

# OBJECTIVES AND GUIDING PRINCIPLES

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## NOTE

In this publication, "Ministry" and "Minister" refer to the Ministry and Minister responsible for child protection, and "Guide" means this *Guide to the Child Care and Protection Act* (which is published in separate chapters).

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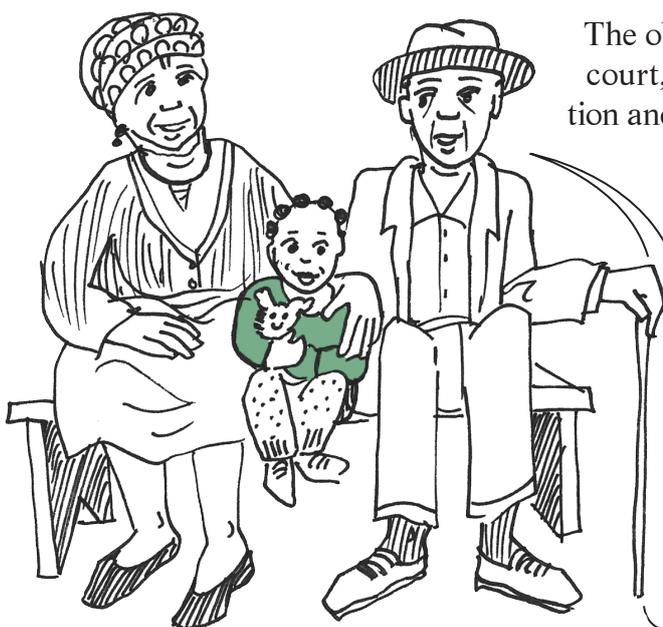
**T**he Child Care and Protection Act is a child-centred law. It recognises that children are persons, not objects. They have a right to participate in decisions that will affect them. Their dignity must be respected, and they must be protected against harm and discrimination. If children are treated with respect, they are more likely to grow up to treat others with respect. The law also recognises that both children and their parents have rights and responsibilities.

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## 1. Objects of Act

The objectives of the Child Care and Protection Act are:

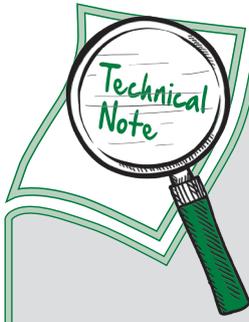
- ④ to protect and promote the **well-being of all children**
- ④ to give effect to children's rights in the **Namibian Constitution**
- ④ to **implement international agreements** that are binding on Namibia
- ④ to promote the **protection of families**, and to **involve families in resolving problems** which may be harmful to the well-being of children in the family
- ④ to **strengthen and develop community structures** which provide care and protection for children
- ④ to **establish, promote and co-ordinate services and facilities** for the care and protection of children, including services which can prevent problems affecting children
- ④ to **provide protective services** to children who need them
- ④ to **protect children from discrimination, exploitation and other forms of harm**
- ④ to ensure that children are not discriminated against or disadvantaged because of the **marital status of their parents**
- ④ to recognise the special needs of **children with disabilities or chronic illnesses**.



The objects of the Act are not directly enforceable in court, but they are intended to guide the interpretation and application of the other provisions of the Act.

◇ Child Care and Protection Act, section 2

*When our daughter couldn't look after our grandson anymore, the children's court put him in our care. The Convention on the Rights of the Child says that care by extended family members is the next best option if parental care is not possible. One of the objectives of the Child Care and Protection Act is to implement international agreements like the Convention on the Rights of the Child.*



## Using the objects of an Act to guide interpretation: Examples from Namibia

The objectives of legislation are important tools of statutory interpretation. When courts are interpreting legislation, they are expected to consider the words of the Act in light of their overall context, including the overall scheme of the Act, the object of the Act and the intention of Parliament. Below are two examples of how courts have used the objectives of legislation to guide interpretation of specific provisions.

### ***Kanguatjivi v Shivoro Business and Estate Consultancy 2013 (1) NR 271 (HC)***

This case concerned the interpretation of a provision of the Administration of Estates Act 66 of 1965 which requires that the account of a deceased person's estate must be available for inspection by members of the public for at least 21 days. In this case, the account had been available for inspection for only 20 days instead of 21 days. The question for the Court was whether this would make the distribution of assets in terms of that account invalid.

In interpreting the relevant provision, the High Court relied in part on the object of the rule: to achieve finalisation of the winding up of estates of deceased persons, after allowing interested persons an opportunity to raise objections to proposed distributions. The intention of Parliament in requiring a period of public inspection was to give interested parties an opportunity to question the correctness of the account.

Any interested person would be entitled during the 21-day period to go to the Master's office to inspect the account. If a person arrived at the Master's office and found that the account was no longer available for inspection during this time period, that person could make enquiries. Thus, it was unlikely that anyone was actually disadvantaged in practice. The Court concluded that the objectives of the legislation were served if there was substantial compliance with the requirements of the rule, as there was in this case.

### ***Buchholz v Ewert 2016 (2) NR 511 (HC)***

This case was about the State's preferential right to purchase agricultural land under the Agricultural (Commercial) Land Reform Act 6 of 1995. In this case, the parties were essentially seeking an exception to this requirement. The Court had to consider the role of the rule in light of the intention of Parliament.

The Court found that the main purpose of the law is to provide for the acquisition of agricultural land by the State for the objective of land reform, which is intended to benefit Namibian citizens who do not have access to land or to adequate agricultural land, and particularly to assist Namibian citizens who have been disadvantaged by past discrimination. Another purpose of the law is to regulate the acquisition of land by foreign nationals.

The Court held that the rule in question gave life and meaning to the objects of the Act and the intention of Parliament. To disregard the rule would defeat the object of the Act and thwart Parliament's intentions. The Court found that the sellers could not enter into a private sales agreement if they refused to first offer the land for sale to the State. As a matter of law and common sense, an owner is not capable of offering land to the State if that owner has already entered into a sales agreement with another purchaser.

## 2. Best interests standard

The Act says that “the best interests of the child” is “the paramount consideration” –

- (a) in all matters arising under the Act that concern “the care, protection and well-being of a child”  
AND
- (b) “in any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general”.

Each component of this rule warrants some examination.

◇ Child Care and Protection Act, section 3(1)



### 2.1 Best interests of an individual child: factors to consider

It is not possible to define “the best interests of the child” because this will always depend on a child’s individual circumstances. The best interests of a particular child may even be different at different times in that child’s life. So, instead of providing a definition, the Act provides a list of factors which should be taken into account. The list is designed to ensure that decision-makers apply their minds fully to the child’s situation.

Not every factor will be relevant in every case. For example, the child’s relationship with his or her parents is not relevant in the case of an orphaned or abandoned child. But the Act says that all of the listed factors **must** be taken into consideration **where they are relevant**.

The factors in the list may conflict with each other in a specific case. For example, the desirability of keeping siblings together may conflict with the need to protect the child from the risk of harm by an abusive sibling. As another example, a child’s good relationship with a particular parent may conflict with concerns about that parent’s capacity to provide for the child’s needs. The various factors must be weighed against each other to identify the approach that is in the best interests of the child.

The shortened summary of factors on the next several pages can be used as a checklist.

**“ The concept of the child’s best interests is complex and its content must be determined on a case-by-case basis. ”**

◇ Committee on the Rights of the Child, *General Comment No. 14* (2013), paragraph 32

## Factors to consider

④ the child's **age, maturity** and **stage of development**

EXAMPLE: Sarah is 8 years old and in Grade 3 at school. She has a good vocabulary and seems confident.

④ the child's **sex**

EXAMPLE: John is 12 years old and does not appear to have entered puberty yet.

④ the child's **background**

EXAMPLE: Mary was born out of a short relationship between her parents, who never married. She has always lived with her mother. She has had some contact with her father although he has been absent from her life for long periods of time.

④ other **personal characteristics** of the child (as relevant)

EXAMPLE: Tom's mother does not accept the fact that Tom is albino. As a result, he has become very reserved and unhappy.

EXAMPLE: Kristine is HIV positive. This has caused her father to reject her completely. He threatens to throw her out of the house.

④ the child's **physical security**

EXAMPLE: Anna's father has a quick temper. Occasionally this anger has been directed at Anna. There was an occasion when Anna disobeyed her father, with the result that he smacked her hard enough to leave bruises.

④ the child's **emotional security**

EXAMPLE: Paul's mother has been married twice since she and Paul's father broke up, and she is now involved with a third man. These frequent changes in male figures in his mother's life have been difficult for Paul, who has maintained a very close relationship with his biological father.

*I have been looking after my granddaughter Rachel since she was a baby. We are very attached to each other. The children's court gave me a right of access when my kinship care agreement with her parents came to an end, because it is in her best interests for us to maintain our close bond.*



④ the child's **intellectual, emotional, cultural and social development**

EXAMPLE: Religion plays an important part in Aaron's life. His mother will make sure that he remains at the church school he is currently attending.

- ⑨ the **views of the child**, in light of the child's age, maturity and stage of development

EXAMPLE: Ruth, age three, has expressed a wish to continue to live with her mother, but this preference seems to be influenced primarily by her concern about being separated from her new puppy. She is clearly affectionate towards both of her parents.

- ⑨ the **right of the child to know and be cared for by both parents**, UNLESS his or her rights are persistently abused by either or both parents OR continued contact with either or both parents would be harmful to the child's well-being

EXAMPLE: The social worker assessment includes reports of repeated and severe beatings by Samuel's father, including a medical report about one incident which resulted in a broken arm. It appears that it would not be safe for Samuel to be placed in his father's custody, or to have unsupervised contact with his father.

- ⑨ the **relationship between the child and other significant persons** in the child's life, including:

- the child's mother and father
- any relevant family member
- any other care-giver of the child
- any other relevant person

EXAMPLE: Julia is very close to her maternal grandmother, who lives with Julia and her mother. Julia's grandmother has been involved in her care since she was an infant.



I wasn't around for most of Mark's life because I was working overseas but I'm hoping to make up for lost time. The children's court awarded me weekly access to Mark so we can continue to develop our relationship.

- ⑨ the **attitude of the child's mother and father** towards the child and towards the exercise of parental responsibilities and rights

EXAMPLE: Susanna is a loving and nurturing mother. She takes her parental role seriously and her children have thrived in her care.

- ⑨ the **capacity of the mother or father or other care-giver or other relevant person to provide for the needs of the child**, including emotional and intellectual needs

EXAMPLE: There is a strong bond between Adam and his father. There is easy communication between them and the father has a good understanding of Adam's needs and is able to cater for them. Adam loves to join his father in sporting activities and identifies with him as a role model.

- ⑨ the **desirability of keeping siblings together**

EXAMPLE: Hannah has a very positive relationship with her half-sister who lives with their mother. It is desirable for Hannah to continue living in the same home as her half-sister.

- ⑨ the **likely effect on the child of any change in circumstances**, including a separation from –

- either or both parents
- a sibling or other child
- any other care-giver
- any other person the child has been living with

EXAMPLE: Jesse's father wants to place him at a school hostel in Windhoek. This would help remove him from the conflict between his parents while the divorce is underway. The parenting plan should be amended accordingly.

- ④ the **practical difficulty and expense required for the child to maintain contact with either or both parents**, and whether that difficulty or expense will substantially interfere with the child's right to maintain a relationship with the parent(s)

EXAMPLE: Miriam's mother wants to move with Miriam from Oshakati to Windhoek to pursue an employment opportunity. She intends to facilitate contact between Miriam and her father through regular telephone calls and monthly visits.

- ④ the need for children to **maintain connections** with their
  - family
  - extended family
  - culture and tradition

EXAMPLE: It is in Rebecca's best interests to be adopted by her aunt and uncle because this will allow her to maintain connections with her family and culture.

- ④ the impact of **any disability or chronic illness** of the child

EXAMPLE: James has cerebral palsy and requires assistance performing the tasks of daily life.

- ④ the importance of a **stable family environment** (or something similar to a caring family environment)

EXAMPLE: Ada's aunt has volunteered to be her kinship care-giver while her parents are seeking help for their alcohol problem. Ada is close to her aunt and uncle and their two children and would be part of a stable family in their care.

- ④ the need to **protect the child from physical or psychological harm** from –
  - maltreatment, abuse, neglect, exploitation or degradation of the child
  - exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person
  - any family violence involving the child or a family member of the child

EXAMPLE: Jacob has witnessed his father physically and verbally abusing his mother. It is in his best interests that access to him at his mother's house be supervised by a neutral third party.

- ④ the need to **minimise further legal and administrative procedures**

EXAMPLE: Judith's adoption would take her out of foster care and provide her with a permanent family.



- ④ **any other relevant factor.**

*Candace's parents are experiencing conflict which has erupted in violence on several occasions. Until they sort out their relationship, it is in Candace's best interests to be placed in the care of her paternal grandparents.*

◆ Child Care and Protection Act, section 3(2)  
◆ Committee on the Rights of the Child, General Comment No. 14 (2013)

“In the best-interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child’s development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability of the child’s present and future situation.”

◆ Committee on the Rights of the Child, *General Comment No. 14* (2013), paragraph 84

## PRINCIPLES for applying the best interests standard

“The best interests of the child remain **the dominant and overarching consideration.**”

◆ *EH v D* 2012 (2) NR 451 (HC), citing *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 144

“... [T]he court has extremely **wide powers** in establishing what is in a particular child’s best interest. In this regard **the court is apparently not even bound by procedural strictures, or by the limitations of the evidence presented, or even by the contentions advanced by the parties.** The court may have recourse to **any source of information**, of whatever nature, which may be able to assist...”

◆ *JM & Another v SM* 2016 (1) NR 27 (HC) at paragraph 35 (Geier J), citing *Terblanche v Terblanche* 1992 (1) SA 501 (W), pages 503I-504D (dicta);

◆ *J v J* 2008 (6) SA 30 (C); *AD & Another v DW & Others* (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC), page 30

◆ The same principle is mentioned in *SK v SK* 2018 (1) NR 268 (HC), paragraph 39 (Prinsloo J), quoting *Kotze v Kotze* 2003 (3) SA 628 (T)

“... [T]here is **no onus [of proof] in the conventional sense. The Court will evaluate, weigh and balance the many considerations and competing factors which are relevant to the decision** whether the proposed change to the children’s circumstances is in their best interests. The Court will make an assessment on the particular facts as they concern these particular children; in other words it will apply individual justice in the sense that all relevant factors... will be assessed in the context of these children’s best interest.”

◆ *NS v RH* 2011 (2) NR 486 (HC), paragraph 70, quoting *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 437G-J

“Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case... **[E]ach child must be looked at as an individual, not as an abstraction. ... [U]nduly rigid adherence to technical matters, such as who bears the onus of proof, should play a relatively diminished role;** the courts are essentially guarding the best interest of a child, not simply settling a dispute between litigants.”

◆ *NS v RH* 2011 (2) NR 486 (HC), paragraph 173, quoting *AD & Another v DW & Others* (Centre for Child Law as Amicus Curiae;

◆ Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC) (Sachs J), page 204C

“I am bound, in considering what is in the best interest of [the child], to take everything into account, which happened in **the past, even after the close of pleadings and in fact up unto today**. Furthermore, I am bound to take into account **the possibility of what might happen in the future** if I make a specific order.”

◇ NS v RH 2011 (2) NR 486 (HC), paragraph 175 (Botes AJ), quoting P & Another v P & Another 2002 (6) SA 105 (N), page 110C-D (Hurt J) (also quoted in JM & Another v SM 2016 (1) NR 27 (HC), paragraph 36 (Geier J))

“Although the standard of best interests of the child was conceived in the context of family disputes relating to custody and access to children, it appears now to be accepted that the standard has the potential to act as **a catalyst in pushing the frontiers of children’s rights and legal interests to limits yet unknown, but refreshingly exciting and to be welcomed.**”

◇ Detmold & Another v Minister of Health and Social Services & Others 2004 NR 174 (HC), page 180 (Damaseb AJ)

## Best interests of the child as a flexible standard

In South Africa, the Constitutional Court noted in a 2008 case that the best interests standard has been attacked for being “inherently indeterminate” and so “providing little guidance to those given the task of applying it”. The Court quoted one commentator as saying:

“[T]he South African Constitution, as also the 1989 United Nations Convention on the Rights of the Child and the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women, enshrine the ‘best interests of the child’ standard as ‘paramount’ or ‘primary’ consideration in all matters concerning children. It has, however, been argued that the ‘best interests’ standard is problematic in that, inter alia: (i) it is ‘indeterminate’; (ii) members of the various professions dealing with matters concerning children (such as the legal, social work and mental health professions) have quite different perspectives on the concept ‘best interests of the child’; and (iii) the way in which the ‘best interests’ criterion is interpreted and applied by different countries (and indeed, by different courts and other decision-makers within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, as also by the value system of the relevant decision-maker.”<sup>1</sup>

The Constitutional Court’s reply to this criticism was that these problems cannot be denied, but that “it is precisely the contextual nature and inherent flexibility” of the best interests standard that are its strength. It is necessarily flexible because “individual circumstances will determine which factors secure the best interests of a particular child”. The list of potentially-relevant factors is almost endless and will depend “on each particular factual situation”. The Court concluded that a **“truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved.** To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”

◇ S v M (*Centre for Child Law as Amicus Curiae*) 2008 (3) SA 232 (CC), paragraphs 23-24

1 B Van Heerden *et al*, *Boberg’s Law of Persons and the Family*, 2<sup>nd</sup> edition (Juta, 1999), pages 502-503 (footnotes omitted).

## 2.2 The paramount consideration

The Act says that the best interests of the child must be “**the paramount consideration**” in respect of matters concerning children.

This formulation echoes the African Charter on the Rights and Welfare of the Child, which says:

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

The Convention on the Rights of the Child is worded slightly differently:

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.

Neither wording makes the best interests of the child absolute. As in the case of most other rights, a child’s best interests must be weighed against the competing rights of others.

**The Act’s reference to “the paramount consideration” means that the child’s best interests must be treated as a particularly high priority, as weighed against the competing rights of others.**

The special weight given to the child’s best interests is justified by the special situation of children, who are dependent on others, lacking in full maturity and legal capacity, and often voiceless. This means that children are less able than adults to make a strong case for their own interests. So, if the law did not highlight the best interests of children, their needs might be overlooked.

- ◇ Child Care and Protection Act, section 3(1)
- ◇ African Charter on the Rights and Welfare of the Child, article 4(1)
- ◇ Convention on the Rights of the Child, article 3(1)
- ◇ Committee on the Rights of the Child, *General Comment No. 14* (2013), paragraph 37

“ The ‘best interests of the child’ is a **universal standard which had its origins in family law, but which has now spread to all other areas of the law** to be a guiding principle in decisions to be made about children. [The Convention on the Rights of the Child] refers to best interests as being ‘a primary consideration’ in matters concerning the child. The African Children’s Charter uses a subtly different wording: ‘the primary consideration’. The difference amounts to only one small word, but it creates a significant difference in how to give weight to the principle. **Whilst ‘a primary consideration’ leaves best interests competing equally with other rights on the same footing, ‘the primary consideration’ suggests that children’s best interests must be given a heavier weighting where there are competing rights.** South Africa’s Constitution, in section 28(2), refers to a child’s best interests as being ‘of paramount importance’ in every matter concerning the child. The South African Constitutional Court, whilst giving careful and deliberate consideration to children’s best interests, has made it clear that **the paramountcy principle is not an absolute trump vis-à-vis other rights. The child’s best interests rights can be limited (as long as such limitation is reasonable and justifiable) where there is a need to weigh those rights against others.** ”

- ◇ Ann Skelton, “The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments”, 9 (2) *African Human Rights Law Journal* 482 (2009)

## Best interests and competing rights: Examples from South Africa

### *S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)*

This was a case about M, a single mother to three boys between the ages of 8 and 16, who was convicted on 38 counts of fraud and sentenced to four years in prison. M had a record of previous convictions for fraud and had committed her latest crimes during the period of a suspended sentence and while out on bail. The legal question for decision was the impact of section 28 of the South African Constitution – which states that a child’s best interests are of paramount importance in every matter concerning the child – on the duties of a court in sentencing a primary care-giver of minor children.

The Constitutional Court held that section 28 requires that the law develop in a manner that favours protecting and advancing the interests of children. Underlying the Convention on the Rights of the Child is the right of each child to be a child and to enjoy special care. While no constitutional injunction can in and of itself protect children from harsh family and neighbourhood environments, section 28 requires courts to make the best possible efforts to prevent any breakdown of family life that might put children at increased risk. When rupture of the family becomes inevitable, the State is obliged to minimise the negative effect on children.

The Court noted that section 28(2) constituted an expansive guarantee that a child’s best interests would be paramount in every matter concerning the child. **Taken literally, this would mean that the best interests of children must override all other considerations in virtually all laws and all forms of public and private action, since very few measures would not have either a direct or indirect impact on children. The Court did not accept this interpretation, but held rather that the best interests principle is not absolute and is capable of limitation. Its relationship to other rights has to be considered.**

In the context of criminal sentencing, the best interests standard requires that focused and informed attention be given to the interests of children at appropriate points. The sentencing court must be in a position to adequately balance all the varied interests involved, including those of the children placed at risk. The form of punishment imposed should be the one that is least damaging to the children, within the range of legitimate sentence choices. The purpose is not to permit parents to unreasonably avoid punishment, but to protect innocent children from avoidable harm. The sentencing court must balance the importance of maintaining the integrity of family care with the State’s duty to punish criminal misconduct.

In the case before it, the Constitutional Court found that the sentencing court’s enquiry into what would happen to M’s children if she were sent to prison was inadequate to meet the requirements of the best interests standard. Reconsidering M’s sentence, the Court held that further imprisonment would impose more strain than the family could bear, with potentially devastating effects on the children. While the seriousness of the misconduct required that the sentence of four years’ imprisonment must stand, the Court ordered that the three months already served be backdated, with the rest of the sentence being suspended so that M did not need to return to prison. The Court also ordered correctional supervision, including community service, counselling and the repayment of the stolen money. In light of all the circumstances, M, her children, the community and the victims stood to benefit more from placing M under correctional supervision than from sending her back to prison.

The best interests principle is also addressed in the context of competing concerns in the following recent South African cases:

- *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA): This case concerned the termination of a contract between a school and the parents of two learners following harassment of school personnel by the parents. The Court found that this termination did not violate the best interests principle, as this principle is not absolute (citing *S v M*) and the school had done everything reasonably within its power to observe the children's best interests.
- *J v National Director of Public Prosecutions and Others* 2014 (2) SACR 1 (CC): This case concerned the public registration of a child who had been convicted of sexual offences towards other children. The court found that the automatic registration of child sex offenders, without taking into account each child's specific circumstances, violates the best interests of these children. It bars them from being reintegrated into society, while a child's moral landscape is still capable of being shaped.

## **Best interests and competing rights: An example from Namibia**

### **Patient autonomy versus best interests of the child: *ES v AC* 2015 (4) NR 921 (SC)**

This was a case about a patient's right to refuse a blood transfusion because of religious beliefs. Mrs ES was a Jehovah's Witness. She believed in a specific moral and religious code that includes a scriptural command to abstain from the ingestion of blood, including medically-necessary blood transfusions. In 2012, Mrs ES delivered her third child by emergency caesarean section. Due to complications, Mrs ES lost a lot of blood. Her brother applied to the High Court to be appointed her curator in order to authorise a blood transfusion, despite her consistent refusals, as her doctors believed that her life was in danger. The High Court granted the application but Mrs ES appealed to the Supreme Court against this decision. (Mrs ES recovered in the meantime without the disputed blood transfusion, but the Supreme Court decided to consider the appeal for future reference.)

One issue the Supreme Court had to consider in deciding the appeal was whether, in circumstances where a parent has young children, the right of those children to be raised by their parents should supersede the right of an individual to refuse a blood transfusion in a life-threatening situation where such treatment is advised. The Supreme Court was divided on this issue.

The majority of the Court held that patient autonomy outweighs the interests of children in parental care. The principle of patient autonomy arises from an individual's basic human right to assert control over his or her own body. A patient may normally refuse to undergo specific medical procedures so long as the patient is an adult of sound mind who understands the implications of the refusal. The majority noted that the constitutional right of children to know and be cared for by their parents is not absolute; it is qualified by the inclusion of the words "as far as possible". This right does not take precedence over a parent's right to liberty and bodily

integrity. A person's right to choose what can and cannot be done to his or her own body is an inalienable human right, regardless of whether that person is a parent or not. If this were not the case, parents of young children might be forbidden to serve in armed forces, to participate in high risk-sports or to consume non-prescription drugs and alcohol – or even compelled to donate an organ if his or her child needed this to survive. The majority therefore overturned the judgment of the High Court.

However, one Justice (Mainga JA) wrote a dissenting opinion on this point. He held that the sanctity of the parent-child relationship is a fundamental liberty interest protected by the Constitution. A competent adult has a right to refuse medical treatment, but that right is not absolute. The state may intervene in a given case if the state's interests outweigh the interests of the patient in refusing medical treatment. Countervailing state interests include the need to protect innocent third parties (including children). This may require the courts to order treatment in a case where refusing the treatment would result in the abandonment of a child. Justice Mainga agreed with the principle that personhood should encompass the freedom to do anything that injures no one else. Mrs ES has the right to practice her religion and also the right to parenthood – but at the point when her life hung in the balance, her right to her religious beliefs and her right to parenthood were in conflict. Parenthood requires many adjustments and often great sacrifice for the welfare of the children. Individuals should not allow their religious beliefs to cause them to neglect this fundamental duty. In this case, Justice Mainga was of the view that the rights of Mrs ES's newborn baby and her other children outweighed her wish to refuse a blood transfusion. Justice Mainga would have dismissed the appeal on the grounds that the High Court order to administer a blood transfusion was justified in the circumstances.

## 2.3 Matters arising under the Act

The best interests standard applies to “all matters concerning the care, protection and well-being of a child arising under this Act”. The Committee which monitors the Convention on the Rights of the Child has noted in the context of the Convention's best interests standard that a reference to matters “concerning” a child includes matters that affect a child directly or indirectly.

The reference to matters “arising under the Act” would cover the actions of any person who is given powers or duties in terms of the Act. This would apply, for instance, to children's court proceedings, and to actions taken in respect of children in terms of the Act by a designated social worker (whether State-employed or private) or a child protection organisation.

- ◇ Child Care and Protection Act, section 3(1)
- ◇ Committee on the Rights of the Child, *General Comment No. 14* (2013), paragraph 19

## 2.4 Proceedings, actions and decisions by organs of state

The best interests standard applies to “any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general”. Here, matters “concerning” a child would include matters that affect a child, a group of children or children in general, directly or indirectly. For example, the Committee which monitors the Convention on the Rights of the Child has noted in the context of the Convention's best interests standard that a reference to

actions “concerning” children would include actions aimed at children (such as actions on child health or education) as well as actions which target both children and other groups (such actions on the environment, housing or transport). The Committee also noted that “actions” for the purpose of applying the best interests standard would include decisions, acts, conduct, proposals, services, procedures and other measures.

For example, with actions of a general character – such as data collection, planning, resource allocation, project implementation, or the development of policies and guidelines – the best interests standard would require that due attention be given to the specific situation of children and any risks to children which might result from the action.

◇ Child Care and Protection Act, section 3(1)



## Organ of state

### What is an “organ of state”?

“Organ of state” is defined in the Act to include:

- ⦿ any **office, ministry or agency of the State**, or any **administration in the local or regional sphere of government**
- ⦿ any other **functionary or institution** exercising a **power** or performing a **function** in terms of the **Namibian Constitution or any law**.

It does **NOT** include a court or a judicial officer.

◇ Child Care and Protection Act, section 1

### Is a government school an “organ of state”?

**Yes.** In a 2005 South African case, the Supreme Court of Appeal of South Africa held, that *“in terms of the definition in the Constitution any institution exercising a public power or performing a public function in terms of any legislation is an organ of state.”* The Court went on to say that a government school is an institution performing a public function in terms of the South African Schools Act. Therefore, a government school is clearly an organ of state contemplated in the Constitution. Since a government school in Namibia is also an institution performing a public function in terms of the Education Act, the same conclusion would apply in Namibia.

This conclusion is bolstered by the judgment of the Namibian Supreme Court in a 1991 case which considered the constitutionality of corporal punishment by organs of state. The Court held, that *“the system of corporal punishment at schools [...] is regulated by a formal Code formulated and administered by a Government Ministry.”* Therefore, since a government school is an organ of state and corporal punishment at schools is regulated by law, corporal punishment exercised at a government school by a school body is exercised by an organ of state.

◇ *Minister of Education (Western Cape) v Mikro Primary School Governing Body* (140/2005) [2005] ZASCA 66; [2005] 3 All SA 436 (SCA) (27 June 2005)

◇ *Ex Parte Attorney-General, Namibia: Re: Corporal Punishment by Organs of the State* 1991 NR 178 (SC)

## Why are courts and judicial officers EXCLUDED from the definition of “organ of state”?

Courts and judicial officers are excluded from the definition of “organ of state” in the **Child Care and Protection Act** in accordance with the doctrine of separation of powers. Articles 78(2) and (3) of the Namibian Constitution state that the courts shall be independent and subject only to the Namibian Constitution and the law, and that no member of the Cabinet or the Legislature or any other person shall interfere with judges or judicial officers in the exercise of their judicial functions. These constitutional provisions also say that all organs of the State shall accord such assistance as the courts may require to protect their independence, dignity, and effectiveness, subject to the terms of the Constitution or any other law. If courts and judicial officers were organs of state, they would not be able to perform their constitutional duties as required by the Namibian Constitution.

In any event, the duty to apply the principle of the best interests of the child already applies to courts and judicial officers even though they are excluded from the definition of “organ of state” – because the functions of children’s courts and children’s commissioners are covered by the requirement that “the best interests of the child” must be “the paramount consideration” in “all matters concerning the care, protection and well-being of a child arising under this Act”.

- ◆ Child Care and Protection Act, sections 1, 3(1)
- ◆ Committee on the Rights of the Child, *General Comment No. 14* (2013), paragraph 17-20
- ◆ *Ex Parte Attorney-General, Namibia: Re: Corporal Punishment by Organs of the State* 1991 NR 178 (SC)

## 2.5 Best interests in action

This *Guide to the Child Care and Protection Act* was published shortly after the Act came into force, so it does not include any examples of the Act in action. However, the best interests standard has been applied in Namibian law in the past, as part of the common law on custody and access issues between parents and through the application of the Convention on the Rights of the Child. (Common law refers to the legal rules developed over time through the decisions in individual court cases.)

**“ [...] the concept of the child’s best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child’s best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions – such as by the legislator –, the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general. ”**

- ◆ Committee on the Rights of the Child, *General Comment No. 14* (2013), paragraph 32

## **Application of the best interests standard: Examples from Namibia**

### **Custody: *JM & Another v SM* 2016 (1) NR 27 (HC)**

This case involved child custody. While the parents were able to reach an agreement on most issues, the court was required to determine whether or not their two younger children should be enrolled in a hostel in Windhoek during weekdays in order to be removed from a confrontational home environment. The High Court noted that it had extremely wide powers in establishing what was in a particular child's best interests. It stated that it was not bound by procedural rules or by the limitations of the evidence presented, or even by the arguments advanced by the parties. It was entitled to look at any source of information which might be able to assist it in resolving the custody dispute.

In deciding that the enrolment of the children at the hostel would, in the interim, be in their best interests, the Court considered a number of factors, including the following:

- Ideally, children should be brought up in a secure home environment, as opposed to a hostel. Relocation of children to a school hostel will always cause a certain degree of disruption and will upset a portion of their daily routine.
- On the other hand, hostel life has certain advantages such as homework being done in a regulated environment under the supervision of qualified teaching staff, and the continuous company of other children.
- The hostel environment would ensure that the children would not be dramatically removed from a known and safe environment, since their mother is resident in Windhoek and could maintain contact with them without exposing them to the problematic behaviour of her new partner.
- The sex matching principle (where it is considered advantageous to place adolescents or children approaching puberty with a parent of the same sex) would not be materially undermined by the relocation of the two female children to the hostel as the mother was resident in Windhoek.
- The domestic situation at the mother's home was not tranquil. The relationship between the mother and her partner was potentially a volatile one, and the partner was inclined to aggressive behaviour. The risk that the children could again be exposed to unwarranted conduct endangering their emotional well-being at the mother's home had not been eliminated.
- The case before the Court concerned only interim arrangements. The father was launching an application to vary the custody order in the children's court, which would probably result in a renewed escalation of conflict between the parents. Enrolment at the hostel would keep the children out of the middle of this conflict.

### **Criminal sentencing: *S v Gomaseb* 2014 (1) NR 269 (HC)**

This case was an appeal against the sentence imposed on a minor for rape. The appellant was 15 years old when he penetrated a 5-year-old girl with his fingers. He was convicted of rape under the Combating of Rape Act 8 of 2000 and sentenced to six years' imprisonment on top of his 18 months of pre-sentence incarceration, with three years suspended for five years on condition that he was not convicted of rape or attempted rape during that period. Counsel for the convicted perpetrator relied on the Convention on the Rights of the Child for the proposition that the imprisonment of a child must be used only as a measure of last resort

and for the shortest appropriate period of time. The High Court agreed with this principle. It also agreed that the appropriate approach to sentencing a child is to focus on the particular child being sentenced, and to avoid or minimise incarceration where possible. However, in light of the seriousness of the crime and the young age of the rape victim, the High Court found that the custodial sentence imposed was justified and fell within the category of last resort contemplated by the Convention.

### **Access rights: *JT v AE* 2013 (1) NR 1 (SC)**

This case was an appeal of a decision granting access rights to a child's father who had previously been absent from the child's life for a period of approximately four years. The High Court, despite having referred the matter for oral evidence and requesting a welfare report on whether access would be in the best interests of the child, granted the access order without hearing this evidence – on the basis that it would take too long to hear oral evidence and to obtain a report, and that it was not aware of any factors militating against the requested access. In this way, the High Court paid lip service to the best interests principle, but gave no meaningful consideration to the child's position.

On appeal, the Supreme Court held that as upper guardian of minor children, the High Court always has to take the best interests of the child into account. In the present case, there were many issues of fact in dispute between the parties that should have been considered at an oral hearing. Also, the High Court should have considered a report compiled by a clinical social worker who had already evaluated the mother and her family. The Supreme Court noted that the best interests of the child include the child's emotional and psychological well-being, noting that there was a real concern that the sudden introduction of a father figure that the child did not remember could disturb her emotional and psychological balance. Accordingly, the Supreme Court reversed the decision of the High Court and sent the matter back for reconsideration after an oral hearing.

## **The child's best interests as a threefold concept**

- (a) **A substantive right:** The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. [...]
- (b) **A fundamental, interpretative legal principle:** If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. [...]
- (c) **A rule of procedure:** Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the

right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

## States' three types of obligations to safeguard the child's best interests

- (a) The obligation to ensure that the child's best interests are appropriately integrated and consistently applied in **every action taken by a public institution**, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children
- (b) The obligation to ensure that all **judicial and administrative decisions as well as policies and legislation** concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.
- (c) The obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in **decisions and actions taken by the private sector**, including those providing services, or any other private entity or institution making decisions that concern or impact on a child.

◆ Committee on the Rights of the Child, *General Comment No. 14* (2013), paragraphs 6 and 14



### More Information

For more detailed information on the best interest principle, see:

- ◆ Yvonne Dausab, "The best interest of the child" in Oliver C Ruppel (ed), *Children's Rights in Namibia*, Windhoek, Konrad Adenauer Foundation, 2009 on the best interest principle as applied in Namibian context.
- ◆ Admark Moyo, "Balancing the Best Interests of the Child and the Interests of Society When Sentencing Youth Offenders and Primary Caregivers in South Africa", *South African Journal on Human Rights*, Volume 29, Issue 2, 2013.
- ◆ E Sutherland and L Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best interests, Welfare and Well-being*, Cambridge: Cambridge University Press, 2016.

# 3. Child participation

## 3.1 Right to participate

In the past, children were often treated as objects instead of as people with their own rights and opinions. Recognising children as full persons requires giving them a right to participate in decisions that affect them. Both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child say that children should participate in matters that affect them.

The Child Care and Protection Act implements these Conventions by requiring that a child of sufficient age, maturity and stage of development must be given a chance to participate “in an appropriate way” in “any matter concerning that child” which arises under the Act. The Act also says that the child’s views must be given “due consideration”. The child’s views must be considered whether expressed verbally or non-verbally.

- ◆ Child Care and Protection Act, section 4(1)
- ◆ Convention on the Rights of the Child, Article 12
- ◆ African Charter on the Rights and Welfare of the Child, Article 4(2) and 7

### Child’s Right to Participate

<p><b>WHEN does the right to participate apply?</b></p> <p>The right to participate applies in any matter under the Act which concerns the child.</p>	
<p><b>WHO does the right to participate apply to?</b></p> <p>It applies to any child who has sufficient age, maturity and stage of development to participate.</p>	
<p><b>HOW can the child participate?</b></p> <p>The child can participate in any appropriate way. This includes verbal and non-verbal participation.</p>	
<p><b>What is the DECISION-MAKER’S DUTY?</b></p> <p>The decision-maker must give “due consideration” to the child’s views.</p>	

## Participation and representation: Examples from South Africa

Children can express their views in a number of ways – through direct participation or indirect representation. The Committee on the Rights of the Child has emphasised that it is the child who chooses how to be heard, and that the child must always be given the opportunity to be heard directly.

**Participation** refers to situations where children are heard directly and consulted about their opinions, without an intermediary, and yet with the support of their parent or guardian where appropriate. For example, a children’s court may consult a child about his or her opinion or enable the child to become a party to the legal action so that he or she has the right to participate in the proceedings or request a certain remedy.

As an example, in the 1994 case of *McCall v McCall*, the judge had a talk with the child to find out whether he preferred to live with his mother or father. The judge ultimately gave some weight to the child’s preference to live with his father because he displayed a degree of maturity and intellectual development that demonstrated that he was capable of forming and expressing an intelligent and informed judgment.

In the 2016 case of *Centre for Child Law v Hoerskool Fochville and Another*, the Centre for Child Law had children complete a questionnaire about their victimisation at school and then consulted with them in small groups. The children’s views and experiences were then collated and articulated in affidavits. This approach allowed the children to participate in the proceedings while also remaining protected.

- ◆ *McCall v McCall* 1994 (3) SA 201 (C)
- ◆ *Centre for Child Law v The Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA), paragraph 25

**Representation** refers to situations where a child is represented in legal proceedings by another person.

The child can be represented by a **curator ad litem**, which has been defined as “a person to conduct litigation in the name and in the interests of the minor” (see the South African case of *Legal Aid Board in re Four Children*). This will often be a close relative of the child.

A child who is old enough to give meaningful instruction may be presented by a **legal practitioner** who will represent the child’s interests separately from his or her parents. The South African case of *Brossy v Brossy* provides an example of such a situation. The judge in this case found that, although in disputes between parents regarding the maintenance of their children the children have an identity of interest with the parent claiming maintenance on their behalf, there might be a need for someone to represent the child separately. This might be the case when the maintenance dispute involves acrimonious litigation concerning fundamental questions, such as where a child will live and who shall be responsible for day-to-day care. In a situation like this, the child’s voice may be drowned out by the voices of warring parents, and it may be necessary to afford the child the assistance of a legal practitioner to avoid substantial injustice to the child.

The role of a *curator* is different from that of a legal representative. A *curator ad litem* assists the court and the child by independently advancing the child’s best interests. A *curator* does not

have to follow the child's instructions, yet he or she does have to ensure that the child's views are correctly transmitted to the decision-maker. A legal representative appointed to represent a child, on the other hand, takes instructions from the child as a client and represents the child's views – regardless of whether the lawyer believes that the child's stance is in the child's own best interests.

- ◆ *Brossy v Brossy* (602/11) [2012] ZASCA 151 (28 September 2012), paragraph 19
- ◆ *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), paragraph 12
  - ◆ Committee on the Rights of the Child, *General Comment No. 12* (2009), paragraph 35-37
- ◆ T Boezaart & DW de Bruin, "Section 14 of the [South African] Children's Act 38 of 2005 and the child's capacity to litigate", *De Jure Law Journal*, Volume 2: Issue 44, 2011, 422-23

**How might a child express a view non-verbally?:** The term "verbal" can be used in different senses. "Verbal" can refer to the use of words, as opposed to visual representations. "Verbal" can also mean communication that is spoken rather than written.

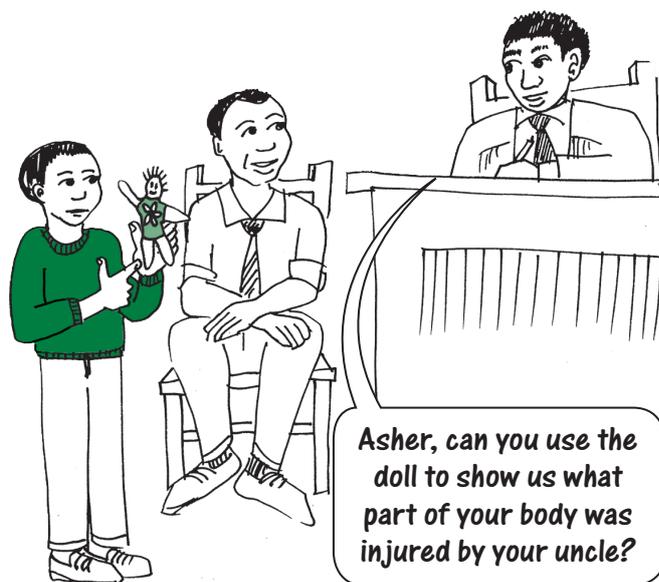
Not all children are able to communicate verbally (in either sense of the term), even if they are capable of forming intelligent, informed decisions. The Child Care and Protection Act requires that the views of such children must still be considered.

For young children, or children with learning or communication difficulties, there may be a need to find methods of communication which do not involve words at all, such as through the use of dolls, pictures or photographs, and to pay attention to their body language, facial expression and actions.

It is also possible that children who are able to communicate by speaking in court would prefer not to do this, perhaps because they are intimidated by the legal proceedings. One way to address this would be for a child to write his or her views down in a letter to the court. Alternatively, the child could be interviewed by a professional such as a social worker or psychologist, and the child's views could be incorporated into the professional's report. The court would then have the child's views in writing.

“ Young children are acutely sensitive to their surroundings and very rapidly acquire understanding of the people, places and routines in their lives, along with awareness of their own unique identity. They make choices and communicate their feelings, ideas and wishes in numerous ways, long before they are able to communicate through the conventions of spoken or written language. ”

- ◆ Committee on the Rights of the Child, *General Comment No. 7* (2005), paragraph 14



**Age, maturity and stage of development:** The Act bases the right of participation on the child’s “age, maturity and stage of development”, as opposed to providing a specific age which triggers the right to participation. This is because different children mature at different stages.

**Age** is only one criterion and is not decisive on its own.

**Maturity** refers to the ability to understand and assess the implications of the matter in question.

**Stage of development** refers to a child’s degree of physical, cognitive and social growth. Is the child capable of forming and expressing an intelligent and informed judgment on what he or she perceives to be in his or her best interests?

This rule ensures that every child who is able to express meaningful views will have the opportunity to do so. Research has namely shown that very young children, as well as children with profound learning difficulties, are capable of expressing meaningful views.

The Committee on the Rights of the Child has emphasised that it is not up to the child to prove his or her capacity, instead this should be presumed. Starting from this presumption, courts are to determine the child’s capacity on a case-by-case basis. In addition, it is not required that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter.

- ◇ Child Care and Protection Act, section 4(1)
- ◇ Committee on the Rights of the Child, *General Comment No. 12* (2009), paragraph 20-21
  - ◇ *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 3<sup>rd</sup> edition, 2007, Chapter 12
  - ◇ G Lansdown, “The evolving capacities of the child”, Florence: Innocenti Research Centre, UNICEF/Save the Children, 2005

**Due consideration:** The Act says that the views expressed by the child *must* be given “due consideration”. This means that the child’s view cannot be ignored. The child’s input must be seriously considered; merely listening to the child is insufficient. Yet, as the Convention on the Rights of the Child and the Child Care and Protection Act both make clear, the decision-maker can take into account factors such as the child’s age and maturity when considering the weight to be given to the child’s input. The decision-maker should also take into consideration the child’s overall level of understanding of the issues concerned.

- ◇ Child Care and Protection Act, section 4(1)
- ◇ Convention on the Rights of the Child, Article 12
  - ◇ Committee on the Rights of the Child, *General Comment No. 12* (2009), paragraphs 28-30



Naomi, who is 5 years old, says she does not want to be with her mother anymore because her mother is mean. However, after speaking with Naomi privately, I am satisfied that this statement is based on recent events where Naomi’s mother exercised appropriate discipline for misbehaviour by Naomi. I am not convinced that Naomi understands that a change of custody would be a long-term situation, and I do not believe that Naomi’s mother has behaved in any unwarranted way.

## The child's right to participate in matters beyond the Act

The right to child participation in the Child Care and Protection Act applies specifically to matters under the Act. However, the *Convention on the Rights of the Child* applies this right to “all matters affecting the child”. The Convention says that this applies in particular to any judicial and administrative proceedings affecting the child, but it is not limited to those proceedings. Examples of such proceedings are family law proceedings; proceedings involving children in conflict with the law or child crime victims; proceedings involving asylum-seeking and refugee children; and administrative proceedings concerning children's education, health, environment or living conditions. The child's right to participation applies both to proceedings which are initiated by the child, as well as to proceedings initiated by others which affect the child.

This principle highlights the role of children as active participants in the promotion, protection and monitoring of their rights. In many cases, only children themselves are in a position to indicate whether their rights are being fully recognised and realised. But as the Committee on the Rights of the Child makes clear, “listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights.”

The Committee has offered some guidance on the type of child engagement States should facilitate:

One-off or regular events like Children's Parliaments can be stimulating and raise general awareness. But article 12 requires consistent and ongoing arrangements. Involvement of and consultation with children must also avoid being tokenistic and aim to ascertain representative views. The emphasis on “matters that affect them” in article 12(1) implies the ascertainment of the views of particular groups of children on particular issues – for example children who have experience of the juvenile justice system on proposals for law reform in that area, or adopted children and children in adoptive families on adoption law and policy. It is important that Governments develop a direct relationship with children, not simply one mediated through non-governmental organizations (NGOs) or human rights institutions. In the early years of the Convention, NGOs had played a notable role in pioneering participatory approaches with children, but it is in the interests of both Governments and children to have appropriate direct contact.

The Committee has also recognised that the child's right to participate encompasses a right to participate in all the settings in which they grow up, develop and learn, including settings relating to their family, workplace, education, play, recreation, sports and cultural activities. Children should also be consulted with regard to matters that affect them as a group, such as the organisation of health care, immigration and asylum proceedings and measures to address violence in society.

The *African Charter on the Rights and Welfare of the Child* applies the right to be heard to judicial or administrative proceedings affecting a child, but also guarantees the child's general right to express opinions freely “in all matters”.

- ◆ Convention on the Rights of the Child, Article 12
- ◆ African Charter on the Rights and Welfare of the Child, Article 4(2) and 7
- ◆ Committee on the Rights of the Child, *General Comment No. 12* (2009), paragraphs 32-39, 89-104
  - ◆ Committee on the Rights of the Child, *General Comment No. 5* (2013), paragraphs 12 and 50

## 3.2 Right NOT to participate

Every child has the right to choose **NOT** to participate in a matter concerning that child in terms of the Act. But the child in question must be given sufficient information about the matter to enable the child to make a decision on participation which is in his or her best interests.

For example, a child might choose not to participate if the child's parents agree on what is in the child's best interests. On the other hand, a child might choose not to participate in an acrimonious dispute between the parents because the child does not want to choose between them.

The court should always make sure that the child understands what is at stake. For example, if the court proceedings concern custody, parental access rights or an alternative placement, the presiding officer should be sure that the child understands what these concepts mean and how long the proposed arrangement will last.

*I decided not to participate in the discussion about custody when my parents got divorced. I did not want to choose between them because I love them both. They decided that I should live with my mom but see my dad every week. That made sense to me.*



*We are here in court to decide where you should stay while your parents get help with their drug addiction problem. Since you do not have any grandparents or other close family members in Namibia, we are suggesting that you could stay with foster parents. These are people who are willing to look after you until it is safe for you to live at home with your parents again. I would like to know what you think about this idea, if you feel comfortable discussing it with me. You can ask me questions if anything we are discussing is not clear.*

◇ Child Care and Protection Act, section 4(2)

## 3.3 Principles of child participation

The Act contains five principles to guide child participation. These principles also apply in cases where the child chooses *not* to participate, as some of them help to ensure that this decision is a free choice on the part of the child.

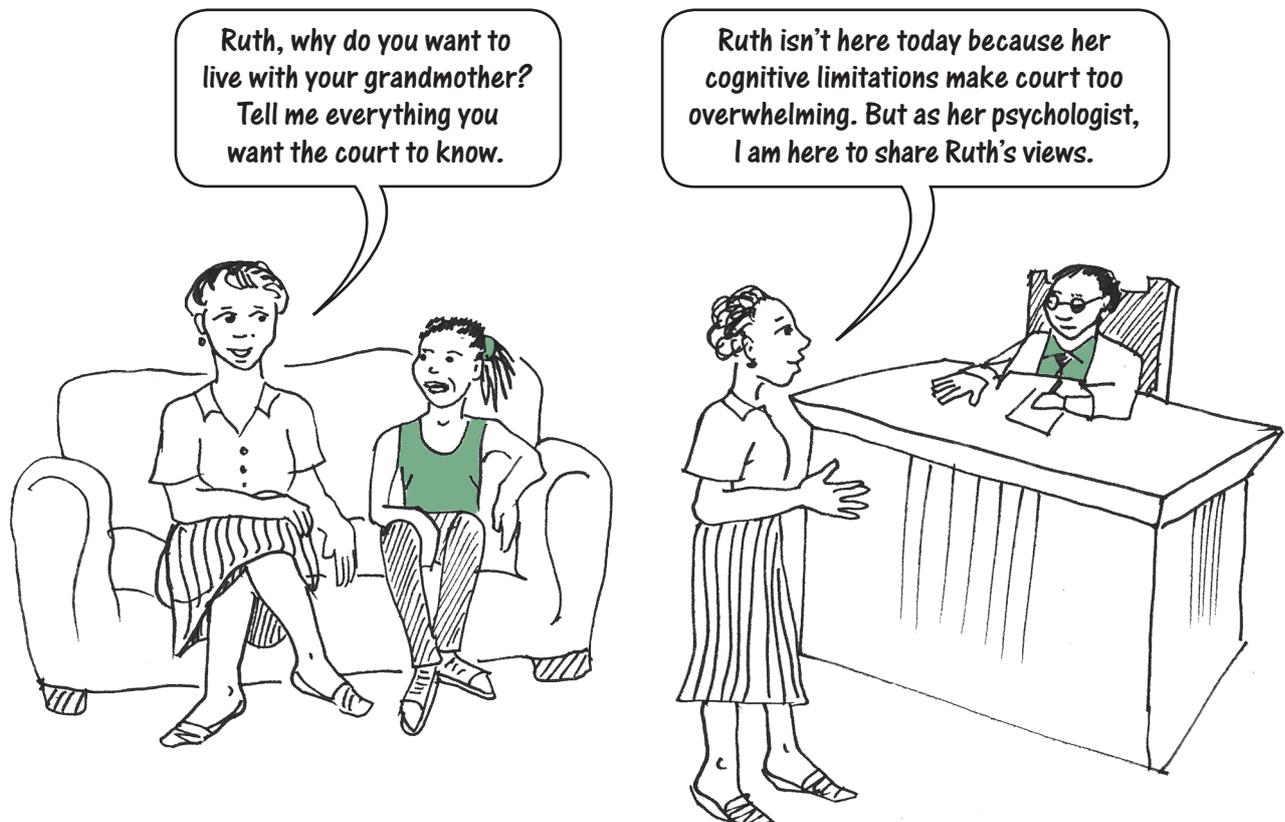
- (1) Information about context:** Children must be informed of the circumstances under which they will be asked to express their views and the impact of their views on the issue at stake. They must also be informed about services that are potentially available to them.
- (2) Protection against victimisation:** Children must be protected against being punished or victimised for expressing their views. A child who is invited to express an opinion should be informed of the protections which are in place.

- (3) **Information about outcome:** Children must be informed of any decision which affects them – whether or not they chose to participate in the process.
- (4) **Opportunity to complain:** Children must be given an opportunity to complain if they feel that their right to participate is not being respected. In practice, this means that children should be informed about who to talk to if they experience problems with the process, and asked if they have any concerns.

For example, in some countries, presiding officers of children’s courts give children who are before the court a chance to speak with them in private before the matter involving the child is concluded. This gives the child a chance to speak freely about any concerns that may have arisen.

- (5) **Special measures to overcome barriers:** Some children may experience specific barriers in respect of participation – such as language barriers, disabilities or some form of discrimination. In such cases, there may be a need to take special measures to promote child participation.

For example, a child who is deaf may need a sign language interpreter. A language interpreter may have to be located for a child who speaks a language not commonly used in Namibia. A child who is mentally disabled may need to communicate with the assistance of someone who is familiar with the child’s situation. A child who has suffered past discrimination may need to communicate through someone that the child feels comfortable with.



◆ Child Care and Protection Act, section 4(3)



## More Information on Child Participation

For more detailed information on child participation, see these publications:

- ◆ Elvis Mukumu Fokala, “Implementing Children’s Right to Participation in Family Decision-Making Processes in Africa”, Åbo, Finland: Åbo Akademi University Press, 2017, <[www.doria.fi/bitstream/handle/10024/144086/fokala\\_elvis\\_mukumu.pdf?sequence=2&isAllowed=y](http://www.doria.fi/bitstream/handle/10024/144086/fokala_elvis_mukumu.pdf?sequence=2&isAllowed=y)>
- ◆ Charlotte Mol, “Children’s Representation in Family Law Proceedings: A Comparative Evaluation in Light of Article 12 of the United Nations Convention on the Rights of the Child”, *The International Journal of Children’s Rights*, Volume 27, Issue 1, 2019, <[https://brill.com/view/journals/chil/27/1/article-p66\\_66.xml?lang=en](https://brill.com/view/journals/chil/27/1/article-p66_66.xml?lang=en)>
- ◆ The Resource Centre of the NGO Save the Children has a database collecting a large amount of international and national guides and practices on child participation at <<https://resourcecentre.savethechildren.net/our-thematic-areas/cross-thematic-areas/child-participation>>
- ◆ UNICEF has published targeted guides on child participation. For example, see Gerison Lansdown, *Promoting Children’s Participation in Democratic Decision-Making*, 2001 <[www.unicef-irc.org/publications/pdf/insight6.pdf](http://www.unicef-irc.org/publications/pdf/insight6.pdf)> and *Child Participation in Local Governance: A UNICEF Guidance Note*, [2017] <[www.childrenandaids.org/index.php/node/778](http://www.childrenandaids.org/index.php/node/778)>
- ◆ The African Child Policy Forum, “Child Participation Strategy for Eastern African Countries”, 2015, <[www.svri.org/sites/default/files/attachments/2017-01-13/Child%20Participation%20Strategy%20for%20East%20Africa.pdf](http://www.svri.org/sites/default/files/attachments/2017-01-13/Child%20Participation%20Strategy%20for%20East%20Africa.pdf)>.



## 4. General principles

The following principles must guide the implementation of the Child Care and Protection Act. They must also guide “all proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general”.

◇ See the discussion in section 2.4 of this chapter on what this phrase covers.

**PRINCIPLE 1:** Respect, protect, promote and fulfil the **fundamental rights and freedoms** set out in the Constitution, the **best interests** of the child, and the **rights and principles set out in the Act** – subject to any **lawful limitation**.

**Fundamental rights and freedoms in the Constitution:** The Namibian Constitution guarantees all persons, including children, the right to life, liberty, human dignity, equality, privacy, property, fair trial and political activity. It also guarantees freedom of speech, thought, association, movement, culture, language and religion. Article 14 provides that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Article 15 provides that children have the right from birth to a name, the right to acquire a nationality and, “as far as possible the right to know and be cared for by their parents”. Children also have specific rights to protection against economic exploitation and harmful labour practices, and to education. The implementation of the Act must be consistent with these fundamental rights and freedoms.

**Best interests of the child:** The content of this standard is discussed in section 2 of this chapter.

**Rights and principles set out in the Act:** These include all of the rights and principles which have been discussed in this chapter as well as those in any other part of the Act – such as a child’s right to privacy; right to be protected from harmful social, cultural or religious practices; and right to consent to medical intervention or adoption (if sufficiently mature).

**Lawful limitation:** The rights and principles established by the Child Care and Protection Act are subject to the Namibian Constitution. As discussed in section 2 of this chapter, even the duty to protect the best interests of the child is not absolute. The child’s best interests can be limited, as long as the limitation is reasonable and justifiable, where there is a need to weigh the child’s rights against the rights of others.

**PRINCIPLE 2:** Respect the child’s **dignity**.

One Namibian case identified **three elements of the constitutional right to dignity**: (1) Every human being possesses an intrinsic worth, merely by being human. (2) This intrinsic worth should be recognised and respected by others. (3) Recognising the intrinsic worth of the individual requires that the State should be seen to exist for the sake of the individual human being. Another Namibian case held that children “also have an inherent dignity by virtue of their status as human beings”.

*Medical Association of Namibia Ltd v Minister of Health and Social Services* 2015 (1) NR 1 (HC)  
*Ex Parte Attorney-General, Namibia: Re: Corporal Punishment by Organs of the State* 1991 NR 178 (SC)

### PRINCIPLE 3: Treat all children fairly and equitably.

**What is the difference between equal and equitable?** Equal treatment means treating people in the same way, without discrimination. Equitable treatment means treating people in a way which will advance meaningful equality, in light of the different positions of different groups. For example, it is equitable to apply affirmative action to help persons from groups who experienced past discrimination. It is equitable to make special arrangements for persons with disabilities to place them on an equal footing with persons who do not have the challenges of such disabilities. It is also equitable to take into account the special vulnerabilities of children as compared to adults, or the disadvantages of some groups of children compared to others.

### PRINCIPLE 4: Protect children against **direct or indirect discrimination** on the basis of

- ⊕ race, ethnic or social origin or colour

**What is the difference between race, ethnic origin and colour?** Race refers to the physical characteristics associated with distinct populations, such as skin colour, eye colour, facial structure and hair colour. Ethnic origin refers to being part of an ethnic group, which means a group with a long standing history and a distinct cultural tradition – where group members may have language, heritage, religion and customs in common. Colour refers to the colour of a person’s skin. These three terms can overlap, but they are distinct. For example, a person of African descent who grew up in Finland may identify racially as African and ethnically as Finnish. The grounds of race, ethnic origin and colour are often combined under the comprehensive concept of ethnic identity. Together, these grounds cast a wide net to combat complex discriminatory conduct on such identity.

**Social origin** refers to a person’s inherited status, which can be a person’s descent, property status or economic or social status. There is thus some overlap between the concepts of social origin and socio-economic status.

- ⊕ M Macewen, “Racial Grounds: A Definition of Identity?”,  
⊕ *International Journal of Discrimination and the Law*, Volume 3, Issue 1, 1998  
⊕ Committee on Economic, Social and Cultural Rights, *General Comment No. 20* (2009)

- ⊕ sex or gender

**What is the difference between sex and gender?** Sex refers to biological differences between males and females, such as their different genitals and their genetic differences. Gender refers to the characteristics that a society or culture identifies as masculine or feminine, or the role of a male or female in society. A person’s sex as male or female is a biological fact. What that biology means in terms of a person’s gender role in society can be different in different cultures. For example, girls might be treated differently than boys with regard to family responsibilities or practices such as genital mutilation or infanticide.

“Sex” is also often understood to encompass “**sexual orientation**”. The Committee on the Rights of the Child has noted that discrimination against children on the basis

of sexual orientation is of particular concern. Discrimination against learners on this basis is also addressed in Namibia's National Safe Schools Framework.

◆ *Implementation Handbook for the Convention on the Rights of the Child*, 3<sup>rd</sup> edition, 2007, page 26

**“ An individual’s sexuality – perceived or otherwise – is a common trigger for GBV. In Namibia there are still many myths, fears and inaccurate beliefs surrounding homosexuality and non-conforming genders. The LGBTI+ community is protected by national and international laws, including the Namibian Constitution, which states that all persons shall be equal before the law. This wording stresses the responsibility of the Namibian state to ensure that unequal treatment is met with a strong set of non-discrimination measures. Schools should play a central role in promoting tolerance. Remember, sexual orientation is not a choice that people make. ”**

◆ Namibia's National Safe Schools Framework: PART B-Practical Guide for Building Safe Schools, 2018, page 67

#### ☉ pregnancy

Pregnancy could include unfair discrimination based on a future, current or past pregnancy. The issue of discrimination against children on the basis of pregnancy is addressed, for example, in Namibia's "Education Sector Policy for the Prevention and Management of Learner Pregnancy". Discrimination on the basis of pregnancy is also forbidden by the Labour Act 11 of 2007.

#### ☉ marital status

Marital status might include being married or unmarried. It might also include unfair discrimination based on whether children or their parents are married under the general civil law or under customary law. For example, the Namibian case of *Frans v Paschke* held that the common law rule that children born outside marriage may not inherit from their fathers in the absence of a will was unconstitutional.

◆ *Frans v Paschke & Others* 2007 (2) NR 520 (HC)

#### ☉ age

The Committee on the Rights of the Child has found that young children are particularly at risk of discrimination because they are relatively powerless and depend on others for the realisation of their rights.

◆ Committee on the Rights of the Child, *General Comment No. 7* (2005), paragraphs 11-12

#### ☉ disability

Disability is discussed in more detail under section 7 of this chapter.

### Ⓞ religion, conscience or belief

Religion, conscience or belief encompasses more than traditional religions. It includes personal convictions about morality or politics, whether manifested individually or in community with others. It also encompasses the right **not** to have any specific religion or belief.

### Ⓞ culture or language

### Ⓞ birth

Discrimination on the basis of birth refers to discrimination for reasons of parentage. For example, a child must not be treated differently because he or she was born outside marriage, born to stateless parents or adopted, or born in what are perceived to be unusual circumstances. Children should also not be discriminated against because their birth was not registered. Discrimination on the basis of birth also includes discrimination based on longer lines of descent, such as discrimination on the basis of caste, royalty or other systems of inherited status which encompass ideas about superiority and inferiority on the basis of descent.

### Ⓞ family status

Family status covers a number of relationships. For example, children and their parents must not be discriminated against based on their having or not having children, having more or less than a particular number of children, being in a cohabiting relationship instead of being married, living in an extended family or kinship group, or having differing kinds of responsibility for children and dependents.

### Ⓞ health status

Health status refers to a person's physical or mental health. Children and their parents must not be discriminated against because of their actual or perceived health status, such as having a mental illness or a particular disease or condition.

### Ⓞ socio-economic status

Socio-economic status refers to the social standing or class of an individual or group. It is often treated as a combination of education, income and occupation. Children and their parents must not be discriminated against because of poverty or homelessness.

### Ⓞ HIV status

Children can experience stigma and discrimination because of their own HIV status, or because of the HIV status of a family member.

### Ⓞ residence status or nationality

The prohibition of discrimination on residence status or nationality means that there should be no unfair discrimination between citizens and non-citizens, or on the basis of

what kind of residence permit (work permit, study permit, etc) applies to the child and the child's family.

There must be no discrimination on these grounds or a combination of these grounds as they apply to the child OR to the child's parents, guardian, care-giver or family members as they affect the child.

**PRINCIPLE 5:** Recognise the child's need for **development** and the child's need to **play**.

Both Article 31 of the Convention on the Rights of the Child and Article 12 of the African Charter on the Rights and Welfare of the Child, using identical language, recognise the child's right "to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts".

**PRINCIPLE 6:** Respond to any **special needs** related to a child's disability or chronic illness.

The rights of children with disabilities are elaborated in another provision in the Act. See section 7 of this Chapter.

**PRINCIPLE 7:** Give the **child's parents or care-givers** an opportunity to **express their views** in any matter concerning the child, IF

⊗ the parent or care-giver can be located with reasonable effort

AND

⊗ hearing from the parent or care-giver is in the best interests of the child.

For example, if a child was conceived as a result of a rape, it would not be in the child's best interests for the rapist parent to be given an opportunity to express views on a matter concerning the child.

**PRINCIPLE 8:** Resolve matters concerning children in a **non-conflictual** way if possible. Promote **conciliation** and **problem-solving** where this is appropriate.

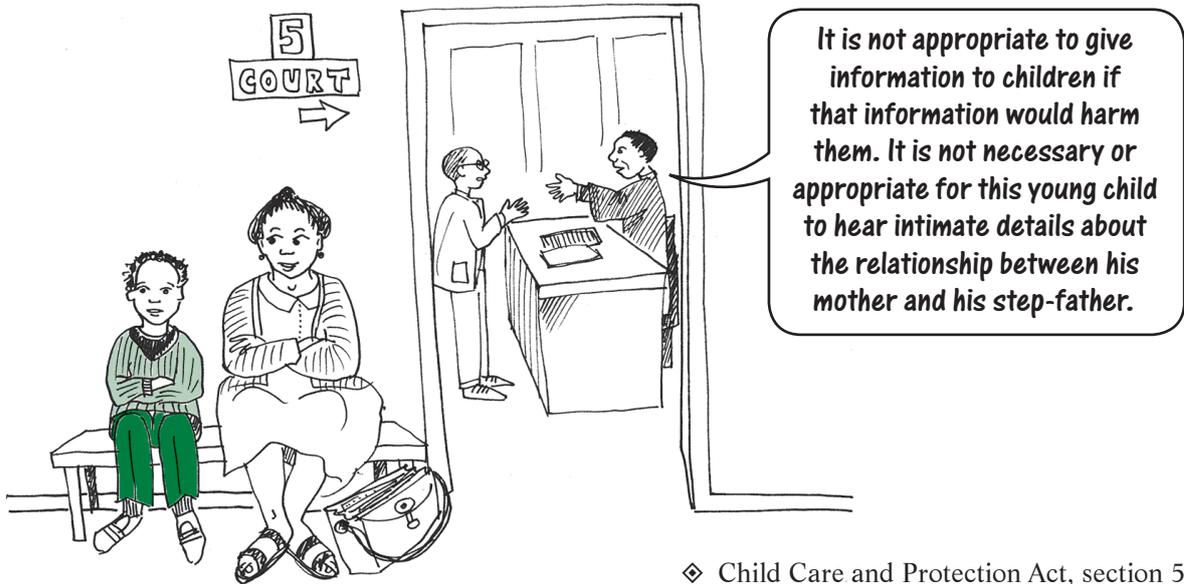
For example, family mediation might be a good way to proceed when divorcing parents are in dispute about child custody and access. But this would not be an appropriate way to deal with a case of child abuse.

**PRINCIPLE 9:** **Avoid delays** as far as possible.

Delays in proceedings are generally harmful to children, because this can create uncertainty, or lead to a situation where a child must face a change after having adapted to the existing situation.

**PRINCIPLE 10: Inform children and their parents** of matters which could substantially affect the child, if appropriate. Care-givers who share some parental rights and responsibilities, such as foster parents, should also be informed of matters which could substantially affect the child.

Parents and care-givers are entitled to be informed only if they can be located with reasonable effort. The child's right to information must be considered with regard to the child's age, maturity and stage of development.



◇ Child Care and Protection Act, section 5

## 5. Children's rights and responsibilities

Rights and responsibilities go together. The Child Care and Protection Act discusses some of the key rights and responsibilities of both parents and children.

### 5.1 Key children's rights

**Right to basic living conditions:** A child has the right to the basic conditions of living necessary for his or her development, including:

④ adequate **food**



④ adequate **shelter**



④ adequate **clothing**



④ adequate **care and protection**, including **health care** and **immunisation**



④ adequate **education**



④ adequate **play and leisure**.



A child's parents, guardian and care-giver all have a duty to fulfil these basic needs, in light of their ability and financial capacity.



Esther's father spends all of his salary on alcohol while Esther goes hungry. He is violating his duty to provide adequate food to Esther.

George's mother works very hard, but her wages are low. She makes sure that George has healthy food every day, even though she cannot afford fresh meat or fruit. She is following her duty to George because she is doing the best she can in light of her resources.

◇ Child Care and Protection Act, section 6

## Rights to play, leisure and rest

Both Article 31 of the Convention on the Rights of the Child and Article 12 of the African Charter on the Rights and Welfare of the Child, using identical language, recognise the child's right "to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts".

In the Convention on the Rights of the Child, "play" means children's activities which are not controlled by adults and do not necessarily conform to any rules. "Leisure" means having the time and freedom to do as one pleases. "Rest" means time free from any obligations, including time to sleep.

Many people may think that the right to play and rest are luxuries rather than necessities of life. But play and rest are essential to children's development, and thus as important as other basics such as nutrition, housing, health care and education. Many social skills – such as negotiation, sharing and self-control – are acquired during play with other children. Play promotes the development of creativity, imagination and self-confidence. Physical forms of play exercise the child's body and contribute to physical development. Children who are unable to play will often lack important social and personal skills. Play is particularly important to young children, but even adolescents need places to meet with their peers and explore their emerging independence and transition to adulthood. Sufficient rest is a prerequisite for children's well-being, and for their ability to learn and engage in meaningful participation in activities.

Certain conditions represent obstacles to a child's right to play. For example, unsafe and hazardous environments such as polluted water, uncontrolled traffic, lack of safe local play areas and high levels of crime and violence can severely restrict children's opportunities for safe play and recreation. Other obstacles include resistance to children's use of public spaces, lack of access to nature, pressure for educational achievement, overly structured and programmed schedules and the growing role of electronic media.

Some children require particular attention in order to realise their right to play. Girls in particular often have diminished opportunities to enjoy play because of domestic

responsibilities, protective concerns on the part of parents, lack of appropriate facilities or cultural assumptions about appropriate behaviour of girls. Other children who require particular attention include children living in poverty, children with disabilities, children from indigenous and minority communities, and children in institutions. Children living in poverty and children in institutions often lack access to recreational facilities. Children in poverty may be unable to afford the cost of participation in some recreational activities. They may also be required to spend their time working. Children with disabilities face multiple barriers to play, including exclusion from school and other arenas where friendships are formed and where play and recreation take place, isolation at home, cultural attitudes which reject children with disabilities, and physical inaccessibility of public spaces. Children from some indigenous and minority communities may face rejection, discrimination and violence, which can prevent them from exercising their right to play.

Article 31 of the Convention on the Rights of the Child imposes three obligations on States to guarantee that the rights it covers are realised by every child without discrimination:

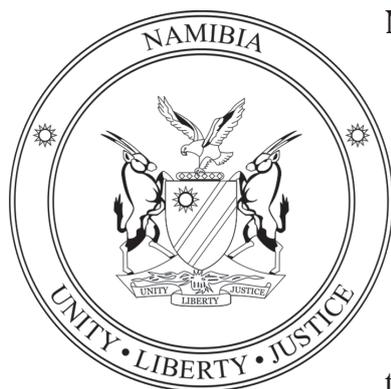
- (1) The obligation to respect rights: to refrain from interfering directly or indirectly in the enjoyment of rights
- (2) The obligation to protect rights: to take steps to prevent third parties from interfering in rights
- (3) The obligation to fulfil rights: to introduce the necessary legislative, administrative, judicial, budgetary, promotional and other measures aimed at facilitating the full enjoyment of rights.

In terms of the obligation to *respect* children's rights in this context, States are expected to support caregivers with regard to implementing the right to play and rest, and to conduct awareness raising regarding the importance of the right to play and rest. The obligation to *protect* rights in this context includes an obligation to guarantee children access to recreational facilities without discrimination and to give attention to child online safety.

- ◆ *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 3<sup>rd</sup> edition, 2007, Chapter 31
- ◆ Committee on the Rights of the Child, *General Comment No. 17* (2003)



**Other rights:** It is not possible to list all the rights which children – and all persons, including children – have in terms of Namibian laws and international agreements signed by Namibia. Here is a list of some of the key rights.



**Namibian Constitution:** The Namibian Constitution guarantees all persons, including children, the right to life, liberty, human dignity, equality, privacy, property, fair trial and political activity. It also guarantees freedom of speech, thought, association, movement, culture, language and religion. Article 14 provides that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Article 15 provides that children have the right from birth to a name, the right to acquire a nationality and, “as far as possible the right to know and be cared for by their parents”. Children also have specific rights to protection against economic exploitation and harmful labour practices, and to education. The implementation of the Act must be consistent with these fundamental rights and freedoms.

**International Covenant on Civil and Political Rights:** Article 24 gives children the right, without discrimination, to such measures of protection as are required by their status as minors, by their families, by society and by the State. It also gives all children the right to acquire a nationality, to be registered immediately after birth and to have a name.



**Convention on the Rights of Persons with Disabilities:** Article 7 requires States to take all necessary measures to ensure the full enjoyment of all human rights and fundamental freedoms by children with disabilities on an equal basis with other children. Article 23 provides, amongst other things, that a children must not be separated from their parents on the basis of a disability of either the child or one or both parents. Where the immediate family is unable to care for a child with disabilities, the State must make every effort to provide alternative care within the wider family, or failing that, within the community in a family setting.



**Convention on the Rights of the Child:** The Child Care and Protection Act implements many of the rights from this Convention. These are discussed throughout the *Guide*. For example, in this chapter, see the discussion of the best interests principle in section 2, the right to participate in section 3, and the right to play and rest discussed above in section 5.



**African Charter on the Rights and Welfare of the Child:** Similarly, the Child Care and Protection Act implements many of the rights from the African Charter, including the best interests principle, the right to participate and the right to play and rest discussed in this chapter.



## 5.2 Key children's responsibilities

**Specific responsibilities:** Children also have some specific responsibilities under the Act which balance their rights:

- ⑨ **Duty to the family:** Children are expected to work for the cohesion of the family, to respect the rights of their family members and to assist their family members in times of need.
- ⑨ **Duty to the community:** Children are expected to serve their communities, to respect the rights of all community members and to preserve and strengthen the positive cultural values of their communities in the spirit of tolerance, dialogue and consultation.
- ⑨ **Duty to the nation:** Children are expected to serve the nation, to respect the rights of all other persons in Namibia and to preserve and strengthen national solidarity.
- ⑨ **Duty to society:** Children are expected to contribute to the general moral well-being of society.

These responsibilities are based on the *African Charter of Rights and Welfare of the Child*. They must be kept in mind in the application of the Act and “in any proceedings, actions and decisions by an organ of state concerning any child”. Children’s duties must be viewed in light of the age, maturity, stage of development and ability of each child. The limitations in the Act must also be kept in mind.

◇ Child Care and Protection Act, section 8

◇ African Charter on the Rights and Welfare of the Child, article 31



The rules on child labour limit what a child can do to assist their family in times of need. For example, a child must not be required to do work that is not appropriate for the child’s age, is dangerous or places the child’s education at risk.

Children have a duty to serve their nation, but it is contrary to the Act to recruit a child in any national, private or foreign armed or security force or to be used in any armed conflict.



# 6. Parental rights and responsibilities

Parental authority is a collective term for the many rights and duties that vest in a parent (and occasionally in a non-parent) in respect of the person and property of a minor child. Parental authority must at all times be exercised and performed in the best interests of the child and with due regard to the child's rights. Much of the content of the concept of parental authority comes from the common law, which refers to the legal rules developed over time through the decisions in individual court cases.

It would be very difficult to give a comprehensive list of everything that is included in the concept of parental rights and responsibilities. The Act defines "parental responsibilities and rights" as including the responsibilities and rights conferred on a parent by the common law, including those referred to in the Act in sections 6(2), 7 and 118 (all summarised below).

Other aspects of common law parental rights and responsibilities would include caring for the child, promoting the child's development and welfare and making legal decisions on the child's behalf.

- ◇ Child Care and Protection Act, section 1
- ◇ common law on parents and children

**Section 6(2):** Parents, guardians and other care-givers have a duty to secure, within their abilities and financial capacities, the child's rights to the basic conditions of living – including the right to adequate food, shelter, clothing, care and protection (including adequate health care and immunisation), education and play and leisure.

**Section 7:** This provision emphasises a specific set of parental duties which is discussed below: the duty to act in the child's best interests, the duty to guide and direct the child, the duty to protect the child and the duty to make sure that the child receives proper care.

**Section 118:** This provision covers parental responsibilities and rights relating to custody, access and guardianship and the parental duty to contribute to the maintenance of the child. These are all common law rights which have been supplemented by legislative procedures for enforcing them and dealing with disputes about them.

## 6.1 Key parental responsibilities

In terms of the Child Care and Protection Act, any person who has parental responsibilities and rights towards a child has four key responsibilities in addition to any others. These responsibilities also apply to any other person who is legally responsible for a child.

- Ⓞ **Duty to act in the child's best interests:** to ensure that the best interests of the child are the paramount concern at all times.
- Ⓞ **Duty to guide and direct the child:** to guide and direct the child in the exercise of the child's rights under this Act or under any other law, in a manner consistent with the child's evolving capacities.

- ⑨ **Duty to protect the child:** to protect the child from neglect, discrimination, violence, abuse and harm.
- ⑨ **Duty to make sure that the child receives proper care:** to ensure that the child is adequately cared for by a competent person when the parent or care-giver is temporarily absent.

◇ Child Care and Protection Act, section 7

## Who has parental rights over a child aside from a parent?

- 1. A legal guardian appointed by the High Court or by a children’s court under this Act**  
Usually the person with custody of a child born outside marriage is also the sole guardian of that child, while married parents are usually equal guardians of their children. However, there are some exceptions. If a parent is a minor, guardianship of that parent’s child vests in the guardian of the parent. The court may also grant legal guardianship to a person other than a parent if such an order is sought by either parent, the child, the child’s care-giver or someone acting in the best interests of the child.
- 2. A person in whose care a child is placed in terms of a court order under this Act**  
Examples include kinship care-givers, foster parents and the person who is the head of a facility where a child has been placed.

## 6.2 Key parental rights

As discussed above, parental authority encompasses a number of rights with respect to their minor children. These include:

- ⑨ the right to control and administer the child’s property and property interests
- ⑨ the right to represent the child in legal proceedings
- ⑨ the right to maintain contact with the child, if this is in the child’s best interests
- ⑨ the right to give or refuse consent required by law in respect of the child, including consent to the child’s marriage, adoption, removal from the country, application for a passport and transactions involving the child’s property.

- ◇ common law on parental authority
- ◇ Child Care and Protection Act, sections 10(10) and 101(8)
- ◇ Married Persons Equality Act 1 of 1996, section 14



There is no set age for leaving children home alone. There is such a wide variation in the rate that children mature that it would be almost impossible to come up with a “one size fits all” rule. Parents know their children best. They should not leave children alone if they will be at risk. In general, children under the age of 10 are rarely mature enough to cope with an emergency and should not be left home alone for any significant period of time.

## 7. Children with disabilities

The Child Care and Protection Act aims to promote social integration, development, self-reliance and community participation for children with disabilities. To that end, all children with disabilities must be treated in a manner that respects their dignity by every person, authority, institution or body that comes into contact with them. A child with disabilities is entitled to appropriate care and protection. A child with disabilities is also entitled to effective access to inclusive and non-discriminatory education, training, health care services, support services, rehabilitation services, preparation for employment and recreation opportunities.

◇ Child Care and Protection Act, section 9



### **Children with disabilities: Article 23 of the Convention on the Rights of the Child**

Article 23 of the Convention on the Rights of the Child provides that “a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.” According to the General Comment on this Article, “The core message of this paragraph is that children with disabilities should be included in society.”

The Article goes on to recognise the right of disabled children, and their parents and care-givers, to special care and assistance designed to ensure that disabled children receive education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities.

The Committee on the Rights of the Child emphasises that many disabilities are preventable and encourages States to focus efforts on prevention. For example, “communicable diseases are still the cause of many disabilities around the world and immunisation programmes need to be stepped up to achieve universal immunisation against all preventable communicable diseases”. Road traffic accidents are another major cause of disability and “policies of prevention need to be established and implemented such as the laws on seat belts and traffic safety”.

◇ Committee on the Rights of the Child, *General Comment No. 9* (2006)