ (3451/2021) [2022] ZAFSHC 77 (18 March 2022) [52].

⁸² (3451/2021) [2022] ZAFSHC 77 (18 March 2022) [52].

⁸³ (A186/2021) [2021] ZAWCHC [29].

sufficient maturity. The voice of the child should be taken into consideration if the child has the necessary intellectual and emotional maturity to give his or her expression.⁸⁴ In *Mabule v Mabo*⁸⁵ it was stated that the child's best interest in the matter is important but that it is 'just fair that the minor's expressed view be obtained.'

2.4.1 The rights of the child

2.4.1.1 Best interests principle

The primary piece of legislation concerning children is the Children's Act. It is trite that the golden rule is section 9 of the Children's Act.⁸⁶ Section 9 of the Children's Act states that: 'in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance must be applied'.⁸⁷

In *Girdwood v Girdwood*⁸⁸ it was stated that:

The court, as upper guardian of all dependent and minor children, has an alienable right and authority to establish what is in the best interests of children, and to make corresponding orders to ensure that such interests are effectively served and safeguarded and that no agreement between the parties can encroach on this authority.

The use of the word 'paramount' is important to take note of because it suggests that the child's best interests will always trump all other competing rights.⁸⁹ Stahl⁹⁰ agrees with Parkinson and Cashmore (2015) and Thompson (2015) regarding children not being placed in the middle of conflict between parents. According to Stahl⁹¹ whatever the outcome of a relocation decision, it should be about the child and the child's best interests even though there are two fundamental rights of parents that conflict, identified by the Supreme Court in the United States, which are 'the right to live wherever one wants and the right to parent one's children'.

⁸⁴ 1994 3 SA 201 (C) at 207H.

⁸⁵ (614/2021) [2021] ZAFSHC 194.

⁸⁶ Boezaart, 'The Position of Minor and Dependent Children', 171.

⁸⁷ Boezaart, 'The Position of Minor and Dependent Children', 171.

⁸⁸ 1995 (4) SA 698 (C) at 708 - 709A.

⁸⁹ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 86.

⁹⁰ Stahl, 'Critical issues in relocation cases: A custody evaluators response to Parkinson and Cashmore (2015) and Thompson (2015)' 633.

⁹¹ Stahl, 'Critical issues in relocation cases: A custody evaluators response to Parkinson and Cashmore (2015) and Thompson (2015)' 633.

2.4.1.2 Arguments against the best interest of the child principle

It has been said that the best interest of the child will always trump other rights; but according to case law, the child's best interests do not always outweigh other competing rights.⁹² The court in *B v M*⁹³ stated that:

[t]he legislature did not intend the “best interests” of the child to be the sole or exclusive aspect to be considered because it did not prescribe that the child’s “best interests” are the only factor to be considered or the sole determinant of the exercise of the court’s discretion.

Skelton⁹⁴ has argued that although the words ‘paramount importance’ is used ‘it does not serve as a trump to automatically override other rights, and as a right in a non-hierarchical system of rights, is itself capable of being limited’. The best interests principle has been described as being ‘vague or indeterminate’⁹⁵. In *S v M*⁹⁶ Sachs J stated that the best interests principle is not an ‘overbearing and unrealistic trump’ and that it cannot be interpreted to mean that the ‘direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations’. In *S v M*⁹⁷ the “best interests” principle was described as ‘inherently indeterminate, providing little guidance to those given the task of applying it’. Similarly in *Centre for Child Law v Minister of Justice and Constitutional Development*⁹⁸ Cameron J stated that the word paramountcy means that ‘the child’s interests are “more important than anything else”, but not that everything else is unimportant’.

2.4.1.3 International and regional treaties regarding the best interests principle

International and regional treaties have influenced the relationship between parents and children. Section 39(1) of the Constitution states that when interpreting rights, the court must consider international law and may consider foreign law. For more than a century, the best interest of the child principle concept has been part of South African law.⁹⁹ The United Nations Convention on the Rights of the Child, 1989¹⁰⁰ states that

⁹² Brigitte Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ (2017) 134 SALJ 80, 86.

⁹³ 2006 (3) SA 109 (W) [146].

⁹⁴ Skelton, ‘Children’, 619.

⁹⁵ Boezaart, ‘The Position of Minor and Dependent Children’, 175.

⁹⁶ 2008 (3) SA 232 (CC) [25].

⁹⁷ 2008 (3) SA 232 (CC) [23].

⁹⁸ 2009 (6) SA 632 (CC) [29].

⁹⁹ Skelton and Hansungule, ‘Parental responsibilities and rights’ 281.

¹⁰⁰ Art 3(1) United Nations Convention on the Rights of the Child, 1989.

the best interests of the child must be a primary consideration in all actions that concern the child.¹⁰¹ The best interest's principle is also found in article 16(1) of the United Nations Convention on the Elimination of Discrimination against Women.¹⁰² South Africa ratified the Convention on the Rights of the Child in 1995 and then the African Charter on the Rights and Welfare of the Child in 2000.¹⁰³ The African Charter on the Rights and Welfare of the Child has termed the best interests of the child '*the*' primary consideration and not '*a*' primary consideration.¹⁰⁴ Countries that have signed and ratified the United Nations Convention on the Rights of the Child must ensure that children's voices are heard.¹⁰⁵

2.4.1.4 Views of the Child in relocation

Prior to the Children's Act many South African courts did not place a lot of weight on the wishes and feelings of children.¹⁰⁶ In appropriate cases, courts should have regard to the views of the child regarding the proposed relocation especially if the child is of sufficient age.¹⁰⁷ Section 10 of the Children's Act states that the court must give due consideration to the views expressed by the minor child if they were of an age, maturity and stage of development to be able to meaningfully participate in the proceedings. Section 6(5) of the Children's Act states that:

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 the child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

The problem with the views and voice of the child in relocation cases is that many children are not yet able to conceive what the reality would be like to live in a different

¹⁰¹ Charlotte Mol and Thalia Kruger 'International child abduction and the best interest of the child: an analysis of judicial reasoning in two jurisdictions' (2018) 14 *Journal of Private International Law* 422.

¹⁰² United Nations Convention on the Elimination of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 34/180 2 (CEDAW) art 16 (1).

¹⁰³ Ann Skelton, 'Children' in Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th edn, Juta 2016) 600.

¹⁰⁴ Boezaart, 'The Position of Minor and Dependent Children', 174.

¹⁰⁵ Stahl, 'Critical issues in relocation cases: A custody evaluators response to Parkinson and Cashmore (2015) and Thompson (2015)' 633.

¹⁰⁶ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 100.

¹⁰⁷ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 100.

location without direct contact to the other parent who they love especially when contact will be limited because of the distance involved.¹⁰⁸

Furthermore, in *F v F*¹⁰⁹ the court stated that when deciding whether a relocation is in the best interests of the child, the court has to consider and weigh the competing factors present, including the child's wishes in appropriate cases. As stated in paragraph 2.4 above, in *McCall v McCall*¹¹⁰ it was found that the child's opinion in the matter should be considered if the court is satisfied that the child is intellectually and emotionally mature enough. The "best interests of the child" is an important consideration in any matter involving the child, but the interests of the parents must also be considered especially if courts, as seen above, are now preferring to follow a neutral approach when considering relocation.

2.4.1.5 Factors applicable in relocation cases

Section 7 of the Children's Act contains factors which courts should apply in child relocation cases. The issue is that the way a court interprets the factors set out in section 7 of the Children's Act, will directly impact whether a child will relocate or not or whether the non-relocating parent will have adequate contact with his/her child. Section 7(1) of the Children's Act states that whenever a provision in the Children's Act requires the best interests of the child standard to be applied, then specific factors have to be taken into consideration, and these factors include: the likely effect that a change in the child's circumstances such as separation from both parents; the practical difficulty and expense of the child having contact with his parent and what effect that difficulty will have on the child to maintain personal relations and direct contact with that specific parent on a regular basis. In *McCall v McCall*¹¹¹ it was stated that a court should consider 'any other factor which is relevant to the particular case with which the court is concerned.' The discretion of the courts to determine what is in the best interests of the child is unique and cannot just be determined in the narrow or strict sense of the word. ¹¹² Ferreira¹¹³ explained that it is not an easy task to establish

¹⁰⁸ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 100.

¹⁰⁹ 2006 (3) SA 42 (SCA) [10].

¹¹⁰ *McCall v McCall* 1994 (3) SA 201 (C) at 207H.

¹¹¹ 1994 3 SA 201 (C) 204J-205F.

¹¹² *Bezuidenhout v Bezuidenhout* 2005 (2) 187 (SCA) [17].

¹¹³ Sandra Ferreira 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' 2010 (73) THRHR 9.

what is in the best interests of the child and it is unfortunate that section 7 of the Children's Act, which lists the section 7 factors of what is in the best interests of the child, is not an open-ended list. In *M v M*¹¹⁴ it was stated that if a factor was not addressed in the relevant judgment, it should not mean that such a factor was not considered.

2.4.2 The rights of the parents

Parents can never be stopped from moving because they have the right to freedom of movement as entrenched in the Constitution, it is only a child's residence that can be subjected to court order.¹¹⁵ The right to freedom of movement is guaranteed in section 21 of the Constitution of the Republic of South Africa, 1996¹¹⁶ which states that:

'(1) Everyone has the right to freedom of movement;

(2) Everyone has the right to leave the Republic.'

Before the enactment of the Children's Act, parents were vested with parental authority which consisted of three rights: 'guardianship, custody and access'.¹¹⁷ Section 1(2) of the Children's Act states that in any law, and the common law, the terms 'custody' and 'access' must be construed to also mean 'care' and 'contact' as defined in this Act.

Both parents have the responsibility and right to provide the child with love, a safe home, food, education, promote the child's well-being, maintain a relationship with the child and attend to the best interests of the child.¹¹⁸ In *V v V*¹¹⁹ Foxcroft J stated that:

The old position where the custody of young children was invariably granted to mothers has changed. As far as young children are concerned, the pendulum has swung to accommodate the possibility of a father being a suitable custodian parent to young children. The evidence in this case amply demonstrates that plaintiff was a highly suitable father ...'.

¹¹⁴ (15986)/2015) [2018] ZAGPJHC 4 (22 January 2018) [40].

¹¹⁵ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 43.

¹¹⁶ Constitution of the Republic of South Africa, 1996 (Herein after the Constitution).

¹¹⁷ Ann Skelton and Zita Hansungule, 'Parental responsibilities and rights' in B Van Heerden *and others*, *Family Law in South Africa* (2nd edn, Oxford University Press 2021) 280.

¹¹⁸ Domingo, "For the sake of the children": South African Family Relocation Disputes' 149.

¹¹⁹ 1998 (4) SA 169 (C) 176F-G.

The Constitutionally entrenched right to freedom of movement for the primary caregiver (relocating parent) is an important fundamental right and can have an impact on the right of the child and those of the non-primary caregiver (non-relocating parent).¹²⁰ Therefore, after divorce, the decision by one parent (relocating parent) to relocate after separation or divorce with the child to a different city, town, province or even country, can complicate the already complicated life of all involved in the new family dynamic, especially the parent being left behind (non-relocating parent).¹²¹ The non-relocating parent is the parent that will be deprived of easy and regular contact and access to their child because of the relocating parents decision to relocate with the child.¹²² In *B v M*¹²³ the court stated that parents should have the freedom to live their own lives after divorce and should not have to lose their right to freedom of movement. When trying to balance the issue of where the child will live during relocation disputes, the right of the parent wishing to move should be given due weight.¹²⁴ The interests of the parent wishing to maintain contact and a relationship with his or her child should be seriously considered, especially if the relationship between the child and the non-relocating parent is established.¹²⁵

The court in *Maryke Cunningham (born Ferreira) v Daniel Johannes Jacobus Pretorius*¹²⁶ Murphy J stated the following regarding loss of contact of the non-custodian parent:

Perhaps the most vexing of the issues in balancing relevant factors is the practical difficulty and expense involved in B having contact with the respondent if he relocates and the substantial impact it is likely to have on B's right to maintain a meaningful personal relationship with his biological father – Section 7(1)(e). In the modern world, marked by globalisation and increased mobility, when marriages break up, one parent's interests invariably will have to yield to those of the other. When the balance of factors (in this case the age of the child, the 29 bond, the favourable environment and opportunities available at the place of relocation and the custodian parent capacity) all favour the custodian parent, the best the court can do is to ensure that meaningful contact and access continues with the non-

¹²⁰ Rollie Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 40, 40.

¹²¹ Domingo, "For the sake of the children": South African Family Relocation Disputes' 148.

¹²² Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 42.

¹²³ 2006 (3) SA 109 (W) [162].

¹²⁴ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 104.

¹²⁵ Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' 104.

¹²⁶ (unreported GNP Case No. 31187/08)

custodian parent albeit in a less satisfactory manner and will not be thwarted by the non-custodian parent.

Therefore, relocation whether locally or internationally, is a decision that will affect the child and the parents. It is a decision that is not easily balanced by our courts because of the different competing interests and rights involved. International relocation should not only be seen as a relocation that will affect the different competing interests, as stated above, because local relocation affects the same interests and rights.

2.5 VARIOUS COURT JUDGMENTS REGARDING LOCAL CHILD RELOCATION WITHIN SOUTH AFRICA

In the absence of guidelines on relocation within South Africa, court judgments remain an important source of guidance for child relocation disputes.¹²⁷ A child relocation dispute occurs in a relocation case when one parent wants to relocate with the child and the other parent rejects the idea.¹²⁸ Relocation cases generally get decided on a case-by-case basis and as yet there is no set formula for courts to follow. Sachs J in *S v M*¹²⁹ stated that to apply a pre-determined formula in child relocation cases for the sake of certainty would be contrary to the best interests of the child.

2.5.1.1 ADB v BAK¹³⁰

The recent case of *ADB v BAK*¹³¹ was an urgent matter decided in January 2023. The applicant (primary care-giver of the minor child) wanted to relocate with the child from Durban to Cape Town as she had been offered a more lucrative job by the company that currently employs her.¹³² The applicant and respondent are separated and they never married.¹³³ The parties underwent mediation and entered into a Parenting Plan after separating in order to regulate their responsibilities and how the minor child would be raised.¹³⁴ The Parenting Plan had a non-relocation clause which stipulated that neither party would be allowed to relocate outside the borders of Kwa-Zulu-Natal and/or South Africa without the other parties written consent and that the consent

¹²⁷ South African Law Reform Commission, Discussion Paper 155 (Project 100D) *Relocation of Families with Reference to Minor children* (SALC 2022) para 4.1.

¹²⁸ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 48.

¹²⁹ (Centre for Child Law as Amicus Curiae) [2007] ZACC 18 [16].

¹³⁰ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023).

¹³¹ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023).

¹³² (15944/22P) [2023] ZAKZPHC 1 (9 January 2023).

¹³³ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [1].

¹³⁴ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [1].

would not be unreasonably withheld or delayed.¹³⁵ The problem with the current case is the level of urgency involved because the applicants' employer attached a deadline that she had to commit to, therefore the Family Advocate did not have enough time to investigate the matter properly and consequently, a report was not prepared for court.¹³⁶ The Applicant argued that she was not informed that she in fact did not require the respondents consent to relocate within the borders of South Africa.¹³⁷ The parenting plan is a roadmap for the parents in terms of the upbringing of their child and it provides them with certainty.¹³⁸ In this particular case, the parenting plan was not intended to be immutable and could be revisited from time to time.¹³⁹ The non-relocation clause did not apply to the minor child, instead it applied to the applicant and respondent.¹⁴⁰ This means that the parenting plan does not provide that the minor child should remain in the province.¹⁴¹ The judge found that the respondent held the view that the bond between the minor child and his immediate family (minor child's half sibling) should be maintained at the expense of the applicants relationship to the child as a primary care-giving mother.¹⁴² The respondent is not motivated by what is in the best interests of the minor child, but rather what is in his best interests.¹⁴³ The respondent does not seem to foresee the potential anxiety and distress the minor child could endure if separated from the mother.¹⁴⁴ The judge found that the respondent holds the view that the applicants career is an irrelevancy and that the applicants rights are subservient to his rights.¹⁴⁵ Due to the urgency of the matter, the Family Advocate did not have the necessary time to investigate the matter and prepare a report.¹⁴⁶ Therefore, the legal representatives instructed a social worker to prepare a report instead.¹⁴⁷ The report highlighted the competing interests but did nothing to assist in resolving those issues.¹⁴⁸ The social worker recommended that the child should stay

¹³⁵ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [1].

¹³⁶ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [1].

¹³⁷ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [9].

¹³⁸ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [14].

¹³⁹ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [14].

¹⁴⁰ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [16].

¹⁴¹ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [16].

¹⁴² (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [23].

¹⁴³ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [25].

¹⁴⁴ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [25].

¹⁴⁵ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [25].

¹⁴⁶ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [29].

¹⁴⁷ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [29].

¹⁴⁸ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [29].

with the applicant. In this case Mossop J found that the relocation of the applicant to Cape Town is reasonable and that it is in the best interests of the child that she accompanies her mother to Cape Town.¹⁴⁹ Mossop J further ordered that the respondent be allowed to have contact and visitation with the child in Cape Town. The above case shows that currently in South Africa there is no consistent approach that courts and parents can follow when considering relocating from one province to another within South Africa. Some parents include a non-relocation clause in their parenting plan while others do not. The Children's Act needs clear guidelines in terms of local relocation within South Africa so that parents are aware of what is required of them where minor children are involved.

2.5.1.2 *G v G*¹⁵⁰

A neutral approach was followed in *G v G*,¹⁵¹ and it concerned a local relocation from Johannesburg to Cape Town. The mother (the custodian parent) wanted to relocate with the minor children to Cape Town where she would be near her family, but the father refused to provide consent. The application was urgent because the children would be starting school in Cape Town and she did not want to relocate without her children because that would affect their relationship.¹⁵² For the father to see his children, he would have to find a place to stay in Cape Town, pay for transport and ask for time off work.¹⁵³ The mother was dependent on the monthly maintenance of the father because she was unemployed.¹⁵⁴ The relocation of the mother and children to Cape Town would be a big financial burden on the father.¹⁵⁵ The court found that it would be in the best interests of the children, after considering all the factors, to refuse the application. The court also very fairly considered the interests of both the mother and father without favouring one over the other.

¹⁴⁹ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [33].

¹⁵⁰ (32377/12) [2015] ZAGP JHC [13].

¹⁵¹ (32377/12) [2015] ZAGP JHC [13].

¹⁵² (32377/12) [2015] ZAGP JHC [27].

¹⁵³ (32377/12) [2015] ZAGP JHC [30].

¹⁵⁴ (32377/12) [2015] ZAGP JHC [30].

¹⁵⁵ (32377/12) [2015] ZAGP JHC [30].

2.5.1.3 *LW v DB* ¹⁵⁶

The following case is important because it involves relocation within the borders of South Africa where both parents have joint care and contact in respect of the child.¹⁵⁷ The court stated that the problem with previously decided cases is that those decisions suited the specific circumstances of the case at the time.¹⁵⁸ The mother wanted to relocate from Gauteng to Cape Town with her child and sought an order to that effect.¹⁵⁹ Satchwell J stated that relocation of parents, whether outside or within South Africa, is a continuing fragmentation of the original family unit and consists of the same distress.¹⁶⁰ Satchwell J concluded that certain guidelines should guide a court hearing a relocation matter and stated that the following are applicable in terms of relocation with children:¹⁶¹

- (a) the best interests of the child 'are the first and paramount consideration';
- (b) each case must 'be decided on its own particular facts';
- (c) both parents have joint primary responsibility in raising the child and; where the parents are separated, the child has the right, and the parents a responsibility to ensure that contact is maintained;
- (d) where a custodial parent wishes to relocate, a court will not lightly refuse leave for the child to be taken out of a province 'if the decision of the custodial parent is shown to be *bona fide* and reasonable;¹⁶² and
- (e) the courts remain sensitive to the interests of the left-behind parent.¹⁶³

Satchwell J stated that courts in South Africa generally apply the same principles in both international and relocation cases.¹⁶⁴ Satchwell J¹⁶⁵ further observed the following:

When a custodial parent wishes to emigrate, a court will not likely refuse leave for the children to be taken out of the country if the decision of the custodial parent is shown to be *bona fide* and reasonable.

¹⁵⁶ 2015 JR 2617 (GJ) [13].
¹⁵⁷ 2015 JR 2617 (GJ) [16].
¹⁵⁸ 2015 JR 2617 (GJ) [17].
¹⁵⁹ 2015 JR 2617 (GJ) [13].
¹⁶⁰ 2015 JR 2617 (GJ) [16].
¹⁶¹ 2015 JR 2617 (GJ) [17].
¹⁶² 2015 JR 2617 (GJ) [101].
¹⁶³ 2015 JR 2617 (GJ).
¹⁶⁴ 2015 JR 2617 (GJ) [20].
¹⁶⁵ 2015 JR 2617 (GJ) [20].

In this specific case, the court applied the same principles as the above to determine whether the decision by the applicant to relocate to Cape Town from Vanderbijlpark was *bona fide* and reasonable.¹⁶⁶

2.5.1.4 *Hinds v Hinds*¹⁶⁷

In this case, it was stated that courts have to ensure that the non-relocating parent's position will not be made worse by the conduct of the relocating parent who might try to frustrate (deliberately or inadvertently) the non-relocating parent's right to contact or ease of contact with the child.¹⁶⁸ If relocation is permitted, then courts have to ascertain that everything is done to ensure that regular contact is maintained between the non-relocating parent and the child.¹⁶⁹

2.5.1.5 *Mabule v Mabo*¹⁷⁰

The parties were granted a decree of divorce on 5 January 2017 in which a deed of settlement was incorporated regarding contact rights of the Applicant.¹⁷¹ After the decree of divorce was granted, the Respondent left Bloemfontein and relocated to Pretoria.¹⁷² Prior to the relocation, the parties had a verbal agreement that the minor child will be dropped off on a Friday and collected at a Shell garage in Kroonstad.¹⁷³ The Respondent could not drop the child off on 22 August 2019 due to the child's health.¹⁷⁴ Then on 11 October 2019, the child could not be taken to Kroonstad due to a school concert.¹⁷⁵ Thereafter the Covid-19 pandemic hit the country and alert level 5 lockdown was issued on 26 March 2020 restricting the movement of all people.¹⁷⁶ The Applicant argued the following: that the Respondent did not adhere to the existing court order and verbal agreement; his contact rights were frustrated; the Respondent's conduct was willful and *mala fide* and in contempt of court.¹⁷⁷ The Respondent argued that on several occasions she offered the Applicant to drive to Bloemfontein to collect

¹⁶⁶ 2015 JR 2617 (GJ) [23].

¹⁶⁷ [2016] ZAKZPHC 92 [72].

¹⁶⁸ [2016] ZAKZPHC 92 [72].

¹⁶⁹ [2016] ZAKZPHC 92 [72].

¹⁷⁰ (614/2021) [2021] ZAFSHC 194.

¹⁷¹ (614/2021) [2021] ZAFSHC 194 [4].

¹⁷² (614/2021) [2021] ZAFSHC 194 [5].

¹⁷³ (614/2021) [2021] ZAFSHC 194 [5].

¹⁷⁴ (614/2021) [2021] ZAFSHC 194 [5].

¹⁷⁵ (614/2021) [2021] ZAFSHC 194 [6].

¹⁷⁶ (614/2021) [2021] ZAFSHC 194 [6].

¹⁷⁷ (614/2021) [2021] ZAFSHC 194 [7].

the minor child.¹⁷⁸Contempt of court is a criminal offence and the standard of proof is that of beyond reasonable doubt.¹⁷⁹ The court found that the Applicant has not shown beyond reasonable doubt that the Respondent is in contempt of court.¹⁸⁰The court found that the Respondent cannot be faulted for the parties' verbal agreement about the Kroonstad arrangement.¹⁸¹ The application for contempt of court was dismissed.¹⁸² The court did not have a report from the Family Advocate, therefore the matter was urgently referred to the Office of the family Advocate to investigate the minor child's best interests including the child's expressed views.¹⁸³

2.5.1.6 *Joubert v Joubert*¹⁸⁴

The court held that a primary caregiver generally has the right to have the child with him/her.

2.5.1.7 *F v F*¹⁸⁵

The court stated that courts should guard against 'too ready an assumption that the [custodian's] proposals are necessarily compatible with the child's welfare'.¹⁸⁶ Maya AJA considered the competing interests of the custodian parents right to his or her own life and career which are fundamental rights to privacy, dignity and freedom of movement and that if these rights are restricted by courts then it would have a severe impact on the welfare of any children involved.¹⁸⁷ The court stated that the custodian parent's emotional and psychological well-being are key to the child being raised in a happy and secure environment.¹⁸⁸ An order of court which does not allow relocation can create negative feelings for the custodian parent and this will not create a good environment for the child to be in.¹⁸⁹ Maya AJA stated that the court has to: carefully scrutinise the custodian parents decision to relocate; the best interests of the child to move; and the extent to which the custodial parent has properly thought through,

¹⁷⁸ (614/2021) [2021] ZAFSHC 194 [8].

¹⁷⁹ (614/2021) [2021] ZAFSHC 194 [14].

¹⁸⁰ (614/2021) [2021] ZAFSHC 194 [14].

¹⁸¹ (614/2021) [2021] ZAFSHC 194 [14].

¹⁸² (614/2021) [2021] ZAFSHC 194 [24].

¹⁸³ (614/2021) [2021] ZAFSHC 194 [24].

¹⁸⁴ 2008 JOL 219229 (C) (unreported to date).

¹⁸⁵ 2006 (3) SA 42 (SCA) [11].

¹⁸⁶ 2006 (3) SA 42 (SCA) [31].

¹⁸⁷ 2006 (3) SA 42 (SCA) [11].

¹⁸⁸ 2006 (3) SA 42 (SCA) [11].

¹⁸⁹ 2006 (3) SA 42 (SCA) [11].

planned and weighed the potential advantages and disadvantages of the proposed move.¹⁹⁰ Therefore, this research will advocate that parties must be required to provide evidence of thorough and proper planning of the proposed relocation and this requirement should be provided for in legislation.

*2.5.1.8 Cunningham v Pretorius*¹⁹¹

The court stated that, although it is guided by the principle of the child's best interests, it must still carefully weigh and balance the reasonableness of the primary caregiver's decision to relocate and weigh the advantages and disadvantages of relocation and how relocation will affect the child's relationship with the non-primary caregiver.

*2.5.1.9 DJB v DJB*¹⁹²

The respondent wanted to relocate from Cape Town to Pretoria with the minor children. After the parties divorced in 2011, the children lived with the applicant in Worcester and attended Afrikaans medium public schools. The respondent informed the Applicant that he did not consent to the children's relocation to Centurion and the schools that they were to be enrolled in. Mr Schneider was appointed mediator, but mediation was suspended pending an assessment by a clinical psychologist. The applicant then requested the Respondent's cooperation and that an urgent assessment be done by Dr Martalas, a clinical psychologist, who was appointed to determine what was in the best interests of the children.¹⁹³ The Respondent did not co-operate and the Applicant brought an urgent court application seeking relief in two parts: Part A, that Dr Martalas investigate the care and contact arrangements, the children's relocation and recommend schools for the children to attend in 2021. Part B, that leave be granted for the Applicant to relocate with the children to Centurion and that the issue of the Applicant being liable to pay for one economy return ticket per child per month so that the children can visit the Respondent in Cape Town be varied in accordance with Dr Martalas' recommendation.¹⁹⁴ The relocation report given by Dr Martalas recommended that the children should be allowed to relocate with the applicant to Centurion and attend dual medium private schools. The court stated that

¹⁹⁰ 2006 (3) SA 42 (SCA) [31].

¹⁹¹ (31187/08) [2008] ZAGPHC 258 (21 August 2008)(Unreported case).

¹⁹² (13973/2020) [2021] ZAWCHC 27.

¹⁹³ (13973/2020) [2021] ZAWCHC 27 [4].

¹⁹⁴ (13973/2020) [2021] ZAWCHC 27 [44].

the Applicant cannot be blamed for marrying during these proceedings and for deciding to relocate because she is entitled to continue with her life.¹⁹⁵ The court reminded the parties that their interests should not be put before the best interests of their children.¹⁹⁶ The court stated that in respect of both parties 'neither have impressed in respect to their approach to this matter, despite the valiant efforts by their legal representatives.'¹⁹⁷ As seen above the best interests of the child is the primary consideration in relocation matters where children are involved however there are various factors courts need to consider first and there will be a reliance on expert opinion. The court has to find a way to balance the motivation of the relocating parent, economic considerations, the views of the child and the impact that the moving away of the child will have on the non-relocating parent. The various competing interests will have to be carefully considered before relocation locally can be permitted. The issue is that relocation disputes are complicated and can end up being protracted.

2.5.1.10 *CG v NG*¹⁹⁸

Courts often do not allow relocation if it is recommended that it will not be in the best interests of the child as seen in the case of *CG v NG*¹⁹⁹ where the Applicant sought an order to allow her to relocate from Johannesburg to Cape Town with the minor children. The matter was then referred to the Office of the Family Advocate who prepared a report on the primary residency of the children. The court stated that each case must be assessed on its own merits. The two questions that arose were firstly whether the proposed relocation was in the best interests of the minor children and secondly, whether the Applicant's intended move is bona fide and reasonable. The Respondent alleged that: it would not be possible for him to travel to Cape Town on a regular basis to see his children because of costs; his income would be affected if he took time off work to see his children; the Applicant was unemployed and depended solely on the monthly maintenance he paid. The Family Advocate stated that moving the children to Cape Town would disrupt the increased contact with their father, their routine and cause unnecessary shock in their lives. The application was dismissed.

¹⁹⁵ (13973/2020) [2021] ZAWCHC 27 [44].

¹⁹⁶ (13973/2020) [2021] ZAWCHC 27 [45].

¹⁹⁷ (13973/2020) [2021] ZAWCHC 27 [43].

¹⁹⁸ [2015] JOL 33246 (GJ).

¹⁹⁹ [2015] JOL 33246 (GJ).

2.5.1.11 *A v A*²⁰⁰

Various expert opinions were given to the court regarding what would be in the best interests of the child. The main issue was the contact arrangements of the Applicant. The court granted the application on the basis of the current Family Advocates recommendations. Custody was granted to the respondent (relocating parent) and reasonable access was granted to the applicant (non-relocating parent). The custody award was on the basis of a settlement agreement which the Judge made an order of court. The Applicant had agreed to the prejudicial contact conditions to end the acrimonious relationship between them during the course of the divorce proceedings.²⁰¹

2.5.1.12 *Jackson v Jackson*²⁰²

When determining the child's best interests the court has to consider the custodian parent's interests, the reasonableness of his or her decision to relocate, the practical and other considerations as well as whether the decision to relocate has been properly thought through and the advantages and disadvantages balanced.²⁰³ The court will not lightly refuse leave for a child to be taken out of the country if it is found that the decision by the custodian parent is shown to be *bona fide* and reasonable.²⁰⁴ Scott JA²⁰⁵ stated that 'it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken.' Scott JA²⁰⁶ further stated that:

Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and, while past decisions based on other facts may provide useful guidelines, they do no more than that. By the same token care should be taken not to elevate to rules of law the *dicta* of Judges made in the context of the peculiar facts and circumstances with which they were concerned.

²⁰⁰ (38371/05) [2008] ZAGPHC 235.

²⁰¹ (38371/05) [2008] ZAGPHC 235.

²⁰² 2002 (2) SA 303 (SCA) [2].

²⁰³ 2002 (2) SA 303 (SCA) [2].

²⁰⁴ 2002 (2) SA 303 (SCA) [2].

²⁰⁵ 2002 (2) SA 303 (SCA) [2].

²⁰⁶ 2002 (2) SA 303 (SCA) [2].

2.5.1.13 *Girdwood v Girdwood*²⁰⁷

In this case it was stated that the court has an alienable right and authority to establish what is in the best interests of the child.²⁰⁸ The court has to ensure that the best interests of the child are safeguarded.²⁰⁹ Any agreement between the parents may not encroach on the best interests of the child.²¹⁰

Different decided cases were discussed above and as can be seen, courts do not have a consistent approach to follow, especially when trying to balance the competing interests of the child and the custodial and non-custodial parents. Another issue is that proper planning of relocation does not take place and relocation cases generally end up being protracted.

2.6 ISSUES TO CONSIDER IN TERMS OF CHILD RELOCATION

2.6.1 *Definition of relocation*

The Children's Act currently does not define relocation. The Act should define relocation and the different types of relocation that are possible. For example, relocation can be permanent or temporary depending on circumstances, like a short-term contract of employment or studies.²¹¹

Relocation may also not be a final act because a parent might decide to come back or the non-relocating parent might decide to move closer to the child. Therefore, relocation of this nature has been termed 'an ongoing process of family post-separation transition(s)'.²¹² It has been said that a child should not relocate with a parent on an interim basis, for example a short term job contract, especially if the parent will go back to their previous location.²¹³ The children's Act should provide definitions of the different types of moves and decisions in terms of relocation.

²⁰⁷ 1995 (4) SA 698 (C) at 708J-709A.

²⁰⁸ 1995 (4) SA 698 (C) at 708J-709A.

²⁰⁹ 1995 (4) SA 698 (C) at 708J-709A.

²¹⁰ 1995 (4) SA 698 (C) at 708J-709A.

²¹¹ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 43.

²¹² Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 43.

²¹³ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 48.

2.6.2 Major decisions and notice of intention to relocate

In terms of major decisions involving a child, section 31(1)(a) states that before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development. Section 31(b) states that a decision referred to in paragraph (a) is any decision:

- (i) in connection with a matter listed in 18(3)(c);
- (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
- (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
- (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

Section 18(3)(c) of the Children's Act lists the following:

- (i) consent to the child's marriage;
- (ii) consent to the child's adoption;
- (iii) consent to the child's departure and removal from the republic;
- (iv) consent to the child's application for a passport; and
- (v) consent to the alienation or encumbrance of immovable property of the child

Section 18(4) of the Act states that 'whenever more than one person has guardianship of a child, each of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other, any right or responsibility arising from such guardianship. Section 18(5) of the Act states that 'unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (c)'.

Relocation can have a big effect on the non-relocating parent's right to exercise parental rights because it can affect the provisions of the parenting plan which can include the non-relocating parents care and contact arrangements. The issue with a

'major decision' in the Children's Act is that what one parent might assume to be an unimportant decision, another parent might see it as a major decision.²¹⁴ In *TSF v SCD*²¹⁵ an order interdicting the mother (the Respondent) from relocating to Cape Town was granted pending an investigation by the Family Advocate in January 2020.²¹⁶ The mother relocated to Cape Town in September 2020 as she was going to pursue a new job opportunity as an event organiser.²¹⁷ In this case the mother did not require the respondents consent to relocate locally to Cape Town, although she said that she did take his views into consideration.²¹⁸ According to the court, it is important that parties 'consult each other with regards to any major decision regarding the minor child as per Section 31 of the Children's Act 38 of 2005'.²¹⁹ Section 31(2)(a) of the Children's Act states that 'before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.' Section 31(2)(b) of the Children's Act further states that: 'A decision referred to in paragraph (a) 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.'

There are varying court decisions regarding section 31 of the Children's Act in terms of local relocation. This is confusing. Clear and strict guidelines are required in the Children's Act regarding consent provisions for local relocation. The confusion and varying decisions by judges can be seen in the following two cases: In *Joubert v Joubert*²²⁰ it was found that the respondent (the mother) was supposed to give due consideration to the views and wishes of the father before enrolling the child in another school. The reason is because the decision would likely have a significant adverse effect on the exercise of his parental responsibilities and rights towards the child.²²¹ The court found that although the relocating parent with whom the child resides had

²¹⁴ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 149.

²¹⁵ (2019/15250) [2022] ZAGPJHC 758 (27 September 2022) [2].

²¹⁶ (2019/15250) [2022] ZAGPJHC 758 (27 September 2022) [66].

²¹⁷ (2019/15250) [2022] ZAGPJHC 758 (27 September 2022) [66].

²¹⁸ (2019/15250) [2022] ZAGPJHC 758 (27 September 2022) [66].

²¹⁹ (2019/15250) [2022] ZAGPJHC 758 (27 September 2022) [50.10].

²²⁰ 2008 JOL 219229 (C) (unreported to date) [35].

²²¹ 2008 JOL 219229 (C) (unreported to date) [35].

to consult with the other parent in terms of section 31 of the Children's Act, it does not mean that the relocating parent is bound to give effect to the views and wishes of the non-relocating parent after the required consultation.²²² The court found that failure to inform or consult and give due consideration to the views and wishes of the non-relocating parent did not render the decision to relocate void or invalid.²²³

Courts will generally not allow a relocation if it was found that section 31(2)(a) of the Children's Act was not complied with. In the more recent case of *D v P*²²⁴ the mother wanted to relocate locally from Cape Town to Durban with the child. The father sought an order to stay the relocation pending an assessment by an expert to determine whether the relocation would be in the best interests of the child. The mother sold her house and resigned from her job and only after all of that in the last minute did she inform the father. Section 31(2) of the Children's Act requires a parent to inform the other parent before making a decision that can affect the child in terms of section 31(1)(b) of the Children's Act but that did not happen and the court found that the submissions by both parents regarding relocation concerned the parents best interests and not the child.²²⁵ An order to prevent the relocation was granted.²²⁶ After reviewing the report and recommendation pending the decision to relocate, the court found it not in the best interests of the child to relocate to Durban.²²⁷ A neutral approach was followed in this case.

Relocation, whether locally or internationally, should only be permitted after proper notice has been given to the other co-parent and adequate planning has taken place.²²⁸ This should be provided for in the Children's Act. There have been many cases decided where courts rejected the application to relocate locally in South Africa if it was found that the relocating parent did not give regard to the consent or opinion of the non-relocating parent about the move. According to Thompson,²²⁹ there is a 'clear consensus that the relocation of a child by a parent should not be done

²²² 2008 JOL 219229 (C) (unreported to date) [35].

²²³ 2008 JOL 219229 (C) (unreported to date) [35].

²²⁴ (82527/2016) [2016] ZAGPPHC 1078.

²²⁵ (82527/2016) [2016] ZAGPPHC 1078 [42].

²²⁶ (82527/2016) [2016] ZAGPPHC 1078 [45].

²²⁷ (82527/2016) [2016] ZAGPPHC 1078 [45].

²²⁸ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 41.

²²⁹ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 42.

unilaterally, surreptitiously, or without notice'. There have been cases where courts postponed moves because their relocation proposals were poorly planned.²³⁰ A parent who intends to change address, whether with a child or without a child, should be required to give notice of the intended move by giving the date of the move and the new address.²³¹ Enough time should be given ahead of the move so that the necessary modifications can be made regarding parental time with the child.²³² Necessary exemptions will be applicable such as, for example, domestic violence.²³³ The requirement to give notice is 'good parental behaviour' so that the other parent is kept in the loop.²³⁴

Relocation, whether locally or internationally, is a major decision that should not be taken lightly. Permission to relocate, whether locally or internationally, should only be permitted after proper planning and proof of that planning has taken place.²³⁵ Therefore, the legislature should introduce guidelines in the Children's Act that make a notice of intention to relocate compulsory which will mean that the parent will have to either give or withhold their consent to relocate.

2.7 LOCAL DOCUMENTS AND INTERNATIONAL INSTRUMENTS REGARDING CHILD RELOCATION

The best interest of the child principle concept has been 'part of South African law for more than a century'²³⁶. The United Nations Convention on the Rights of the Child, 1989²³⁷ states that the best interests of the child must be a primary consideration in all actions that concern the child.²³⁸ The best interest's principle is also found in article 16(1) of the United Nations Convention on the Elimination of Discrimination against

²³⁰ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 42.

²³¹ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 42.

²³² Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 42.

²³³ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 42.

²³⁴ Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 42.

²³⁵ Rollie Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 40, 41.

²³⁶ Skelton and Hansungule, 'Parental responsibilities and rights' 281.

²³⁷ United Nations Convention on the Rights of the Child, 1989.

²³⁸ Charlotte Mol and Thalia Kruger 'International child abduction and the best interest of the child: an analysis of judicial reasoning in two jurisdictions' (2018) 14 *Journal of Private International Law* 422.

Women.²³⁹ South Africa ratified the Convention on the Rights of the Child in 1995 and then the African Charter on the Rights and Welfare of the Child in 2000.²⁴⁰ The African Charter on the Rights and Welfare of the Child has described the best interests of the child as ‘the’ primary consideration and not ‘a’ primary consideration.²⁴¹

International and regional treaties have influenced the relationship between parents and children. Section 39(1) of the Constitution states that when interpreting rights, the court must consider international law and may consider foreign law.

Countries that have signed and ratified the United Nations Convention on the Rights of the Child should ensure that children’s voices are heard.²⁴² Section 10 of the Children’s Act states that ‘every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.’

2.8 NON-BINDING LAW

The following is non-binding law because it is not developed by the legislature.²⁴³ Non-binding law can have a positive effect when developing legislation.²⁴⁴ It can be useful when courts deal with relocation disputes.²⁴⁵

2.8.1.1 The American Academy of Matrimonial Lawyers

The American Academy of Matrimonial Lawyers 1998 addressed relocation issues and made a Model Relocation Act.²⁴⁶ South Africa can learn from these recommendations.

²³⁹ United Nations Convention on the Elimination of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 34/180 2 (CEDAW) art 16 (1).

²⁴⁰ Ann Skelton, ‘Children’ in Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th edn, Juta 2016) 600.

²⁴¹ Boezaart, ‘The Position of Minor and Dependent Children’, 174.

²⁴² Stahl, ‘Critical issues in relocation cases: A custody evaluators response to Parkinson and Cashmore (2015) and Thompson (2015)’ 633.

²⁴³ Béréños, ‘Time to Move on? The international State of Affairs with Respect to Child Relocation Law’ 11.

²⁴⁴ Béréños, ‘Time to Move on? The international State of Affairs with Respect to Child Relocation Law’ 11.

²⁴⁵ Béréños, ‘Time to Move on? The international State of Affairs with Respect to Child Relocation Law’ 11.

²⁴⁶ Béréños, ‘Time to Move on? The international State of Affairs with Respect to Child Relocation Law’ 11.

2.8.1.2 *The Hague Conference on Private International Law*

The Hague Conference on Private International Law describes its legal instrument as the ‘Washington Declaration on International Family Relocation’.²⁴⁷ Its purpose is to encourage international debate.²⁴⁸

The International Family Justice Conference for Common Law and Commonwealth Jurisdictions was hosted by Lord Justice Thorpe in 2009 where solutions were supplied relating to relocation disputes.²⁴⁹ These solutions included the following: the best interests of the child is a paramount (primary) consideration²⁵⁰; determinants made should be without any presumptions for or against the relocation²⁵¹; the right of the child should be to maintain contact with both parents on a regular basis so that a relationship may be maintained²⁵²; the views of the child should be taken into consideration with the child’s age and maturity in mind²⁵³; the parties should have their proposals available which contains practical arrangements²⁵⁴; the reasons for relocating and then the reason for opposing relocation²⁵⁵; history of family violence or abuse²⁵⁶; current care and contact arrangements²⁵⁷; the impact on the child of granting or refusing the application²⁵⁸; how the relationship will be maintained after relocation²⁵⁹; whether the proposals for contact are realistic because of financial

²⁴⁷ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁴⁸ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁴⁹ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵⁰ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵¹ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵² Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵³ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵⁴ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵⁵ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵⁶ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵⁷ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵⁸ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.
²⁵⁹ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.

cost²⁶⁰; enforceability of contact provisions²⁶¹; mobility for family members²⁶²; any other circumstances that are relevant²⁶³ such as that there should be a common principle applied in the judicial resolution of relocation both nationally and internationally, relocation disputes should be resolved with as little delay as possible, and that there needs to be more research done on the impact that relocation had on the children and parents concerned.²⁶⁴

2.9 COMMISSION FINDINGS

The South African Law Reform Commission (herein after SALRC) noted that the changed terminology of ‘custody’ and ‘access’ to ‘care’ and ‘contact’ in the Children’s Act are a lot broader.²⁶⁵ The introduction of new terms in the Children’s Act indicates that there is a preference for shared parenting and joint decision-making.²⁶⁶ The aim of shared parenting is to ensure that the child is given a chance to live a normal life despite not being able to reside with both parents.²⁶⁷ The SARLC Issue Paper 31²⁶⁸ indicated that the regulation of relocation should not only deal with international relocation but also national (internal) relocation. The SALRC said that there has to be a more consistent approach in terms of both internal and international relocations and that currently there are many inconsistencies.²⁶⁹ The Women’s Legal Centre in Response to the SALRC Issue paper 31 stated that a parent, with exception to domestic violence cases, must obtain the consent of the co-parent if they wish to relocate within the Republic or abroad.²⁷⁰ The SALRC found that in the absence of

²⁶⁰ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.

²⁶¹ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.

²⁶² Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.

²⁶³ Clark, ‘The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?’ 110.

²⁶⁴ Nicola Taylor and Marilyn Freeman, ‘Relocation: The international Context’ (2010) 1.2 *Journal of Family Law and Practice* 25.

²⁶⁵ South African Law Reform Commission, Discussion Paper 155 (Project 100D) *Relocation of Families with Reference to Minor children* (SALC 2022) para 3.10.

²⁶⁶ SALRC on Relocation of Families with Reference to Minor children para 3.11.

²⁶⁷ SALRC on Relocation of Families with Reference to Minor children para 3.11.

²⁶⁸ South African Law Reform Commission, Issue Paper 31 (Project 100D) *Family Dispute Resolution: Care and Contact with children* (SALC 2015) para 2.3.59.

²⁶⁹ SALRC Issue paper on Family Dispute Resolution: Care and Contact with children para 2.3.59.

²⁷⁰ SALRC on Relocation of Families with Reference to Minor children para 3.25.

guidelines on relocation in South Africa, court judgments remain an important source of guidance in settling disputes.²⁷¹

2.10 CONCLUSION

The Children's Act should clearly define the following: relocation (whether permanent or temporary); child relocation; local child relocation within South Africa (and this can be outside a province or long distance within a province); international relocation (outside South Africa); changes to the child's place of residence including travel with the child; any change that will affect the child and the child's relationship with his or her parents and guardians; major decisions (about a child that will have a long-term effect on the child and parents).

The solution to ensure that a middle ground is reached in relocation is that travelling costs will be shared so that the non-relocating parent will maintain contact with the child. Although digital communication may be a solution it is not a substitute to physically seeing and maintaining a relationship with the non-relocating parent. Adequate solutions should be available so that the relationship between the child and the non-relocating parent is maintained.

²⁷¹ SALRC on Relocation of Families with Reference to Minor children para 4.1.

CHAPTER 3: ALTERNATIVE DISPUTE RESOLUTION IN FAMILY LAW MATTERS

3.1 INTRODUCTION

This chapter will discuss the role that Alternative Dispute Resolution (ADR) can have in matters relating to local relocation, post-divorce or separation, with minor children in South Africa. This chapter will further consider whether mediation should be compulsory or voluntary in local child relocation within South Africa.

The African ideology of mediation is referenced to establish what lessons, if any, the South African legal system may draw from customary law in family law matters, such as relocation with minor children, post-divorce or separation. Lastly, this research briefly examines the various other types of ADR processes available for family law matters.

3.2 ADVERSARIAL SYSTEM OF LITIGATION IN FAMILY LAW MATTERS

3.2.1 Family law disputes in the adversarial system

It is presumed that the best solution for any dispute is when two opposing parties argue their case before a court.¹ A family dispute can share many similar characteristics with other types of litigation cases, which results in family law practitioners treating the dispute as another legal event.² A family dispute starts to resemble a contest between the opposing parties with the main aim of 'achieving victory at all costs'.³ Although the adversarial system works well in other fields of law, it is not always suitable for most family disputes.⁴ In a family dispute: negative past behaviour is brought up; conflict escalates; the situation becomes hostile; the case gets drawn out; and then substantial costs are incurred for legal fees and court use.⁵ A family dispute that becomes

¹ Madelene De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' (2017) 2 TSAR 298, 299.

² Madelene De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' in Jacqueline Heaton (ed), *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2nd edn, JUTA 2014) 578.

³ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 579.

⁴ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 578.

⁵ De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

acrimonious ends in bitterness between two parties, which is detrimental to the children involved.⁶ A family dispute is not only a legal event, many non-legal issues are dealt with - the situation is full of emotional trauma, grief, high levels of stress and a reduced coping ability.⁷ The biggest issue in a family dispute is that the relationship will more than likely be a continuing relationship between the parties because of the minor children involved.⁸ Children involved will be affected because proceedings end in 'bitterness, unresolved feelings and irreconcilability between disputing parties'.⁹ It has also been said that the adversarial process focuses more on the rights of the parents and less on the rights of the child.¹⁰

3.2.2 'Best interest' principle in the adversarial system

Relocation gets complicated when the competing interests of the parents and the child clash, forcing judges to make decisions with limited solutions as well as challenges with the best interest principle.¹¹ The non-relocating parent is the parent that will be deprived of easy and regular contact and access to their child because of the relocating parent's decision to relocate with the child.¹² Leading child relocation dispute cases all over the world have shown that there is no proper and effective formula that judges can use to determine what will be in the best interests of the child as each case is unique.¹³ It is complicated for judges to decide whether a child should relocate with one parent away from the other.¹⁴ Duggan¹⁵ described a decision by a judge to move a child away from the other parent in the child's 'supposedly' best interest as no better 'than if the parents did rock-paper-scissors.'¹⁶ Like a three-legged chair, it does not matter which leg is removed because if one leg is removed the chair

⁶ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 299.

⁷ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 577.

⁸ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 577.

⁹ De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

¹⁰ De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

¹¹ Stahl, 'Critical issues in relocation cases: A custody evaluators response to Parkinson and Cashmore (2015) and Thompson (2015)' 632.

¹² Thompson, 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 Family Court Review 42.

¹³ Dennis W Duggan, "Rock-paper-scissors: Playing the odds with the law of child relocation" (2007) 45 Family Court Review 193, 193.

¹⁴ Duggan, "Rock-paper-scissors: Playing the odds with the law of child relocation" 193.

¹⁵ Duggan, "Rock-paper-scissors: Playing the odds with the law of child relocation" 193.

¹⁶ Duggan, "Rock-paper-scissors: Playing the odds with the law of child relocation" 193.

will still fall over, either way. A judge, deciding what is in the child's best interest in a relocation case is seized with what will be the least detrimental alternative.¹⁷

A relocation decision by a judge has a 50-50 chance of being correct.¹⁸ If a judge makes a mistake, the damage will be irreparable.¹⁹ Therefore, as far as possible, parents, especially parents who respect each other, should make a decision that they know will be in their child's best interest.²⁰ The reason for the above is, parents make decisions everyday about their child, they should at least have some say regarding the child's interests in a relocation case.²¹

Section 6(4)(a) of the Children's Act²² states that in all matters concerning children 'an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided'. Section 6(4)(b) of the Children's Act further states that 'a delay in any action or decision to be taken must be avoided as far as possible.' In *LF v TV*²³ the court expressed its concern that many legal practitioners do not try hard enough to settle disputes timeously. The consequence of this is that the child's best interests suffer, and unnecessary costs are incurred.²⁴

Since the promulgation of the Children's Act, there has been greater emphasis placed on parents' involvement in the daily life of children.²⁵ In *PD v MD*²⁶ Goosen J said the following:

[a] reading of the Act indicates that it seeks to accord to parents equal responsibility for the care and wellbeing of their children, and that it seeks to ensure that, as far as may be reasonably possible, parental responsibilities and rights are exercised jointly, in the best interests of children.

The issue for courts regarding the shift of shared parental involvement is that the court environment has become an area where co-parents dispute the day-to-day issues

¹⁷ Duggan, "Rock-paper-scissors: Playing the odds with the law of child relocation" 193.

¹⁸ Duggan, "Rock-paper-scissors: Playing the odds with the law of child relocation" 193.

¹⁹ Duggan, "Rock-paper-scissors: Playing the odds with the law of child relocation" 193.

²⁰ Duggan, "Rock-paper-scissors: Playing the odds with the law of child relocation" 193.

²¹ Duggan, "Rock-paper-scissors: Playing the odds with the law of child relocation" 193.

²² Children's Act 38 of 2005 (herein after the Children's Act).

²³ *LF and Another v TV* 2020 (2) SA 546 (GJ) [15].

²⁴ *LF and Another v TV* 2020 (2) SA 546 (GJ) [15].

²⁵ Madelene De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' (2015) 18 PELJ 149, 149.

²⁶ 2013 1 SA 366 (ECP) [12].

about their children.²⁷ The adversarial approach has the tendency to escalate conflict and cause bitterness between the parties.²⁸ According to De Jong²⁹ many ‘co-parents became repeated litigants who consume heavy workloads for our courts’ and parents ‘annoy courts with their recurrent and untimely disputes about issues such as weekend pick-up times, holiday schedules and telephone access to children at the other parent’s home’. The main issue is the negative effect that these high-conflict situations can cause for children.³⁰

In the end, judges will always be required to make decisions on difficult cases involving relocation disputes where children are involved.³¹ Therefore, courts have a duty to ensure that where children are involved, the process and atmosphere is as friendly as possible.³² It is now generally accepted that the adversarial approach has not been designed to deal with ‘important, intimate, emotional, social and psychological aspects of child-centered or other family disputes’.³³

3.3 ALTERNATIVE DISPUTE RESOLUTION IN FAMILY LAW MATTERS: WITH SPECIFIC REFERENCE TO FAMILY MEDIATION

There are various forms of Alternative Dispute Resolution. To understand the differences between them, a brief discussion of each follows. The main focus of this chapter is on the use of family mediation before relocation. This chapter looks at South Africa’s African ideology of mediation in customary law.

The Children’s Act advocates for an approach that ensures that the rights of the child are protected every step of the way in any matter involving children.³⁴ Section 6(4)(a) of the Children’s Act³⁵ states that in all matters concerning children ‘an approach which is conducive to conciliation and problem-solving should be followed and a

²⁷ De Jong, ‘Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa’ 152.

²⁸ De Jong, ‘Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa’ 152.

²⁹ De Jong, ‘Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa’ 152.

³⁰ De Jong, ‘Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa’ 152.

³¹ Duggan, “Rock-paper-scissors: Playing the odds with the law of child relocation” 193.

³² Duggan, “Rock-paper-scissors: Playing the odds with the law of child relocation” 193.

³³ Madelene De Jong, ‘Child-informed Mediation and Parenting Coordination’ in Boezaart T, *Child Law in South Africa* (2nd edn, JUTA 2017) 135.

³⁴ Boezaart, ‘The Position of Minor and Dependent Children’, 190.

³⁵ Children’s Act 38 of 2005 (herein after the Children’s Act).

confrontational approach should be avoided'. Section 6(4)(b) of the Children's Act further states that 'a delay in any action or decision to be taken must be avoided as far as possible.' Boezaart³⁶ stated that when dealing with children and while adhering to the best interests principle, 'the approach needs to be non-adversarial, conciliatory, non-confrontational and conducive to solving problems'. It is also the job of a parent to ensure that a less rigid stance is adopted when resolving disputes involving children.³⁷

3.3.1 Commission Findings

The South African Law Reform Commission (herein after SALRC) published an issue called *Family Dispute Resolution: Care and Contact with children*³⁸ and included the development for proposals for alternative dispute resolution for all family disputes relating to children, including private and public law disputes.³⁹ Alternative Dispute Resolution (herein after ADR) is increasingly being used as an adjunct to court litigation where children are involved.⁴⁰ ADR means all Alternative Dispute Resolution processes facilitated by either untrained non-professionals, qualified persons such as family advocates or social workers.⁴¹

The SALRC recognizes that ADR processes may address many problems associated with the adversarial system of litigation in family matters. The following ADR processes are recognized by the SALRC:

- a) private decision-making by parties the parties themselves such as mediation, African dispute resolution and collaborative practice.⁴²

³⁶ Boezaart, 'The Position of Minor and Dependent Children', 190.

³⁷ *Odendaal v Battiss* ECD 201/2009 (Unreported) [33].

³⁸ South African Law Reform Commission, Issue Paper 31 (Project 100D) Family Dispute Resolution: Care and Contact with children (SALC 2015) (herein after the SALRC).

³⁹ SALC Issue paper on Family Dispute Resolution: Care and Contact with children para 1.1.2.

⁴⁰ Frederick N Zaal, 'Children's Court and alternative dispute resolution in care and protection cases: An assessment of the legislation' (2010) 73 THRHR 353, 354.

⁴¹ Zaal, 'Children's Court and alternative dispute resolution in care and protection cases: An assessment of the legislation' 356.

⁴² De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 300.

- b) private adjudication by third parties such as arbitration and parenting coordination.⁴³

The above will be discussed briefly in more detail in this chapter.

3.4 WESTERN MEDIATION

3.4.1 Mediation

Western mediation is in fact an ancient process that has developed over time to suit the needs of modern-day societies.⁴⁴ It is a service profession.⁴⁵ Mediators therefore must be accredited by a professional body.⁴⁶ The mediator must have no connection or relationship with the parties.⁴⁷ The aim of mediation is that an agreement must be reached which can then give rise to a settlement agreement.⁴⁸ Section 7(1)(n) of the Children's Act states that 'which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child' and is in the best interests of the child should be used in deciding what is in the best interest of the child.

3.4.2 Important cases regarding mediation

3.4.2.1 *MB v NB*⁴⁹

This case is a groundbreaking decision. If a party refuses to mediate, they are at risk of a cost order being issued against them, especially if the mediation was in line with the best interests of the child standard. In *MB v NB*⁵⁰ Brassey AJ strongly supported the use of Alternative Dispute Resolution, specifically mediation, where parties are contemplating divorce proceedings. Brassey AJ stated that the dispute should have been referred to possible settlement by mediation.⁵¹ The attorneys' failure to send

⁴³ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 300.

⁴⁴ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 379.

⁴⁵ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 379.

⁴⁶ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 379.

⁴⁷ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 379.

⁴⁸ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 379.

⁴⁹ 2010 (3) SA 220 (GSJ) [49ff].

⁵⁰ 2010 (3) SA 220 (GSJ) [49ff].

⁵¹ Boezaart, 'The Position of Minor and Dependent Children', 190.

the matter to mediation led to their fees being capped.⁵² Judge Lewis in *S v J*⁵³ endorsed the views of Brassey AJ in the *MB v NB*⁵⁴ case where it was stated that mediation in family matters is a 'useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be a first resort'.

3.4.2.2 *Townsend-Turner v Morrow*⁵⁵

Knoll J ordered the parties to attend mediation offered by private mediators of their own choice or those proposed by the Office of the Family Advocate. The main aim of ordering mediation is to attempt to resolve issues causing conflict between them, such as the issue of contact.⁵⁶

The problem is that mediation is of little use in a high-conflict situation between co-parents where agreement cannot be reached, and conflict has escalated.⁵⁷

3.4.3 *Family Mediation*

De Jong⁵⁸ defines family mediation as:

[a] process in which the mediator, an impartial third party who has no decision-making powers, facilitates negotiations between disputing parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfactory settlement agreement that recognises the needs and rights of all family members.

Mediation is one of the oldest forms of Alternative Dispute Resolution.⁵⁹ It is also one of the primary processes of alternative dispute resolution in South Africa.⁶⁰ Mediation is now being used as an alternative method to resolve family disputes because there is growing criticism towards the application of the adversarial system in family law matters as stated above.⁶¹ Mediation is 'a process in which a mediator – a neutral or

⁵² Boezaart, 'The Position of Minor and Dependent Children', 190.

⁵³ *S v J* [2011] 2 ALL SA 299 (SCA).

⁵⁴ *MB v NB* 2010 (3) SA 220 (GSJ).

⁵⁵ 2004 (2) SA 32 (C) [15].

⁵⁶ 2004 (2) SA 32 (C) [15].

⁵⁷ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 153.

⁵⁸ De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

⁵⁹ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 583.

⁶⁰ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 379.

⁶¹ Marita Carnelly and Julia Anderssen, 'Family law in practice: Courts, mediation, maintenance and domestic violence', in Van Heerden B *and others*, *Family Law in South Africa* (2nd edn, Oxford University Press 2021) 462.

impartial third party – helps parties in their negotiations in family disputes to reach a solution⁶². The purpose of mediation and a neutral third party is to help parties reach an agreement that recognizes the needs and interests of all family members.⁶³ The mediator will control the entire process and will have a full understanding of the legal system applicable.⁶⁴ The mediator will be in a position to assist the parties and ensure that they understand the process every step of the way.⁶⁵ Although, the parties involved in mediation will be left with the final decision.⁶⁶ The mediator will refer the parties to a legal practitioner so that they have a clear understanding of their legal situation.⁶⁷

Mediation in South Africa is a service profession where mediators have to be accredited by a professional body.⁶⁸ Prior to 2010, almost anyone could be a mediator but the National Accreditation Board for Family Mediators now requires the training and accreditation of anyone who wants to be a mediator.⁶⁹ In South Africa a mediator can be an advocate, attorney, psychologist, social worker or even a religious leader but they have to be accredited by the National Accreditation Board for Family Mediators.⁷⁰

Mediation can be beneficial in family law matters for the following reasons: The mediator must be impartial, not take sides and must ensure that throughout the entire process one person is not disadvantaged by the other because of intimidation or threats.⁷¹ The mediator must ensure that there is no power imbalance. If the mediator finds that the power imbalance is impossible to redress then the mediator must

⁶² Carnelly and Anderssen, 'Family law in practice: Courts, mediation, maintenance and domestic violence' 462.

⁶³ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 582.

⁶⁴ Carnelly and Anderssen, 'Family law in practice: Courts, mediation, maintenance and domestic violence' 462.

⁶⁵ Carnelly and Anderssen, 'Family law in practice: Courts, mediation, maintenance and domestic violence' 462.

⁶⁶ Carnelly and Anderssen, 'Family law in practice: Courts, mediation, maintenance and domestic violence' 462.

⁶⁷ Carnelly and Anderssen, 'Family law in practice: Courts, mediation, maintenance and domestic violence' 462.

⁶⁸ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 378.

⁶⁹ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 588.

⁷⁰ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 588.

⁷¹ De Jong, 'Child-informed Mediation and Parenting Coordination' 137.

terminate the process.⁷² Parties feel they are in control of the situation because they can come to an agreement on their own without being forced into a corner by their legal representative.⁷³ Mediation can lessen conflict between the parties because a mediator is experienced in social and behavioural sciences and knows how to 'lessen conflict between the parties and bridge communication gaps'.⁷⁴ Mediation focuses on the future rather than assessing the past conduct of both parties.⁷⁵ It is a private and confidential process and without prejudice.⁷⁶ Mediation operates in the shadow of the law and fits neatly into the legal system as a whole.⁷⁷ Mediation acknowledges that the High Court is the upper guardian of all minor children and any decision made in mediation has to be endorsed by the appropriate court.⁷⁸ Parties can be given an opportunity to sort out their private problems before going to court.⁷⁹

The problem with mediation is that it can generally occur in a formal setting.⁸⁰ The person who is the mediator has no prior relationship with the parties.⁸¹ The goal of mediation is that agreement must be reached and then parties can enter into a settlement agreement and the settlement may be made an order of court if that is what the parties want.⁸² According to Boniface⁸³ western mediation is 'an ancient process that has been re-engineered to suit the needs of highly industrialised urban societies, and so has discarded the social context that originally underscored it'.

⁷² De Jong, 'Child-informed Mediation and Parenting Coordination' 138.

⁷³ De Jong, 'Child-informed Mediation and Parenting Coordination' 138.

⁷⁴ De Jong, 'Child-informed Mediation and Parenting Coordination' 138.

⁷⁵ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 583.

⁷⁶ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 583.

⁷⁷ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 583.

⁷⁸ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 583.

⁷⁹ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 583.

⁸⁰ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 379.

⁸¹ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 379.

⁸² Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 379.

⁸³ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 378.

3.4.4 Compulsory family mediation

There have been many questions and debates around whether family mediation and court annexed mediation should be mandatory and then privately or publicly funded.⁸⁴ The problem currently with voluntary mediation is because of its voluntary nature it does not get used.⁸⁵ It is generally preferred that mediation should be voluntary but this requirement is no longer being regarded as absolute because mediation is increasingly being forced on parties.⁸⁶ Although mediation is being forced on parties and is strongly encouraged it does not mean that the parties have to reach an agreement.⁸⁷ Therefore, parties will not be forced to reach an agreement and if an agreement is reached it is generally voluntary.⁸⁸ Voluntary court-annexed mediation is the voluntary submission of civil disputes to mediation in selected lower courts.⁸⁹

Australia's compulsory Family Dispute Resolution is discussed in the next chapter. Family Mediation should be contained in the Children's Act because it deals with children's rights and issues. If family mediation fails, especially in high conflict cases, then Parenting Coordination should be the next step.

⁸⁴ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 301.

⁸⁵ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 300.

⁸⁶ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 583.

⁸⁷ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 583.

⁸⁸ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 583.

⁸⁹ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 300.

3.5 AFRICAN IDEOLOGY OF MEDIATION

The purpose of this section is to see what lessons, if any, western mediation can draw from customary law, such as the African ideology of mediation, and whether this can apply to family mediation in child relocation disputes.⁹⁰

South African courts must interpret and develop any provision of customary law in line with the Bill of Rights.⁹¹ Section 39(2) of the Constitution, 1996 provides that in the interpretation of, 'any legislation, and when developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

Sections 30 and 31 of the Bill of Rights in the Constitution are about the rights of culture. Section 31 states that everyone has the right to belong to and participate in cultural, religious or linguistic communities but these rights are conditional. The exercise of these rights cannot be inconsistent with any other provision in the Bill of Rights. Therefore, other rights in the Bill of Rights cannot be undermined by the practice of culture. Customary law is practiced by many people in South Africa today.⁹² The norms regulating the lives of people practicing customary law varies across different 'communities, ethnicities and provinces'.⁹³

3.5.1 Brief History

The Constitution⁹⁴ gave legal force to customary law in 1996 and it was accepted through social practices.⁹⁵ It is unwritten law that the community accepts.⁹⁶ Customary law can be divided into two different concepts, which are looked at below.

⁹⁰ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 378.

⁹¹ Himonga C *and others*, 'African Customary Law in South Africa' 173.

⁹² Moore E and Himonga C, 'Living Customary Law and Families in South Africa' [2018] *South African Child Gauge* 61, 61.

⁹³ Moore and Himonga, 'Living Customary Law and Families in South Africa' 61.

⁹⁴ Constitution of the Republic of South Africa, 1996 (herein after the Constitution).

⁹⁵ Moore and Himonga, 'Living Customary Law and Families in South Africa' 61.

⁹⁶ Moore and Himonga, 'Living Customary Law and Families in South Africa' 61.

3.5.2 Living and codified customary law

The majority judgement in *Bhe v Khayelitsha Magistrate*⁹⁷ recognised and acknowledged the co-existence of two different concepts of customary law called codified and living customary law.⁹⁸

3.5.2.1 Codified/ official customary law

Codified customary law is also referred to as official customary law.⁹⁹ It is the customary law that was developed and invented by colonial and the apartheid state and it exists in codes and precedents.¹⁰⁰ The aim of codified customary law was to control and manage communities.¹⁰¹ Official customary law is the law that is applied by the courts.¹⁰² It is a system of law that rarely depicts the actual customary law practised by indigenous people.¹⁰³

3.5.2.2 Living customary law

Living customary law is the unwritten practises of the day-to-day life of people in a community who practise it every day.¹⁰⁴ It is changing and evolving as it adapts to the beliefs and circumstances of the people it applies to.¹⁰⁵

3.5.3 Important issues to consider in terms of customary law in general

There is no uniform system of customary law that applies to all indigenous communities in South Africa.¹⁰⁶ It is unwritten, which means that there will be constant conflicts over its content.¹⁰⁷ Customary law is left to evolve in an unregulated manner.¹⁰⁸ It has been argued that the minute living customary law enters the judicial process, it is then transformed into state law or official customary law.¹⁰⁹

⁹⁷ (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) [87].

⁹⁸ Himonga C *and others*, 'African Customary Law in South Africa' 25.

⁹⁹ Moore and Himonga, 'Living Customary Law and Families in South Africa' 61.

¹⁰⁰ Moore and Himonga, 'Living Customary Law and Families in South Africa' 61.

¹⁰¹ Moore and Himonga, 'Living Customary Law and Families in South Africa' 61.

¹⁰² Himonga C *and others*, 'African Customary Law in South Africa' 33.

¹⁰³ Himonga C *and others*, 'African Customary Law in South Africa' 33.

¹⁰⁴ Moore and Himonga, 'Living Customary Law and Families in South Africa' 61.

¹⁰⁵ Moore and Himonga, 'Living Customary Law and Families in South Africa' 61.

¹⁰⁶ Himonga C *and others*, 'African Customary Law in South Africa' 32.

¹⁰⁷ Himonga C *and others*, 'African Customary Law in South Africa' 32.

¹⁰⁸ Himonga C *and others*, 'African Customary Law in South Africa' 32.

¹⁰⁹ Himonga C *and others*, 'African Customary Law in South Africa' 32.

3.5.4 Customary law and family matters

Customary law covers all matters regulating personal and family life.¹¹⁰ Section 1 of the Recognition of Customary Marriages Act 120 of 1998¹¹¹ defines customary law as the 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'. According to Moore and Himonga,¹¹² customary law is derived from social practices that the community accepts as obligatory'. Section 211(3) of the Constitution states that 'courts must apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. African dispute resolution must be distinguished from western mediation.¹¹³ Mediation is a new concept in common law, but it has always been used in the customary divorce process.¹¹⁴

Western law emphasises the individual, whereas customary law recognises the person as part of a group.¹¹⁵ In customary law, the father does not have automatic rights and responsibilities to his children, instead the father's rights to the child are linked by marriage or *lobolo*.¹¹⁶ If the father is linked to the child by either marriage or *lobolo* then the child will form part of the father's family.¹¹⁷ If the father is not linked to the child by marriage or *lobolo* then the child will fall into the mother's side of the family.¹¹⁸

In customary law it is common practice to move children from one family to another, even extended family.¹¹⁹ If a parent cannot look after the child, the family will take over the role of looking after the child.¹²⁰

¹¹⁰ Moore and Himonga, 'Living Customary Law and Families in South Africa' 62.

¹¹¹ Recognition of Customary Marriages Act 120 of 1998 (herein after the RCMA).

¹¹² Moore and Himonga, 'Living Customary Law and Families in South Africa' 61.

¹¹³ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 301.

¹¹⁴ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 301.

¹¹⁵ Moore and Himonga, 'Living Customary Law and Families in South Africa' 62.

¹¹⁶ Moore and Himonga, 'Living Customary Law and Families in South Africa' 62.

¹¹⁷ Moore and Himonga, 'Living Customary Law and Families in South Africa' 62.

¹¹⁸ Moore and Himonga, 'Living Customary Law and Families in South Africa' 62.

¹¹⁹ Moore and Himonga, 'Living Customary Law and Families in South Africa' 64.

¹²⁰ Moore and Himonga, 'Living Customary Law and Families in South Africa' 64.

State courts only have jurisdiction to award a divorce and determine custody and maintenance issues. Although, many marriages are dissolved informally between families rather than through the court system because of the many challenges involved in obtaining a divorce.¹²¹ The consequence of this is that parties do not enjoy the protection offered by the Recognition of Customary Marriages Act 120 of 1998 (herein after the RCMA).¹²²

Courts have the power to make maintenance payments in terms of section 8(4) of the RCMA. The issue with this is that, in real life maintenance is not always paid and it is left to mother and her family to carry the burden alone.¹²³

3.5.5 African Dispute resolution

When a dispute arises, people living according to customary law can approach customary or state law systems for assistance.¹²⁴ In South Africa, all courts have jurisdiction to hear marriage and succession matters that arise under customary law depending on the matter, for example, a divorce court could be applicable.¹²⁵ Since the enactment of the RCMA, traditional courts do not have the jurisdiction to hear matters on customary marriages but their jurisdiction is now limited to mediation before divorce.¹²⁶ A dispute in a customary marriage is first dealt with in the family and if that does not work, then the assistance of other dispute resolution forums are used.¹²⁷ Many individuals prefer to use state courts as dispute resolution compared to the family because they perceive the state courts to be more powerful.¹²⁸ The advantage for individuals in customary communities is that they have a choice between their family or the state to solve their dispute.

¹²¹ Moore and Himonga, 'Living Customary Law and Families in South Africa' 64.

¹²² Moore and Himonga, 'Living Customary Law and Families in South Africa' 64.

¹²³ Moore and Himonga, 'Living Customary Law and Families in South Africa' 64.

¹²⁴ Moore and Himonga, 'Living Customary Law and Families in South Africa' 67.

¹²⁵ Moore and Himonga, 'Living Customary Law and Families in South Africa' 67.

¹²⁶ Moore and Himonga, 'Living Customary Law and Families in South Africa' 67.

¹²⁷ Moore and Himonga, 'Living Customary Law and Families in South Africa' 67.

¹²⁸ Moore and Himonga, 'Living Customary Law and Families in South Africa' 67.

3.5.5.1 Compulsory African Mediation

What is critical is that African mediation is compulsory in the African culture, especially when a family problem occurs.¹²⁹ According to Boniface¹³⁰ the key aspect of African mediation and African conflict resolution is that it has 'ubuntu-style values'. African mediation is a group mediation process facilitated by elders with togetherness and *Ubuntu* at its core.¹³¹ Africa has a tradition of family or neighbourhood mediation.¹³² The objectives of African mediation is to 'soothe hurt feelings and to reach a compromise that can improve future relationships'.¹³³ In African indigenous societies, individual conflicts are seen as affecting the order of the group.¹³⁴ The aim of settling disputes is reconciliation, instead of punishment, to create harmony instead of enforcing the rule of law.¹³⁵

3.5.6 Legislation and African Mediation

In South Africa, the principles of African group mediation have influenced legislation.¹³⁶ The Children's Act provides for mediation as a method of dispute resolution in terms of parental responsibilities and rights.¹³⁷ Section 6(4) of the Children's Act states that in any matter involving a child, an approach that is conducive to problem-solving and conciliation should be followed, and a confrontational approach should be avoided. There is evidence that suggests that customary law has adapted to facilitate children to participate in decisions regarding custody arrangements.¹³⁸

¹²⁹ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 382.

¹³⁰ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 391.

¹³¹ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 381.

¹³² Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 381.

¹³³ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 382.

¹³⁴ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 382.

¹³⁵ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 382.

¹³⁶ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 385.

¹³⁷ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 386.

¹³⁸ Moore and Himonga, 'Living Customary Law and Families in South Africa' 64.

African mediation has influenced the Children's Act.¹³⁹ According to Boniface¹⁴⁰ there is room for African group-style mediation to be used in mandated mediation sessions in the Children's Act.¹⁴¹ African group-style mediation can also be used in divorce or family mediations and court-mandated mediation.¹⁴² African mediation is compulsory in the African culture, especially when a family problem occurs.¹⁴³ Mediation is compulsory in specific sections of the Children's Act. For example, when preparing a parenting plan, section 33(5) of the Children's Act states that parties must first seek the assistance of a family advocate, social worker or psychologist in preparing the parenting plan or mediation through a social worker or other suitably qualified person. Section 34(1)(b) of the Children's Act states that parties may have the outcome of the mediation reviewed by a court.

3.5.7 Best interests of the child principle and customary law

Section 30(3) of the Interim Constitution of South Africa, 1994¹⁴⁴ introduced the common law principle of the best interests of the child in the Bill of Rights.¹⁴⁵ It provided that in all matters concerning the child the interests of the child were of paramount consideration.¹⁴⁶ In *Hlophe v Mahlalela*¹⁴⁷ the father of the child claimed possession of his child who was living with her grandparents after her mother's death.¹⁴⁸ The father made a claim under the emaSwati Customary law and the parents had also previously entered into a civil marriage with each other.¹⁴⁹ The father had not paid the *lobolo* in full at the time of his wife's death.¹⁵⁰ The court did not invalidate the practice of *lobolo* but it nullified its effect on the issue of the child's custody.¹⁵¹ The court held

¹³⁹ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 382.

¹⁴⁰ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 393.

¹⁴¹ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 393.

¹⁴² Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 393.

¹⁴³ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 382.

¹⁴⁴ Interim Constitution of the Republic of South Africa Act 200 of 1993.

¹⁴⁵ Himonga C *and others*, 'African Customary Law in South Africa' 122.

¹⁴⁶ Himonga C *and others*, 'African Customary Law in South Africa' 122.

¹⁴⁷ 1998 (1) SA 449 (T) [459].

¹⁴⁸ 1998 (1) SA 449 (T) [459].

¹⁴⁹ 1998 (1) SA 449 (T) [459].

¹⁵⁰ 1998 (1) SA 449 (T) [459].

¹⁵¹ 1998 (1) SA 449 (T) [459].

that the rights of custody of children were no longer to be determined by the payment or non-payment of *lobolo*, but by the best interests of the child principle.¹⁵²

In customary law, the best interests of the child are seen as the interests of the child's family and community.¹⁵³ The reason for this is because the family is regarded as a protective place for everyone in the community.¹⁵⁴ The interests of the individual, therefore the child, will have to be suspended where there is a conflict that affects the group.¹⁵⁵ The group-orientated approach of the rights of the child will not be accepted by the constitution, even though in customary communities the choices made for the welfare of the group will also serve the best interests of the child.¹⁵⁶

In African mediation, mediators become more personally involved with the parties compared to western mediation.¹⁵⁷ Family dispute agreements reached during mediation aim to: solve the problem; rectify the injustice; aim for conciliation, restitution, and rehabilitation.¹⁵⁸ As seen above, although customary law dispute resolution can be beneficial for the whole group, some individuals in the community prefer using the state to resolve their dispute if the group were not able to solve the problem.

3.6 CHILDREN'S COURTS

Section 60(3) of the Children's Act states that:

Children's court 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 in the proceedings.

Children's Courts are less expensive and more accessible than high courts.¹⁵⁹ A key point regarding children's courts is the fact that they will have discretionary power to utilize the results of Alternative Dispute Resolution (ADR), wherever relevant, before

¹⁵² 1998 (1) SA 449 (T) [459].

¹⁵³ Himonga C *and others*, 'African Customary Law in South Africa' 123.

¹⁵⁴ Himonga C *and others*, 'African Customary Law in South Africa' 123.

¹⁵⁵ Himonga C *and others*, 'African Customary Law in South Africa' 123.

¹⁵⁶ Himonga C *and others*, 'African Customary Law in South Africa' 123.

¹⁵⁷ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 392.

¹⁵⁸ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 392.

¹⁵⁹ Zaal, 'Children's Court and alternative dispute resolution in care and protection cases: An assessment of the legislation' 353.

deciding on the best solution for children.¹⁶⁰ The South African Law Commission¹⁶¹ recommended the use of ADR in Children's Courts.¹⁶² ADR can expedite the process in relocation cases and is useful in helping families and children participate in comparison to the adversarial setting.¹⁶³

Before a Children's Court decides on a matter, it may order a lay forum hearing to settle the matter before proceeding.¹⁶⁴ Section 49 of the Children's Act states the following in terms of Lay-forum hearings:

A children's court may, before it decides a matter or issue in a matter, order a lay-forum hearing in an attempt to settle the matter out of court, which may include-

- (a) mediation by a family advocate, social worker, social service professional or other suitable qualified person.
- (b) a family group conference contemplated in section 70; or
- (c) mediation contemplated in section 71.

The Children's Act introduced child-centred processes when dealing with divorce and the dissolution of the relationship between parents.¹⁶⁵ Even before the coming into operation of the Children's Act, the court in *V v V*¹⁶⁶ used mediation between two conflicting parents and granted them joint custody (as it was called at the time).

3.7 VARIOUS OTHER TYPES OF ADR PROCESSES AVAILABLE

The various other types of ADR processes available in South Africa are analysed briefly and defined below.

¹⁶⁰ Zaal, 'Children's Court and alternative dispute resolution in care and protection cases: An assessment of the legislation' 354.

¹⁶¹ South African Law Commission *Report on the Review of the Child Care Act* Project 110, (2002) 306.

¹⁶² Zaal, 'Children's Court and alternative dispute resolution in care and protection cases: An assessment of the legislation' 354.

¹⁶³ Zaal, 'Children's Court and alternative dispute resolution in care and protection cases: An assessment of the legislation' 354.

¹⁶⁴ Boniface, 'African-Style Mediation and Western-Style divorce and family mediation: Reflections for the South African context' 386.

¹⁶⁵ Trynie Boezaart, 'The Position of Minor and Dependent Children of Divorcing and Divorced Spouses or Civil Union Partners' in Jacqueline Heaton (ed), *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2nd edn, JUTA 2014) 190.

¹⁶⁶ 1998 (4) SA 169 (C).

3.7.1 Parenting coordination

Parenting-coordination has been termed a 'legal-psychological hybrid'.¹⁶⁷ It is a child-focused Alternative Dispute Resolution process as well as an 'immediate non-adversarial, court-sanctioned, private forum'.¹⁶⁸ Diane Davis AJ in *TC v SC*¹⁶⁹ said that:

[p]arenting co-ordination is a non-adversarial dispute resolution service provided by mental health professionals or family law lawyers who assist high-conflict parents in divorce situations to resolve child-related disputes in an expeditious and child-focused manner, in order to minimise parental conflict with its associated risks for children.

Parenting co-ordination can be used pre- or post-divorce and can assist high conflict co-parents.¹⁷⁰ It is a child-centred process and co-parents are assisted by a mental health or legal professional with mediation training.¹⁷¹ Parenting-coordination in practice is where a parenting coordinator will attempt to first facilitate resolution of parenting disputes by agreement between the parties, and if that fails then the parenting coordinator will have the power to make a decision that will be binding on the parties until a court or the parties direct otherwise.¹⁷² The Parenting Coordinator makes a decision based on his or her professional opinion and not as an arbitrator.¹⁷³

In *TSF v SCD*¹⁷⁴ the court intended to appoint a Parenting Coordinator to assist the Respondent (the mother) regarding any concerns related to the exercise of contact before taking any other action and likewise, if the Applicant (the father) had any concerns regarding the Respondent's interference in the exercise of his contact with his son, then it should be raised with the Parenting Coordinator. Applicant's counsel suggested that the court assumes the role of a case manager (facilitator) but they

¹⁶⁷ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 153.

¹⁶⁸ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 561.

¹⁶⁹ 2018 (4) SA 530 (WCC) [35].

¹⁷⁰ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 153.

¹⁷¹ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 153.

¹⁷² De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 615.

¹⁷³ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 616.

¹⁷⁴ (2019/15250) [2022] ZAGPJHC 758 (27 September 2022) [102].

could not provide the court with any specific precedent which gives the court the authority to do that.

The Children's Act should properly define the different forms of Alternative Dispute Resolution available in any issue relating to children.¹⁷⁵ Moreover the term Parenting Coordination has a different meaning in different provinces, and this leads to confusion.¹⁷⁶ In *TC v SC*,¹⁷⁷ it was said that the Alternative Dispute Resolution process referred to as facilitation in the Western Cape and case management in Gauteng, is in fact, known as parenting coordination, internationally. Therefore, the term in South African that should be used to create uniformity and less confusion is parenting coordination and parenting coordinator.¹⁷⁸ The Children's Act should also specify the training and accreditation required. Currently, the training of parenting coordinators is almost non-existent in most provinces because of poor resources available. Mediators act as parenting coordinators without any specific training because specific training, such as mental health and legal skills, are required.¹⁷⁹ Another issue is the cost of parenting coordination where parenting coordinators charge professional fees and then high-conflict co-parents cannot afford the fee.¹⁸⁰

3.7.1.1 *Is parenting coordination an unlawful delegation of judicial decision-making authority?*

Davis J in *TC v SC*¹⁸¹ said that the question of whether the appointment of a parenting coordinator constitutes an unlawful delegation of judicial authority has not arisen in the courts, but because the mother opposed the appointment of a parenting coordinator by relying on the decision of *Hummel v Hummel*¹⁸², one was not appointed. In the unreported case *Hummel v Hummel*,¹⁸³ the facts of the case were as follows: a father's

¹⁷⁵ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 158.

¹⁷⁶ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 158.

¹⁷⁷ 2018 (4) SA 530 (WCC) [34].

¹⁷⁸ 2018 (4) SA 530 (WCC) [34].

¹⁷⁹ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 158.

¹⁸⁰ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 159.

¹⁸¹ 2018 (4) SA 530 (WCC) [40].

¹⁸² (SGJ) no 06274/2012 of 10 September 2012 (unreported).

¹⁸³ (SGJ) no 06274/2012 of 10 September 2012 (unreported).

application for the appointment of a case manager to help with post-divorce parenting conflict between him and his wife was denied.¹⁸⁴ Sutherland J stated that a court does not have the jurisdictional competence to appoint a third party to make a decision about the issue of parenting between the holders of parental responsibilities and rights but that only a court has the power to make decisions about that.¹⁸⁵ Sutherland J's decision was based on section 165 of the Constitution which states that judicial authority is vested in the court and section 2 of the Arbitration Act 42 of 1965 currently prohibits arbitration in respect of matrimonial and related matters.¹⁸⁶ Davis J in *TC v SC*¹⁸⁷ stated that after examining the reasoning by Sutherland J in *Wright v Wright*¹⁸⁸ more closely, it seems the court did not appoint a parenting coordinator because the 'resistant attitude of the parties meant that parenting coordination was unlikely to work'.¹⁸⁹

In *TC v SC*¹⁹⁰ it was also argued that the court has the power to appoint a Parenting Coordinator notwithstanding the opposition of a parent in situations where it would be in the best interests of the child because of the courts' inherent jurisdiction at common law to act as the upper guardian of all minor children. Davis J in *TC v SC*¹⁹¹ said that it should be required that the parties should already have a parenting plan that they have both agreed to and that has already been made an order of court.

The problem currently is that in South Africa, there is no statute or court rule governing the use or appointment of parenting coordinators.¹⁹² In the Western Cape, both parties in a dispute will agree to the appointment of a parenting coordinator after being recommended to do so by their legal and mental health representatives and the parenting coordinator will mediate the parenting dispute. If successful, the latter will be empowered to make a decision that can be set aside by the court.¹⁹³ The

¹⁸⁴ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 159.

¹⁸⁵ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 159.

¹⁸⁶ De Jong, 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' 159.

¹⁸⁷ 2018 (4) SA 530 (WCC) [42].

¹⁸⁸ 20370/2014 (WCD) unreported (delivered on 18 April 2016)

¹⁸⁹ 2018 (4) SA 530 (WCC) [42].

¹⁹⁰ 2018 (4) SA 530 (WCC) [43].

¹⁹¹ 2018 (4) SA 530 (WCC) [54].

¹⁹² 2018 (4) SA 530 (WCC) [39].

¹⁹³ 2018 (4) SA 530 (WCC) [39].

agreement to appoint a parenting coordinator is usually in a consent paper or a parenting plan that both parties agreed on. The appointment of a parenting coordinator can also be 'embodied in an interim parenting arrangement which is made an order of Court during Rule 43 proceedings for interim relief *pendente lite*'.¹⁹⁴ In *TC v SC*¹⁹⁵ it was said that historically, the court appointed a parenting coordinator if parties were in agreement and if the power to appoint one was not specifically challenged by one of the parties.

It is important to note that Parenting Coordination is not in contravention of section 2 of the Arbitration Act 42 of 1965 which currently prohibits arbitration in terms of matrimonial matters. The reason for this is because the decision is only binding on the parties until it is set aside or reviewed by the court compared to an arbitration award which is final and binding.¹⁹⁶

3.7.2 Collaborative practice

Collaborative practice is one of the most advanced forms of dispute resolution processes in the world.¹⁹⁷ In a situation of collaborative practice, both the parents of the child and their legal representatives enter into binding written agreements where they promise not to litigate, but rather settle the issue by agreement.¹⁹⁸ The rules in the agreement are the following: if the parties cannot reach agreement, then their legal representative must step aside so that the parties to the agreement can consult with other legal representatives.¹⁹⁹ The benefit of collaborative practice is that specialists in various fields can be consulted, for example: a child specialist who is a mental health professional.²⁰⁰ Any information obtained by the specialist will be excluded from any future litigation.²⁰¹ The specialist will no longer be allowed to be part of any future

¹⁹⁴ 2018 (4) SA 530 (WCC) [39].

¹⁹⁵ 2018 (4) SA 530 (WCC) [40].

¹⁹⁶ De Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' 616.

¹⁹⁷ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 302.

¹⁹⁸ De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

¹⁹⁹ De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

²⁰⁰ De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

²⁰¹ De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

proceedings.²⁰² The purpose of a child specialist is to report on the views expressed by the child regarding the dispute between the parents.²⁰³

Collaborative Practice should form part of the Children's Act. It should apply in situations where high conflict parents cannot reach agreement in an instance where mediation has failed.

3.7.3 Arbitration

Arbitration is one of the oldest forms of alternative dispute resolution and dates back to the Greek and Roman times.²⁰⁴ In circumstances where a dispute arose, they would choose a judge to settle it.²⁰⁵

Arbitration in family law matters is currently prohibited in terms of section 2(a) of the Arbitration Act. It is interesting to note that the Arbitration Act has never been amended despite investigations and recommendations by the South African Reform Law Commission.²⁰⁶ Arbitration, either on its own or in conjunction with mediation, is a 'viable option for the resolution of family law disputes in South Africa'.²⁰⁷ According to De Jong,²⁰⁸ although the High Court is the upper guardian of all minor children, it would be more appropriate to have a properly educated and experienced arbitrator determine the best interests of the child rather than a High Court judge who has never in his or her life practiced family law.

3.7.3.1 The positive elements of arbitration:

Parties can, guided by their legal representatives, select the person that will arbitrate their dispute.²⁰⁹ Arbitration is flexible because parties can decide to refer all issues to

²⁰² De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

²⁰³ De Jong, 'Child-informed Mediation and Parenting Coordination' 136.

²⁰⁴ De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' 2358.

²⁰⁵ De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' 2358.

²⁰⁶ De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' 2356.

²⁰⁷ Madelene De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' (2014) 17 PELJ 2358, 2399.

²⁰⁸ De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' 2393.

²⁰⁹ De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' 2365.

arbitration or only one issue.²¹⁰ Parties can decide how, when or where the arbitration must take place.²¹¹ Arbitration is also a private and confidential process and can take place in a private and relaxed environment.²¹² Arbitration is also a quick process and also less costly than litigation.²¹³

The SALRC said that family dispute resolution in the children's Act should contain clear policy guidelines so that there are appropriate balances between family autonomy and court supervision and that there should be appropriate safeguards in place so that vulnerable persons are protected, for example by entering into family arbitration agreements.²¹⁴

3.7.4 Rule 41A of the Uniform Rules of Court

Rule 41A was introduced into the Uniform Rules of Court in February 2020 and that parties to a dispute consider mediation as a dispute resolution mechanism.

Alternative dispute resolution, such as mediation, is available to those involved in disputes.²¹⁵ Rule 41A allows parties to mediate prior to going to court.²¹⁶ Uniform Rules of Court 41A(2)(a) prescribes that in every new action or application proceeding 'the plaintiff or applicant shall, together with the summons and combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation'. It is now mandatory for parties to formally consider mediation as a dispute resolution mechanism.

²¹⁰ De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' 2365.

²¹¹ De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' 2365.

²¹² De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' 2367.

²¹³ De Jong, 'Arbitration of family separation issues – a useful adjunct to mediation and the court process' 2367.

²¹⁴ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 303.

²¹⁵ Joubert, 'Mediation Rule 41A of the High Court'

²¹⁶ Joubert, 'Mediation Rule 41A of the High Court'

In the unreported case of *Koetsioe and Others v Minister of Defence and Military Veterans and Others*²¹⁷ the court stated that:

[Rule 41A] not only requires a notice but clearly contemplated that a party must have considered the issue earnestly prior to exercising its election. This is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated.

The court further stated that the introduction of Rule 41A of the Uniform Rules of Court means that a party is obliged ‘in every...application..’ to indicate ‘by notice whether such a party agrees to or opposes referral of the dispute to mediation.’²¹⁸ This means that a party must have at least considered the use of alternative dispute resolution prior to approaching the court.²¹⁹ The court stated that the dismissive approach to the concept of mediation was wrong and that the use of alternative dispute resolution should have been attempted rather than the legal route, and, because of that, the court made no order as to costs.²²⁰

Rule 41A states that there are four pillars of mediation, and they are the following:

- (a) [mediation is] a voluntary non-binding non-prescriptive dispute resolution process
- (b) The terms of the process to be adopted are those agreed upon by the parties
- (c) The mediator facilitates the process to enable the parties to themselves find a solution and makes no decision on the merits not imposes a settlement on them
- (d) The process is confidential

3.7.4.1 Problems with Rule 41A

This issue is that what the Uniform Rules of Court seems to define as a ‘a voluntary process entered into by agreement between the parties to a dispute’ is contradictory

²¹⁷ *Koetsioe and Others v Minister of Defence and Military Veterans and Others* (12096/2021) (unreported to date).

²¹⁸ *Koetsioe and Others v Minister of Defence and Military Veterans and Others* (12096/2021) (unreported to date) [6.2].

²¹⁹ *Koetsioe and Others v Minister of Defence and Military Veterans and Others* (12096/2021) (unreported to date) [6.2].

²²⁰ *Koetsioe and Others v Minister of Defence and Military Veterans and Others* (12096/2021) (unreported to date) [6.2].

because the Uniform Rules of Court definition of mediation is ‘a voluntary process entered into by agreement between the parties to a dispute in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached or explore areas of compromise, or generate option to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute’.

3.8 THE OFFICE OF THE FAMILY ADVOCATE AND PARENTING PLANS

3.8.1 The Office of the Family Advocate

The Mediation in Divorce Matters Act 24 of 1987 (herein after the Mediation in Divorce Act) allows for the appointment of a Family Advocate to assist the High Courts and Regional Courts by giving the court a report regarding the welfare and recommendations of minor children.²²¹ The purpose of the Mediation in Divorce Act is to safeguard the interests of children in divorce proceedings and prevent the use and abuse of children ‘as a result of acrimony between their parents’.²²²

3.8.1.1 Purpose of the Family Advocate

The purpose of the Family Advocate is to assist parties to reach an agreement on family disputes such as access or guardianship.²²³ If agreement cannot be reached, then the Family Advocate will make a recommendation to the court.²²⁴ The key point is that the Family Advocate can interview the child, this gives the child an opportunity to be heard so that the child does not have to appear in court.²²⁵ The purpose of the Family Advocate is to safeguard the interests of children affected by divorce.²²⁶ The report by the Family Advocate has to contain unbiased and balanced information and

²²¹ Boezaart, ‘The Position of Minor and Dependent Children’, 182.

²²² Boezaart, ‘The Position of Minor and Dependent Children’, 182.

²²³ ‘The Office of the Family Advocate’ <https://www.justice.gov.za/fmadv/f_main.htm> accessed 6 November 2022.

²²⁴ ‘The Office of the Family Advocate’ <https://www.justice.gov.za/fmadv/f_main.htm> accessed 6 November 2022.

²²⁵ ‘The Office of the Family Advocate’ <https://www.justice.gov.za/fmadv/f_main.htm> accessed 6 November 2022.

²²⁶ Lesbury van Zyl, ‘Whitehead v Whitehead: fair comment on the Family Advocate? [1994] De Rebus 469, 469.

recommendations regarding the minor children.²²⁷ Parties can accept or reject part of the report or the whole report.²²⁸

3.8.1.2 Problems with the Office of the family Advocate:

In *Whitehead v Whitehead*²²⁹ the court stated that the purpose of the Family Advocate is to assist courts in an unbiased and balanced way by placing facts and considerations before it about the minor children but in this case the court was disappointed with the conduct of the Family Advocate because the Family Advocate was taking sides and that the delay of six months was unacceptable. According to Van Zyl²³⁰ the problem is that there is no specific reference made regarding what role of the Family Advocate should play in Rule 43 Applications for interim custody or access to child *pendente lite*. Van Zyl²³¹ found that the Family Advocate was far from being one-sided and that great lengths were taken to ensure that the best interests of the child were investigated and that the report was balanced, and delays were prevented as much as reasonably possible and therefore, the Family Advocate did not exceed his or her duties. Van Zyl found that despite the criticism of the report by the Family Advocate, the judge followed the recommendations by the Family Advocate.²³²

Their offices are under-resourced, and they are also overburdened like the courts.²³³ The Family Advocate is viewed as a decision-making body rather than an area that can help children and families mediate their dispute.²³⁴ Their services are only

²²⁷ Boezaart, 'The Position of Minor and Dependent Children', 185.

²²⁸ Boezaart, 'The Position of Minor and Dependent Children', 185.

²²⁹ 1993 (3) SA 72 (SE) [75].

²³⁰ Van Zyl, '*Whitehead v Whitehead*: fair comment on the Family Advocate?' 469.

²³¹ Van Zyl, '*Whitehead v Whitehead*: fair comment on the Family Advocate?' 470.

²³² Van Zyl, '*Whitehead v Whitehead*: fair comment on the Family Advocate?' 470.

²³³ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 305.

²³⁴ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 305.

applicable in the adversarial environment of the court.²³⁵ Their services are not available after a court order has been granted.²³⁶

The role and duty of the Family Advocate in the future must be extended to include children of post-divorce parents in terms of child relocation and Family Alternative Dispute Resolution.

3.8.2 Parenting plan

3.8.2.1 Current legislative guidelines in the Children's Act regarding parenting plans in South Africa

Divorced or separated parents may enter into a Parenting Plan, also called a Parenting Agreement. The Children's Act does not automatically require a parenting plan and there is currently no legal definition of a Parenting Plan. Section 33(1) of the Act states that 'the co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child'. The purpose of a parenting plan is to provide guidelines for parents in the exercise of their rights and responsibilities over their minor child and to ensure that parents are able to co-parent with minimum conflict.²³⁷ Section 33(4) of the Act states that a parenting plan must be in line with the best interests of the child principle. The parenting plan is a roadmap for the parents in terms of the upbringing of their child and to provide them with certainty.²³⁸

The content and formalities of a parenting plan are dealt with in section 33 and 34 of the Children's Act. In terms of section 33(3) of the Act, a parenting plan must deal with the following issues:

- a) where and with whom the child is to live;
- b) the maintenance of the child;
- c) contact between the child and any other person; and

²³⁵ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 305.

²³⁶ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 305.

²³⁷ South African Law Reform Commission, Discussion Paper 155 (Project 100D) Relocation of Families with Reference to Minor children (SALC 2022) para 5.1.

²³⁸ ADB v BAK (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [14].

d) issues pertaining to schooling and religious upbringing of the child

Section 33(2) of the Children's Act requires parents to agree on a parenting plan before seeking the intervention of the court. Section 33(5) of the Act advises that parents seek the assistance of either a social worker, family advocate, psychologist, or qualified mediator to help set up the parenting plan. Section 34 of the Children's Act, provides that the formalities of registering a parenting plan are that the parenting plan must be in writing and signed by both the parties; registered with the family advocate or made an order of court. The parenting plan must be registered with the Family Advocate. Where both parents are involved in the child's care and are co-holders of parental rights and responsibilities, each co-holder may act without the consent of the other co-holder when exercising their responsibilities and rights.

3.8.2.2 Relocation Clause in the Parenting Plan

There are no guidelines to follow in the Children's Act in terms of the local relocation of a co-parent with a minor child within South Africa. In past judgments there have been varying instances where parents include a non-relocation clause in the Parenting Plan for local relocation when this was not required by law.²³⁹

3.8.2.3 ADB v BAK²⁴⁰ and a non-relocation clause

In *ADB v BAK*²⁴¹ the applicant wanted to relocate with the child from Durban to Cape Town.²⁴² The parties were never married and after separating they underwent mediation and entered into a Parenting Plan after separating in order to regulate their responsibilities and how the minor child would be raised.²⁴³ The Parenting Plan had a non-relocation clause which stipulated that neither party would be allowed to relocate outside the borders of Kwa-Zulu-Natal and/or South Africa without the other party's written consent and that the consent would not be unreasonably withheld or delayed.²⁴⁴ The Applicant argued that she was not informed that she in fact did not require the respondents consent to relocate within the borders of South Africa.²⁴⁵ The above case shows that currently in South Africa there is no consistent approach that

²³⁹ *ADB v BAK* (15944/22P) [2023] ZAKZPHC 1 (9 January 2023).

²⁴⁰ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023).

²⁴¹ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023).

²⁴² (15944/22P) [2023] ZAKZPHC 1 (9 January 2023).

²⁴³ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [1].

²⁴⁴ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [1].

²⁴⁵ (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) [9].

courts and parents can follow when considering relocating from one province to another within South Africa. Some parents include a non-relocation clause in their parenting plan while others do not. The Children's Act needs clear guidelines in terms of local relocation within South Africa so that parents are aware of what is required of them where minor children are involved. Local and International relocation need the same guidelines in the Children's Act because as seen in the above case discussion local relocation still affects the care and contact arrangements of the non-relocating parent.

3.9 CHILD RELOCATION AGREEMENT PRIOR TO RELOCATING

This research advocates for the establishment of a Child Relocation Agreement, which may be entered into before relocation takes place. The Child Relocation Agreement (herein after Relocation Agreement) should be entered before relocating (or immediately after divorce or separation) with minor children. The Relocation Agreement can assist co-holders of parental responsibilities and rights about what happens after relocating and how to ensure that the rights of children during this process can be protected.

The Relocation Agreement would set up guidelines that have to be met when planning to relocate with a minor child.²⁴⁶ The guidelines in the Relocation Agreement would require: that the child's best interests be met; proof of receiving the required permission (consent) from the non-relocating parent to relocate with the child; proof of proper planning prior to relocating (name of new town or city, new home address, costs of relocating, new school); a possible solution for the future should be agreed upon by both parents in the event the relocation does not go as planned (if the parent decides to move back after relocating).²⁴⁷ The Child Relocation Agreement can also form part of the Parenting Plan after mediation has taken place.

The above proposals are sound, but local relocation should also be included because it affects parental care and contact arrangements. If a parent does not have a

²⁴⁶ Rhona Schuz, 'The Hague Child Abduction Convention and re-relocation disputes' (2021) 35 *Int J Law Policy Family* 1, 36.

²⁴⁷ Schuz, 'The Hague Child Abduction Convention and re-relocation disputes' 36.

parenting plan, the suggested Child Relocation Agreement should be of assistance and applicability in situations where a parenting plan is present or not.

Mediation plays a crucial role in developing parenting plans where co-parents cannot come to an agreement regarding their children.²⁴⁸

In conclusion, if mediation has been attempted and was unsuccessful or inappropriate in a particular case, the last resort by the courts should be an appointment of a parenting coordinator.²⁴⁹

3.10 LAW COMMISSION DISCUSSION AND FINDINGS

3.10.1.1 Commission findings on Parenting Plans

The SALRC²⁵⁰ found that parenting plans could be of great assistance in relocation cases. The SALRC²⁵¹ stated that a parenting plan should further include provisions in terms of section 33(3) of the Children's Act which states that no parent should move outside the borders of South Africa without the written consent of the other parent; a period of time within which the relocating parent must inform the non-relocating parent of relocation; cooperation in assisting other parent in making arrangements; revised contact arrangement and visit plans; agreeing on the distance of relocation.²⁵²

3.10.1.2 Commission finding on Mediation

The South African Law Reform Commission²⁵³ stated that South Africa's legislation should govern a mediation process in terms of child relocation disputes and that the legislation should provide guidelines on how a parenting plan can deal with disputes in child relocation cases. The SALRC proposes that a Family Dispute Resolution Bill, 2020 should provide for mandatory mediation in a family relocation dispute.²⁵⁴

²⁴⁸ SALRC on Relocation of Families with Reference to Minor children para 5.14.

²⁴⁹ 2018 (4) SA 530 (WCC) [106.4].

²⁵⁰ SALRC on Relocation of Families with Reference to Minor children para 5.13.

²⁵¹ SALRC on Relocation of Families with Reference to Minor children para 5.13.

²⁵² SALRC on Relocation of Families with Reference to Minor children para 5.13.

²⁵³ South African Law Reform Commission, Discussion Paper 155 (Project 100D) Relocation of Families with Reference to Minor children (SALC 2022) para 8.4.

²⁵⁴ SALRC on Relocation of Families with Reference to Minor children para 8.4.

This research recommends that instead of a separate Family Dispute Resolution Bill, the legislature should instead introduce mandatory mediation guidelines in the Children's Act which deal with matters specifically relating to Children.²⁵⁵

3.11 CONCLUSION

This chapter considered the use of mandatory mediation before relocation (Prior Consultation). It also advocated for the establishment of a Child Relocation Agreement, which may be entered into before relocation takes effect.

In South Africa, parties can either enter into voluntary mediation or Alternative Dispute Resolution in an attempt to resolve relocation disputes whereas in Australia they have an Alternative Dispute Resolution (ADR) which is compulsory. This is called Family Dispute Resolution where parties must attempt alternative dispute resolution where they discuss their dispute. Public and private bodies run this board.²⁵⁶ The use of Family Dispute Resolution in Australia is discussed in the next chapter.²⁵⁷

²⁵⁵ SALRC on Relocation of Families with Reference to Minor children para 8.5.

²⁵⁷ Beverley Clark, 'International relocation of children in South Africa: overview' <[https://content.next.westlaw.com/8-622-2048?__lrTS=20201217143029705&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/8-622-2048?__lrTS=20201217143029705&transitionType=Default&contextData=(sc.Default)&firstPage=true) > accessed 10 December 2021.

²⁵⁷ Beverley Clark, 'International relocation of children in South Africa: overview' <[https://content.next.westlaw.com/8-622-2048?__lrTS=20201217143029705&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/8-622-2048?__lrTS=20201217143029705&transitionType=Default&contextData=(sc.Default)&firstPage=true) > accessed 10 December 2021.

CHAPTER 4: COMPARATIVE LEGAL ANALYSIS OF AUSTRALIA

4.1 AUSTRALIA

The following chapter discusses the current legislative framework in Australia regarding local relocation where one parent (co-parent) wishes to relocate with the children 'within' Australia (interstate). An analysis of Australia's Alternative Dispute Resolution for family matters such as the compulsory form of Family Dispute Resolution is done. The previous chapter looked at the African ideology on mediation to establish if there are any lessons South Africa can draw from customary law in terms of mediation for family law matters such as childcare and maintenance after divorce. This chapter further examines Indigenous Australian customary law to see what lessons, if any, the South Africa legal system can draw from Australia.

4.2 INTRODUCTION

Australia was chosen as a comparative study because relocation in Australia usually takes place with minor children within the country (interstate) because of the vast distances involved.¹ Relocation disputes are governed by the Family Law Act 1975.² The key consideration in any parenting dispute, like South Africa, is the child's best interests.³ Australia has adopted a more neutral approach when resolving relocation disputes.⁴ Temporary relocations are determined in the same way as permanent relocations.⁵

Australia prefers the alternative dispute resolution processes over the adversarial approach.⁶ Australia has shown a lot of discontent towards the adversarial approach in family law matters, therefore alternatives to adjudication such as mediation have

¹ Brigitte Clark, 'The shackled parent? Disputes over relocation by separating parents – Is there a need for statutory guidelines?' (2017) 134 SALJ 80, 81.

² Family Law Act 1975 (Herein after the Family Law Act).

³ Gillian Coote and Gary Yan, 'International relocation of children in Australia: overview' (Thomson Reuters Practical Law, 2021) < [https://uk.practicallaw.thomsonreuters.com/3-622-3385?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-622-3385?transitionType=Default&contextData=(sc.Default)&firstPage=true) > accessed 10 December 2021.

⁴ Coote and Yan, 'International relocation of children in Australia: overview'.

⁵ Coote and Yan, 'International relocation of children in Australia: overview'.

⁶ Madelene De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' (2017) 2 TSAR 298, 309.

strongly been encouraged.⁷ Since 2006, the rule is that mediation must first be attempted before the matter is referred to court.⁸

4.3 THE CURRENT LEGISLATIVE FRAMEWORK OF RELOCATION IN AUSTRALIA

4.3.1 Relocation

In Australia, relocation is defined as a proposed geographical move from one town to another, interstate or overseas by the relocating parent that will disrupt the non-relocating parents contact with the child.⁹

4.3.2 Child relocation

Subdivision 4 of the Family Law Act of 1975 defines child relocation as ‘changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent’. If the move prevents the non-relocating parent from maintaining contact and a relationship with the child, then the relocating parent must reach an agreement with the other parent and make application to the family law courts in Australia.¹⁰ The above is applicable to a move that is interstate or overseas.¹¹

4.3.3 Relocation Order

If one parent is planning on moving a child away from the other parent and if the move will limit the time the child will spend with the other parent then a court may not give permission for the move.¹² The relocating parent will have to apply to court, prior to moving, for a Relocation Order.¹³ Before making a decision to allow the move or not, the court will consider if the move will be in the best interests of the child.¹⁴ If the non-relocating parent wants to prevent the move from taking place, then an application can

⁷ De Jong, ‘Australia’s family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission’s Issue Paper 31 of 2015?’ 309.

⁸ De Jong, ‘Australia’s family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission’s Issue Paper 31 of 2015?’ 309.

⁹ Lisa Young, ‘Revisiting relocation disputes’ [2016] International Survey of family Law 19, 19.

¹⁰ ‘Relocating children’ (Family Court of Western Australia, 16 April 2018) <https://www.familycourt.wa.gov.au/R/relocating_children.aspx>accessed 14 February 2023.

¹¹ Family Court of Western Australia, ‘Relocating children’

¹² Family Court of Western Australia, ‘Relocating children’

¹³ Family Court of Western Australia, ‘Relocating children’

¹⁴ Family Court of Western Australia, ‘Relocating children’

be made to court.¹⁵ The court will consider the costs involved for the non-relocating parent having to travel to maintain contact with the child.¹⁶

4.3.4 Consent to Relocate

The Family Law Act requires the relocating parent to speak to the other non-relocating parent. The relocating parent must obtain the non-relocating parent's consent prior to relocating with the child. Once the non-relocating parent has given consent to the relocation then arrangements are made about visiting and maintaining the parent-child relationship of the non-relocating parent.¹⁷ If consent to relocate is not given, then the relocation cannot occur until a court order is obtained to allow the move.¹⁸ If a move occurs without the required consent, the court will order the return of the child until it has made a decision at a hearing.¹⁹ If agreement cannot be reached between the parents, then the relocating parent can ask the court for a parenting order with a provision to allow the child to relocate and non-relocating parent can ask for an order to stop the relocation. Notwithstanding, relocation will not be allowed by the court if it is not in the best interests of the child.²⁰

4.3.5 Equally shared parental responsibility

When parents with minor children separate, they will automatically share parental responsibility. The responsibility will include making decisions regarding the child's long-term welfare and living arrangements. Section 61 DA of the Family Law Act states that the court must apply a presumption that it is in the best interests of the child and of the child's parents to have equally shared parental responsibility for the child when it makes a parenting order in relation to a child. That presumption will be rebutted if there is family violence or abuse as listed in section 61DA(2) or if it will not be in the best interests of the child for the child's parents to have equally shared parental responsibilities as stated in section 61DA(4).

¹⁵ Family Court of Western Australia, 'Relocating children'

¹⁶ Family Court of Western Australia, 'Relocating children'

¹⁷ 'Child Relocation in Australia: Here's What to Know' (Emerson Family Law) <<https://emfl.com.au/child-relocation-in-australia-heres-what-to-know/>> accessed 20 October 2021.

¹⁸ 'Child Relocation in Australia: Here's What to Know'.

¹⁹ 'Child Relocation in Australia: Here's What to Know'.

²⁰ 'Child Relocation in Australia: Here's What to Know'.

Section 65DAC of the Family Law Act states that parents with equally shared parental responsibility for the child must consult in relation to the child's major long-term issues.²¹ Both parents have to make a genuine effort to come to a decision about the major-long term issue.²² A parent's failure to do so will be detrimental to a parent's prospects of success in any future litigation.²³ Interestingly, in Australia in terms of section 65Y and 65Z of the Family Law Act, it is a criminal offence to remove a child from Australia without written consent or court order and it is a criminal offence for an owner or operator of an aircraft or vessel to allow a child to leave Australia without the required consent.

4.4 VARIOUS COMPETING INTERESTS

4.4.1 Determining the child's best interests

In *Heath & Hemming*²⁴ Kent J observed that:

In some cases, the determinants of the "best interests" may well mean that one party's choice is effectively outweighed in the balance. Alternatively, proper balancing may result in the child's "best interests" being served by Orders which do not give one parent "optimal" arrangements or outcomes.

Section 60CC (2) of the Family Law Act subject to subsection (5) references how a court determines what is in the child's best interests. The court's two primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents;
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Additional considerations are the following: any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views; the nature of the relationship of the child with each parent and other persons such as grandparents or other relatives of the child.

²¹ Coote and Yan, 'International relocation of children in Australia: overview'.

²² Bérénos, 'Time to Move on? The international State of Affairs with Respect to Child Relocation Law' 6.

²³ Coote and Yan, 'International relocation of children in Australia: overview'.

²⁴ (No 2) [2011] FamCA 749 [101].

The courts will also look at the distance and permanency of the relocation and the impact that it might have on aspects of the child's life such as friends, school and the ways the child will be able to maintain a relationship with the other parent.²⁵

4.4.2 Freedom of movement of the parents

In the Australian case *U v U*²⁶ the court stated that although freedom of movement is a constitutional right for adults in Australia, it does not surpass the rights of the child - which means that the freedom of movement of adults is not above the right of the child.

4.5 COURT JUDGMENTS REGARDING RELOCATION WITH A MINOR CHILD WITHIN AUSTRALIA

Relocation cases will always present difficult questions because taking a child away from the other parent will affect the way the child's relationship with the non-relocating parent can be maintained.²⁷ Courts in Australia generally follow a neutral approach when deciding relocation cases where children are involved. In *Beaufort and Beaufort*²⁸ a neutral approach was followed; the court did not allow the mother to relocate from Sydney to Melbourne. The child had a close relationship with both parents, therefore the court found that although it would be in the best interests of the children to relocate with the mother to Melbourne, it would not be beneficial to the father. The distance involved would make it difficult for him to travel interstate to spend time with the children.²⁹ The court decided that it would be best if the mother remained in Sydney.³⁰ This meant that the father would not lose significant involvement in the lives of his children.³¹ The relationship between the children and the parents would continue without interruption.³²

In *Cahan & Kafka*³³ a parent, the mother, was denied her application to relocate the child to a different city. The mother received a job offer with a substantial wage

²⁵ 'Child Relocation in Australia: Here's What to Know'.

²⁶ *U v U* (2002) 211 CLR 238 [170].

²⁷ 211 CLR 238 [170].

²⁸ *Beaufort and Beaufort* (2009) FMCAfam 191 [132].

²⁹ (2009) FMCAfam 191 [131].

³⁰ (2009) FMCAfam 191 [132].

³¹ (2009) FMCAfam 191 [132].

³² (2009) FMCAfam 191 [132].

³³ *Cahan & Kafka* [2019] FCCA 2421.

increase and wanted to relocate with her children from Melbourne to Sydney.³⁴ The mother's application is to move to Sydney to pursue her career (move interstate) was curtailed.³⁵ Both parents were located in Melbourne.³⁶ The court had to consider and weigh the various proposals to determine what would be in the best interests of the child.³⁷ The father submitted that the move would be detrimental financially, and that because of his age, it would mean that he would have to start over in life.³⁸ The court decided that it was unfair to expect the father to relocate and that if the relocation was allowed, it would affect his relationship with his daughter.³⁹

4.6 ALTERNATIVE DISPUTE RESOLUTION FOR FAMILY MATTERS IN AUSTRALIA

Reforms to the Family Law Act in 2006 by the Family Law Amendment (Shared Parental Responsibility) Act 2006 were described as 'the most significant changes to the FLA since its inception'.⁴⁰ The three main changes to the FLA were the following:⁴¹

- (a) Emphasis on Shared Parenting
- (b) Introduction of mandatory family dispute resolution (FDR) as a precondition to initiating court proceedings
- (c) The handling of matters involving allegations of family violence and child abuse

4.6.1 *Adversarial versus dispute resolution approach*

The reason for the increase of use in pre-litigation dispute resolution in Australia is due to the general dissatisfaction with litigation to solve family law disputes.⁴² The argument in Australia is that the acrimony in litigation does little to promote

³⁴ [2019] FCCA 2421 [4].

³⁵ [2019] FCCA 2421 [5].

³⁶ [2019] FCCA 2421 [1].

³⁷ [2019] FCCA 2421 [6].

³⁸ [2019] FCCA 2421 [75].

³⁹ [2019] FCCA 2421 [179].

⁴⁰ Shelby H and Caruana C, 'Appendix A: Mandatory mediation in family law -a review of the literature; certifying mediation; A study of section 60I certificates' (2017) 2 Australian National University 1.

⁴¹ Shelby and Caruana, 'Appendix A: Mandatory mediation in family law -a review of the literature; certifying mediation; A study of section 60I certificates' 1.

⁴² Shelby and Caruana, 'Appendix A: Mandatory mediation in family law -a review of the literature; certifying mediation; A study of section 60I certificates' 1.

'cooperative parenting after separation'.⁴³ Parental acrimony is also harmful to children.⁴⁴

4.6.2 Voluntary or compulsory mediation

Australia made mediation compulsory.⁴⁵ Mandatory mediation was introduced to limit the involvement of courts to the more difficult cases such as: 'entrenched conflict, family violence, substance abuse or child abuse.'⁴⁶ When the option to mediate was voluntary, the uptake was low.⁴⁷ Research findings found that mandated mediation was effective in resolving disputes involving children and family matters.⁴⁸ Australia does have exemptions where families can be exempted from family dispute resolution.⁴⁹ This is discussed further below. In 2006, Australia created a legislative framework where less adversarial methods can be used in family law.⁵⁰

In Australia, separated families are encouraged to use family mediation to resolve disputes about children before attempting to use family law courts.⁵¹ Mediation, facilitated by a neutral person, is a way of resolving disputes between people who are in conflict.⁵² The aim of mediation is to prevent the matter in dispute from going to court.⁵³ If a dispute cannot be resolved through mediation then the court may need to

⁴³ Shelby and Caruana, 'Appendix A: Mandatory mediation in family law -a review of the literature; certifying mediation; A study of section 60I certificates' 1.

⁴⁴ Shelby and Caruana, 'Appendix A: Mandatory mediation in family law -a review of the literature; certifying mediation; A study of section 60I certificates' 1.

⁴⁵ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 309.

⁴⁶ Shelby and Caruana, 'Appendix A: Mandatory mediation in family law -a review of the literature; certifying mediation; A study of section 60I certificates' 1.

⁴⁷ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 309.

⁴⁸ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 309.

⁴⁹ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 309.

⁵⁰ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 310.

⁵¹ Family Relationships Online, 'Family mediation and dispute resolution <<https://www.familyrelationships.gov.au/separation/family-mediation-dispute-resolution>> accessed 14 February 2023.

⁵² Family Relationships Online, 'Family mediation and dispute resolution' <<https://www.familyrelationships.gov.au/separation/family-mediation-dispute-resolution>> accessed 14 February 2023.

⁵³ Family Relationships Online, 'Family mediation and dispute resolution'.

make a decision.⁵⁴ Australia has a formal mediation process for family matters called Family Dispute Resolution which has an accredited Family Dispute Resolution practitioner.⁵⁵ This is discussed in more detail below.

4.6.3 Family Dispute Resolution (FDR)

Family Dispute Resolution (herein after FDR) is a special type of mediation specifically geared towards helping families with any disputes they might have while encouraging them come to their own agreements.⁵⁶ The aim of an accredited, neutral FDR practitioner is to help families discuss their issues while focusing on the needs of their children.⁵⁷ The objective of FDR is to help families set up parenting plans to agree on future parenting arrangements.⁵⁸ FDR is also a low-cost way to help parents sort out their future parenting arrangements with the help of a professional.⁵⁹

It is compulsory for families who have a dispute to first attempt FDR before applying to court for assistance.⁶⁰ Section 60I (1) of the Family Law Act provides for the attendance of family dispute resolution before applying to a family court. Compulsory FDR aims to ensure that all persons who have a dispute make a genuine effort to resolve that dispute by family dispute resolution.

In Australia, the family dispute area is the largest pre-litigation scheme that mandates attendance in a dispute resolution process.⁶¹ FDR is run by public and privately funded bodies.⁶² FDR services are available at the following government-funded services: Family Relationship Centres; Legal Aid Commissions and community-based family law services.⁶³ Accredited FDR practitioners also provide their services as a private business.⁶⁴

⁵⁴ Family Relationships Online, 'Family mediation and dispute resolution'.

⁵⁵ Family Relationships Online, 'Family mediation and dispute resolution'.

⁵⁶ Family Court of Western Australia, 'Relocating children'.

⁵⁷ Family Court of Western Australia, 'Relocating children'.

⁵⁸ Family Court of Western Australia, 'Relocating children'.

⁵⁹ Family Court of Western Australia, 'Relocating children'.

⁶⁰ Coote and Yan, 'International relocation of children in Australia: overview'.

⁶¹ Shelby and Caruana, 'Appendix A: Mandatory mediation in family law -a review of the literature; certifying mediation; A study of section 60I certificates' 2.

⁶² Coote and Yan, 'International relocation of children in Australia: overview'.

⁶³ Family Relationships Online, 'Family mediation and dispute resolution'.

⁶⁴ Family Relationships Online, 'Family mediation and dispute resolution'.

Everything discussed in front of an FDR practitioner is confidential and cannot be used as evidence in court although there are exceptions.⁶⁵ The following exceptions apply: if someone's life or health has been threatened; the commission of a crime; child abuse; or anything that indicates that a child is at risk of abuse.⁶⁶

FDR does not focus on the emotional side of the relationship, rather it is a formal process that focusses on resolving the specific complex family dispute at hand.⁶⁷ In some instances the mediator will include the children if they are of an age and maturity to understand the proceedings.⁶⁸ The FDR process has an option of being child-inclusive which means that a child consultant will discuss the issue with the children and then provide the views of the child back to the parents.⁶⁹

4.6.3.1 Process of FDR

Section 60I (2) of the Family Law Act provides that the provisions of the *Family Law Rules 2004* impose requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order. After one of the parties has engaged with an FDR practitioner, the practitioner will invite the other party to a mediation session.⁷⁰ If the person that has been invited to attend the mediation process refuses mediation, then the FDR practitioner will need to issue a certificate so that the other person can make an application to the family court.⁷¹

Section 60I (8) of the Family Law Act provides that a family dispute resolution practitioner may give one of the below types of certificates to a person:

- (a) 'A certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party of parties to the proceedings in relation to the issue or issues that the order would deal with, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend.'

⁶⁵ Family Relationships Online, 'Family mediation and dispute resolution'.

⁶⁶ Family Relationships Online, 'Family mediation and dispute resolution'.

⁶⁷ Family Relationships Online, 'Family mediation and dispute resolution'.

⁶⁸ Family Relationships Online, 'Family mediation and dispute resolution'.

⁶⁹ Family Relationships Online, 'Family mediation and dispute resolution'.

⁷⁰ Family Relationships Online, 'Family mediation and dispute resolution'.

⁷¹ Family Relationships Online, 'Family mediation and dispute resolution'.

- (b) A certificate to the effect that the person did not attend family dispute resolution because the practitioner considers that it would not be appropriate to conduct the proposed family dispute resolution.
- (c) A certificate to the effect that the attendees made a genuine effort to resolve the issue or issues.
- (d) A certificate to the effect that the attendees did not make a genuine effort to resolve the issue or issues.
- (e) A certificate to the effect that the practitioner considers that it would not be appropriate to continue with family dispute resolution.'

Section 60I(7) of the FLA provides that a court cannot hear an application for a parenting order unless the application is accompanied by a certificate from a Family Dispute Resolution practitioner.⁷²

4.7 FAMILY RELATIONSHIP CENTRES

In 2006, the Australian government created and funded a network of community-based family relationship centres. The purpose of a family relationship centre is to assist families in distress, to acquire information and assistance, it is not compulsory to use these centres.⁷³

4.8 AUSTRALIAN INDIGENOUS CUSTOMARY LAW

The purpose of this part of the research is to determine if the Aboriginal and Torres Strait Islander group dispute mediation style values are incorporated in the Australian legal system, specifically in family matters relating to minor children.

4.8.1 Recognition of Customary Law

In *Mabo v the State of Queensland*⁷⁴ the court recognised that a law of Indigenous inhabitants operated in Australia prior to 1788 and that it is entitled to respect and recognition by the Common Law in Australia.⁷⁵ This case concerned the issue of land

⁷² Shelby and Caruana, 'Appendix A: Mandatory mediation in family law -a review of the literature; certifying mediation; A study of section 60I certificates' 2.

⁷³ De Jong, 'Australia's family relationship centres: a possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?' 311.

⁷⁴ (1992) 175 CLR 1 [2].

⁷⁵ 'Indigenous Australian' (1995) Family Matters 42 Australian Institute of Family Studies 24, 24.

but the principle that it dealt with was a broader one because it recognised indigenous Australians as the first people of the continent.⁷⁶

The Australian Law Reform Commissions' 1986 report on the use of customary law for aboriginal people was a good initiative, its recommendations have been ignored for the last 30 years.⁷⁷ People are against recognising Aboriginal customary law because it is believed that there is only one law applicable in Australia.⁷⁸

4.8.2 Western-style mediation in Aboriginal communities

Aboriginal people have a growing interest in western mediation since the establishment of Dispute Resolution Centres.⁷⁹ Dispute Resolution Centres were created to assist Aboriginal and Torres Strait peoples.⁸⁰ The reason is that mediation is very similar to how disputes were settled in the Aboriginal and Torres Strait communities.⁸¹ Mediation assists Aboriginal communities to find solutions that are in keeping with their cultural values because it uses elements of customary law practice.⁸² Elements of customary law mediation practice in Aboriginal communities involves large groups of people and the issues being dealt with are public in nature.⁸³ In Australia, mediation agreements are not legally binding but it can be binding if the parties want it that way.⁸⁴

The problem in Australia is that Aboriginal indigenous law is not recognised in Australia. Although the *Mabo v the State of Queensland*⁸⁵ case was a groundbreaking decision, all it did was recognise Aboriginal indigenous people as the first people of the continent.

⁷⁶ 'Indigenous Australian' 24.

⁷⁷ 'Why Australia won't recognise Indigenous customary law' (Australian National University, 14 June 2016) < <https://law.anu.edu.au/news-and-events/news/why-australia-won%E2%80%99t-recognise-indigenous-customary-law> > accessed 20 February 2023.

⁷⁸ Australian National University, 'Why Australia won't recognise Indigenous customary law'.

⁷⁹ 'Mediation for Aboriginal and Torres Strait Islander peoples' (Queensland Government, 6 August 2021) < <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/mediation-services/mediation-for-aboriginal-and-torres-strait-islander-peoples> > accessed 20 February 2023.

⁸⁰ Hearin after Aboriginal means Aboriginal and Torres Stait peoples.

⁸¹ Queensland Government, 'Mediation for Aboriginal and Torres Strait Islander peoples'.

⁸² Queensland Government, 'Mediation for Aboriginal and Torres Strait Islander peoples'.

⁸³ Queensland Government, 'Mediation for Aboriginal and Torres Strait Islander peoples'.

⁸⁴ Queensland Government, 'Mediation for Aboriginal and Torres Strait Islander peoples'.

⁸⁵ (1992) 175 CLR 1 [2].

4.9 CONCLUSION

This chapter provided an analysis of Australia's approach to local child relocation within the borders of Australia and it found that the legislative guidelines in the Family Law Act 1975 are the same for local child relocation and international child relocation. It also provided a comparative analysis of Australia's Compulsory Family Dispute Resolution process defined in the Family Law Act, 1975 which requires that families attempt compulsory mediation prior to even considering approaching the court. Indigenous Australian law was also referenced in terms of family mediation.

CHAPTER 5: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

The following chapter is a summary of the entire dissertation. It lists some recommendations for the effective administration of local relocation of a co-parent of a minor child in South Africa and concludes the study.

5.1 SUMMARY

Chapter 2 established that the Children's Act⁸⁶ lacks a detailed guideline that governs relocation of co-parents of minor children within the Republic. It was pointed out that there is a major disparity between local and international child relocation because consent procedures are required for international child relocation whereas none of such procedures are in place for local child relocation. The absence of legislation and/or provisions that regulate this aspect of relocation could affect the rights of the child.⁸⁷ It is submitted that there should be no disparity between local and international child relocation and the Children's Act should be amended in this regard.

In chapter 3, I analysed mediation as a form of Alternative Dispute Resolution prior to litigation. It was discovered that in South Africa, parties can enter into voluntary mediation in an attempt to resolve relocation disputes. It was suggested that mediation should be mandatory, prior to relocation both locally and internationally. It was suggested that the process of attending mandatory mediation could be called Prior Consultation where a Child Relocation Agreement is entered into before relocation takes effect. It was recommended that the Child Relocation Agreement must set up guidelines for relocation. The guidelines in the Child Relocation Agreement must require that the child's best interests are met and ensure that proper planning is done prior to relocation.

In chapter 4, I discussed the position of Australian child relocation. Australia was chosen because of the vast distances involved in local child relocation between different towns and cities. It was found that the same legislative guidelines exist and that the process to relocate with a child is the same in both local and international relocation. It came to light that Australia has a compulsory Alternative Dispute

⁸⁶ Children's Act 38 of 2005 (herein after the Children's Act).

⁸⁷ Wesahl Domingo, "'For the sake of the children': South African Family Relocation Disputes' (2011) 14 PER 148, 149.

Resolution (ADR) called Family Dispute Resolution where parties attempt to resolve any disputes before they refer their matter to courts. This ADR process is run by public and privately funded bodies.⁸⁸

5.2 RECOMMENDATIONS

In *LW v DB*,⁸⁹ Satchwell J stated that relocation of parents whether outside or within South Africa is a continuing fragmentation of the original family unit and consists of the same distress.⁹⁰ Therefore, South Africa should adopt clear legislative guidelines in the Children's Act to reduce uncertainty in the local child relocation process where minor children are involved. In Australia, the legal requirements for international relocation are the same as local relocation. Therefore, the same legislative guidelines should be applied to both international and local child relocation in South Africa because relocation is a major decision that impacts the parent and child relationship. In *TSF v SCD*⁹¹ the court stated that it is important that parties 'consult each other when they make a decision regarding the minor child as per Section 31 of the Children's Act 38 of 2005'.⁹² It is also crucial that the South African Children's Act fully defines the following where children are involved: a major decision; local relocation; international relocation; permanent move; temporary move; residence; permanent residence; temporary residence; change; and a temporary relocation.

Mandatory notice of intention to relocate must be served on the non-relocating parent. Mandatory mediation should precede any child relocation. It is recommended that there must be Prior Consultation before local and international child relocation is considered. It is recommended that a Child Relocation Agreement must be entered into to assist co-holders of parental responsibilities and rights, concerning relocating. Both parents must decide what should happen should the relocation fail to go in terms of the plan.⁹³

It is suggested that co-parents should enter into a compulsory Child Relocation Agreement before relocation takes place. It is recommended that the Child Relocation

⁸⁸ Gillian Coote and Gary Yan, 'International relocation of children in Australia: overview'.

⁸⁹ 2015 JR 2617 (GJ) [13].

⁹⁰ 2015 JR 2617 (GJ) [16].

⁹¹ (2019/15250) [2022] ZAGPJHC 758 (27 September 2022) [2].

⁹² (2019/15250) [2022] ZAGPJHC 758 (27 September 2022) [50.10].

⁹³ Schuz, 'The Hague Child Abduction Convention and re-relocation disputes' 36.

Agreement must provide guidelines for relocation. The guidelines in the Child Relocation Agreement must uphold the child's best interests.

The Children's Act should provide a clear definition a Parenting Plan. A compulsory relocation or non-relocation clause should be a requirement in the Parenting Plan in the case of potential future relocation of one of the parents.

The Children's Act should contain clear provisions indicating when the various alternative dispute resolution processes in family law relating to children should be used.

South Africa should learn from Australian law where the Family Law Act 1975 requires separating families to make a genuine effort to sort out parenting disputes through the Family Dispute Resolution.⁹⁴ Section 60I (1) of the Family Law Act requires the attendance to a Family Dispute Resolution before resorting to court processes subject to certain exceptions; like child abuse, family violence, or urgency. A notice of one parent's intention to relocate must be given to the other parent.

A middle ground must be reached in the relocation process to save travelling costs and ensure continued shared rights and responsibilities between co-parents. Although digital communication may be a solution to contact, it cannot be a substitute. Adequate solutions should be available so that the relationship between the child and the non-relocating parent is maintained.

⁹⁴ Coote and Yan, 'International relocation of children in Australia: overview'.

5.3 CONCLUSION

We live in a society that is characterised by constant migration and as such relocation with minor children. The South African Children's Act lacks elaborate guidelines for local child relocation. The disparity between local and international child relocation is at odds with the equality clause in the Constitution. Therefore, our legislature should amend the Children's Act to ensure that the same process and legislative guidelines are applicable to local and international child relocation as seen in Australia's Family Law Act, 1975. South Africa may adopt some of the ADR principles set out in the Australian pre-litigation mediation process. The adoption of a certificate system goes to inform the court of the progress of the independent mediation process. A Child Relocation Agreement prior to relocation can be beneficial, especially if done during Consultation with both parents prior to relocation where minor children are involved. If both parents are aware of their rights during the relocation process, there will be no uncertainty and they will know their responsibility to effect the best outcome for the child.

LIST OF ACRONYMS/ ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CRC	Convention on the Rights of the Child
FLA	Family Law Act 53 of 1975
JPIL	Journal of Private International Law
SALRC	South African Law Reform Commission
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
SAJP	South African Journal of Psychology
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (The Journal of Contemporary Roman-Dutch Law)
UNCRC	United Nations Convention on the Rights of the Child

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