Chapter 9
South Africa

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Abstract This chapter on South Africa critically analyses the evolution of the concept of the best interests of the child, and specifically how it pertains to the fields of care (custody), contact (access), guardianship and maintenance (support), which are all part of parents' responsibilities and rights, and impact on the legal position of Muslim children. This chapter compares and contrasts Muslim Personal Law (MPL) and practices pertaining to children with those of South African law in order to ascertain whether they comply with, conflict with or compromise the 'best interests' concept paramount in, and permeating, South African law in general and international and regional instruments. In doing so, the chapter reviews the position of Muslim children and the milestones in child law in South Africa prior to and since democracy with a focus on three pieces of legislation since democracy: the Constitution (1996), the Children's Act (2005) and the Muslim Marriages Bill (MMB) (2010).

Keywords Parental responsibilities and rights · Care (custody) · Contact (access) · Guardianship · Maintenance (support) · Best interests of the child · Muslim children · South Africa · Muslim Personal Law

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9.1 Introduction

The brief of this chapter for South Africa is to critically analyse the evolution of the concept of the best interests of the child, and specifically how it pertains to the fields of care (custody), contact (access), guardianship and maintenance (support), which are all part of parents' responsibilities and rights, and impact on the legal position of Muslim children. This chapter compares and contrasts Muslim Personal Law (MPL) and practices pertaining to children with those of South African law in order to ascertain whether they comply with, conflict with or compromise the 'best interests' concept paramount in, and permeating, South African law in general and international and regional instruments. In doing so, the chapter reviews the position of Muslim children and the milestones in child law in South Africa prior to and since democracy. There will be a focus on three pieces of legislation since democracy: the Constitution,[1] the Children's Act[2] and the Muslim Marriages Bill (MMB).[3]

Section 9.2.1 provides a general setting of the position in South Africa and briefly situates the historical position of Muslims in South Africa. While Sect. 9.2.2 outlines the position of children in South African law, Sect. 9.2.3 examines the impact of marriage laws and the status of (hitherto formally unrecognised) religious marriages generally and Muslim marriages particularly in a current context, on child law in a plural South African legal system. Sections 9.3.1 and 9.3.2 highlight that although in terms of South African law (a mixture of Roman-Dutch and English law), the best interests standard formerly was both vague and indeterminate

and subject to interpretation in specific situations and with reference

1 Constitution of the Republic of South Africa 1996 ('the Constitution').
2 The Children's Act No 38 of 2005 ('Children's Act').
3 See General Notice 37 GG 33946 of 21 January 2011. The 2010 MMB is available at www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf (accessed 9 February 2015).

Contents

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to particular cultural and religious settings, since democracy the position is quite different.

In order to give a broad historical perspective of the evolution of the current South African rules on custody and guardianship, Sect. 9.3.3 provides an analytical overview of the legal consequences flowing from the application of the best interests concept to all (including Muslim) children, and Sect. 9.3.4 examines how it is proposed to apply it specifically to the Muslim child (which may also include dependant adult children) in terms of the MMB once it is enacted. The MMB is based on both Islamic law and South African law. Sections 9.3.3 and 9.3.4 focus on the position of minors and dependant Muslim children with regard to guardianship (*wilaya*), care or custody (*hadana*), contact or access, and maintenance or support (*nafaqa*). The position under traditional Islamic law (Shari'a) forms the focus of a separate chapter, and this chapter excludes detail of the general operation and application of both Islamic and South African law. The chapter follows an integrated approach when dealing with South African law, Islamic law and the proposed MMB, which has inevitably resulted in some overlap and repetition. While this is, for example, evident from the brief summary of the South African law provided in Sects. 9.3.3 and 9.3.4 which deals with the MMB in a comparative context, the overlap and repetition are kept to a minimum since Islamic law is only elaborated upon to elucidate provisions in the MMB based on it. Fortunately, child law, unlike many other more complex Shari'a issues, is less contentious although some of its provisions are of a gender sensitive nature.

9.2 Historical and Demographic Setting

9.2.1 General Setting

The initiation of the Max Planck Research Group's Project on Child Law in 2014 was particularly timely for three reasons. First, it coincided with the commemoration of 20 years since the advent of democracy in South Africa. Secondly, it also coincided with the twenty-fifth anniversary of the adoption in 1989 of the United Nations Convention on the Rights of the Child (CRC), which South Africa signed on 29 January 1993 and ratified on 16 June 1995 without recording any reservations. In South Africa 16 June is a national public holiday, Youth Day, which commemorates the violent uprisings which led to the loss of the lives of children, including Muslim children, during the struggle for liberation from apartheid (politically motivated racial segregation). Thirdly, 2014 also marked the first 'born free' election in South Africa in which youth aged eighteen (legal age of majority and minimum voting age), who were born after apartheid ended in 1994, voted for the first time in a presidential election.

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The 2011 (latest) Census estimated the total South African population to be

51.8 million,[4] but excluded religious affiliation. However, data captured by the 2001 Census[5] highlight that Christianity (79.8%) was the dominant religion. African traditional beliefs, Judaism, Hinduism, Islam and other faiths together accounted for 3.7%, of which Muslims were estimated to constitute 1.5% (654,064), the largest of these groups, followed closely by Hindus (1.2%).[6] Children account for a substantial proportion of the nation. In mid-2012 children constituted 36% (18.6 million) of the total population.[7]

South African born Muslims do not constitute one homogeneous community, either in terms of origin and culture or ideological and political expression. They have both experienced, and fought against, colonialism and apartheid, and have a long history in South Africa dating back to the mid-17th century. They arrived here, at first involuntarily as slaves, indentured workers and political prisoners from the Far East (mainly Indonesia), and then voluntarily as traders from India, during the periods that South Africa was subject to colonial rule, first by the Dutch, and then by the British.[8] Muslims have since then played an active role in the struggle for liberation and to end apartheid imposed by a minority white government.

9.2.2 Children in South African Law

Prior to 1994 there were already several laws and international conventions in place that impacted on the lives of children. However, with democracy, it became clear that these laws were not able to protect and support all the children of the rainbow nation, nor were they deemed adequate. Thus, since 1994 child law has undergone dramatic change and developed exponentially so that today there are various pieces of legislation which specifically aim to protect and promote the rights and best interests of children. Foremost among these are the Constitution and the Children's Act. Section 28 of the Constitution deals with children: section 28(2) guarantees the paramountcy of the best interests of the child as a principle, and section 28(1) provides for independent rights within the Bill of Rights which, like all its other rights (such as, freedom of religion (section 15), association (section 18) and equality (section 9)) which may also apply to children, may be subject to limitation (section 36). Nonetheless, through section 28 the Constitution makes separate and dedicated provision for the rights of children and contains, as it were, a separate 'charter of children's rights'. The Children's Act

4 See Statistics South Africa 2012.
5 See Statistics South Africa 2004.
6 Statistics South Africa 2004, p. 28.
7 Hall et al. 2014, pp. 90–93.
8 For detail see Moosa 2011, p. 146.

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also contains a dedicated section 9 dealing specifically with the paramountcy of the 'child's best interest'. More importantly, the Children's Act does so in the context of a (first such legislated) guiding list of factors, relevant to the 'best interests of the child' standard (section 7), which is both flexible and not exhaustive. Section 7 provides the courts with a clear standard to guide them in the implementation of the constitutional injunction (section 28(2)) that the child's best interests are of paramount importance in all matters affecting children.

However, the Constitution and the decisions of the Constitutional Court (referred to below) primarily indicate the correct way to approach the application and evaluation of this standard and its content in the Children's Act. The Constitution makes it clear that the field of application of the best interests standard in the Children's Act is not restricted to proceedings under its own children's rights section (section 28).

The Children's Act resulted in the streamlining or replacing of some laws. International human rights instruments ratified by South Africa motivated many of the national reforms found in contemporary child law, including the Constitution and the Children's Act. As detailed in Sect. 9.3.3, as a consequence of a long process of review and consultation, the Children's Act and the Children's Amendment Act[9] were passed. On 1 April 2010 the Children's Act[10] eventually came into full force along with Regulations to the Act. This explains both why some of its main provisions (discussed below) were already in effect from 1 July 2007 and why the

impact of the new provisions of the Children's Act on case law and emerging jurisprudence is still relatively new. The consolidating Children's Act is ranked, after the Constitution, as the most important piece of legislation on children's issues in South Africa. Despite its division into nine provinces, South Africa has a single national court system. Magistrates' Courts are the lowest level of the court system. In terms of the Children's Act,[11] every Magistrates' Court is a Children's Court. There are also special Maintenance Courts at every Magistrates' Court. This essentially simplifies access to justice for children. However, the Child Justice Act[12] deals separately with children who are in conflict with the law. In the hierarchy of courts, the Magistrates' Courts are followed by the provincial divisions of the High Court (formerly known as the Supreme Court); the Supreme Court of Appeal (SCA), formerly known as the Appellate Division (AD) and until 1994 the highest court in civil and criminal cases; and the Constitutional Court, established in 1994 as the highest court in constitutional matters.

The Constitution draws a clear distinction between children and adults so that child law in South Africa generally pertains to everyone under the age of eighteen and therefore excludes the unborn from the ambit of its protection. Support for the definition of a child as a person under the age of 18 years is found in both the

9 Act No 41 of 2007.

10 As amended by the 2007 Children's Amendment Act.

11 Section 42.

12 Act No 75 of 2008.

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Constitution (1996),[13] the Children's Act (2005),[14] the CRC,[15] and the African Charter on the Rights and Welfare of the Child (ACRWC) of 1999,[16] all of which link the definition of a child to this age. The definition of a child in the Children's Act was amended to accord with that in the Constitution. While the South African approach that a child (a 'minor'), male or female, becomes a 'major' upon reaching the age of 18 years appears to be in line with the CRC provision, the latter is much wider. It appears to open the door to allow for legal discrimination between Muslim children of different sexes on the basis of their religion. While the CRC, because it is an older UN instrument, may itself be in need of revision, Muslim States have recorded reservations both to it and the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[17] Thus, unlike the position in many Muslim States, the legal position of Muslim children in South Africa, although considered by many to be a Third World country and still developing, is both different and unique and probably on a par with, if not better than, that of most children in the Western First World. Regrettably, this status may be true more in theory than in practice, especially since it may be mired in adverse socio-economic realities and practical implementation constraints with which the majority of South Africa's disadvantaged children, including many Muslim children, have to contend.

The Children's Act came about as a result of a law reform initiative (Project 110 of the South African Law Reform Commission (SALRC)) in 1998 which dealt with a review of the then existing Child Care Act (1983).[18] Unsurprisingly, given the differences between South African law and Islamic law (Shari'a) rules and the different perspectives of Muslims regarding children, of all the religions in South Africa discussed, it was only the section of the SALRC's Issue Paper 13 that dealt with the position of Muslim children that 'elicited strong and forceful responses'. The Child Care Act which governed the position of children was

13 Section 28(3).

14 Section 17. 'The common law term "minor" has always been used in South African law as a term of art; its antonym is a "major". In the absence of any statutory definition … a minor is understood to mean every person who is not yet a major. This usually means every person who is younger than eighteen years.' Schäfer 2011, pp. 11–12.

15 Article 1: 'For the purposes of the present Convention, a child means every human being below the age of 18 years *unless under the law applicable to the child, majority is attained earlier* (my emphasis)'.

16 Article 2. This Convention was adopted in 1990 and entered into force on 29 November 1999. Although it was signed by South Africa on 10 October 1997, a few months after the Constitution had come into effect (4 February 1997), it was only ratified much later on 7 January 2000.

17 Although South Africa signed both the CRC and the CEDAW on 29 January 1993, it only ratified

the CEDAW on 15 December 1995, some 6 months after the CRC and without also recording any reservations.

18 Act No 74 of 1983. I contributed a chapter entitled 'Religious Laws Affecting Children: Muslim law', see Moosa 1998a, pp. 123–132, starting from note 215. This submission was subsequently published as 'Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa', see Moosa 1998b, pp. 479–492.

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replaced by the Children's Act. Although the Children's Act only came into full force on 1 April 2010, all the most important provisions pertaining to parental responsibilities and rights (which include access to, and the custody, guardianship, and maintenance of, children) and the best interests of a child came into effect on 1 July 2007. The term 'custody' has been replaced with 'care', and the term 'access' (or visitation rights) with 'contact'. As Muslim countries still refer to concepts like 'custody' (which is also treated as a form of guardianship) and 'access' in their traditional meanings when referring to Islamic law in State legislation pertaining to children, and, as indicated in Sect. 9.3.4 below, this is also the case in South Africa in the MMB, these terms will be used interchangeably in this chapter for the sake of convenience. Given that 2014 has marked 20 years of democracy in South Africa, the Children's Act is a relatively new statute. However, this does not detract from the fact that it was a long time in the making and was given priority treatment.

9.2.3 Impact of Marriage Laws on Child Law in a South African Pluralistic Legal System

At the time of the review of the Child Care Act, a parallel law reform initiative (Project 59 of the SALRC), which dealt with the recognition of Muslim marriages, was also in progress.19 Although much progress has been made in this regard and the process has culminated in the MMB, also in 2010, the process has unfortunately stalled. The fact that there have thus far been three versions of the MMB, highlights that the Bill is in a constant state of flux and that the latest version may not be the final version and is still subject to change. The most recent step in the direction of recognition was initiated by the Women's Legal Centre, a feminist organisation situated in the Western Cape, on 3 March 2015 when it lodged an application urging the President of South Africa, among others, to enact the MMB into law within a year.20 While the hearing of the application was postponed until June 2015, the main proceedings are expected to begin in May 2016.21

For Muslims, especially women with minor children, this effectively means that the ravages of apartheid still continue in their private lives, because their purely religious marriages, as is the case with all other religious marriages that are also not civilly entered into, still remain formally unrecognised. The religious or Islamic law (Shari'a) marriages of Muslims are still regarded as common law

19 For a detailed history of the protracted process, the South African government's engagement with Islamic law, and the draft legislation, see Moosa 2011, pp. 143–162.

20 See *Women's Legal Centre Trust v. President of the Republic of South Africa*, Case No 22481/14, [2014] ZAWCHC (17 December 2014); Bernardo 2015.

21 See Isaacs 2015.

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marriages in which parties are deemed to be living together without being legally married. A civil (secular) marriage is a registered marriage that has taken place before a magistrate or a minister of certain religions, including imams, rabbis and Hindu and Christian priests. A civil marriage can only be terminated by a divorce granted in the High Court.22 In terms of the Marriage Act it has always been possible for imams to become civil marriage officers. In fact, many imams chose to participate in a 2013 government initiative which took place whereby a large number of imams received formal accreditation as civil marriage officers in 2014. However, this means that, if after entering into a Muslim marriage, the couple enters into a civil law marriage, the marriage is a civil law marriage and not a religious one regardless of the fact that the appointed marriage officer (celebrant) may also be an imam. Many Muslim men (mainly breadwinners) may prefer this status quo, while vulnerable Muslim women (mainly housewives) and their children who face practical hardships pertaining to their status and maintenance, stand to benefit

most from formal statutory recognition of Muslim marriages.
Currently in a plural South Africa there are three types of marriages that are formally recognised: (1) heterosexual, monogamous civil marriages in terms of the Marriage Act,[23] which is the main or 'default' marriage and is still decidedly Christian in nature; (2) since 1998, monogamous or polygamous African customary marriages; and (3) since 2006, monogamous same- or opposite-sex civil unions. However, since 1994 the secular courts and the legislature have increasingly, albeit indirectly and in a piecemeal fashion, recognised some of the legal consequences of civil marriages in the context of purely religious Muslim marriages, regardless of their (monogamous or polygynous) nature and without recognising them as valid marriages. While it will remain the role of the legislature to directly and formally recognise Muslim marriages and to resolve interpretational complexities that may arise, judges have always made rulings in the context of non-recognition of Muslim marriages and have therefore justified avoiding any 'interpretation' of Islamic law, though not necessarily precluding it. Until the passage of the Children's Act in 2005, children born of such religious marriages were deemed to be born 'out of wedlock' and were treated by the law as de facto illegitimate. The progress that has been made in child law therefore benefits Muslim children, and will remain the position even if Muslim marriages are not formally recognised. It is both anticipated and inevitable that religion will probably feature more frequently as a (contested) factor in custody and access disputes. However, given the 'newness' of the Children's Act and the case law and jurisprudence based on it, the emphasis on the best interests of the child principle in South African law implies that there can be no generic recipe that is suitable for all children, and that each case has to be assessed on its own merits.
However, although judicial precedent may be foreign to Islamic law, given that the doctrine of '*stare decisis et non quieta movere*, which means that one stands by

[22] See Divorce Act No 70 of 1979.
[23] Act No 25 of 1961 (Marriage Act).

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decisions and does not disturb settled points …'[24] is part of South African law, this may imply that there is little room for flexibility. Nonetheless, the Preamble to the Constitution, although it holds little legal value, encourages the South African people to be 'united in our diversity'. The Constitution furthermore guarantees freedom of religion, and of association, and equality, among other rights, and makes provision for the recognition of religious marriages. It is therefore contended that if a custody dispute pursuant to a purely religious divorce arises, judges and judicial officers would be expected to be 'flexible' and display some 'judicial activism' in their application of the concept of the best interests of the child even if it may mean having to deviate from previous decisions. This will allow the accommodation of differences in religious rules regarding the custody (care) of a Muslim child, rather than to treat them as 'foreign', and to do so in ways that do not seek to further prejudice South African women whose rights may already have been curtailed by MPL.
For example, should it be deemed to be in the best interests of the child that the mother, rather than the father (the Islamic law default), be accorded guardianship or increased periods of custody after a Muslim divorce (which may even have occurred without her knowledge or consent), given that both her period of custody and post-divorce maintenance are limited (the Islamic law default) and her rights to marital property severely curtailed, it does not necessarily have to follow that she would also be expected to assume additional (or equal, in terms of South African law) maintenance obligations which are attributed to the father in terms of Islamic law precisely because they offset and compensate for the above inequities.
Support for the above contention may also be found in the following facts: A uniform, Western or individualistic understanding of the best interests of the child concept may be considered to be 'foreign' to, and at odds with, the different norms and practices of the various multi-cultural and multi-faith communities that form part of a diverse South African society. South Africa is a developing country still faced with social and economic problems that, realistically, limit the application of the best interests of children in custody decisions, among others. Applying the

best interests of the child principle in ways that seek to further prejudice women already prejudiced by religion could also be deemed to be discriminatory and unconstitutional. This implies that the provisions of the MMB, once enacted, given different perspectives on, and interpretations of, Islamic law, may be subject to constitutional challenge and further amendment.

In a plural and secular South Africa, the Constitution uniquely makes allowance for formal legal recognition of hitherto unrecognised religious marriages and/or personal laws of its minority (mainly, Hindu, Muslim and Jewish) religious

24 See the comment of the Constitutional Court per Kriegler J in *Ex Parte Minister of Safety and Security and Others: In re S v. Walters and Another* 2002 (4) SA 613 (CC), p. 644 [para 57]. See also the approach adopted by the Constitutional Court in *AD and Another v. DW and Others* 2008 (3) SA 183 (CC) where Sachs J endorsed the view that the best interest of minors should not be '… held to ransom for the sake of legal niceties [p. 5 at para 10] (and further that) … best interests should not be mechanically sacrificed on the altar of jurisdictional formalism [p. 16 at para 30].'

communities. Section 15(3)(a) does not constitutionalise the right to have MPL recognised, but provides for the enactment of legislation recognising '(i) marriages concluded under … a system of religious, personal or family law; or (ii) systems of personal or family law … adhered to by persons professing a particular religion'. A court therefore cannot deem (discriminatory) religious family law as inherently in violation of the Constitution's freedom of religion clause (section 15(1)). However, a court, relying on the provisions[25] of the Constitution, can require that MPL be consistent with the Constitution and its Bill of Rights, and therefore be subject to other constitutional rights, especially equality (section 9) and human dignity (section 10).

While little progress has been made concerning the recognition of Hindu and Jewish marriages, Muslims have opted for a draft statement dealing only with the recognition of Muslim marriages and related matters, rather than a 'code' of MPL. The MMB has been framed so that it can satisfy and synthesise both diverse Muslim (ideological) perspectives and the relevant constitutional commands (guarantees of religious freedom and equality). As alluded to in the Introduction, while the government has encouraged the formal statutory recognition of Muslim marriages as part of its law reform initiatives, it has been dragging its feet since the process started in 1999.

The main (civil) Marriage Act will not be amended to accommodate Muslim marriages. Instead, formal statutory recognition of such marriages will take place separately by adjusting South African law, which is already recognised as a hybrid or mixed legal system, because of the formal recognition of two other types of marriage. The proposed legislation is therefore intended to co-exist alongside the mainstream (civil) law rather than to form an integral part of it. Nonetheless, just as there is no strict separation between (the secular) State and religion in the Constitution, at present there is also no strict separation between some of South Africa's statutes and religious law; thus there already is an overlap between the two systems. This has mainly occurred since 1993 because of judicial and statutory interventions which have recognised Muslim marriages for certain purposes. Judicial intervention at the level of the Constitutional Court has occurred after test cases were brought by, or on behalf of, Muslim women and their children, who remain most affected by the consequences of non-recognition of Muslim marriages, upon the divorce or death of their spouses or fathers, respectively. The legislature has in most cases therefore been forced by the judiciary to amend certain laws to make allowance for the rights of Muslim women and children. However, there are many instances where the legislature has been proactive and amended the law of its own accord. A typical example is the Children's Act. The government, as it did with Muslim marriages, accorded children's rights a high priority by making that part of its law reform initiatives in 1998, although, as indicated, the Children's Act was only introduced a few years after a Project Committee of the SALRC had dealt with a review of the Child Care Act.

25 Sections 15(3)(b) and 39(3) (interpretation clause).

This reform initiative overlapped with that pertaining to Muslim marriages,

which, the Committee noted, would necessarily include the position of Muslim children within its ambit. As will be detailed in Sect. 9.3.4, the provisions of the MMB relating to custody, guardianship and maintenance largely conform to Islamic law and have therefore created little contention by according rights and protection to women and children and regulating the corresponding duties of men. Furthermore, given that the principle of best interests straddles both legal systems, until the recognition of Muslim marriages occurs, South African law and this principle remain the norm by which Muslim children's rights are judged.

As a first step to seeking recourse, many Muslims in purely religious marriages, especially women with children, seek the assistance of essentially conservative male religious authorities (*ulama*). These basically adhere to two (namely, the Hanafi and Shafi'i schools) of the four main Sunni schools of law and mediate (rather than arbitrate)[26] and resolve disputes of a religious nature or grant a religious divorce (*talaq* or *faskh*) in several informally constituted religious tribunals. The *ulama* have varying degrees of status based on their formal training and qualifications. Since their decisions do not have legal binding force, getting their decisions enforced by recalcitrant parties may be difficult. If unsuccessful or dissatisfied, these parties will often then seek resolution and relief from secular courts. To date, all such significant test cases were brought by or on behalf of Muslim women. If a religious divorce has, for example, been obtained, and should one party appeal to the secular (High and Divorce) courts (as upper guardian of all children) for a custody order, the standard of the best interests of the child would be applied regardless of any clash with the values of the religion that may be involved. For example, the fact that Islamic law may give preference to the mother (similar to the 'tender years' principle) would be deemed as discriminating between parents on the basis of gender in terms of section 9 (equality clause) of the Constitution.

With recognition of Muslim marriages it is envisaged that MPL matters will continue to be primarily adjudicated in secular courts where judges are not necessarily Muslim, and with religious authorities playing a more minor role than previously envisaged. The MMB is essentially a Shari'a compliant 'code' which is partly based on progressive interpretations of rules, developed by the Sunni schools of Islamic law, as they are currently understood and implemented in practice in the Muslim world. Once enacted, the MMB will be able to guide judges who interpret and apply Islamic law principles. Given that the 'code' is little more than a statement of law and does not contain intricate details of Islamic law, *ulama* and other experts are therefore still expected to give an interpretative and advisory input since there have been cases where secular judges have misinterpreted Islamic law, albeit in a well-intended effort to provide Muslim women with relief. Although judges cannot change Islamic law, the 'code' will at least provide them with a starting point and guide which they currently lack.

[26] Although it can be criticised for clearly being out of touch with current needs, the provisions of the Arbitration Act No 42 of 1965, for example, Section 2, do not make it conducive to mediating personal law matters.

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9.3 The Best Interests of the Child as a Determining Factor in South African Law

9.3.1 Judicial Analysis of the Application and Evaluation of the Provisions Pertaining to the Best Interests of the Child in South African Legislation

That the best interests of the child should be the determining factor in decisions relating to guardianship, contact (access) and custody (care) of children is well established in South African private law. The rule has also been entrenched in the Constitution because the best interests of the child also form a key or guiding principle of the CRC (Article 3). The same can be said of Article 4 of the ACWRC, which deals with the 'primacy' of the best interests of the child because; although its ratification (2000) followed the coming into operation of the Constitution, it nonetheless preceded the Children's Act.

Section 28(2) of the Constitution states that '[a] child's best interests are of paramount importance in every matter concerning the child'. Skelton aptly describes

how the Constitutional Court views section 28(2) as both a principle (standard) and an independent right when she states that '… [it] is not only a principle that helps interpretation of other rights. It is a right in itself'.[27] Unfortunately, since the Constitution does not define what exactly it means by this standard, it has given rise to varied judicial interpretations by the High Court and the Constitutional Court, as detailed below.

In fact, the best interests of the child principle (standard) is not a new concept in South African law as it was already established in an Appellate Division case (*Fletcher*) in 1948.[28] However, the Court in this case did not articulate what would constitute the best interests of a child nor did it set out any particular criteria to be considered. In 1994 the Cape Supreme Court (*McCall*),[29] in the context of the custody of a child, set out an extensive list of some thirteen (a–m) criteria which should be taken into account in determining the best interests of the child. Not only did the list clearly make reference to religion as a consideration ('the ability of the parent to provide for the educational well-being and security of the child, both religious and secular' (factor f)), but the last factor (m) was flexible enough to include religion in that it made provision for '*any other factor which is relevant to the particular case with which the Court is concerned*'. That list was accepted as a guide in custody cases in a number of High Court decisions. Furthermore, these factors were also subsequently statutorily recognised, with minor differences, in section 7 of the Children's Act (as will be detailed below). However, the formal incorporation of a guiding standard (section 7) in the Children's Act, although

27 Skelton 2013, p. 619.

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

29 *McCall v. McCall* 1994 (3) SA 201 (C) at 204 J-205F.

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similarly expansive in that it lists some fourteen factors, regrettably does not contain a flexible criterion similar to the stated factor (m).

The influence of the best interests principle was initially limited to family law and care proceedings. What is new is that, apart from a (non-exhaustive) range of other rights contained in section 28(1)[30] and in the rest of the Bill of Rights that contextually also provide protection to children, the 'best interests' principle has also been specifically included, through section 28(2), as one of the fundamental human rights that constitute the Bill of Rights, and has, through it, been expanded to include all aspects of law affecting children. As Skelton points out and details in two recent sources, the Constitutional Court has therefore 'drawn',[31] although it has not necessarily uniformly dealt with[32] or applied it, the 'best interests' principle into several cases that not only pertain to the right to family or parental care (custody),[33] which is the focus of this chapter, but also to a range of other issues,

30 Section 28(1), which is also not exhaustive of children's rights, lists nine (a–i) specific rights which include the right '(*b*) to family care or parental care, or to appropriate alternative care …'.

31 See Skelton 2013, p. 620.

32 See Boezaart 2014, p. 174.

33 In *Bannatyne v. Bannatyne* 2003 (2) SA 363 (CC) the Court held that the best interests requirement obliged parents to properly care for their children, but also obliged the State to provide the necessary legal administration to ensure appropriate care—which in this case related to the payment of maintenance; In *S v. M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), which is also reported as *M v. S* 2007 (12) BCLR 1312 (CC) (see also note 35 below), the Court considered the best interests principle together with the right to family and parental care in a situation where children might be deprived of such care if their primary caregiver (in this case an unmarried mother) was imprisoned. The Court found (at para 30) that 'section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it can'. In *C v. Department of Health and Social Development, Gauteng*, 2012 (2) SA 208 (CC) the Constitutional Court found the lack of a provision for automatic review of the removal of children from their parents to be an unconstitutional infringement of their best interests. Although not a Constitutional Court case, the criminal law case of *S v. Petersen* 2008 (2) SACR 355 (C) elicited much interest in the local community because the appellant, Nejwa Petersen, was the wife of a famous Muslim theatre personality, Taliep Petersen. She was, along with two co-accused, convicted in the Cape High Court of his murder and sentenced to 28 years imprisonment. Given that at the time she was the mother of the couple's minor daughter, Zaynab, the Court (at para 44) considered the position of the child in the context of her best interests in terms of section 28(2) of the Constitution and with reference to the then recent

Constitutional Court case of *M v. S* (2007) referred to above. In so doing the Court recognised the rights and interests of children of perpetrators. After finding that the appellant was not the primary caregiver, the Court nonetheless went on to address the matter of the minor child's care as follows (at para 76): 'I am quite satisfied that she is presently in excellent hands, under the supervision of persons who love and care for her and have voluntarily undertaken this duty since the appellant's incarceration, if not already from the time of the death of the deceased. Zaynab is, in my view, in more than appropriate alternative care, as envisaged by section 28(1)(b) of the *Constitution*.' Such a ruling would satisfy Islamic law requirements since it typifies what would ordinarily be expected to happen in a similar case in the context of extended Muslim families.

for example, international child abduction and adoption by unmarried fathers, same-sex couples, and foreign couples. Furthermore, the 'best interests' principle may be of 'paramount importance' but, like every other right in the Bill of Rights, it may also be subject to limitation in terms of section 36 (general limitation clause). Therefore it does not enjoy any special hierarchic position in the Bill of Rights, nor does it automatically trump the rights of other interested parties, like parents or the State. Therefore, although section 7(1) of the Children's Act ought to be read in conjunction with the interpretation and context of section 28(2) of the Constitution as adduced from the Constitutional Court cases,[34] the Court has in more recent cases conceded that section 28 may also be used to limit rights and, as a right, is therefore also subject to limitation.[35]

Clearly modelled on section 28(2) of the Constitution, Chap. 2 of the Children's Act also contains a section (section 9) dealing specifically with the paramountcy of the best interests of a child 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' (my emphasis).

Bosman-Sadie and Corrie[36] explain that in this section '"[p]aramount" means supreme or of utmost importance [and that] … [a]ccording to this section, the "best interests of a child" standard is the single most important principle to be considered in this entire Act'.

Bosman-Sadie and Corrie[37] also give an impressive list of some forty cases, starting with *Fletcher* (1948 in the Appellate Division) and ending in 2012[38] in the Constitutional Court, 'that tracks the development of the current best interests of the child standard over the last 60 years'. However, despite all this development, it is clear that currently '[w]hat is considered in the child's best interest has proved confusing. This difficulty is compounded by different and rapidly changing social standards and values of our diverse society'.[39]

Given its historical context, it is not surprising that the 'best interests' principle has often been referred to as the 'golden thread'[40] that permeates all law in South Africa when decisions affecting children are under consideration. Further

34 For detail see especially the judgments of Goldstone J referred to in note 42.

35 The limitation of the paramountcy of the 'best interests' principle is explained in the following cases: *Centre for Child Law v. Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC), per Cameron J, at para 29 and *De Reuck v. Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC), para 55, per Langa, DCJ. Similarly, the Constitutional Court expanded on the meaning of paramountcy in a later case, *M v. S* 2007 (12) BCLR 1312 (CC), p. 1324 at paras 23 and 26 of the judgment by Sachs J. The approach of this case was in turn applied in a subsequent Constitutional Court case, *Van der Burg v. National Director of Public Prosecutions* 2012 (2) SACR 331 (CC).

36 Bosman-Sadie and Corrie 2013, p. 30.

37 Bosman-Sadie and Corrie 2013, pp. 29–30.

38 *CM v. NG* (2012) 3 All SA 104 (CC).

39 Van der Walt 2009, p. 238.

40 See *Kaiser v. Chambers* 1969 (4) SA 224 (C) at 228 E-G.

corroboration and guidance as to what is meant by this principle, and the factors that must be taken into account in giving effect to its application, are also found in section 7 (titled 'Best interest standard') of the Children's Act.

The principle of the best interests of the child must always be considered when making decisions about children. Section 7(1)(a–n) sets out a lengthy, though not exhaustive, list of fourteen factors for courts to consider when determining a child's best interests under the Act (the 'best interests of the child standard' is

also referred to in section 9 of the Children's Act detailed below) and under the Constitution. These factors are:
(1)(*a*) the nature of the personal relationship between—(i) the child and the parents … and (ii) … care-giver;
(*b*) the attitude of the parents … towards—(i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child;
(*c*) the capacity of the parents … 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 … 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 … 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…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 [such behaviour] …;
(*m*) any family violence involving the child or a family member of the child; and
(*n*) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child (my emphasis).
Although culture and tradition (which may be linked with religion) are specifically mentioned in factor f (ii), and although factors g (iii–iv) and h may allude to it, it is a pity that section 7 does not specify religion in its list of factors or contain

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a useful flexible provision, similar to criterion (m) in the *McCall* case (as detailed above), from which to have inferred it.
However, ultimately, judges, because the court acts as the 'upper guardian' in *all* disputes concerning children, exercise discretion when determining what is, or may be, in a particular child's best interests. As will be detailed in Sect. 9.3.3.4 below, section 33(3) of the Children's Act, in the context of a parenting plan, makes provision for 'any matter' (including religion) to be catered for. As alluded to above, judges have expressed different views as to what section 28(2) (best interests standard) entails. For example, although the High Court may have deemed this section merely to be a 'general guideline',[41] the Constitutional Court has subsequently interpreted this provision as being both 'independent' of other rights contained in the Constitution and as an 'expansive guarantee'. In other words, given that both were never given 'exhaustive' content, section 28(2) is not limited by the list of rights enumerated in section 28(1) of the Constitution or the list of factors contained in section 7(1) (the best interests standard) of the Children's Act.[42]
Chapter 1 of the Children's Act, in the section dealing with its Objects, states that one of its goals is 'to give effect to the [above] constitutional rights of children, namely … that the best interests of a child are of paramount importance in every matter concerning the child …'.[43]

9.3.2 International and Regional Instruments

The Preamble to the Children's Act, which holds little legal value, sets out two of its purposes as according added significance to the best interests of the child (section 28) and South Africa's commitment to both regional and international human rights instruments which protect such interests. A clear goal of the Children's Act is 'to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic …'.[44] The section of the Constitution[45] dealing with the application of international law states:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

41 See the judgment of Van Dijkhorst JP in *Jooste v. Botha* 2000 (2) BCLR 187 (T), p. 198.
42 See Chaskalson P at p. 1360 para 9 in *Fraser v. Naude and Others* 1998 (11) BCLR 1357 (CC); Goldstone J in *Minister for Welfare and Population Development v. Fitzpatrick and Others* 2000 (7) BCLR 713 (CC), pp. 719–720 and again Goldstone J in *Sonderup v. Tondelliand and Another* 2001 (1) SA 1171 (CC) which is also reported as *LS v. AT and Another* 2001 (2) BCLR 152 (CC), p. 162 at para 29 of the judgment.
43 Section 2(b)(iv).
44 Section 2(c).
45 Section 233.

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Although the interpretation clause of the Constitution[46] states that a court, tribunal or forum 'must consider international law' and 'may consider foreign law' when interpreting the Bill of Rights, this consideration does not mean that it is obliged to 'apply' the provisions of international human rights instruments unless South Africa has also ratified them.

As indicated in Sect. 9.2.2, South Africa has both signed and ratified a range of regional and international instruments affecting women and children. These include the ACWRC, the CRC and the CEDAW, all of which enshrine the principle of the 'best interests' of the child. This therefore means that the provisions of these instruments must be taken into account when dealing with section 28 of the Constitution or any other relevant provision in it pertaining to a child. For example, Article 3(1) of the CRC provides:

In *all* actions concerning children, whether undertaken by public *or private social welfare institutions*, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be ***a*** primary consideration (my emphasis).

While section 9 of the Children's Act is modelled on section 28(2) of the Constitution, the latter clearly appears to have been modelled on Article 3 of the CRC. Although Article 3 can be construed to include unofficial religious bodies within its ambit, it appears that in South Africa the application by such bodies of Islamic law and custom governing Muslim marriages does not provide for a child's best interests being of paramount importance in every matter concerning the child, as provided for in the Constitution.

Article 16(1) of the CEDAW states:

States Parties shall…ensure, on a basis of equality of men and women:
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; *in all cases the interests of the children shall be paramount*;…
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; *in all cases the interests of the children shall be paramount*…(my emphasis).

When compared with the CRC, the following two provisions of the ACWRC appear to offer all South African children increased, and their best interests more emphatic, protection.

Article 1(3) of the ACWRC, which deals with the obligation of States Parties, expressly provides:

Any custom, tradition, cultural or religious practice that is *inconsistent* with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be *discouraged* (my emphasis).

Article 4(1) of the ACWRC, which is dedicated to dealing with the best interests of the child, provides:

In *all* actions concerning the child undertaken *by any person or authority* the best interests of the child shall be ***the*** primary consideration (my emphasis).

46 Section 39(1)(a) and (b).

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The conservative understanding and interpretation of the law has been, and is still being, developed to align with the provisions of the Children's Act and the guidance it provides. It is also clear that the formulation of Article 3 of the CRC which deals with the 'paramountcy' of the best interests principle has both led to and influenced the formulation of section 28(2) of the Constitution, which in its turn has influenced the incorporation of the best interests principle into national legislation in section 9 of the Children's Act. As indicated in Sect. 9.3.1, the same can be said of Article 4 of the ACWRC which deals with the 'primacy' of the best interests of the child.

The interpretation clause of the Constitution[47] further states:

> When interpreting any legislation, and when developing the common law or customary law, *every* court, *tribunal or forum* must promote the spirit, purport and the objects of the Bill of Rights (my emphasis).

Chapter 2 (General principles (sections 6–17)) of the Children's Act contains several important provisions pertaining to the best interests of children. One of its central foci is:

> All proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation.[48]

Finally, the Children's Act has incorporated the following three major international Conventions into South African law (and dedicates a specific chapter to each: the Hague Convention on Inter-Country Adoption of 1993 (Chapter 16); The Hague Convention on (the Civil Aspects of) International Child Abduction of 1980[49] (Chapter 17); and the UN Protocol to Prevent Trafficking in Persons, supplementing the UN Convention against Transnational Organized Crime of 2000 (Chapter 18). However, it appears that although the three Conventions are therefore enforceable in South African courts, that this may not be sufficient in itself.[50]

The operation of the Hague Convention on International Child Abduction has amended South African law in respect of custody and access rights since 1997. South Africa does not appear to be a signatory or party to either the 1996 Hague Child Protection Convention[51] or the 2007 Hague Child Support Convention and Protocol.[52]

47 Section 39(2).

48 Children's Act No 38 of 2005, section 6(2)(a).

49 This Hague Convention was adopted by South Africa in 1996 and has since the date of its entry into force (1 October 1997) been applicable between South Africa and several other contracting States. Cases decided before the Convention's incorporation by the Children's Act are therefore still of relevance.

50 For detail see Schäfer 2011, p. 55.

51 See www.hcch.net/index_en.php?act=conventions.text&cid=70 (accessed 26 May 2015).

52 See www.hcch.net/index_en.php?act=conventions.status2&cid=131 (accessed 26 May 2015).

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9.3.3 Parental Responsibilities and Rights in the Children's Act

With the introduction of the new Children's Act in 2005, South African law has moved its focus away from the concept of parental power or authority which constituted the sum total of the *rights and duties* of parents with regard to their children. The Children's Act places the emphasis on parental *responsibilities and rights* (in that reverse order of precedence), which include caring for, maintaining contact with, acting as guardian for, and contributing to the maintenance of, the child. Although, as indicated, the Children's Act only became fully operational on 1 April 2010, most of the provisions dealing with the acquisition of parental responsibilities and rights have been in operation since 1 July 2007. As indicated in Sect. 9.2.2 above, the term 'custody' has been replaced with the term 'care', and 'contact' is similar in meaning to 'access'. Guardianship may also be co-exercised or shared by parents.[53]

Parents who are legally (civilly) married to each other, and live together, are automatically and equally the guardians of their (biological) minor children born of the marriage. Equal guardianship rights would also apply to Muslim parents who have entered into both a religious marriage and a civil marriage. If for some

reason a guardian is unable to, or fails to, perform his or her duties, the court may appoint a 'legal' guardian for the children. The High Court is itself ultimately the 'upper' guardian of all minor children.

9.3.3.1 The Marital Status of Parents and the Distinction Between Legitimate and Illegitimate Children

As will be detailed in Sect. 9.3.4.6 below, prior to the Children's Act, the law unjustifiably distinguished between illegitimate (born out of wedlock) and legitimate (born in wedlock) children. In this sense it accorded with Islamic law which still draws such a distinction. Although it did away with classifying children born of religious marriages, including Muslim ones, as 'illegitimate', it continued to categorise such children, although born of religious marriages, as born 'out of wedlock'. Thus, although in terms of section 1(c) of the Child Care Amendment Act No 96 of 1996 the term 'illegitimate' was replaced by the term 'out of wedlock', the substantive legal status of, for example, children born of marriages carried out in accordance with religious rites remained unaffected. The Children's Act, fortunately, no longer draws a distinction between legitimate and illegitimate children and simply refers to them as children born of married and unmarried parents, respectively.

53 See Chapter 1, section 1 (interpretation) and Chapter 3, section 18(2) (parental responsibilities and rights) and section 18(3) (shared guardianship) of the Children's Act.

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9.3.3.2 The Legal Duty of Maintenance

As guardians, both parents not only have joint custody and guardianship of their children but also have a legal duty to support (maintain) them. Furthermore, both the Children's Act and the Maintenance Act[54] provide for equal rights and duties of parents of children born of religious marriages regardless of the fact that such marriages are not legally recognised (or that in terms of Islamic law only a father has maintenance responsibilities, as will be detailed in Sect. 9.3.4.5 below).

The legal duty of parents to support their children usually terminates when the children become independent, for example, when they marry or when they become self-sufficient. If the children are not living with the mother or the father, the persons who are looking after them, for example, their grandparents (without distinction between maternal or paternal grandparents, as is the case in Islamic law), are able to apply for maintenance from the parents through the children's court. Section 22 of the Children's Act makes it possible for both sets of grandparents or other family members to become 'co-holders' with parents of parental responsibilities and rights through a written agreement registered with a family advocate or made an order of court (similar to a parenting plan referred to in Sect. 9.3.3.4 below). If the parents are themselves destitute and in need of support, they may apply for a State child support grant (CSG), or for a care dependency grant (CDG) if they have a child with a disability who may be in need of special care. A State foster care grant (FCG) is also available for children deemed to be at risk and who therefore have been placed in the care of foster parents (who are not the biological parents) by a children's court. Although the grants for the children are paid to the parent or person who has to take care of them, it is the children who have the right to the grants and not the parent or caregiver. Section 1 of the Children's Act generically defines an 'orphan' as 'a child who has no surviving parent caring for him or her'; children who have lost only one parent are excluded from the definition and may suffer prejudice as a result even though the Children's Act (section 150(1)(a)) is in the process of being further amended.[55] The households of many poor (especially black) families in South Africa are also headed by children ('child-headed households')[56] or grandparents due to the ravages of HIV/AIDS, poverty and the scourge of apartheid. The State currently carries the financial responsibility of providing grants to millions of destitute and needy children that are in more dire straits than their Muslim counterparts.

In terms of Islamic law a father is only responsible for maintaining his legitimate children. Where both parents are unable to support their children, the paternal grandfather may be expected to assist. The position is different in terms of South African law: both maternal and paternal grandparents of children born in wedlock may have an obligation to maintain them when necessary. In 1930, before

54 Act No 99 of 1998.
55 For a detailed critical discussion see Jamieson et al. 2014, pp. 18–19.
56 See the Children's Act, section 137.

the concept of best interests started to play a role in court cases, the Appellate Division, in *Motan v. Joosub*,57 drew a distinction between children born in and out of wedlock. The Court, per Wessels JA, upheld a Supreme Court (now High Court) decision that South African law did not recognise the right of a Muslim mother (who was equated to a concubine in this case) of four minor children born out of wedlock (because they were born of an unrecognised Muslim marriage and deemed to be 'illegitimate') to claim maintenance for them from their paternal grandfather. In the case of an extra-marital child whose parents were unable to support the child, the South African law, as interpreted in the *Motan* case, provided that only the maternal grandparents had a duty of support towards the child.
It mattered little to the Court that the grandfather (the defendant in the case) had admitted that a Muslim marriage had existed between the children's mother and his son, and it appears that aspersions were instead cast on the mother's morality because of a remote possibility that the children might not be his grandchildren.
Not surprisingly, the *Motan* ruling has, albeit only recently in 2004, been rejected as unconstitutional in yet another case involving Muslim parties, but which this time involved an illegitimate child. In *Petersen v. Maintenance Officer, Simon's Town Maintenance Court and Others*,58 the applicant, a young single female, had been unable to secure from the child's biological father, who had admitted paternity, a contribution to the maintenance of their child. The applicant and her parents (the child's maternal grandparents) were supporting the child from straitened means. The High Court recognised the liability of paternal grandparents for the maintenance of a child who in this case was born out wedlock, since there was no question of any marriage.59 The applicant's Muslim attorney argued that the law as interpreted in *Motan* was contrary to the best interests of the child.

9.3.3.3 Co-holders of Parental Responsibilities and Rights

Children born through artificial insemination to a childless couple or a lesbian couple in a (same-sex) civil union60 or through surrogacy where at least one of the parents has contributed an ovum or sperm61 are similarly (to children born of the marriage) also referred to as biological children because of the genetic link. However, adopted children are regarded as the 'natural' children of adoptive parents.62
The fact that the Children's Act permits legal adoption means that Muslim couples are able to adopt children in South Africa even though Sunni Islam is deemed
57 1930 AD 61. See especially p. 65 of the judgment.
58 2004 (2) SA 56 (C).
59 See van Schalkwyk 2009, p. 45.
60 Chapter 3 of the Children's Act.
61 Chapter 19 of the Children's Act.
62 Chapter 15 of the Children's Act.

not to permit adoption. However, section 234 of the Children's Act does make allowances for an 'open adoption', albeit in the context of formal adoption where the child's identity is fully absorbed into that of the adoptive family. The adoptive and biological families can enter into a 'post-adoption agreement' which makes provision for the right of the child and his or her biological family to retain contact with each other. As with formal adoption, Sunni Islam does not permit surrogacy for various reasons, which include implications of adultery (*zina*) and that a child's legal mother is deemed to be the birth mother. Support for the Islamic view against surrogacy can also be inferred from the MMB with its emphasis on children born of 'marriage'63 since it implies that (biological) paternity is the consequence of a licit (legal) sexual relationship. Should a constitutional challenge arise in South Africa with regard to such an assisted reproductive technology (ART), it could raise questions pertaining to, in addition to status, the child's maintenance; inheritance; dignity; contract (womb rental); or even polygyny (such a marriage could, for example, be 'creatively' envisaged with a surrogate purely for the purpose of

'procreation', and just as easily terminated thereafter).

9.3.3.4 Parenting Plans

In South Africa custody (and therefore the best interests of children) usually only becomes a litigious issue once the marriage breaks up. When couples separate or divorce the court usually grants (physical) custody to one parent and general access to the other. In terms of section 1 of the Children's Act,

'contact' [or access], in relation to a child, means-
(*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; or (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.

However, through the vehicle of a parenting plan newly introduced by the Children's Act,[64] there has been a shift from the idea of sole custody to joint custody in the best interests of children. Furthermore, courts can only be approached once parties have first sought to iron out such issues with the assistance of available expertise and/or through such a parenting plan. Although section 33(2) provides some guidelines as to the issues which may be dealt with in a parenting plan, which is usually helpful when divorce is in issue, it does not preclude parties from tailoring such a parenting plan to suit their culture, customs and religion, as long as they do not conflict with the best interests of the child standard detailed in section 7 of the Act as elaborated below. In terms of section 10 of the Children's Act

63 See text to note 80.

64 Sections 33(2) and 33(5).

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(and as envisaged by Article 4(2) of the ACWRC and Article 12(1) of the CRC), the child's input and views (where maturity provides for it) may also play a role, as explained below. However, nothing precludes parties, who may as yet not have marital problems but want to be pro-active in avoiding co-parenting issues that may cause problems in the future, from also drafting such a parenting plan to help them deal with these issues within an existing marriage. In terms of section 33(3) of the Children's Act the content of a parenting plan may deal with '***any matter***' that may relate to 'co-parenting' or co-exercising or sharing of their parental responsibilities and rights, and with which they may be struggling. It may, for example, range from working out a fair division of labour if both couples work and co-contribute to income earned and how to deal with interfering in-laws; and it may include, where parents subscribe to different religions (in the case of interfaith marriages) or different schools of Islamic law, what religion should be followed or what school should be attended by the child etc. As indicated, prior to seeking the intervention of a court, parties must, as a first step, seek the assistance of either a family advocate[65] or a social worker or a psychologist, or a suitably qualified person who can help mediate in order to reach agreement on disputed issues pertaining to care (custody), contact (access) and guardianship. A family advocate often works in collaboration with the expertise provided by these other specialists. A family advocate may, for example, facilitate the drafting of a parenting plan which in terms of section 33(4) of the Children's Act 'must comply with the best interests of the child standard set out in section 7'. Even though the Children's Act itself (as is the case also with all other legislation in South Africa) ultimately defers to the Constitution since it is the highest or supreme law, section 7 of the Children's Act, as detailed in Sect. 9.3.1, pays more attention to the child's best interests than section 28(2) of the Constitution, by detailing a list of factors for courts to consider and be guided by when ascertaining what may be in a child's best interests under both the Children's Act and the Constitution. Section 34(1)(a) of the Children's Act prescribes the formalities with which the parenting plan must comply, for example, that it be in writing and signed. In terms of section 34(1)(b) a parenting plan may be legally enforceable either if registered with a family advocate or made an order of court. If, however, consensus cannot be achieved by the parties, a family advocate may make a recommendation to the court, always acting in the best interests of the child. This recommendation merely assists the court in reaching a decision and is therefore not binding until the court

65 The Office of the Family Advocate, although established prior to democracy by section 2(1)

of the Mediation in Certain Divorce Matters Act No 24 of 1987 (in terms of which litigants are now obliged to mediate their disputes before resorting to litigation), has expanded significantly with the implementation of the Constitution and the Children's Act. The responsibilities of family advocates are not limited to assisting with divorce matters in the Divorce Court, but also include matters heard in Children's Courts, mediation in domestic violence issues, and assisting in Maintenance Courts. The Office of the Family Advocate is a neutral institution which, because it is less formal than a court, is 'child-friendly' and affords both parents and children an opportunity to be heard. The family advocate is paid by the State which offers this service at no cost to parties. For more information see Department of Justice and Constitutional Development 2015.

deems it so. A parenting plan may be amended or terminated either by the Office of the Family Advocate (section 34(4)) or by a court (section 34(5)), as the case may be. A child (or his or her representative) may also approach the court for such amendment or termination. Section 35 deals with refusal of access or refusal to exercise parental responsibilities and rights. Section 35(1) makes it a criminal offence for one parent to deny access to a parent who has access in terms of section 22(4) of the Children's Act (that is, through a registered parental plan or one made an order of the High Court). In terms of section 305(4) the failure to honour an obligation to maintain a child is an offence. As indicated in Sect. 9.3.4.2, although the issues of access and maintenance may appear to be unrelated, the father's failure to maintain his child will often result in the mother denying him access, with the result that it is ultimately the child that gets 'punished'.

More often than not, and similarly to Islamic law, the mother is awarded custody by the court. However, there have been cases where awarding the father custody has not only been deemed to be in the best interests of the children but may also have been at their request or in accordance with their wishes. In terms of section 1(a–j) of the Children's Act, custody or 'care' is interpreted to include a host of factors, such as, providing a child with basic day-to-day necessities, such as, a suitable home, nutrition, financial support and education (including cultural and religious education), and, very importantly, '(*j*) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child'. However, quite unlike Islamic law where the father is deemed the sole guardian, given that normally the mother and father have joint guardianship of their children, they are expected to jointly make decisions in this regard. For example, section 18(3) of the Children's Act provides that a person who acts as a guardian must:

(*a*) administer and safeguard the child's property and property interests; (*b*) assist or represent the child in administrative, contractual and other legal matters; or (*c*) give or refuse any consent required by law in respect of the child, including—(i) … marriage; (ii) … adoption; (iii) … departure or removal from the Republic; (iv) … child's application for a passport; and (v) … alienation or encumbrance of any immovable property of the child.

Nothing therefore precludes Muslim parents from utilising the tool of a parenting plan as long as it is in accordance with South African law. However, unlike civil (legal) marriages, which are dissolved in secular divorce courts and matters pertaining to the care, contact and maintenance of children are sorted out before a divorce is granted, the issue of how Muslim parents will exercise their religious parental responsibilities regarding their children, let alone their secular law responsibilities, does not automatically ensue when unrecognised Muslim marriages are terminated by divorce (whether by unregulated unilateral *talaq* by the husband or regulated *faskh* granted by a religious tribunal to either the husband or wife). Recalcitrant fathers often fail to uphold the legally non-binding decisions of *ulama* bodies when such a dispute has been decided in favour of mothers. As indicated, this has often left Muslim women with little option but to approach the secular courts for relief.

While, similarly to Islamic law, parents may still have many important rights over children, for example, the right to moderately chastise them, these rights do not necessarily take precedence over the rights of children. The rights and best interests of children may take precedence over those of parents regardless of any religious law or practice which may conflict with such rights, for example, when it may not allow for a medical blood transfusion to save the life of the child[66] or

regarding a child's participation in religious activities in a particular church.[67] The rights of Muslim children, as those of all other children in South Africa, are currently protected from 'sabotage' under the guise of religion. Under normal circumstances, the roles of parent and child are expected to be both complementary and balanced so that children, as long as they are minors (or 'majors' in some instances) incapable of taking care of themselves, have the right to be reared jointly by both parents in a caring environment, and vice versa when parents reach old age. However, this ideal does not reflect current reality where parents get divorced or remarry or enter into polygynous marriages so that children are forced to live in 'blended' families with children from a previous marriage of the wife, husband, or both, or are orphaned when both biological parents die and are then often left to the mercy of welfare.

9.3.3.5 Capacity of Minors to Enter into Marriage

As eighteen is the legal age of majority, it is also the legal age to enter into marriage. A minor under eighteen, who has not been previously married, needs the written consent of both parents.[68] If parents unreasonably refuse their consent or there is sufficient evidence that getting married is in the best interests of the minor, consent can be requested from a judge of the High Court. Minors (those under the age of eighteen) require parental consent to marry. In addition, a boy under the age of eighteen or a girl under the age of fifteen will need the consent of, for example, the Minister of Home Affairs.[69] If a minor manages to get married without consent while under the age of eighteen, his or her parents can seek to have the marriage dissolved.

66 *Hay v. B and Others* 2003 (3) SA 492 (W), pp. 494–495.

67 *Kotze v. Kotze* 2003 (3) SA 628 (T), pp. 630–631. See text to note 78.

68 See the Marriage Act 1961, sections 24(1) and (2).

69 See the Marriage Act, section 26(1). If ministerial consent was required but not obtained, the minor's marriage will be deemed null and void. However, the Minister may also, in terms of section 26(2) read together with section 26(3) of the Marriage Act (dealing with the possibility of retrospective consent), subsequently declare the marriage 'valid' if 'desirable and in the interests of the parties in question'. It can therefore be deduced from the above that there appears not to be a set age below which it can be said with any certainty that a minor cannot enter into a marriage. A minor who enters into a valid civil marriage before attaining the age of eighteen acquires the status of majority.

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In terms of Islamic law, the ages of marriage for girls and boys are even lower, and they are usually marriageable at the onset of puberty. Although they vary between the schools of law, the age of puberty for girls is lower than that for boys. South African law may penalise civil marriages entered into by underage couples, but the Muslim marriage per se is not secularly recognised. While it may be questioned whether or not a young (pubescent) girl is able to give 'full and free' consent to marriage as required in terms of international human rights instruments,[70] if Muslim children enter into such marriages in South Africa their religious validity will not be affected. Furthermore, given that there is no national register of Muslim religious marriages, it is difficult to ascertain the extent of such child marriages in South Africa. Of course, nothing will preclude an imam from officiating at the marriage of such children in terms of an Islamic *nikah* only, and thereafter, when both are of civil marriageable age, for them to enter into a civil marriage in terms of South African law, and, moreover, to even do so with a different imam who is also a registered civil marriage officer.

The MMB differs from the Marriage Act in this regard as follows. Unlike the position in respect of a civil marriage, clause 5 of the MMB, which deals with the requirements for the validity of Muslim marriages, does not set a minimum marriageable age. Instead, clause 5(4) of the MMB makes provision for a *wali* (guardian) of a minor to conclude a marriage on behalf of that minor.[71] Implicit in the application, and paramountcy, of the 'best interests' principle in South Africa is the power to curtail any rights that a *wali* may enjoy over minor children. Since there is no default guardian in terms of the MMB, and given that both Islamic law and South African law will be taken into consideration, this implies, especially since nothing precludes such an interpretation, that a mother may act as a *wali* even in such a case. However, the MMB makes it clear that the father retains the

Islamic law financial obligations associated with guardianship although, strictly speaking, the application of the relevant provisions of the Children's Act may mean that both parents share in this responsibility, as will be detailed below. Given that the best interests of a child come into play only after a mother's official Islamic law period of custody (which is her right) ends, this would presumably also be the case if the mother were to be awarded custody beyond the (official) period in terms of a *khul* (divorce) arrangement. In other words, while the mother may decide to waive any compensation due to her in order to secure such a divorce, the father will not be absolved from his maintenance obligations towards the child. Furthermore, clause 5(5) of the MMB allows a Muslim person or body designated by the relevant Minister to authorise a marriage between minors. Activists have voiced concern that these provisions may encourage, rather than

70 See Article 16 of the Universal Declaration of Human Rights (UDHR) (1948), which South Africa has not signed or ratified and whose provisions it may therefore not be obliged to apply.

71 Although there are exceptions, a Muslim woman is usually not present at (her) the *nikah* (actual marriage) which takes place in a mosque. She is represented by a male guardian (father or brother) and signs the marriage register beforehand. In most cases, where she is present in the mosque, she is merely an observer and sits separated from the men.

deter, child marriages and that marriages without the knowledge and consent of the bride and groom could occur. The content of both these concerns would be contrary to the best interests of such children.

9.3.4 Parental Responsibilities and Rights in the Muslim Marriages Bill (MMB)

This Section will highlight that in terms of the provisions of the MMB, regard was had to the fact that in terms of Islamic law effective custody and guardianship ultimately remain vested in the (ex-)husband, whose financial and maintenance obligations to the (ex-)wife, though generous upon and during marriage, are severely curtailed upon and after divorce. Hence clause 10 (dealing with custody or guardianship of, and access to, minor (and major) children) and clause 11 (dealing with their maintenance) of the MMB regulate the usually limited consequences that flow from Muslim marriages and synthesise them with the provisions of South African law. In doing so, the MMB succeeds in making generous provision for children.

As indicated in Sect. 9.2.3, while the present version of the MMB may still undergo further revision, it is contended that, since it largely complies with Islamic law, the revisions, if any, will be minimal. This section therefore critically analyses clauses 10 and 11 of the MMB and does so in the context of South African law.

As indicated in Sect. 9.2.3, Muslim marriages are currently only recognised in terms of, and for the purposes set out in, several Acts including the Children's Act which comprehensively deals with the protection of the rights of a child. In terms of section 1(1) of the Children's Act:

'marriage' means a marriage (*a*) recognised in terms of South African law … or (*b*) concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly.

9.3.4.1 Custody (*Hadana*) or Guardianship (*Wilaya*) of and Access to Children

Clause 10 of the MMB deals with the custody or guardianship of, and access to, children as follows:

(1) In making an order for the custody of, or access to a minor child, or in making a decision on guardianship, the court must, ***with due regard to Islamic law*** and the report and recommendations of the Family Advocate, which must take into account ***Islamic norms and values***, ***consider the welfare and best interests of the child***.

(2) … the non-custodian parent must be afforded reasonable access to a child.

(3) In the absence of both parents, for any reason … the court must, in accordance with Islamic law, in awarding or granting custody (*al-hadānah*) or guardianship (*al-walāyah*) of minor children, award or grant custody or guardianship to any person as the court deems appropriate, in all the circumstances.

(4)(a) An order regarding the custody or guardianship of, or access to, a child made in terms of this Act, may … at any time be rescinded or varied or, in the case of access to a child, be suspended by a court on good cause shown.
(b) If an enquiry is instituted by the Family Advocate … the court must consider the report and recommendations of the Family Advocate ***concerning the welfare of minor children in accordance with Islamic Law*** before making an order … (my emphasis).

Muslim children begin their first (natural) phase of life under female custody. Once this (limited) period terminates, they enter into a new phase under male guardianship. Having regard to both the Islamic and South African law contexts, clause 10(1) of the MMB, although clearly taking into consideration the best interests of the child, does not specify which parent, if any, is to be awarded custody or/and guardianship nor does it stipulate the period of such custody and/or guardianship. It can, therefore, be inferred that either parent (therefore equal rights), both parents, neither parent, or someone other than the parents can be granted custody and/or guardianship since the term 'parent' is not used. While Islamic law is not spelt out in the MMB, it is also important that any decision in terms of the MMB be guided by considerations and interpretations of Islamic law. However, Islamic jurisprudence recognises only the father as the guardian of his minor children and provides that divorced fathers (and relatives) of children generally have both more (albeit supervisory) guardianship rights and more (financial) duties than their (caretaker) divorced mothers (and relatives). Women are usually accorded the initial (and, therefore, also limited) and natural role of having custody of children. Islamic law, rather than necessarily distinguishing between the terms 'custody' and 'guardianship', effectively treats custody *as* (a form of) guardianship. The mother's (right to and *duty* of) custody of her child during the early years of its life is, therefore, limited and is regarded as one (usually the first) of three categories of guardianship of the child. However, this does not mean that Muslim women and men have equal rights in this regard. The other two categories of guardianship, namely, with respect to the education and property of the child, are usually entrusted to the father (or other male relatives). Paradoxically, the fact that the mother may be financially competent and is allowed by Islamic law to own property and to control her own assets unaided, is of little consequence. The mother of the child, whether married to or divorced from the father, always has the first claim (and duty) to custody of her (infant) child. Although not explicitly stated and with due regard to the father's unilateral duty to support his children and the mother's initial right to custody, it seems that the MMB also supports the Islamic law view that custody be awarded to the wife (mother) in the first instance, as well as in the case of interim custody.[72] Custody may, however, be entrusted to someone other

[72] Muslim Marriages Bill, clauses 10(1) and (2) read with clauses 11(2)(c)(ii) and 9(3)(g)(i) (interim custody).

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than the mother, and this person may also be the father. In terms of the MMB, in the absence of both parents, a court must also consider Islamic law when awarding custody or guardianship to anyone else.[73]

9.3.4.2 Practical Challenges: Access, Maintenance and Paternity Leave

It becomes apparent from Sect. 9.3.4.1 that Islamic law appears to promote the 'maternal preference' or 'tender years' principle in custody matters, which often implies the absence of fathers in the lives of young children. However, this principle has been challenged in the courts,[74] which have emphasised that parenting is a gender-neutral function. Although this therefore implies that both parents have equal rights in raising their children, practical reality appears to dictate otherwise. For example, access, maintenance and paternity leave are not necessarily unrelated factors in South Africa. The Maintenance Act (1998) provides socio-economic relief for children who have been neglected by their parents and responsible guardians. It places a responsibility on the parents to support the child financially and to ensure that they have basic nutrition and shelter. If they fail to do so, the State may be obliged to step in. The Department of Justice has recently concluded the process of amending the Maintenance Act. Legislation[75] to deal with maintenance defaulters hopes to enable credit bureaux to track them down and black-list them. Fathers who default in paying child maintenance are often denied access and visitation rights by mothers. South African law only provides for maternity leave and

makes no provision for paternity leave. This state of affairs is currently being challenged[76]—about half of South Africa's over eighteen million children grow up without a father (who may be alive), and one of the main reasons cited for absent fathers not being involved in the lives of their children is a lack of money.

9.3.4.3 Re-marriage, Inter-religious Marriages and Sexual Orientation

It appears that although Islamic law may be interpreted to imply that a mother may lose her limited right to custody if she marries a man who is a stranger (that is, not a blood relative) to the child, it is doubtful that such rule will withstand constitutional scrutiny, especially if it would not be in the child's best interests that

[73] Muslim Marriages Bill, clause 10(3).

[74] See *Potgieter v. Potgieter* [2007] SCA 47 (RSA), pp. 16–17 [para 26].

[75] The Maintenance Amendment Bill 2014 [B 16—2014] was tabled in Parliament on 5 November 2014. It was subsequently (on 7 September 2015) signed into law by the President as the Maintenance Amendment Act No 9 of 2015.

[76] See Sosibo 2015, p. 16.

the mother be so debarred. Islamic law entitles a mother to custody irrespective of her Christian or Jewish (*kitabi*) religion in the case of inter-religious marriages. However, in South Africa, inter-religious marriages, although only permitted for Muslim men, do occur among Muslims of both sexes, as do gay marriages (to a lesser extent). It is anticipated that with recognition of Muslim marriages some discrimination is inevitable because of the nature of religious law, despite the guarantee of the rights to equality based on sexual orientation or religious freedom. It may, for example, be argued that while the MMB is only available to heterosexual Muslim couples, that nothing would preclude same-sex Muslim gay or lesbian couples and inter-religious couples (where the man is not Muslim or the woman is a follower of a religion other than Christianity or Judaism) from entering into a *nikah* (Muslim marriage) and thereafter legally entering into a civil union or marriage in South Africa, thereby deriving civil benefits and protections. However, I am doubtful that if a custody challenge is, for example, brought by a Muslim woman in an inter-religious marriage with a non-Muslim man who has not converted to Islam, or who has herself converted from Islam to, especially, another *kitabi* religion, that a gender-stereotyping disqualification of this nature would survive a constitutional challenge.

Furthermore, Muslim children usually follow the faith of their father upon birth. Although the MMB[77] defines a 'Muslim' as '… a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of Islam …', and although Islam may be inferred from the application of Islamic law therein, the MMB does not give a clear indication of the child's religion. In the *Kotze* case,[78] although the parents were in agreement, the Court, as upper guardian of the child, refused to sanction their joint wishes contained in a settlement agreement in a secular divorce with regard to the (Christian) religious education of their 3-year-old son. It is contended that although both Article 14(1) of the CRC and section 15 of the Constitution assure children a choice of religion and section 18 assures everyone (including children) the right to freedom of association, the outcome of a similar case could be different today. The *Kotze* case preceded the Children's Act and, in addition, once religious (Muslim) marriages are formally recognised and end in divorce, it will be even more complicated for the courts to determine in an interfaith marriage (regarding which the MMB strategically remains silent) the possibly competing claims of the parents as to whose religion their children will follow.

[77] See clause 1.

[78] *Kotze v. Kotze* 2003 (3) SA 628 (T), and see text to note 67.

9.3.4.4 Access, Periods of Custody and Guardianship

Section 10(2) of the MMB provides for the non-custodian parent to have reasonable access to the child, subject to a court's decision in that regard which must have been made considering the welfare and best interests of the child (section 10(1)). The provisions of the MMB do not specify the periods of custody and guardianship

and, therefore, guidance must be sought in Islamic law rulings which may also vary according to the school of law. This leaves much room for leeway because the mother's period of custody of her child, in respect of which there is no limitation in the Qur'an and Sunna, has been determined as a result of the *ijtihad* (independent reasoning or interpretation) of early jurists who also held different views in this regard. According to these views, although women are usually denied custody of their children beyond a certain age, depending on the gender of the child and the school(s) of law (*madhhabs*) to which the family (or each parent) subscribes, the child's wishes are also taken into consideration.

While the guardianship rights of the father are often viewed as depriving a woman of the right to bring up her children as an equal parent, the reality is that there are many Muslim women who are forced to, or may even choose to, leave their children with their father upon divorcing him or re-marrying. These women, instead of blaming themselves, could view this 'freedom' from, or 'rejection' of, 'natural' parental responsibilities and duties as a guilt-free re-balancing of priorities and a redressing of past inequalities rather than reverse discrimination, or even as being liberated from a burdensome role. Women in South Africa who are delaying motherhood, or deciding against it altogether, because of career options and the patriarchal nature of current unequal maternity and paternity laws, may find leaving children with fathers to be a better option. Parenting plans (detailed in Sect. 9.3.3.4 above) in South Africa can be tailored so that women can have the best of both worlds.

9.3.4.5 Maintenance (*Nafaqa*)

Clause 11 of the MMB deals with the maintenance (*nafaqa*) of children as follows. The Islamic law understanding is that *nafaqa* covers maintenance generally owed by a man to his dependants, and it is also understood as such in terms of the MMB. Clauses 11(2)(a) and (b) of the MMB expressly stipulate that the provisions of the Maintenance Act apply, 'with the changes required by the context' (clause 11(1)), if a Maintenance Court makes a maintenance order. This means that a court must take into consideration the Islamic law provisions in this regard and as outlined in clause 11(2) of the MMB. In a nutshell, upon the termination of his marriage, the obligations of a father with regard to his children do not also come to an end. In terms of the MMB, a father is obliged to maintain his daughters 'until they are married' (clause 11(2)(b)(i)), and his sons 'until they reach the age of majority or otherwise for the period that they are in need of support' (clause 11(2)(b)(ii)). This would include a divorced daughter (presumably until

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her re-marriage) and an adult male child who may, for example, be chronically ill, both of whom may be in need of further support. In accordance with the broader guardianship rights and duties of the father, more generous provision is made for support of children in the MMB, which stipulates that his duty to maintain children born of any marriage continues when the marriage ends and '… includes the provision of food, clothing, separate accommodation, medical care and education' (clause 11(2)(c)(iv)). In terms of the MMB the amount of maintenance for which a father is responsible will vary from case to case and 'must be' determined in a 'fair and just' (clause 11(3)) manner and with due regard to 'his means' and the special 'need of support' for older male children (clause 11(2)(b)(ii)) and older daughters. This would, therefore, also exclude the child who is in possession of his/her own wealth. While a father, for example, may himself suffer from a chronic illness which may prevent him from providing maintenance, it is expected that he make a concerted effort to ensure that he acquires the means to be able to earn a living when he is not so incapacitated.

9.3.4.6 The Marital Status of Parents and the Maintenance and Guardianship of Children Born in and Out of Wedlock and Post-divorce

As indicated in Sect. 9.3.3.1, prior to the Children's Act, children born of couples married only in terms of religious laws or rites, given that these marriages were (and still are) unrecognised, were accorded the status of 'illegitimacy'. It is only since 2005 that Muslim children in South Africa are no longer labelled as 'illegitimate' even though their parents may be only religiously married to each other and

these marriages still remain unrecognised. Their parents are referred to simply as being 'married' or 'unmarried'. In terms of section 20 of the Children's Act (section 1 of which broadly defines 'marriage' to include Muslim marriages), a child is regarded as being born of married parents 'if the biological parents were legally married to each other at the time of the child's conception, or at his or her birth, or at any time between conception and birth'.[79] In terms of section 38 of the Children's Act, even if parents marry each other at any time subsequent to the birth of the child, the child will still be regarded as being born of married parents. The Children's Act has not only removed the status of 'illegitimacy' accorded to Muslim children in the past, but also accords both parents a legal duty to support them. Two practical questions that, therefore, arise concern, first, the legitimacy of a child conceived during marriage where the ex-wife's pregnancy is only ascertained during her mandatory waiting period (*idda*) after she has been irrevocably divorced, and, secondly, the legal position of the unmarried father and his illegitimate child. In the first case, the child is technically born 'out of wedlock' but in reality it is assumed that the child is her husband's especially since she may also

79 See also Boezaart 2010, pp. 94–95.

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not re-marry during the *idda* period. This of course does not rule out the possibility of pregnancy resulting from a sexual encounter with somebody else. In the event of a divorce, the MMB clearly limits the husband's duty to support, and issues of interim custody or access, to a 'child born of the *marriage*'.[80] Maintenance and guardianship of such children is, therefore, also not directly provided for in the proposed MMB and its recognition of Muslim marriages. In the event of a dispute of this nature arising after an irrevocable separation, Islamic law provides that the parentage of children of spouses, besides being established through marriage, may also be established through acknowledgement by the father or evidence (for example, through paternity testing or the witnessing of the birth by a midwife).[81]

Regarding the legal position of unmarried fathers in the second practical question, prior to the Children's Act, unmarried fathers had the right to go to court to ask for access to, and custody or guardianship of, their children.[82] In terms of the Children's Act, fathers, whether regarded in law as married or unmarried, automatically have parental responsibilities and rights if certain specified conditions are present. With its new provisions on the parental responsibilities and rights of unmarried fathers relating to access to, and the custody or guardianship of, their children, section 21 of the Children's Act, which deals with parental responsibilities and rights of unmarried fathers, merely *aims* to, but does not categorically, give unmarried fathers the same parental responsibility that biological mothers have. For example, if an unmarried father was residing with the biological mother of his child at the time of its birth, they will have equal rights (section 21(1)(a)); if not, the father is able to obtain such rights through his consent to be identified as the child's father (section 21(1)(b)(i)). An opinion[83] has been expressed that, in spite of the increased recognition afforded biological fathers as legal parents, this may not be enough because the Children's Act still draws a distinction between biological mothers and biological fathers as far as the automatic allocation of parental responsibilities and rights is concerned, and that therefore an argument for an equalisation of their legal positions is both constitutionally justifiable and ultimately in the best interests of their child.[84]

Regarding the legal position of illegitimate children in the second practical question, Muslim children that are illegitimate (born out of wedlock) because of

80 My emphasis. See, respectively, clauses 11(2)(c)(iv) and 9(3)(g)(i). See also text to note 63.

81 Nasir 2002, pp. 145, 150. See also section 21 of the Children's Act.

82 The Natural Fathers of Children Born out of Wedlock Act No 86 of 1997. This Act has been repealed by the Children's Act.

83 Louw 2010, pp. 156, 195.

84 In *S v. J* (695/10) [2010] ZASCA 139 (judgment delivered on 19 November 2010) the Supreme Court of Appeal held that the appellant, the father of a child (a girl) born out of wedlock (her mother had died shortly after her birth), had full parental responsibilities and rights in terms of section 18 of the Children's Act. The Court further held that the child should permanently reside with her father and that her (maternal) grandparents were entitled to have regular

contact with her.

the unlawful sexual intercourse (*zina*) of their parents continue to be socially discriminated against and legally (financially) prejudiced because of traditional, but popular, interpretations of Islamic law to their detriment. Islamic law does not allow such children to be legitimated by the subsequent marriage of their parents. Furthermore, Islamic law also does not recognise any ties of maintenance between an illegitimate child and its putative father (or his relatives), placing this burden on the mother (and her relatives) as the child is considered to be related only to her.[85]
It is contended that, although the MMB is silent on such children and places an emphasis on children born of a 'marriage', as indicated above, emphasis should shift from the status of illegitimate children to their best interests for the following reasons: they are born through no fault of their own; South African law no longer discriminates between legitimate and illegitimate children and emphasises the best interests of all children; and the father has to take some, even if only financial, responsibility for his role in the child's conception.
Clause 11(2)(c)(iii) of the MMB provides, in accordance with Islamic law, that, following the birth of her child, a divorced mother may breastfeed her baby for the duration of the nursing ('fosterage') period (which can be for up to 2 years) regardless of whether she is irrevocably divorced from the child's father. She is entitled to separate remuneration while she breastfeeds her own child. Clause 11(2)(c)(ii) of the MMB provides that during the nursing period following an irrevocable divorce, the father must maintain and house both the child and mother.
It is clear that the areas of guardianship, care, access and maintenance in relation to children often overlap, and for this reason it is also very difficult to strictly separate the position of the mother from that of her children. For example, while maintenance for the child is theoretically generously provided by the father, such maintenance ought to be inextricably linked with that given to the mother during the post-divorce period that their children are in her custody, and this symbiosis ought to lead to an increase of the usually limited amount and period of post-divorce support for the mother. It is, however, contended that, with some exceptions, the inference that mothers may stand to substantially benefit through children in their care is currently unfounded in South Africa. Although the Islamic ideal, this is simply not a material reality for many South African Muslim women who, instead, often have to step into the shoes of the father when he reneges on his duties in this regard. It is, therefore, hoped that the provisions of the MMB will be able to rectify this.
In accordance with the trend already established by South African courts in terms of Rule 43 concerning interim maintenance, but more strictly in accordance with Shari'a, the MMB provides that, following the registration of an irrevocable divorce[86] and after failed attempts at compulsory mediation,[87] in the event of a

[85] Nasir 2002, pp. 145–146, 150–151.
[86] In the form of a repudiation (*talaq*) (clause 9(3)(g)) or judicial divorce (*faskh*) (clauses 9(5)(b) and (c)).
[87] See Muslim Marriages Bill, clause 12(1) together with clauses 4, 9(3)(e) and 9(5)(b).

dispute and before the adjudication thereof by the court, given the urgent nature of these cases, spouses may make an application to seek interim relief pending litigation (*pendente lite*) in matters pertaining to interim custody of, or access to, minor children of the marriage or '*for the payment of maintenance*' (clause 9(3)(g)(i)), a contribution to costs (clause 9(3)(g)(ii)), and maintenance for the wife during the *idda* period (clause 9(3)(g)(iii)). I have emphasised 'for the payment of maintenance' to highlight the fact that, given the Islamic law unilateral duty of the father to provide maintenance for his children, and the initial right of custody on the part of the mother, it is contended that if a court grants the mother interim custody, the father is not only responsible for the child's maintenance but also for remuneration of the mother who has custody during this period and, further, that this is separate from and in addition to the *idda* maintenance of the wife.

9.3.4.7 How Is the Best Interests Rule to Be Applied When Muslim Marriages Are Recognised?

It is a fact that all rights, including competing rights like freedom of religion and equality, although guaranteed in the Bill of Rights, may be limited. Section 12 of the Children's Act allows, but regulates, social, cultural and religious practices, such as those relating to the marriageable age. It is also a fact that the legal age of marriage in South Africa, not only differs from Islamic law but that Islamic law also differs from it in allowing a guardian to contract the marriage of a minor as explained in Sect. 9.3.3.5 above. There is no doubt that each system can defend the legality of its rules in this regard. I contend that the solution does not lie in trying to prove that it would be in the Muslim child's best interests that his or her rights be judged according to Islamic law and not according to South African law, as has been proposed by Vahed.[88] This would merely amount to abstractly or clinically pitting the competing South African and Islamic law rules against each other to see which one may be in the child's best interests. The way to use this test when the MMB does become law is, first, to ask whether regard was had to the best interests concept and, secondly, whether it was applied in determining whether (in our example) a minor child of a particular age can marry and whether there were any other motivating factors that supported the need for an early marriage. For example, although sex outside of marriage is not permitted in Islam, South African law allows minors (between 12 and 16 years of age) to have consensual sex. If, as a result, the child becomes pregnant, she may not want an abortion for religious reasons although it may be legally permitted for minors in South Africa to have one on request.[89]

[88] Vahed 1999, p. 375.

[89] See section 129(1) of the Children's Act and section 2(1)(b)(i–iv) of the Choice on Termination of Pregnancy Act No 92 of 1996.

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Although South African law no longer discriminates between legitimate and illegitimate children, the minor mother wants her unborn and herself to be protected from further societal and religious stigmatisation and may therefore opt for early marriage instead. Imams are already officiating at such early 'MGM' (must get married) marriages of pregnant teenagers.[90] In addition, early marriage may be encouraged to prevent MGM marriages. Heaton,[91] in a contribution dealing with the approach that should be adopted when applying the concept of 'the best interests of the child' and evaluating the individual factors that are used in determining what is in the child's best interests, gives sound advice in support of such an approach when she proposes that:

> … an individualised, contextualised and child-centred determination of the child's best interests is required. In view of our constitutional values of tolerance of and respect for diversity and pluralism, it is further submitted that we must move away from a mainly Judaeo-Christian, Eurocentric interpretation of 'the best interests of the child' to an approach that takes the cultural and religious circumstances, interests and needs of the individual child into account. It is concluded that all factors that are shown to be relevant because they have, or could have, a negative or positive impact on the individual child should be taken into account in a contextualised child-centred way without reducing other constitutionally-protected rights and interests to nothing.

9.4 Conclusion

Today, a post-apartheid and democratic South Africa can boast of having a Constitution and a Children's Act that are among the most progressive in the world, and which benefit all of the country's children, including Muslim children. As a consequence, the concept of the 'best interests of the child' is a decisive factor in all legislation, including the proposed legislation on the recognition of Muslim marriages, where the welfare of the Muslim child is paramount.

The position of a Muslim child in South Africa is therefore unique. The Constitution and Children's Act, with the favourable interpretation of their provisions by the courts, including the Constitutional Court, assure a Muslim child of the secular protection of the law, whether or not the religious (monogamous or polygynous) marriage(s) of his or her parents will be formally recognised or he or she is born in or out of wedlock (illegitimate). The MMB has ensured that the limited rights guaranteed to children in terms of Islamic law will be utilised optimally, and in so doing will allow Islamic law rights to be upheld secularly with the force of law and with the co-operation of religious authorities. If the legislature fails to

enact the MMB, it will mean that, for the children and their mothers for whom the MMB is intended to be of most benefit, the *status quo* of non-recognition will

90 See Moosa 2009, p. 81.

91 Heaton 2009, pp. 1–18.

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remain. However, this does not detract from the fact that the reality for Muslim men and women is that they live in a democratic South Africa, and as citizens have recourse to the secular laws of a State which already incorporates Muslim marriages within its protective ambit. With or without recognised MPL, Muslim women and their children have been accorded relief when seeking redress for the hardships caused by the consequences of the non-recognition of their Islamic marriages which have ended in death or divorce. Children, if they cannot depend on their parents' protection, can independently invoke the aid of the courts, whose judges are expected to act as their upper guardian, and can also rely on State protection. Ultimately, their best interests, a principle that permeates all law, must prevail.

The MMB, if and when enacted into law, must defer to the provisions of the Constitution as the supreme law, as must the Children's Act. Although all three laws emphasise the paramountcy of the best interests of the child, the Constitution treats the best interests of the child as a principle and as an independent human right within the 'mini-charter' of children's rights that it contains, while the Children's Act goes further by providing interpretative guidelines through its own best interests standard. While the interpretation of the provisions of the MMB will therefore benefit from, and be guided by, recent case law and jurisprudence based on the Children's Act, this does not detract from the value of the case law that preceded it. Greater judicial flexibility and activism on the part of the courts is also anticipated with the formal recognition of Muslim marriages, and this will hopefully add a further unique dimension to the existing law. Ultimately, when a court sits as the upper guardian of minor children in custody matters, it is both duty bound, and has wide powers, to establish what is or is not in the best interests of minor or dependent children. Furthermore, without in any way diminishing the value of the recommendations made by the family advocate or expert evidence in assisting the court with ultimately determining the best interests of a child, it is submitted that when dealing with custody (care) cases involving Muslim children, given diverse Islamic law interpretations and perspectives, just as the courts are not bound to act in accordance with a family advocate's recommendation, decision-makers should remain neutral and impartial when it comes to questions of religion. They should guard against the following: projecting their own value systems into their decisions and evaluations when they consider the effects of the beliefs of parents belonging to religious minorities; by using the best interests standard unfairly prejudicing children of parents who are observers of minority faiths; and according the value judgments of religious experts and the evidence of Muslim religious experts undue weight when they are called upon to act as witnesses (which they will be because the MMB does not spell out what the Islamic law entails). Support for such a view can be adduced from a case[92] that was

92 See *Potgieter v. Potgieter* [2007] SCA 47 (RSA), p. 11 [para 16].

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decided before the coming into operation of section 7(1) (best interest standard) of the Children's Act.

Finally, Sachs J, in his judgment in *S v. M*,[93] eloquently sums up what to my mind is an ideal South African position as follows:

> Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

Although the SALRC initiative regarding children overlapped with that regarding Muslim marriages, the former has resulted in a new Children's Act while the latter has not as yet led to any Act. Given that there is judicial support to ensure that the presidency and related bodies uphold their end of the legislative bargain, it

is hoped that legislation will soon follow.

References

Bernardo C (2015) Womens' rights body compared to pet cat, IOL News, 2 December 2015. www.iol.co.za/news/crime-courts/womens-rights-body-compared-to-pet-cat-1954233#.Vl-PRKmukdQ. Accessed 27 Feb 2016

Boezaart T (2010) Law of Persons, 5th edn. Juta, Cape Town

Boezaart T (2014) The Position of Minor and Dependent Children of Divorcing and Divorced Spouses or Civil Union Partners. In: Heaton J (ed) The Law of Divorce and Dissolution of Life Partnerships in South Africa. Juta, Cape Town, pp 171–227

Bosman-Sadie H, Corrie L (2013) A Practical Approach to the Children's Act, 2nd edn. LexisNexis, Durban

Department of Justice and Constitutional Development (2015) The Office of the Family Advocate. www.justice.gov.za/FMAdv/f_main.htm. Accessed 28 Feb 2015

Hall K et al (2014) Demography of South Africa's Children. In: Mathews S et al (eds) South African Child Gauge 2014, part 3: Children Count - The Numbers, Children's Institute, University of Cape Town, Cape Town, pp 90–93. www.ci.org.za/depts/ci/pubs/pdf/general/gauge2014/ChildGauge2014.pdf. Accessed 25 Feb 2015

Heaton J (2009) An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context. Journal for Juridical Science 34(2):1–18

Isaacs R (2015) MMB laws contradict Shari'ah: attorney. VOC News, VOCFM, 6 March 2015. www.vocfm.co.za/mmb-laws-contradict-shariah-attorney. Accessed 6 March 2015

Jamieson L et al (2014) Legislative Developments 2013/2014. In: Mathews S et al (eds) South African Child Gauge 2014, part 1: Children and Law Reform, Children's Institute, University of Cape Town, Cape Town, pp 13–20. www.ci.org.za/depts/ci/pubs/pdf/general/gauge2014/ChildGauge2014.pdf. Accessed 25 Feb 2015

Louw A (2010) The constitutionality of a biological father's recognition as a parent. Potchefstroom Electron Law J (PER/PELJ) 13(3):156–206

93 In *S v. M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), p. 11 [para 18].

nmoosa@uwc.ac.za

9 South Africa 257

Moosa N (1998a) Religious Laws Affecting Children: Muslim Law. In: South African Law Commission, Issue Paper 13, Project 110: The Review of the Child Care Act, First Issue Paper, 18 April 1998, pp 123–132. www.justice.gov.za/salrc/ipapers/ip13_prj110_1998.pdf. Accessed 25 Feb 2015

Moosa N (1998b) Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa. S Afr Law J 115(3):479–492

Moosa N (2009) Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS. Potchefstroom Electron Law J (PER/PELJ) 12(3):65–95

Moosa N (2011) Unveiling the Mind: The Legal Position of Women in Islam - A South African Context, 2nd edn. Juta, Cape Town

Moosa N (2014) The Dissolution of a Muslim Marriage by Divorce. In: Heaton J (ed) The Law of Divorce and Dissolution of Life Partnerships in South Africa. Juta, Cape Town, pp 281–354

Nasir JJ (2002) The Islamic Law of Personal Status, vol XXIII. Arab and Islamic Laws Series, 3rd edn. Kluwer Law International, The Hague

Schäfer L (2011) Child Law in South Africa - Domestic and International Perspectives. LexisNexis, Durban

van Schalkwyk N (2009) Maintenance for Children. In: Boezaart T (ed) Child Law in South Africa. Juta, Cape Town, pp 38–61

Skelton A (2013) Children. In: Currie I, De Waal J (eds) The Bill of Rights Handbook, 6th edn. Juta, Cape Town, pp 598–623

Sosibo K (2015) One man fights for all fathers. Mail & Guardian 31(22):16 (29 May 2015)

South African Law Reform Commission (2003) Project 59: Islamic Marriages and Related Matters, Report, July 2003. www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf. Accessed 9 Feb 2015

Statistics South Africa (2004) Census 2001: Primary tables South Africa Census '96 and 2001 compared, Report No. 03-02-04, statssa 2001, p 25. www.statssa.gov.za/census01/html/RSAPrimary.pdf. Accessed 9 Feb 2015

Statistics South Africa (2012) Statistical release (Revised) P0301.4 2011, statssa 2012. www.statssa.gov.za/Publications/P03014/P030142011.pdf. Accessed 9 Feb 2015

Vahed MA (1999) Should the question: "What is in a child's best interests?" be judged according to the child's own cultural and religious perspectives? The case of the Muslim child. Comp Int Law J S Afr (CILSA) 32:976–990

van der Walt G (2009) Children's rights. In: Govindjee A et al (eds) Introduction to Human Rights Law. LexisNexis, Durban, pp 231–238