

PARENTING PLANS IN TERMS OF THE CHILDREN'S ACT: SERVING THE BEST INTERESTS OF THE PARENT OR THE CHILD?

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SUMMARY

The Children's Act 38 of 2005 provides the legal basis for the reshaping of the exercise of parental responsibilities and rights. In previous case law the custody of a child was assigned to the parent who had been the primary caretaker during the subsistence of the marriage relationship, although the overriding factor remained the best interests of the child. This model has proved to be insufficient in order to promote the need for a child to be brought up in a stable family environment or, where this is not possible, in an environment that is as close as possible to a caring family environment; including the child's right to maintain close contact with both parents.

Facing this shortfall, the legislature adopted a "parenting-plan" model in terms of the Children's Act, which attempts to help parents to set aside their differences and work out a plan which is in their child's best interests. The parenting plan further attempts to help parents in exercising their parental responsibilities and rights over their children. The purpose of this article is to analyse this legal solution in an effort to ascertain whether it really promotes the best interests of the child, namely, promoting his/her right of growing up in a close relationship with both parents.

1 INTRODUCTION

Making decisions about where children will live after separation is one of the most difficult issues when divorce occurs. While parents have the general responsibility to make decisions in relation to their children, this task may prove to be more difficult when there are disputes over the future living arrangements of their children.¹ This is the reason why South African legislation has introduced the concept of "parenting plans",² which may be agreed upon by parents who have parental responsibilities and rights in respect of their children.³ It should, however, be noted that it is not obligatory⁴ for all holders of

¹ Parkinson and Cashmore *The Voice of a Child in a Family Law Dispute* (2008) 15.

² By means of s 33 and s 34 of the Children's Act 38 of 2005 (hereinafter "the Children's Act").

³ S18(2) of the Children's Act provides that "the parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right – (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child."

parental responsibilities and rights to agree on such a plan. Section 33(1) of the Children's Act⁵ provides 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 concept of "parenting plans" reflects a desire on the part of the legislature to move away from a child-custody system that favoured the mother over the father, or *vice versa* and towards a more progressive system that recognizes the importance of both parents playing an active role in the child's life.⁶ The Convention on the Rights of the Child⁷ has long recognized the value of both parents in their children's lives. Article 18 of this Convention provides that:

"(1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

The CRC therefore places an obligation on the courts to consider the option of providing that the child should spend equal time with each of his parents, if this is in the child's best interests. The rationale of the CRC is that both parents must share responsibility in raising their children, except for cases where the court specifically finds that such joint responsibility is not in the best interest of the child.

2 PARENTAL RESPONSIBILITIES AND RIGHTS, AND THE ACQUISITION THEREOF IN TERMS OF THE CHILDREN'S ACT

Before the coming into operation of the Children's Act, the courts in South Africa used terms such as "parental power",⁸ and later "parental authority".⁹ This parental power or parental authority entailed custody, access and guardianship. Custody was awarded to one parent only, and access to the non-custodial parent. This means that in most instances the non-custodial parent's role would be no more than a visiting one. Guardianship was awarded to both parents. However, sections 18 to 23 of the Children's Act introduce the concept of parental responsibilities and rights. The acquisition of parental responsibilities begins when the child is born. Section 20 of the Children's Act provides that a father who is or was married to the mother of a child when the child was conceived, or born, or at any time between the conception and birth

⁴ Optional parenting plans can encourage separating and divorcing parents to negotiate their own parenting arrangements through non-adversarial means, reflecting the particular needs of their children.

⁵ 38 of 2005.

⁶ This may also be motivated by s 9 of the Constitution of the Republic of South Africa, 1996, in that there should be equality between the father and the mother.

⁷ Adopted by the UN General Assembly in 1989 and hereinafter "the CRC". It was ratified by South Africa in June 1995. South Africa is therefore legally bound to implement its provisions.

⁸ *H v I* 1985 (3) SA 237 (C).

⁹ *B v S* 1995 (3) SA 571 (A).

of the child, has automatic parental responsibilities.¹⁰ However, where the mother and the father were not married when the child was born, the mother will in certain circumstances have full parental responsibilities and rights to the exclusion of the father.¹¹

In terms of the Act, unmarried fathers can, however, also acquire parental responsibilities and rights. These may be acquired in other ways apart from marrying the mother of the child.¹² An unmarried father, regardless of whether or not he has ever lived with the child's mother, also acquires full parental responsibilities and rights if he:

- (i) consents to be identified or successfully applies to be identified as the child's father or pays damages in terms of customary law;¹³
- (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and¹⁴
- (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.¹⁵

A biological father may also acquire parental responsibilities and rights by means of a formal parental responsibilities and rights agreement with the mother of the child,¹⁶ or by being appointed a guardian.¹⁷ Courts are obliged to make all decisions based on the best interests of the child.¹⁸ Therefore any arrangement that would pose a risk of harm to the physical or psychological well-being of the child will not be granted by the courts.

3 THE “BEST INTERESTS OF THE CHILD” PRINCIPLE

The “best interests of the child” is a criterion always used by courts when deciding matters concerning children. This principle was acknowledged and applied by the South African courts as far back as 1948.¹⁹ However, before the introduction of the Children's Act, South African legislation neither provided a description of what would constitute the best interests of the child nor did it describe any particular factors to be considered. In 1994 *McCall v McCall*,²⁰ for the first time provided a rather comprehensive list of guiding factors the court had to take into account in relation to the granting of application for custody.²¹

¹⁰ S 20(a) and (b).

¹¹ S 19(1).

¹² S 21(1)(a) and (b).

¹³ S 21(1)(b)(i).

¹⁴ S 21(1)(b)(ii).

¹⁵ S 21(1)(b)(iii).

¹⁶ S 22(1) and (2).

¹⁷ S 22(7). In terms of s 23 an application may also be brought for an order granting care and contact with a child.

¹⁸ S 28(4).

¹⁹ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

²⁰ 1994 (3) SA 201 (C).

²¹ 204G–205J.

Some of these guidelines are now set out in section 7²² of the Children's Act. When there is a dispute concerning the child, the court must use these factors to decide the outcome. Such factors include, but are not limited to, the nature of the personal relationship between the child and the parents, the child's physical and emotional security, the need for the child to be brought up within a stable family, and the relevant characteristics of the child.²³

Section 9 of the Children's Act puts section 7²⁴ into perspective in that the paramountcy of the best interests of the child should be applicable to all matters concerning the child. Section 9 provides as follows:

"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."

The paramountcy of children's best interests is also emphasized in section 28(2) of the Constitution of the Republic of South Africa, 1996. It provides:

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

The current legal position in most countries is that the best interests of the child are the fundamental criterion governing legal decisions regarding the child.²⁵ In South Africa, judicial officers are free to decide what is best for a child's welfare on a case-by-case basis. The "best interests" criterion is therefore, the guiding principle in the determination of all aspects of parental

²² S 7 provides that "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely – (a) the nature of the personal relationship between – (i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances; (b) the attitude of the parents, or any specific parent, towards – (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child; (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs; (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from – (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living; (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis; (f) the need for the child – (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition; (g) the child's – (i) age, maturity and stage of development; (ii) gender; (iii) background; and (iv) any other relevant characteristics of the child; (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; (i) any disability that a child may have; (j) any chronic illness from which a child may suffer; (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment; (l) the need to protect the child from any physical or psychological harm that may be caused by (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behavior towards another person; (m) any family violence involving the child or a family member of the child; and (n) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child. (2) In this section "parent" includes any person who has parental responsibilities and rights in respect of a child."

²³ S 7 of the Children's Act. These factors were also considered by the courts prior to the coming into effect of the Act. See also Hoffman and Pincus *The Law of Custody* (1989) 5.

²⁴ Children's Act.

²⁵ Van Zyl *Divorce Mediation and the Best Interests of the Child* (1997) 22.

responsibilities and rights. This was confirmed by the court in the decision of *P v P*,²⁶ where Chetty JA held that:

“Determining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgement, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of the minor children.”²⁷

Schäfer rightly makes the point that “(d)etermining what is or is not in the best interests of a child depends to a large extent on making predictions”.²⁸ However, Schwartz points out that the use of predictions is rather unsatisfactory:

“A Judge cannot look into the future and predict what is in the best interests of the child. Lawyers cannot. Mental health professionals cannot. Gurus cannot. When there are two ‘good enough’ parents, one cannot choose who should parent.”²⁹

4 DEFINITION OF “CONTACT” AND “CARE”

In terms of section 1(2) of the Children’s Act, the concepts of “custody” and “access” have been replaced with “care”³⁰ and “contact”³¹ respectively:

“[I]n addition to the meaning assigned to the terms ‘custody’ and ‘access’ in any law, and the common law, the terms ‘custody’ and ‘access’ in any law must be construed as to also mean ‘care’ and ‘contact’ as defined in this Act.”

Section 1 of the Act defines the terms “care” and “contact”. This shift from “custody” and “access” to “care” and “contact” conveys an understanding that “parents have obligations and responsibilities for the proper care and upbringing of children”.³² “Care” and “contact” are therefore concepts that represent a complex interaction of rights and obligations. “Contact” means

²⁶ 2007 (3) All SA 9 (SCA).

²⁷ Par 14.

²⁸ Schäfer “Joint Custody” 1987 104 SALJ 149–164

²⁹ Schwartz “Towards Presumptions of Joint Custody” 1984 18 *Family LQ* 231–232.

³⁰ “Care” is defined as “care’, in relation to a child, includes, where appropriate – (a) within available means, providing the child with – (i) a suitable place to live; (ii) living conditions that are conducive to the child’s health, well-being, and development; and (iii) the necessary financial support; (b) safeguarding and promoting the well-being of the child; (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional, or moral harm or hazards; (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child’s right set out in the Bill of Rights and the principles set out in Chapter 2 of this Act; (e) guiding, directing and securing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development; (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development; (g) guiding the behaviour of the child in a humane manner; (h) maintaining a sound relationship with the child; (i) accommodating any special needs that the child may have; and (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;”

³¹ Contact is “defined as – (a) maintaining a personal relationship with the child; and (b) if the child lives with someone else – (i) communication on a regular basis with the child in person, including – (aa) visiting the child; or (bb) being visited by the child (ii) communication on a regular basis with the child in any other manner, including – (aa) through the post; or (bb) by telephone or any other form of electronic communication.”

³² Lowe “The Allocation of Parental Rights and Responsibilities After Separation and Divorce Under Russian Law” 2005 39 *Family LQ* 373.

“actual contact” with the child that needs not be merely personal in nature, but also by letters, e-mails or by telephone.³³ The terminology shift is meant to reflect a change from the notions of parental power over the children in favour of parental responsibilities and rights for children. The shift also reflects a change from the concept that parents have possessory interests in children (conveyed by terms such as “parental authority”) to an understanding that parents have obligations and responsibilities for the proper care and upbringing of their children.

4 1 Past judicial approaches to custody and access

Prior to the coming into effect of the Divorce Act,³⁴ custody was awarded to the innocent spouse provided that the interests of the child did not indicate otherwise.³⁵ In the past, judges presumed that it was in the best interest of young children to be in the sole custody of their mothers and older boys to their fathers.³⁶ The father was only awarded custody if the mother’s character or past conduct was such that it was undesirable to leave the child in her care or where the father’s financial status and lifestyle were more favourable than hers.³⁷ Maternal preference was the general rule in the large majority of judicial custody decisions. However, these “maternal preference” or “tender years” principle could be seen as being inconsistent with the equality clause in the Constitution because they discriminate between parents on the basis of gender.³⁸ In *Van der Linde v Van der Linde*,³⁹ Hattingh J stated that it is an inappropriate approach to make reference to the gender of the parents when determining parenting roles, and that men can equally fulfil the role of the mother in parenting and *vice versa*. In the case of *Madiehe v Madiehe*,⁴⁰ the court emphasized that custody is not a gender privilege or right, but a responsibility and privilege that has to be earned.

³³ S 1 Children’s Act

³⁴ 70 of 1979.

³⁵ *Fletcher v Fletcher supra* par 145. In this case Greenberg JA pointed out that: “The majority of cases go by default, and in such cases, unless the court has some reason to doubt the plaintiff’s capacity to look after the minor offspring of the marriage, an order granting him or her custody will usually follow as a matter of course upon the main order. The Court has ordinarily in such cases no material from which to judge whether the children will be better off with the plaintiff or with the defendant, beyond the fact that the latter has not taken the trouble to claim the custody. As the plaintiff is, in the eyes of the law, an innocent party, the prevalence of unopposed proceedings may help to account for such statements as that ‘the general rule in these cases is to give the custody of the children to the innocent party.’”

³⁶ Van Heerden *Boberg’s Law of Persons* 2ed (1999) 537–540. See also SA Law Commission *Review of the Child Care Act Project 110 Report* (2002) 200.

³⁷ Clark “Competing Custody Rights: New Concepts of ‘Family’ and the Best Interests of the Child” 1998 3 *CILSA* 288–306.

³⁸ SA Law Commission *Review of the Child Care Act Project 110 Report* (2002) 200. See also *Ex parte Chritchfield* 1999 (3) SA 132 (W); and *Van der Linde v Van der Linde* 1996 (3) SA 509 (O). These cases rejected the maternal preference rule.

³⁹ *Supra* 509.

⁴⁰ 1997 (2) All SA 153 (B).

4 2 Joint custody

According to Van Heerden, the term joint “custody” is used for joint legal and joint physical “custody.”⁴¹ In South Africa, joint custody was applied unnecessarily cautiously,⁴² although there was nothing to preclude a court from making such an order. In the case of *Pinion v Pinion*,⁴³ the parties desired to exercise joint custody over their minor child, aged seven years. They applied to the court for a joint-custody order, which application was supported by the family counsellor and the family advocate who had interviewed the parties and the child at an enquiry in terms of the Mediation in Certain Divorce Matters Act 24 of 1987. However, though Page J accepted that he had the power to grant a joint-custody order in terms of section 6(3) of the Divorce Act,⁴⁴ he focused on “the obvious disadvantages inherent in such an order.”⁴⁵ He concluded that it was not in the best interests of the child to grant an order of joint custody. In his judgment he said:

“The future behaviour of parents, as other humans, is unpredictable; and where their potential behaviour can give rise to a situation which will be detrimental to the interests of the minor concerned, it would, in my view, be better to exclude that possibility by avoiding creating a situation where it can occur unless the advantages to the minor of such a course are so significant as to justify taking risk involved. I do not think that the fact that the parties may approach the court should the risk materialise is any justification for taking it; it would serve the minor’s interest far better not to take it all.”⁴⁶

Though the parties’ application for joint custody was based on the parents’ concern that they wanted “their divorce to cause as little disruption and distress to D [the child] as possible”,⁴⁷ the judge appears to have said that a joint custody order might not have been in the best interests of the child and it would have been a fatal exercise to grant such an order. In the case of *Heiman v Heiman*⁴⁸ the court felt that it would not grant an order of joint custody on the basis that “there should be one parent directly responsible for the child”.⁴⁹ In the case of *Edwards v Edwards*⁵⁰ Jansen J rejected an agreement of joint

⁴¹ Joint custody is a term that is used loosely to describe shared custody, which has two components – joint physical custody and joint legal custody. See also Atkinson “Criteria for Deciding Child Custody in the Trial and Appellate Courts” (1984–1985) 18 *Family LQ* 1 36: “Joint *physical* custody means both parents spend substantial amounts of time with the child and share in the day-to-day upbringing and it usually means [that] both parents spend weekdays and weeknights with the child ... Joint *legal* custody means both parents have equal rights to make major decisions affecting the child, including such matters as schooling, religious training and medical care.”

⁴² *Venton v Venton* 1993 (1) SA 763 (D).

⁴³ 1994 (2) SA 725 (D).

⁴⁴ S 6(3) of the Divorce provides that “A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so ...”

⁴⁵ *Pinion v Pinion supra* par 728G.

⁴⁶ Par 730E–F.

⁴⁷ Par 727J.

⁴⁸ 1948 (4) SA 926 (W), where Murray J refused to grant an order of joint custody at the request of the parents providing that custody of their eleven-year-old boy “should be vested in the two parents jointly”.

⁴⁹ Par 524F–H.

⁵⁰ 1960 (2) 523 (D) par 524G–H, he added that “[t]he legal custody involves the privilege and responsibility of taking certain decisions in regard to, for example, the education of the child. It

custody between parents of a fourteen-year-old boy, because such an order would only lead to a position of a deadlock. It therefore appears that the court saw joint custody as making it more likely to encourage a tug of war between the parents.

Arguments in favour of joint custody usually focus on the benefits the child will derive from maintaining close contact with both parents.⁵¹ However, it is clear from the above case that South African courts rarely grant an order for joint custody unless they are convinced that the parents are “truly adults in their dealings with each other, and mature in the way they relate to their children”.⁵² Thus, for example of what happened in the case of *Kastan v Kastan*⁵³ King AJ was of the opinion that the court could move away from the common practice of rejecting joint custody. The court confirmed an arrangement for joint custody of the three young girls, aged four, six and eight after having heard evidence from the psychiatrist and a clinical psychologist. Although he did not specify whether it was an order of joint legal or joint physical custody, he explained his reasoning as follows:

“Both the parties are experienced and competent parents. All three of the children are equally bonded to both their parents. They love their parents very much. Both parents reciprocate this love. The children, young as they are, have expressed their satisfaction with and approval of this arrangement and what, of course, is more important, are determined to make it work because they both recognise that it is in their child’s best interests.”

Hoffman and Pincus⁵⁴ are also of the view that an order for joint custody should be granted where:

“the parents retain hostility or resentment toward each other, that they are mutually supportive of each other in regard to the children, and that they have a great deal of respect for each other and mutually desire joint custody”.⁵⁵

In *Venton v Venton*⁵⁶ the court granted an order for joint custody. Some of the circumstances that were considered were that the parties were found to be sensible, mature, responsible and temperamentally stable people, further that they shared duties of parenthood amicably during their cohabitation.⁵⁷ The order, unlike in *Kastan*, made it clear that what was visualized was both joint physical custody and legal custody. The children were to spend equal time with both parents. All decisions relating to their well-being were to be taken by both parents jointly. A provision was also made in terms of the order for a situation

would seem that such a decision should appertain to a single individual. If the responsibility is shared between two individuals there is the continuing possibility of a deadlock arising over every triviality”.

⁵¹ Rohrbaugh *A Comprehensive Guide to Custody Evaluations: Mental Health and Legal Perspectives* (2008) 188–192.

⁵² Rohrbaugh *A Comprehensive Guide to Custody Evaluations* 131.

⁵³ 1985 (3) SA 235 (C) 236 par H–J. See also *Krugel v Krugel* 2003 (6) 220 (T) par C–D, where De Vos J granted joint custody, albeit with different reasons.

⁵⁴ *The Law of Custody* 53–56.

⁵⁵ See *Schlebusch v Schlebusch* 1988 (4) SA 548 (E) 766, where Didcott J concluded that “there are no ‘hard and fast’ rules [for the granting of a joint custody order], except for the one guiding rule ... the rule that the interests of the child or children are paramount. And those must always be assessed with reference to the particular circumstances of the case”.

⁵⁶ *Supra*.

⁵⁷ Par 766C–D.

where the parties were unable to reach an agreement on any issue where joint decision-making was required.

The desirability of awarding joint custody to parents was also evident in the case of *Krugel v Krugel*.⁵⁸ This trend of awarding joint custody incorporates the right of the child to be cared for, and to have contacts with both parents as far as possible.

Although joint-custody orders and -parenting plans are practically different in their approach,⁵⁹ they both usually imply that it is in the best interest of children to have both parents involved in post-divorce parenting.⁶⁰

5 PARENTING PLANS

The parenting-plan agreement has been introduced in terms of legislation in South Africa by means of sections 33 and 34 of the Children's Act. This agreement will be entered into by both parents who have parental responsibilities and rights. In principle, the parents will continue to exercise joint parental responsibilities and rights, as if they were still married. Although this concept is fairly new, Levy⁶¹ believes that parenting plans are "old wine in new bottles", not different from the old custody orders where parents decided to share responsibilities. The term "parenting plan" refers to the agreement between the parents or the court order which defines provisions for care and contact. It determines whether one or both parents have the ability to make decisions regarding the health, education and welfare of the child. The parenting plan also defines when the child is to be with the non-caregiving parent in cases where joint custody is not awarded.

The parenting-plan concept presupposes a diverse range of child-rearing arrangements and rejects any pre-established set of statutory choices about what arrangements are better for children.⁶² Whether the parents decide to have sole or joint legal custody, any major decisions regarding the child's health, education or welfare should be a shared decision by both parents. Article 9(3) of the CRC, imposes a general duty on the courts to consider the child's right to continue and develop a relationship with both parents post divorce. It declares that:

"State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest."⁶³

⁵⁸ 2003 (6) 220 (T) 228 par C–D, where De Vos J granted joint custody, albeit for different reasons.

⁵⁹ The aim of parenting plan is to determine and regulate the exercise of parental responsibilities and rights (by parents already vested with such responsibilities and rights) while it remains within the court's discretion to decide which parent is best suited to exercise "custody" or rather care in the case of disputes relating to joint custody or joint care. The latter issue is thus more concerned with whom should acquire responsibilities and rights than how such responsibilities and rights should be exercised.

⁶⁰ Covell "Promoting Parenting Plans: A new Role for the Psychologist as Expert in Custody Disputes" 1997 7 *Expert Evidence* 113–126.

⁶¹ *Mental Health Aspects of Custody Law* (2005) 277.

⁶² See American Law Institute, *Principles of the Law of Family Dissolution*, S2.05, cmt.a 145–146 (hereinafter "Principles" with Section numbers). See also Levy *Mental Health Aspects of Custody Law* 274.

⁶³ Convention on the Rights of the Child.

It appears that courts are moving away from their former practice of granting sole custody of the children of separated or divorced parents to one of the parents and general access to the other parent. Courts have begun to realize that it is not in the best interest of the children to exclude one parent from participating in their upbringing and in making decisions about their welfare.⁶⁴ Instead of making a custody order giving to one parent a bundle of rights and duties to make decisions about the welfare of the child, South African legislation has come up with an alternative that will involve both parents. Section 33(2) of the Children's Act states the following:

"If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child."

Courts are also becoming more aware that, if the focus is shifted towards a more "child-centred" divorce,⁶⁵ emphasizing and encouraging involvement by both parents, both children and parents will benefit alike. Consequently, courts now recognize "parenting plans" with the care and control of the children being divided between the parents.⁶⁶ The "parenting-plan" concept is a very useful one, because decisions about children are not simply a matter of awarding custody to one or the other parent and then assuming that all problems are solved. However, when the parents cannot agree on a parenting plan, the court will make the decision for them, with the overriding consideration being the child's best interests.⁶⁷

It must, however, be noted that an agreement between parents regarding a child's upbringing cannot oust the statutory obligation of the court to grant a residence, contact and care order that reflects a full and balanced consideration of all factors relevant to a determination of a child's interest. The only factor to be considered, albeit an important factor, will be a prior parenting plan between the parents. However, in terms of section 29 of the Children's Act,⁶⁸ the court is not obliged to make any parenting plan an order of court, if it is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare. Such an agreement may only be considered if it is in the best interest of the child.⁶⁹

Provisions on parenting plans do not only consider the child's best interests, but also further attempt to eliminate the concept of "custody" and "access",⁷⁰ and instead provide a residential schedule that specifically details the time that the children will reside with each parent. A parenting plan decreases conflict

⁶⁴ Levy *Mental Health Aspects of Custody Law* 278.

⁶⁵ Payne and Payne *Canadian Family Law* (2006) 408.

⁶⁶ 408.

⁶⁷ De Cruz *Family Law, Sex and Society: A Comparative Study of Family Law* (2009) 62.

⁶⁸ S 29 (5) Children's Act provides that "The court may for the purposes of the hearing order that – (a) a report and recommendations of the family advocate, a social worker or other suitably qualified person must be submitted to the court; (b) a matter specified by the court must be investigated by a person designated by the court; (c) a person specified by the court must appear before it to give or produce evidence; or (d) the applicant or any party opposing the application must pay the costs of any such investigation or appearance."

⁶⁹ Mitchell *Adoption and Special Guardianship: A Permanency Handbook* (2009) 455.

⁷⁰ Davel and Skelton *Commentary on the Children's Act* (2007) 1–29; and Payne and Payne *Canadian Family Law* 409.

between parents, and increases the chances that the children will grow up in a stable environment, where they will be able to experience loving and close relationships with both parents.⁷¹

5 1 What is a parenting plan?

Although the Children's Act does not provide an exact definition of a parenting plan, it provides a detailed explanation as to what the possible content thereof might be. In terms of the Act, a parenting plan may determine any matter concerning parental responsibilities and rights, including (a) where and with whom the child is going to live,⁷² (b) maintenance arrangements of the child, the parents, and any other person involved in the raising of the child,⁷³ (c) what visiting or other contact arrangements there should be,⁷⁴ and (d) the child's education, and his religious upbringing.⁷⁵

5 1 1 What happens if parents do not agree on major decisions regarding the child's life?

The question to ask is whether the courts are adequate to address cases that will be presented when parents fail to agree on major decisions regarding the child's life. Should the courts intervene in determining which religious preference is in the best interests of the child if the parents fail to agree on that aspect?

Arguably, even though courts have the authority to determine matters regarding parental responsibilities and rights, it is considered preferable if the parents can reach an agreement on these issues themselves. To help parents reach agreement, the Children's Act obliges them to seek the assistance of a family advocate, social worker or psychologist.⁷⁶ Mediation through a social worker or other suitably qualified person is also a mandatory component of the process.⁷⁷ With the aid of the mediator, parents will be able to work together towards reaching an agreement.⁷⁸ However, there are times when no agreement can be reached and handing over of the court's responsibility is not the answer.⁷⁹

Section 33 of the Children's Act suggests that most couples are able to agree on the contents of a parenting plan. However, before confirming such an agreement, the court is enjoined by section 9 and 33 of the Act in that "a parenting plan must comply with the best interests of the child standard."⁸⁰

⁷¹ SA Law Commission *Review of the Child Care Act Project 110 Report* 197.

⁷² S 29(3)(a).

⁷³ S 29(3)(b)(i)(ii).

⁷⁴ S 29(3)(c).

⁷⁵ S 29(3)(d).

⁷⁶ S 29(5)(a).

⁷⁷ S 29(5)(b).

⁷⁸ Van Zyl *Divorce Mediation and the Best Interests of the Child* 57.

⁷⁹ Judges often engage the services of mental health professionals and social workers mainly because they are untrained in the dynamics of interpersonal relationships and the developmental needs of children.

⁸⁰ See also s 6(1) of the Divorce Act which provides that "satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances ..."

5 2 Contents of a parenting plan

The Children's Act provides some guidelines regarding the contents of the parenting plan. These guidelines are provided to help parents to come up with a proper plan that will meet their child's needs. However, regardless of what is included in the parenting plan, it should be clear and easy to understand. Some of those elements that may be considered are the following:⁸¹

- A clear, well defined schedule including provisions for holidays, vacations, school vacations and long weekends.
- An outline of whom is responsible for making decisions and how those decisions are to be made if both parents are responsible.
- A plan for whom provides transportation to the other parent's home and to extracurricular events.
- A plan for the financial responsibilities of each parent.
- A plan for specific parenting responsibilities (for example, who stays home when a child is sick; who goes on school field trips and other events; who helps with homework and; who takes the children to medical and dental appointments.)
- A forum for managing disagreements when they arise.
- A system for sharing information.
- A timetable to evaluate and change the parenting plan if needed.

The list itself is not exhaustive. It is always open to the mediator or the court to specify other matters that they would like to see included in the parenting plan.

5 3 Formalities of a parenting plan

Section 34 of the Act specifies the formal requirements for a valid parenting plan.⁸² As a matter of good practice and in order to avoid future

⁸¹ Douglas *Mending Broken Families: Social Policies for Divorced Families, How Effective Are They?* (2006) 66. See also Mercer and Pruett *Your Divorce Advisor: A Lawyer and a Psychologist Guide You Through The Legal And Emotional Landscape of Divorce* (2001).

⁸² S 34(1) stipulates that "A parenting plan – (a) must be in writing and signed by the parties to the agreement; and (b) subject to subsection (2), may be registered with a family advocate or made an order of court. (2) An application by co-holders contemplated in section 33(1) for the registration of the parenting plan or for it to be made an order of court must – (a) be in the prescribed format and contain the prescribed particulars; and (b) be accompanied by a copy of the plan. (3) An application by co-holders contemplated in section 33(2) for the registration of a parenting plan or for it to be made an order of court must – (a) be in the prescribed format and contain the prescribed particulars; and (b) be accompanied by – (i) a copy of the plan; and (ii) a statement by – (aa) a family advocate, social worker or psychologist contemplated in section 33(5)(a) to the effect that the plan was prepared after consultation with such family advocate, social worker or psychologist; or (bb) a social worker or other appropriate person contemplated in section 33(5)(b) to the effect that the plan was prepared after mediation by such social worker or such person. (4) A parenting plan registered with a family advocate may be amended or terminated by the family advocate on application by the co-holders of parental responsibilities and rights who are parties to the plan. (5) A parenting plan that was made an order of court may be amended or terminated only by an order of court on application – (a) by the co-holders of parental responsibilities and rights who are parties to the plan; (b) by the child, acting with leave

misunderstandings, the agreement should be in writing and signed by both parents of the child.⁸³ Parents can also make a parenting plan legally enforceable by registering it with a Family Advocate, or by asking the court to make an order in line with the agreements recorded in the parenting plan.⁸⁴

The court must be satisfied that the plan is fair and in the best interests of the children.⁸⁵ Care needs to be taken, however, that the agreement is genuine and not merely used as a bargaining tool in order to obtain co-parenting responsibilities and rights. In considering whether to make an order, the court will be guided by expert reports⁸⁶ accompanying the application. The experts' opinions "will be given considerable weight in the judge's adjudication".⁸⁷ Once made, these orders are legally binding – they have the same effect as any other parenting order made by a court.

A parenting plan may be varied or revoked by agreement in writing between the parties to the plan. There are no formal requirements as to when a parenting plan may be varied or revoked, but clearly to justify an adjustment, there has to be a change of circumstances. Commonly, variations are sought where the best interests of the child dictate otherwise. In the case of *H v G*⁸⁸ the court refused to order a change to the existing parenting plan after having given due consideration to the views of the children who were of the age and level of maturity to make an informed decision.⁸⁹ In terms of the settlement agreement the parents were awarded joint custody of the children, the intention being that the children would spend an equal amount of time with each parent. An application to relocate with the children to Dubai was found not to be in the best interests of the children as they would miss their father, school friends and the city of Port Elizabeth to which they were accustomed.

5 4 Refusal to grant access to exercise parental authorities and rights

In terms of section 33(1), a parenting plan refers to an agreement in which the co-holders of parental responsibilities and rights can make arrangements regarding the way in which they will govern and exercise their respective rights

of the court; or (c) in the child's interest, by any other person acting with leave of the court. (6) Section 29 applies to an application in terms of subsection (2).

⁸³ S 34(1)(a).

⁸⁴ S 34(1)(b).

⁸⁵ See also s 22(5) Children's Act which provides that "before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child".

⁸⁶ These experts help resolve residence, contact and care disputes by working with parents to develop their own parenting plans, thereby avoiding the need for a court hearing, as is the case in England and Wales, and American jurisdictions.

⁸⁷ Payne and Payne *Canadian Family Law* 379 "In a high conflict situation where the expert evidence of a psychologist supports a finding that the parents are incapable of reaching a viable parenting plan that will meet the developmental needs of their child, the trial judge's refusal to grant an order for shared parenting should be upheld on appeal."

⁸⁸ 2010 (3) SA 352 (ECP).

⁸⁹ Par 23. See also s 10 of the Children's Act. It provides 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 appropriate ways and views expressed by the child, must be given due consideration".

and responsibilities. Although a parenting plan is an agreement between two parents, once it is registered or made an order of court, the parties would be expected to adhere to it. Section 35⁹⁰ of the Act makes it a criminal offence if one parent refuses to grant access to a parent who has parental responsibilities and rights.⁹¹ The section further obliges the residential parent to notify the non-residential parent who has parental responsibilities and rights over the child of any change in his or her residential address. This notification should be in writing.⁹² Failure to do so will result in a fine or prison sentence not exceeding one year.⁹³ This provision is not designed to prohibit a parent from moving to a different location, but to allow the parents to discuss the move in order to find solutions to meet the needs of the child.

6 THE RIGHT TO A CHILD OF GROWING UP IN A CLOSE RELATIONSHIP WITH BOTH PARENTS⁹⁴

In terms of the Children's Act, "parenting responsibilities and rights" include the rights to care for the children, and the responsibility and the right to maintain contact with the children.⁹⁵ In many cases, parents have previously lived together and shared the care of the child while their relationship was still intact; the child has formed a relationship with both parents while still in the first months of life or longer; and the challenge is how to maintain and develop that relationship after separation. Superficially the concept of "co-holders of parenting rights and responsibilities" seems fair to parents, but fairness to children is less obvious. There are a number of reasons that can make it impossible for the child to benefit from a close relationship with both parents.

6.1 Violence or abuse⁹⁶

The Act seeks to ensure that a child benefits from a close relationship with both parents, in the absence of violence or abuse. A child will almost always benefit from a close relationship with both parents who cooperate and communicate and have low levels of conflict, where the shared care is very fair to children and has no apparent ill-effects.

The courts may in certain circumstances conclude that a close relationship with both parents is not possible, especially where there is an intractable conflict between the parents on an ongoing basis,⁹⁷ or where children have experienced or are likely to be exposed to continuing domestic violence or child abuse.⁹⁸

⁹⁰ S 35(1).

⁹¹ In terms of s 22(4) Children's Act "a parental responsibilities and rights agreement takes effect only if – (a) registered with the family advocate; or (b) made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement.

⁹² S 35(2)(a).

⁹³ S 35(2)(b).

⁹⁴ Article 9(3) of the CRC.

⁹⁵ S18 Children's Act

⁹⁶ S 305(3) Children's Act.

⁹⁷ Parkinson "Decision-making about the Best Interests of the Child: The Impact of the Two Tiers" 2006 20 *Australian Journal of Family Law* 186.

⁹⁸ S 305(3) Children's Act.

6 2 Failure to meet obligation to maintain the child

Another situation where the court may have to decide whether to vary a parenting plan, will be where the parent has failed to fulfil his or her responsibilities and rights as a parent by failing to provide the child with “adequate food, clothing, lodging and medical assistance”.⁹⁹

6 3 Child’s resistance to co-parenting

The child’s right to be heard is one of the most important rights in the middle of a custody dispute. In some situations, the courts must find out about the views of the child.¹⁰⁰ This is due to the fact that it will not benefit the child to maintain a relationship with a non-custodian parent, when their relationship has irretrievably broken down. Further that even though the child is not considered a “party” to the custody action, the child’s future contact and care will be impacted forever.

7 CONCLUSION

The parenting plan is aimed at directing the future parental and parent-child relationships. The message of the parenting plan is that a child is entitled to be cared for by both parents, and that having a child entails responsibilities for both parents. However, co-parenting arrangement does not only require the parents to work together, there are other circumstances that need to be taken into account.

On the other hand, refusal to register or make a parenting plan an order of court will inevitably interfere with the rights of the child under Article 9(3) of the CRC, specifically the right of a child to have a relationship with both parents.¹⁰¹ Such interference will therefore need to be justified. However, it should also be clear that, as much as both parents should be involved, the parents’ interests should be subject to the child’s interests.

Practically, our courts are guided by the principle that the primary consideration underlying any residence, care and contact decision must be the best interests of the child. Maccoby points out that “children’s best interests should trump parents’ needs and claims of right if and when the two conflict”.¹⁰² The best interests of the child must continue being the sole determinant for making child-custody decisions.

⁹⁹ S 305(4).

¹⁰⁰ S 10 Children’s Act. It provides 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 the views expressed by the child must be given due consideration”.

¹⁰¹ See also s 28(1) of the Constitution which makes provision for the rights relating to children, especially the right to family care or parental care.

¹⁰² Maccoby “Editorial: A Cogent Case for a New Child Custody Standard” 2005 6(1) *Psychological Sciences in the Public Interest* i–ii. See also Siebel “Fathers and their Children: Legal and Psychological Issues of Joint Custody” 2006 40 *Family LQ* 236.