



Analysing the adequacy of domestic and international legal frameworks for the protection of children's rights: A South African perspective

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ABSTRACT

The purpose of this article was to examine how well South Africa's domestic and international legal frameworks protect children's rights, especially in custody disputes where abuse is alleged. This study analysed the adequacy of domestic and international legal frameworks for the protection of children's rights in South Africa, with a particular focus on custody disputes involving allegations of child abuse. A qualitative, desktop-based research methodology is adopted, drawing on legislation, case law, policy documents, and existing academic literature. The study addresses the following legal questions: (i) How effective is the domestic legal framework that governs child abuse in custody disputes? (ii) How do courts interpret and apply child protection laws in custody proceedings? The study examined the degree to which the "best interests of the child" principle is applied to determine custody outcomes involving primary caregivers. In addition, it assesses how international legal instruments influence South Africa's child protection regime. The findings indicate that while the legal framework, including the Children's Act 38 of 2005, provides a strong rights-based foundation, inconsistencies in judicial interpretation and implementation weaken its effectiveness. It recommends stronger judicial training, improved enforcement mechanisms, and better integration of international standards into domestic law. The study concludes that despite a progressive legal framework, challenges in enforcement, judicial consistency, and procedural delays continue to undermine child protection in custody disputes. This study will contribute to the advancement of South African child protection jurisprudence.

Keywords: Child Rights, Custody Disputes, Abuse, Children's Act, Best Interests of the Child, South Africa, International Obligations.

INTRODUCTION

South Africa's constitutional order provides comprehensive protection to children, with Section 28 expressly safeguarding their rights while obliging courts to draw on international law when interpreting these provisions.¹ Despite the strong constitutional foundation, serious gaps remain in the practical implementation of child protection systems. Courts often fail to give substantive effect to international

¹ Solange Rosa and Mira Dutschke, "Child Rights at the Core," 2006.

legal instruments, with references often limited to superficial mentions rather than detailed engagement. As a result, the interpretation of children's socio-economic rights has remained underdeveloped, with little clarity about the full scope and content of these protections.² The main objective of this study is to analyse the existing domestic and international legal frameworks. Hence, this article will examine whether the current domestic and international legal framework aligns with the best interests of the child as mandated by the Children's Act. In practice, courts often cite international instruments in passing rather than engaging with them to deepen the interpretation of children's rights.³ This tendency has left the jurisprudence surrounding children's socio-economic rights and custodial protections underdeveloped, with limited guidance on how these rights should be understood and applied in concrete situations. The result is an uneven system where some children benefit from the full weight of the law while others remain vulnerable to neglect, abuse, or inadequate judicial protection. Against this backdrop, this chapter seeks to critically evaluate both the domestic and international legal frameworks governing child custody, with a particular focus on disputes where abuse is alleged.

It will interrogate whether South Africa's current legislative and judicial practices truly align with the "best interests of the child" standard mandated by the Children's Act⁴ and reinforced by international law. This article is structured into four main sections. Section II examines the domestic legal framework that governs child abuse in custody disputes, with an emphasis on the Constitution, the Children's Act, and related statutory instruments. Section III analyses the judicial application of these child protection laws, assessing how courts have interpreted and applied the best interests of the child in disputes involving abuse. Section IV evaluates the effectiveness of the current legal framework, considering implementation challenges, resource constraints, and procedural safeguards to protect children in custody battles. Section V turns to the international legal framework, focusing on South Africa's obligations under instruments such as the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, and interrogates the extent to which these obligations have been integrated into domestic law and practice.

METHODOLOGY

This study adopted a qualitative research approach to examine how children's constitutional rights are addressed in custody disputes under South African law. A qualitative method was chosen to allow for a deeper engagement with the legal and social complexities surrounding child custody, rather than relying on statistical analysis. The primary research method was desktop-based research, which involved a careful review of secondary sources, including legislation, court judgments, academic journal articles, and legal textbooks. This approach allowed evaluation of both the strength of the legal framework and the practical challenges arising from its application.

DISCUSSION

Domestic Legal Framework Governing Child Abuse in Custody Disputes

Constitutional Protections for Children in Custody Disputes

South Africa's Constitution firmly embeds children's rights in section 28, with section 28(2) explicitly declaring that "a child's best interests are of paramount importance in every matter concerning the child."⁵ This provision not only mirrors the rights enjoyed by adults but also extends further, recognising the increased vulnerability of children. It guarantees them added protections, including the right to parental or family care, access to essential services, and protection from all forms of harm.⁶ The best interests of the child principle, while constitutionally enshrined in South Africa, faces significant implementation challenges. Courts have applied this principle inconsistently, sometimes using it broadly

² Rosa and Dutschke, "Child Rights at the Core."

³ Tara M Collins, "A Child's Right to Participate: Implications for International Child Protection," *The International Journal of Human Rights* 21, no. 1 (2017): 14–46.

⁴ Children's Act 38 of 2005.

⁵ Justice Sisi Khampepe, "Centre for Child Law 20 Year Conference 5 December 2018, 09: 40," *De Jure Law Journal* 52, no. SPE (2019): 488–95.

⁶ Khampepe, "Centre for Child Law 20 Year Conference 5 December 2018, 09: 40."

as a substitute for engaging in other constitutional rights of children and family members, thereby diluting its effectiveness.⁷

The South African Constitutional Court's extensive application of the best interests principle, while initially positive, may go too far by preventing the normative development of children's rights when other constitutional provisions would be more appropriate.⁸ Additionally, the principle creates tensions when intersecting with customary practices such as polygamy, initiation rites, and traditional guardianship, requiring ongoing legal reform to balance cultural recognition with constitutional mandates prioritising children's welfare.⁹ At the core of this protection is Section 28 of the Constitution of the Republic of South Africa, which affirms every child's right to receive parental care or suitable alternative care when separation from the family becomes necessary.¹⁰ It also guarantees protection from abuse, neglect, maltreatment, and any form of degradation.¹¹ Importantly, these rights are not symbolic; they carry direct legal force and significantly influence how courts resolve custody-related disputes.¹²

The Constitutional Court, in the seminal decision of *S v M* (Centre for Child Law as Amicus Curiae),¹³ stressed the fundamental importance of Section 28. The Court held that any legal decision involving the care of a child must prioritise the child's best interests above all else.¹⁴ This ruling clarified that children's constitutional rights are actionable and must be examined individually in each custody or care matter.¹⁵ The Court also emphasised the need for a substantive, not merely procedural, evaluation of a child's situation, particularly when allegations of abuse or neglect are raised.¹⁶ Beyond Section 28, Section 9 of the Constitution, which safeguards the right to equality and prohibits unfair discrimination, also plays a huge role in custody cases involving abuse. This becomes crucial in cases where gendered assumptions may skew outcomes, possibly placing children at further risk if abuse claims are dismissed or minimised due to bias.¹⁷ According to Bonthuys, courts are therefore expected to interrogate whether decisions regarding custody rights are informed by stereotypes or institutional shortcomings that could compromise a child's safety.¹⁸ The Constitutional Court's reasoning in *Bannatyne v Bannatyne*¹⁹ further reinforces the primacy of a child's best interests even in matters dealing with the enforcement of parental obligations, such as maintenance.²⁰ The ruling illustrated how family law must be interpreted through a rights-based lens that centres the child's welfare.²¹ The constitutional right at stake in matters of child maintenance is grounded in Section 28 of the Constitution.²² Specifically, Section 28(2) states that:

⁷ Elsje Bonthuys, "The Best Interests of Children in the South African Constitution," *International Journal of Law, Policy and the Family* 20, no. 1 (2006): 23–43.

⁸ Ann Skelton, "Too Much of a Good Thing? Best Interests of the Child in South African Jurisprudence," *De Jure Law Journal* 52, no. SPE (2019): 557–79.

⁹ Ramaccio Calvino Lizelle, "Balancing Customary Practices with Constitutional Principles: The Best Interest of the Child in South African Law," *WORLD* 23, no. 3 (2024): 1138–47.

¹⁰ Constitution sec 28(1)(b).

¹¹ Constitution sec 28(1)(d).

¹² Skelton, "Too Much of a Good Thing? Best Interests of the Child in South African Jurisprudence."

¹³ *S v M* (Centre for Child Law as Amicus Curiae) 2007 (2) SACR 539 (CC).

¹⁴ *S v M* (Centre for Child Law as Amicus Curiae) paras 18–24.

¹⁵ *S v M* (Centre for Child Law as Amicus Curiae) para 22.

¹⁶ *S v M* (Centre for Child Law as Amicus Curiae) para 26.

¹⁷ Constitution, Section 9(1); see also Bonthuys, E., "Legal Issues Affecting Child Custody in South Africa," *SAJHR* 38, no. 2 (2021): 215–218.

¹⁸ Bonthuys, "Legal Issues Affecting Child Custody in South Africa." 216.

¹⁹ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC).

²⁰ *Bannatyne v Bannatyne* paras 20–25.

²¹ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC); upon the parties' divorce, the court ordered the appellant to pay maintenance for the respondent and the minor children. Subsequently, the appellant obtained an order from the Maintenance Court that the amounts payable be reduced. That order replaced the high court order. When appellant fell into arrears, the respondent successfully approached the high court for an order of contempt. The court held that the high court was not informed that its order had been replaced by one from the maintenance court, as the original court was no longer valid, the committal of the appellant to prison for contempt was not competent, and the appeal was upheld.

²² Constitution sec 28(1) of the Constitution provides: "(1) Every child has the right-(a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that; (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period, and has the right to be; (i)

“A child’s best interests are of paramount importance in every matter concerning the child.”²³

This provision enshrines the principle that children are entitled to adequate parental care, and it has become a universally accepted cornerstone of family law that the child’s best interests must guide all decisions affecting them.²⁴ Although the primary responsibility to provide this care lies with parents, as clearly outlined in the Constitution, the state also bears a duty to facilitate the conditions under which parents can meet these responsibilities. The Constitutional Court has recognised this shared obligation, affirming that the state must establish the appropriate legal and administrative framework to give effect to the rights contained in Section 28.²⁵ This includes ensuring that there are systems in place to protect children and support the enforcement of maintenance and care obligations where necessary. Nonetheless, the real-world implementation of these constitutional principles in custody disputes is uneven. According to the South African Law Reform Commission on family violence and custody, lower courts often fail to apply section 28 consistently, particularly where abuse allegations intersect with custody claims.²⁶ This reveals the urgent need for judicial capacity-building, procedural alignment, and clearer statutory guidance to ensure that the constitutional vision for child protection is translated into lived realities.²⁷ In emphasising the constitutional principle that a child’s best interests are of paramount importance, Van der Schyff AJ explained that²⁸

‘This principle is not only grounded in the vulnerability of children, who require special care and assistance, but also in the broader benefits it brings to society. Protecting children’s rights, she observed, naturally strengthens the well-being of their families and communities, since children cannot be safeguarded in isolation. They require protection and support to develop into responsible members of society. This protection must foster the child’s “full and harmonious development,” enabling them to grow up in a nurturing family environment characterized by happiness, love, and understanding. Importantly, the constitutional guarantee that a child’s best interests are paramount must always be applied in the specific context of the case before the court. For example, determining what is in the best interests of a pregnant minor considering a termination of pregnancy will differ significantly from a situation involving a divorce, where questions of care, contact, or relocation of a child must be resolved.’

Statutory Protections under the Children’s Act 38 of 2005

The Children’s Act marked a turning point in South Africa’s child protection framework, consolidating and modernising principles that had previously been governed by the Child Care Act.²⁹ One of the most significant contributions of the Act was its shift in legal terminology, replacing the notions of “custody” and “access” with the more holistic concepts of “care” and “contact.” This change reflected an attempt to move beyond narrow, ownership-based understandings of parental rights and to recognise the broader responsibilities owed to children.³⁰ The Act also introduced a developmental approach that emphasises

kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child’s age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.” See also *Bannatyne v Bannatyne* para 24. ²³ Constitution sec 28(2).

²⁴ International law also affirms the “best interests” principle, and many countries have subsequently incorporated it into their constitutions or child and family legislation. Article 3(1) of the United Nations Convention on the Rights of the Child, 1989, requires that “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.” Similar pronouncements are found in article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990 (African Children’s Charter). Significantly, the preamble to the Act refers to South Africa’s commitment under these international instruments. South Africa ratified the United Nations Convention on 16 June 1995 and the African Children’s Charter on 7 January 2000; See also *Bannatyne v Bannatyne* para 24.

²⁵ *Bannatyne v Bannatyne* para 24.

²⁶ ‘South African Law Reform Commission, Issue Paper 29: Family Violence and Custody’ (2022) 11-13.

²⁷ South African Law Reform Commission (n26) 14.

²⁸ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC); 2007 (2) SACR 539M (CC) para 25.

²⁹ Siphso Sibanda and Antoinette Lombard, “Challenges Faced by Social Workers Working in Child Protection Services in Implementing the Children’s Act 38 of 2005,” *Social Work/Maatskaplike Werk* 51, no. 3 (2015): 332–53.

³⁰ J. C Bekker, “Commentary on the Impact of the Children’s Act on Selected Aspects of the Custody and Care of African Children in South Africa,” *Obiter* 29, no. 3 (2008): 395–405.

prevention and early intervention, moving away from a purely reactive model. To support this, it created a range of new family services and alternative care mechanisms, including partial care, shared care, cluster care, and formal recognition of child-headed households.³¹

Despite these progressive reforms, the implementation of the Act has been fraught with challenges. The transition has often been described as “chaotic,” reflecting legislative gaps, the difficulty social workers face in adapting to new systems, and persistent capacity and resource constraints among stakeholders.³² Moreover, in practice, certain implementation strategies have proved inappropriate, sometimes placing children at further risk rather than securing their protection.³³ These shortcomings underscore the gap between legislative ambition and lived reality, raising questions about whether the framework is fully capable of advancing children’s constitutional rights in practice. Under the Children’s Act, “care”³⁴ encompasses a broader set of responsibilities, including providing for the child, protecting them, safeguarding and promoting their overall well-being, maintaining a healthy relationship with the child, and ensuring that the child’s best interests are the paramount concern in all matters affecting them. This reflects a more holistic approach to parental duties, focusing not just on physical presence or control, but on nurturing the child’s development and welfare. The term “contact”³⁵ is understood to mean, among other things, maintaining a personal relationship with a child, particularly regularly when the child lives with someone else.

The careful introduction of these terms in the Children’s Act reflects the legislature’s clear intention to promote shared parenting and joint decision-making. This approach aims to ensure that both parents remain actively involved in the child’s life. Additionally, it seeks to minimise the disruption and emotional or behavioural difficulties that can arise when a child becomes alienated from one parent. Furthermore, the Act demonstrates an effort to give children the opportunity to experience as normal a life as possible, even when they cannot live with both parents. In *Joubert v Joubert*,³⁶ the appellant argued that, under section 31(2) of the Children’s Act, the respondent, the mother with whom the child lived, was required to consult him and give proper consideration to his views before deciding to enrol the child in a different school. He contended that such a decision could significantly affect his ability to exercise his parental rights and responsibilities. The court held, however, that while section 31 obliges the parent with whom the child resides to consult the non-resident parent on such matters, this does not require that the views or wishes of the non-resident parent be followed.³⁷ In other words, consultation is mandatory, but the ultimate decision remains with the parent who has the child in their care. The Children’s Act serves as South Africa’s primary piece of legislation that governs matters related to the care, protection and custody of children, including situations where abuse may arise during parental

³¹ Carmel R Matthias and F Noel Zaal, “Supporting Familial and Community Care for Children: Legislative Reform and Implementation Challenges in South Africa,” *International Journal of Social Welfare* 18, no. 3 (2009): 291–98.

³² Sibanda and Lombard, “Challenges Faced by Social Workers Working in Child Protection Services in Implementing the Children’s Act 38 of 2005.”

³³ Matthias and Zaal, “Supporting Familial and Community Care for Children: Legislative Reform and Implementation Challenges in South Africa.”

³⁴ Section 1 “care”, in relation to a child, includes, where appropriate - (a) within available means, providing the child with - (i) a suitable place to live; (ii) living conditions that are conducive to the child’s health, well-being, and development; and (iii) the necessary financial support; (b) safeguarding and promoting the well-being of the child; (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards; (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child’s rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act; (e) guiding, directing and securing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development; (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development; (g) guiding the behaviour of the child humanely; (h) maintaining a sound relationship with the child; (i) accommodating any special needs that the child may have; and (j) generally, ensuring that the best interest of the child is the paramount concern in all matters affecting the child.

³⁵ Section 1 “contact”, in relation to a child, means - (a) maintaining a personal relationship with the child; and (b) if the child lives with someone else - (i) communication regularly with the child in person, including - (aa) visiting the child; or (bb) being visited by the child; or (ii) communication regularly with the child in any other manner, including - (aa) through the post; or; (bb) by telephone or any other form of electronic communication.

³⁶ *Joubert v Joubert* 2008 JOL 219229 (C).

³⁷ *Joubert v Joubert* para 35.

disputes.³⁸ One of its cornerstone provisions, Section 9, reinforces the constitutional mandate that the best interests of the child must guide all decisions involving their care, protection, and well-being.³⁹

This principle, derived from section 28(2) of the Constitution, acts as the central standard by which every action taken under the Act is measured.⁴⁰ To operationalise this best interests standard in custody disputes, section 7 of the Act sets out a detailed list of more than 14 factors that courts must consider when evaluating a child's situation. These include aspects such as the child's physical and emotional safety, previous exposure to harm, the ability of each parent to meet the child's needs, and any prior incidents of abuse.⁴¹

This framework empowers judicial officers to scrutinise claims of abuse with care and sensitivity, ensuring that decisions are grounded in a comprehensive understanding of the child's circumstances.⁴² In cases where a parent misuses their responsibilities, courts are authorised under Section 45(3)(b) to restrict or even suspend access rights pending further investigation.⁴³ In addition to judicial tools, the Act imposes clear duties on professionals. Section 110(1)(a) obliges individuals such as social workers, teachers, healthcare providers, and legal practitioners to report suspected abuse or neglect to the Department of Social Development.⁴⁴ These reports play a vital role in triggering protective investigations that can influence custody arrangements. By mandating proactive reporting, the Act ensures that concerns about child safety are handled in a protective and child-centred manner, rather than being left to adversarial court processes.⁴⁵ Failure to report may result in disciplinary or even criminal consequences, signalling the law's strong stance on safeguarding vulnerable children.⁴⁶ In the case of *JG v CG*,⁴⁷ the Gauteng South High Court acted on psychological and medical evidence indicating that the child suffered trauma following contact with the father. As a result, the court suspended his visitation rights.⁴⁸ Referring to Section 7(1)(l), the court emphasised the need to protect children from exposure to psychological harm, prioritising their mental and emotional welfare.⁴⁹ This decision highlights how the judiciary increasingly relies on expert testimony and legislative tools to

³⁸ Bonthuys E, "Family Law and Child Protection in South Africa," *South African Journal on Human Rights* 38, no. 2 (2021): 215–18.

³⁹ Children's Act sec 9.

⁴⁰ Constitution sec 28(2).

⁴¹ Children's Act sec 7(1)(a)–(n) state the Best interests of child standard (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely- (a) the nature of the personal relationship between- (i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances; (b) the attitude of the parents, or any specific parent, towards- (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child; (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs; (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from- (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living; (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis; (f) the need for the child- (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition; (g) the child's- (i) age, maturity and stage of development; (ii) gender; (iii) background; and (iv) any other relevant characteristics of the child; (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; (i) any disability that a child may have; (j) any chronic illness from which a child may suffer; (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment; (l) the need to protect the child from any physical or psychological harm that may be caused by- (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; (m) any family violence involving the child or a family member of the child; and (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

⁴² SALRC 'Issue Paper 29: Family Violence and Custody' (2022) 16-18.

⁴³ Children's Act sec 45(3)(b).

⁴⁴ Children's Act sec 110(1)(a).

⁴⁵ UNICEF South Africa 'Policy Brief on Abuse Reporting and Custody' (2022) 4-7.

⁴⁶ Children's Act sec 305(1).

⁴⁷ *JG v CG* 2012 (3) SA 103 (GSJ), the court ruled that before altering a child's primary residence, exceptional circumstances must be demonstrated. While the Children's Act 38 of 2005 prioritises the best interests of the child, the court in this case emphasised that a change in residence should not be granted without a compelling reason that goes beyond ordinary considerations. This interpretation aligns with the principle that exceptional circumstances must be substantial enough to warrant a deviation from the standard approach.

⁴⁸ *JG v CG* paras 14-19.

⁴⁹ *JG v CG* para 21.

evaluate the seriousness of abuse allegations in custody cases.⁵⁰ Comparative research on child custody and protection systems shows that although the principle of the “best interests of the child” is universally acknowledged, its practical application varies considerably across jurisdictions. Nasoha observed that implementation tends to be stronger in developed countries, whereas developing nations often face serious obstacles rooted in resource limitations, institutional weaknesses, and cultural dynamics.⁵¹ Sloth-Nielsen further noted that while incremental progress has been achieved in strengthening children’s rights to legal representation, full realisation remains elusive, underscoring the need for greater stakeholder collaboration and more adaptive strategies to safeguard children’s participation in judicial processes.⁵²

Judicial Interpretation of Abuse Allegations in Custody Proceedings

The application of the “best interests of the child” principle in South African custody disputes involving allegations of abuse raises complex interpretative challenges for the courts. Judges must carefully balance the constitutional obligation in Section 28(2) with the realities of cultural diversity and parental rights.⁵³ While the Constitutional Court has generally been commended for its nuanced application of the principle, scholars have warned that an overreliance on “best interests” risks sidelining other constitutional rights that may sometimes offer more appropriate guidance.⁵⁴ In practice, South African courts are expected to adopt an individualized and context-sensitive approach that places the child at the centre of decision-making. This requires moving beyond narrow, Eurocentric interpretations of welfare to consider the cultural and religious dimensions that shape children’s lived experiences.⁵⁵ In custody cases where abuse is alleged, the judicial inquiry is not limited to proving whether the abuse occurred, but rather to assessing whether custody or access arrangements adequately protect the child’s welfare. Solutions such as supervised contact, though commonly used, have been criticized as potentially inadequate and not always serving children’s long-term well-being.⁵⁶ A key case that shaped judicial treatment of abuse in custody contexts is *F v F*.⁵⁷ Here, the Supreme Court of Appeal considered whether a pattern of verbal and emotional abuse, although not resulting in a criminal conviction, justified limiting the father’s unsupervised visitation.⁵⁸

The Court concluded that persistent abusive conduct, even if not criminally prosecuted, could warrant restricted access under Section 7(1)(l) of the Children’s Act, which recognises exposure to harmful behaviour as a legitimate ground for limiting parental involvement.⁵⁹ The judgment clarified that custody decisions are not bound by the criminal law’s “beyond reasonable doubt” threshold; rather, courts may take precautionary measures where there is credible evidence of risk.⁶⁰ The Constitutional Court addressed similar concerns in *AD and Another v DW and Others* (Centre for Child Law as Amicus Curiae; Department for Social Development Intervening),⁶¹ where emotional abuse by a parent was the

⁵⁰ Sloth-Nielsen J and Mezmur B, “South Africa’s Child Law Reform: CRC’s Role and Reach,” *International Journal of Children’s Rights* 14, no. 1 (2007): 1–27.

⁵¹ Muhamad Mustain Nasoha Ahmad, Sulistyono Adi, and N. U. R. Atqiya Ashfiya, “Social Development Perspective in Child Custody Law Enforcement: A Comparative Study of Legal Systems and Their Implications in Developing and Developed Countries,” *Evolutionary Studies In Imaginative Culture*, 2024, 1358–67.

⁵² Julia Sloth-Nielsen, “Realising Children’s Rights to Legal Representation and to Be Heard in Judicial Proceedings: An Update,” *South African Journal on Human Rights* 24, no. 3 (2008): 495–524.

⁵³ J. Heaton, “An Individualised, Contextualised and Child-Centred Determination of the Child’s Best Interests, and the Implications of Such an Approach in the South African Context,” *Journal for Juridical Science* 34, no. 2 (2009): 1–18.

⁵⁴ Skelton, “Too Much of a Good Thing? Best Interests of the Child in South African Jurisprudence.”

⁵⁵ Heaton, “An Individualised, Contextualised and Child-Centred Determination of the Child’s Best Interests, and the Implications of Such an Approach in the South African Context.”

⁵⁶ Gillian Catherine Baker, “The Absent Voice: An Examination of the Experiences of Women in Scottish Civil Courts in Child Contact Cases Involving Domestic Abuse” (Edinburgh Napier University, 2023).

⁵⁷ *F v F* 2006 (3) SA 42 (SCA).

⁵⁸ *F v F* 2006 (3) SA 42 (SCA), paras 5-9.

⁵⁹ *F v F* para 14; see also Children’s Act sec 7(1)(l).

⁶⁰ B. Mezmur, “Custody and the Best Interests of the Child,” *Comparative Family Law Journal* 41, no. 3 (2018): 263–70.

⁶¹ *AD and Another v DW and Others* (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party) 2008 (3) SA 183 (CC), the Court had to consider the best interest of a baby girl who was the subject of an adoption application. The Court expressly confirmed that the best interest of a child in adoption proceedings is best protected by following the correct judicial procedures when bringing such applications.

central issue.⁶² The Court upheld the lower court's conclusion that prolonged exposure to harmful conduct had caused significant psychological harm and affirmed that custody arrangements must be taken where they compromise a child's constitutional rights to dignity, protection, and emotional well-being.⁶³

In a more recent matter, *LB v YD*,⁶⁴ the High Court responded to allegations of sexual abuse made by a child against her father. Although the claims were contested, the Court ruled that access should be temporarily suspended pending a full investigation.⁶⁵ Referring to Section 45(3)(a) of the Children's Act, the Court stressed the importance of erring on the side of caution when a child's safety is potentially at stake and warned that delayed intervention may constitute a violation of the child's rights.⁶⁶ Courts have also come to rely increasingly on expert assessments, such as forensic psychological reports and input from social workers, to evaluate the credibility of abuse claims. For instance, in *W v V*,⁶⁷ the Western Cape High Court awarded sole custody to the mother after an expert evaluation revealed that the father had engaged in coercive control and emotional manipulation.⁶⁸

The Court referred to Section 10 of the Children's Act, which recognises children's rights to be heard in matters affecting them, and highlighted the evidentiary value of the child's own account in corroborating claims of abuse.⁶⁹ Furthermore, in *KH v VW*,⁷⁰ the Court criticised the father's repeated attempts to invalidate and downplay his daughter's allegations of abuse. The Court found that this dismissive behaviour itself inflicted psychological harm and posed a developmental risk that could not be ignored in determining custody.⁷¹ This ruling reflects a growing judicial awareness of the indirect trauma children may experience when abuse is denied or minimised during legal proceedings. Nevertheless, the application of these protective principles remains inconsistent. Bonthuys observed that family courts occasionally revert to traditional frameworks that favour maintaining parental access and encouraging reconciliation even in the face of credible abuse allegations.⁷² She contends that Sections 7 and 28 of the Constitution and the Children's Act should be interpreted through a trauma-informed lens to ensure that the lived experiences of affected children are not overlooked in favour of outdated presumptions about parental entitlement.⁷³

Judicial Application of Child Protection Laws in Custody Disputes

South African courts are constitutionally mandated to act as the upper guardian of all children, ensuring that their best interests are paramount in any custody dispute.⁷⁴ This principle is derived directly from Section 28(2) of the Constitution, which declares that a child's best interests are of paramount importance in all matters involving the child.⁷⁵ In practice, this responsibility requires courts to intervene where children may face harm, even before abuse is definitively proven. The Children's Act⁷⁶ provides the primary statutory framework, obligating courts to prioritise children's care, protection, and well-being in all custody matters. Section 9 of the Act underscores that every decision concerning a child must be guided by their best interests, cementing this principle into domestic legislation.⁷⁷ Courts are therefore expected to balance competing parental claims with the overarching duty of ensuring the child's safety and development.⁷⁸

⁶² *AD and Another v DW and Others* 2008 (3) SA 183 (CC) paras 16-22.

⁶³ *AD and Another v DW and Others* paras 32-34.

⁶⁴ *LB v YD* [2021] ZAGPJHC 328.

⁶⁵ *LB v YD* [2021] ZAGPJHC 328, paras 7-9.

⁶⁶ *LB v YD* paras 14-16; see also Children's Act, sec 45(3)(a).

⁶⁷ *W v V* [2017] ZAWCHC 77.

⁶⁸ *W v V* paras 11-18.

⁶⁹ Children's Act sec 10.

⁷⁰ *KH v VW* [2020] ZAGPPHC 211.

⁷¹ *KH v VW* paras 20-23.

⁷² Bonthuys, "Legal Issues Affecting Child Custody in South Africa." 215–218.

⁷³ Bonthuys, "Legal Issues Affecting Child Custody in South Africa." 218.

⁷⁴ Constitution sec 28(2).

⁷⁵ Constitution sec 28(2).

⁷⁶ Act 38 of 2005.

⁷⁷ Constitution sec 9.

⁷⁸ *TH v CH* (14667/2022) [2024] ZAWCHC 100, where it was stated that the court's decision to have the parents share the costs of the parenting coordinator equally is based on the principle of parental responsibility.

The judicial obligation also extends to ensuring that children's voices are heard. Section 10 of the Children's Act gives children the right to participate in proceedings that affect them, according to Article 12 of the UN Convention on the Rights of the Child.⁷⁹ The Pretoria High Court in *C.D.N v M.D.N* recognised this by considering social worker reports and directly engaging with the children's stated preferences.⁸⁰ In this case, the High Court of South Africa, Gauteng Division, Pretoria, considered the interim care and residence of two minor children amid allegations that the mother and maternal grandmother abused alcohol.⁸¹ The Court granted the father interim care of the children, allowed the mother supervised contact, and directed the Family Advocate and a social worker to conduct thorough investigations to inform the final parenting and residency arrangements. Such cases affirm that children's expressed fears and wishes can meaningfully shape judicial determinations. Nevertheless, the weight given to children's views is not always consistent, and courts sometimes rely heavily on adult-generated reports rather than the child's direct input. This inconsistency risks undermining the spirit of participatory rights enshrined in both domestic and international law.⁸²

Furthermore, there is a debate over whether children's views are subjectively considered as personal wishes or objectively as part of a holistic best interests test. Another layer of complexity arises in balancing parental rights with child protection imperatives. While the Constitution and the Children's Act grant parents responsibilities and rights, courts have held that these cannot override the child's safety.⁸³ However, in practice, some judgments have been criticised for appearing to favour parental contact rights despite credible risks to children.⁸⁴ The *B v K* case illustrates a more cautious approach, in which access was tailored to safeguard the child while preserving limited parental involvement.⁸⁵ International frameworks also play a guiding role. South Africa, as a party to the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, is bound to harmonise its domestic law with global child protection standards.⁸⁶ Courts frequently reference these instruments when interpreting statutory duties, reflecting their persuasive authority in shaping child-centred jurisprudence.⁸⁷

The Best Interests of the Child in Sentencing Primary Caregivers

On 26 September 2007, the Constitutional Court delivered judgment in *M v State*,⁸⁸ a case that examined how the constitutional principle that the best interests of the child must be paramount in all matters concerning children applies when sentencing primary caregivers of young dependants. The applicant, M, was a 35-year-old single mother raising three boys aged 16, 12, and 8. She was convicted of multiple counts of credit card fraud, involving approximately R29 000, and sentenced by the Regional Court to

⁷⁹ UN Convention on the Rights of the Child, 1989, art 12.

⁸⁰ *C.D.N v M.D.N* (093505/2023) [2023] ZAGPPHC 1885.

⁸¹ *C.D.N v M.D.N* (093505/2023) [2023] ZAGPPHC 1885 para 16, the father brought his application to obtain interim relief with respect to the children's primary residence because of concerns the children raised regarding their mother and maternal grandmother. On 17 September 2023, the mother's neighbour contacted the father through telephone and advised him that the children fled the mother's house crying. The children indicated to the neighbour that the mother and the grandmother were drunk. The children requested the neighbour to call their father to come and collect them. It was argued on behalf of the father that the children complained to different people about their mother and grandmother's drinking habits. Further, the children are exposed to emotional abuse by their mother and grandmother.

⁸² Alet Magdaleen Uys, "South African Courts' Differing Approaches to Determining Children's Views in Family Law Matters," *De Jure Law Journal* 56, no. 1 (2023): 309–29.

⁸³ In South Africa, a child's safety is paramount and takes precedence over parental rights under the Constitution and the Children's Act. Courts prioritise the child's well-being by prioritizing their protection from harm, neglect, and abuse, ensuring their right to appropriate care and alternative care when removed from their home. This principle ensures that parental rights cannot be exercised in a manner that endangers a child's physical, emotional, or mental well-being.

⁸⁴ Constitution sec 28(1)(b)–(d).

⁸⁵ *B v K* (441/2020) [2024] ZAFSHC 145.

⁸⁶ African Charter on the Rights and Welfare of the Child, 1990.

⁸⁷ In *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC), the Constitutional Court of South Africa declared that the mandatory minimum sentencing provisions in the Criminal Law Amendment Act 105 of 1997, as amended, were unconstitutional when applied to children aged 16 and 17. The Court found that these provisions violated the rights of children, particularly their right to have their best interests considered and the principle that imprisonment should be a last resort. The case established that while sentencing for child offenders must be tailored to the individual, the broad application of minimum sentences for serious crimes to this age group inappropriately constrained judicial discretion and led to a de-individualized sentencing process.

⁸⁸ 2007 ZACC 18.

four years of direct imprisonment.⁸⁹ On appeal to the High Court, one conviction was set aside, and her sentence was adjusted to imprisonment with eligibility for correctional supervision after serving eight months. Her further appeal to the Supreme Court of Appeal was unsuccessful, and she then approached the Constitutional Court.⁹⁰ Justice Sachs, writing for the majority, emphasised that sentencing courts have a constitutional duty to pay careful and informed attention to the rights and interests of children, particularly when the offender is their primary caregiver. He noted that this duty is not always adequately fulfilled in current judicial practice, which often prioritises punishment without considering the wider impact on children.

Sachs J found that both the Regional Court and the High Court failed to independently assess how M's imprisonment would affect her children, as required under Section 28(2), read with Section 28(1)(b), of the Constitution. Although recognising the seriousness of M's offences and the harm caused to the victims, Sachs J concluded that correctional supervision combined with restitution and counselling would serve the interests of the children, the community, the victims, and M herself more effectively than further incarceration.⁹¹ Therefore, the Court upheld the appeal and replaced the High Court's sentence with four years of imprisonment, suspended for four years on the condition that M committed no further dishonesty offences and repaid her victims. She was also placed under correctional supervision for three years, which required regular counselling and ten hours of community service per week. In a separate but concurring judgment, Justice Madala, supported by Justices Navsa and Nkabinde, agreed that the lower courts had not given sufficient weight to the best interests of M's children. However, he reached a different conclusion. Madala J noted that the children had extended family willing to care for them in M's absence and argued that the children's best interests could not be considered in isolation from society's broader interests in deterrence and punishment.⁹² On this basis, he would have upheld the High Court's sentence and dismissed the appeal. The majority judgment underscored the need for a shift in judicial thinking: sentencing should not only punish offenders but must also consider the constitutional rights of children who depend on them.

Effectiveness of Legal Frameworks in Protecting Children in Custody Battles

South Africa's legal architecture, which includes both domestic laws and international obligations, provides a strong theoretical basis for child protection in custody disputes where abuse is alleged. However, gaps in enforcement and integration of these legal tools often undermine their intended impact.⁹³ This section offers a critical reflection on whether the current laws and institutional mechanisms effectively safeguard children caught in contested custody cases involving abuse.⁹⁴ Even though Section 28(1)(d) of the Constitution guarantees every child the right to be free from abuse, neglect, and maltreatment, courts still differ significantly in how they handle allegations of psychological and emotional abuse.⁹⁵ Mezmur observes that many family courts still prioritise physical abuse over emotional harm, despite mounting evidence and legal precedent showing that psychological trauma can be just as damaging to a child's well-being.⁹⁶ This inconsistency leads to inconsistent rulings and insufficient protection measures in custody disputes.⁹⁷ The Children's Act contains several protective provisions, such as the duty to report abuse Section 110 and allowing for suspension of parental rights when contact is unsafe (Section 45(3)(b)).⁹⁸

However, implementation remains patchy, largely due to a shortage of skilled social workers and insufficient training for magistrates in child-sensitive procedures. The South African Law Reform Commission (SALRC) noted that backlogs in social worker reports and the scarcity of trauma-informed

⁸⁹ *M v State* para 2.

⁹⁰ *M v State* para 3.

⁹¹ *M v State* para 4-7.

⁹² *M v State* para 7-17.

⁹³ Bonthuys 'Legal Issues Affecting Child Custody in South Africa' 215-218.

⁹⁴ SALRC, 'Issue Paper 29: Family Violence and Custody' (2022) 11-13.

⁹⁵ Constitution sec 28(1)(d).

⁹⁶ Mezmur 'Custody and the Best Interests of the Child' 263-270.

⁹⁷ SALRC 16-18.

⁹⁸ Children's Act secs 110, 45(3)(b).

professionals delay assessments in abuse-related custody cases.⁹⁹ These delays not only prolong the litigation process but also increase the child's exposure to potentially harmful environments.¹⁰⁰

South Africa's commitment to child protection is also anchored in international instruments such as the CRC and the ACRWC,¹⁰¹ which emphasises the obligation to protect children from all forms of abuse. However, these instruments are rarely cited in local court rulings, limiting their influence in shaping child-centred jurisprudence.¹⁰² Legal scholar Bonthuys argued that this threshold for intervention should be adapted more broadly, especially in cases involving emotional abuse within South Africa.¹⁰³ On an institutional level, the Children's Act provides for multiple layers of protection through children's courts, family advocates, and specialised family violence courts under Sections 42, 47, and 10.¹⁰⁴

However, these mechanisms are often underused due to court delays, lack of prioritisation, and disparities in resource distribution across regions. According to the Department of Justice Annual Review,¹⁰⁵ fewer than 35% of custody cases involving abuse receive assistance from family advocates, despite courts having the discretion to request such support. The right of children to express their views, as protected by Section 10 of the Children's Act and Article 12 of the CRC,¹⁰⁶ is not always upheld. In many instances, children's voices are filtered through adults or completely disregarded based on assumptions about their age or maturity. Sloth-Nielsen maintains that the legal system must institutionalise child-sensitive interviewing and legal representation to ensure that participation rights are respected and enforced.¹⁰⁷

International Legal Frameworks on Children's Rights

United Nations Convention on the Rights of the Child

Since ratifying the United Nations Convention on the Rights of the Child (CRC) in 1995, South Africa has bound itself to international child protection standards, including those related to custody.¹⁰⁸ The CRC is the most far-reaching treaty on children's rights globally and has significantly shaped domestic legislative frameworks, particularly the formulation and interpretation of the Children's Act.¹⁰⁹ Foundational principles such as the right to non-discrimination, prioritisation of the child's best interests, the right to survival and development, and respect for children's voices are reflected in both international law and South Africa's own legal instruments.¹¹⁰

Article 3(1) of the CRC stipulates that in all decisions concerning children, whether made by courts, social services, legislatures, or administrative bodies, the child's best interests must be a primary consideration.¹¹¹ This aligns directly with Section 28(2) of the Constitution, reinforcing the constitutional expectation that children's well-being must guide all legal actions involving them, including custody disputes.¹¹² Furthermore, Article 19 of the CRC compels member states to shield children from every form of abuse, neglect, or violence, even when such harm occurs within the family context.¹¹³ This places an international obligation on the state to intervene when abuse arises during a custody arrangement.¹¹⁴ South African courts have increasingly turned to the CRC to guide decisions in family law contexts. In *M v Minister of Police*,¹¹⁵ the Pretoria High Court found that police failed in

⁹⁹ SALRC, 'Implementation Challenges in Child Custody' (2022) 19-21.

¹⁰⁰ Child Welfare South Africa, 'Custody Litigation Report' (2021) 6-9.

¹⁰¹ CRC, Art 19 and the ACRWC, Art 16.

¹⁰² Sloth-Nielsen and Mezmur, "South Africa's Child Law Reform: CRC's Role and Reach."

¹⁰³ Bonthuys 'International Custody and Abuse: Limits of the Hague Convention' 197-205.

¹⁰⁴ Children's Act secs 42, 47, 10.

¹⁰⁵ Department of Justice, 'Annual Review of Family Protection Services' (2023) 44-47.

¹⁰⁶ Children's Act sec 10; see also CRC, Art 12.

¹⁰⁷ Sloth-Nielsen 'Child Participation in Custody Litigation', 89-94.

¹⁰⁸ Sloth-Nielsen & Mezmur 'South Africa's Child Law Reform: CRC's Role and Reach', 1-27.

¹⁰⁹ Children's Act; see also UNICEF, 'Comparative Review of CRC in Domestic Legislation' (2022).

¹¹⁰ Constitution sec 28; see also CRC, General Principles, Articles 2, 3, 6, 12.

¹¹¹ CRC, Art 3(1); see also UN Treaty Series Vol. 1577.

¹¹² Constitution sec 28(2).

¹¹³ CRC, Art 19.

¹¹⁴ UNICEF South Africa, 'Child Protection in Custody Toolkit' (2022) 9-14.

¹¹⁵ *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) one WM died in police custody after he was seriously assaulted by fellow police cell inmates. As a result, his two wives sued the defendant, the Minister of Police, for the loss of support they suffered.

their constitutional and international duties when they did not protect a child from violence during a custody exchange, referencing both Article 19 of the CRC and South Africa's constitutional commitments.¹¹⁶

The judgment reaffirmed that, while international treaties like the CRC may not be self-executing, they remain pivotal for interpreting local statutes and constitutional rights.¹¹⁷ Legal scholars have also highlighted the value of integrating CRC principles into South African custody law. Sloth-Nielsen and Mezmur, for instance, point to the underutilisation of Article 12, which affirms a child's right to be heard in legal proceedings that affect them, as a persistent issue, often due to inadequate representation and procedures that are not tailored to children's developmental needs.¹¹⁸ These critiques are echoed by UNICEF's Child Participation Toolkit, which urges reforms such as the adoption of more child-friendly interview methods and regular reviews of custody arrangements in line with children's evolving preferences.¹¹⁹ For instance, in *Centre for Child Law v Minister for Home Affairs*,¹²⁰ the High Court recognised the CRC as a valid tool for interpreting domestic law in matters affecting children, further entrenching South Africa's responsibility to align its laws with international child protection standards.¹²¹ This case demonstrated the CRC's growing influence in shaping judicial reasoning, even in matters beyond direct custody disputes in which children's welfare is implicated. However, practical limitations remain. The South African Human Rights Commission Annual Review found that many lower courts seldom reference CRC provisions due to insufficient training and awareness among family law practitioners.¹²² In response, institutions such as the Law Society of South Africa (LSSA) and the Office of the Family Advocate have, since 2021, incorporated CRC-focused content into their professional development programmes to address this gap.¹²³

The African Charter on the Rights and Welfare of the Child (ACRWC)

The African Charter on the Rights and Welfare of the Child (ACRWC), adopted in 1990 by the Organisation of African Unity and ratified by South Africa in 2000, offers a regional framework that strengthens child protection in contexts such as custody disputes involving abuse.¹²⁴ Unlike the more universal approach of the CRC, the ACRWC incorporates African cultural norms and acknowledges systemic challenges such as poverty and social inequality that often shape custody litigation on the continent.¹²⁵ A cornerstone of the ACRWC, Article 4(1), stipulates that the child's best interests must be the primary consideration in any action undertaken by public or private actors concerning the child.¹²⁶ This principle complements Section 28(2) of the South African Constitution, reinforcing a rights-based, child-focused approach to custody cases involving allegations of maltreatment.¹²⁷

Additionally, Article 16 places an affirmative duty on state parties to shield children from "torture, inhuman or degrading treatment," including abuse within custodial relationships, and obliges them to establish preventative and remedial mechanisms across legal, administrative, and social

Furthermore, they also sued for loss of parental care suffered by their minor children as a result of the death of their father. Mothle J held that although South Africa, unlike some countries, did not have a statute providing for compensation to any child for damages consequent to the unlawful death of a parent at the hands of a third party, the law nevertheless recognised that constitutional damages could be awarded as appropriate relief in compensation for loss suffered as a consequence of the unlawful infringement of a constitutional right. In this regard, a court could fashion a new remedy and make an award in the form of constitutional damages as appropriate relief to compensate for an infringement of that right.

¹¹⁶ *M v Minister of Police* paras 18-20.

¹¹⁷ *M v Minister of Police* 23-25.

¹¹⁸ Sloth-Nielsen & Mezmur (n108) 14-17.

¹¹⁹ UNICEF 'Child Participation Toolkit' (2022) 6-8.

¹²⁰ In *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 T, the Pretoria High Court addressed the unlawful detention and deportation of unaccompanied foreign children. The court found that the actions of the Minister of Home Affairs and other respondents violated the children's fundamental rights as protected under the South African Constitution, particularly sections concerning the best interests of the child.

¹²¹ *Centre for Child Law v Minister for Home Affairs* paras 29-32.

¹²² South African Human Rights Commission, 'Annual Review of Children's Rights' (2023) 23-26.

¹²³ Law Society of South Africa (LSSA), 'Continuing Education Module: CRC Integration' (2021) 4.

¹²⁴ African Committee of Experts on the Rights and Welfare of the Child, 'Status List of ACRWC Ratification' African Union, (2023).

¹²⁵ J Sloth-Nielsen, "The Role of Regional Instruments in South African Child Law Reform," *Law, Democracy & Development* 15, no. 1 (2010): 37-45.

¹²⁶ CRWC, Article 4(1); African Union Treaty Series.

¹²⁷ CRWC, Article 4(1); African Union Treaty Series.

domains.¹²⁸ Further support for this approach is found in the Centre for Child Law's 2020 submission to the African Committee of Experts on the Rights and Welfare of the Child, which argues that the ACRWC strengthens national laws by compelling states to implement services that prevent abuse and rehabilitate affected children.¹²⁹ Notably, Article 20 calls for equal parental responsibility in child-rearing, provided that such responsibilities are consistent with the child's best interests, a standard often invoked in disputed custody cases involving alleged neglect or violence.¹³⁰

Legal scholars such as Sloth-Nielsen argued that the ACRWC expands the scope of South African family law by addressing issues like generational trauma, customary caregiving practices, and socio-economic vulnerabilities that often underpin abuse in custody disputes.¹³¹ These considerations are especially relevant in rural settings, where informal kinship care and traditional authority figures frequently play key roles in custodial arrangements.¹³² A unique element of the ACRWC is Article 31, which recognises children's responsibility to respect parents and elders, provided that such respect does not infringe on their rights.¹³³ This clause demands a careful judicial balance: while acknowledging familial hierarchies, courts are cautioned against tolerating abuse disguised as discipline or cultural practice.¹³⁴ Nonetheless, significant implementation hurdles remain. The South African Human Rights Commission's 2023 review of regional child protection instruments revealed that the ACRWC is rarely cited in family court decisions, largely due to limited judicial exposure and a scarcity of precedent directly engaging the Charter.¹³⁵ In response, institutions such as the University of Pretoria's Centre for Human Rights have introduced continuing legal education modules since 2022 to train practitioners in applying ACRWC norms to custody and abuse matters.¹³⁶

Challenges and Limitations in Judicial Protection of Children in Custody Disputes

In South Africa, the legal framework governing child custody disputes is primarily centred on the principle that a child's best interests are of paramount importance. However, applying this principle in custody disputes often poses significant challenges and limitations.¹³⁷ One of the primary challenges is the subjective nature of determining what constitutes the "best interests" of a child.¹³⁸ Courts are tasked with interpreting this concept, which can vary depending on individual perspectives and circumstances. This subjectivity can lead to inconsistencies in rulings and potential biases that influence decisions. Moreover, the legal processes involved in custody disputes can be lengthy and complex, causing emotional and psychological strain on the children involved.¹³⁹ Extended court proceedings can disrupt a child's sense of stability and security, which are crucial for their development.¹⁴⁰

¹²⁸ ACRWC, Article 16(1).

¹²⁹ Centre for Child Law, 'Submission to ACRWC Committee on Custody and Abuse' (2020) 7.

¹³⁰ ACRWC, Article 20.

¹³¹ Sloth-Nielsen, "The Role of Regional Instruments in South African Child Law Reform."

¹³² UNICEF South Africa 'Customary Care and Child Protection' (2021) 13-16.

¹³³ ACRWC, Article 31.

¹³⁴ SALRC, 'Family Law and Culture Integration Report' (2022) 19-21.

¹³⁵ South African Human Rights Commission, 'Review of Regional Child Rights Instruments' (2023) 25-28.

¹³⁶ University of Pretoria Centre for Human Rights, 'ACRWC Training Manual' (2022) 10.

¹³⁷ Simon Tebogo Lobaka, "The Failure of the South African Family Law System in Custody Battles: A Father's Perspective," *South African Review of Sociology* 54, no. 2 (2024): 177–99.

¹³⁸ Determining a child's "best interests" is challenging due to its inherent subjectivity and lack of universal definition, which requires careful contextual consideration of factors like age, culture, and individual circumstances to avoid compromising a child's fundamental rights and well-being. While legal frameworks often emphasise this principle in decisions, the challenge lies in providing objective guidelines for decision-makers to apply the concept in a nuanced and child-centered manner, ensuring that decisions are not adult-centric but rather promote the holistic development of the child.

¹³⁹ The legal processes for child custody disputes are often lengthy and complex and can cause significant emotional and psychological strain on children. This is due to the high stress of the legal proceedings, the intense emotions of the parents, and the impact of the conflict on a child's mental health, leading to increased anxiety and depression.

¹⁴⁰ Extended court proceedings can negatively affect a child's development by disrupting their sense of security and stability, which are vital for a healthy sense of well-being and confidence. The constant change, conflict, and unpredictability inherent in lengthy legal processes create an unstable environment, potentially causing stress, anxiety, behavioral issues, and even long-term health problems, especially in young children. Prioritising stability and minimizing disruption through swift, child-centered legal resolutions is therefore crucial for protecting a child's developmental trajectory.

The involvement of various professionals, such as social workers and psychologists, is often necessary to assess the child's best interests.¹⁴¹ Although their expertise is invaluable, delays in obtaining reports and assessments can prolong the legal process. These delays can hinder timely decisions in the child's best interests. Additionally, there is a concern regarding the adequacy of the legal framework in addressing cases of parental alienation.¹⁴² Parental alienation occurs when one parent undermines the child's relationship with the other parent, which can have detrimental effects on the child's well-being.¹⁴³ The current legal provisions may not adequately address this issue, potentially harming the child. The judiciary's capacity to handle the volume of custody disputes is another limitation.¹⁴⁴ Courts often face a backlog of cases, which can delay the resolution of custody disputes.¹⁴⁵ This backlog can result in prolonged periods of uncertainty for the child, affecting their emotional and psychological health.¹⁴⁶ Furthermore, the legal system's reliance on adversarial proceedings may not always be conducive to resolving custody disputes in a manner that prioritises the child's best interests.¹⁴⁷ The adversarial nature can exacerbate conflicts between parents, potentially leading to outcomes that are not in the child's best interests.

Procedural Safeguards in Child Custody Disputes and the Judicial Dilemma in Custody Matters

In child custody disputes, judges often rely on reports from investigative agencies¹⁴⁸ that are not disclosed to the parties to understand the family situation. This practice is often justified by the perceived need for expert guidance, a lack of confidence in the evidence presented during the proceedings, or both. Despite the value of investigative reports in child custody cases, there is a tension between two competing legal and social interests. On the one hand, fundamental principles of law emphasise that court decisions should be based on evidence presented openly in a fair trial. On the other hand, professionals such as social workers, who have specialised training and experience, are well-positioned to assess what serves the best interests of the child.¹⁴⁹ The strict due-process perspective holds that reliance on reports outside the formal court record undermines the legal ideal of a fair trial.¹⁵⁰

Furthermore, the statements made in these reports are not made under oath, increasing the risk of inaccurate or misleading information. The exclusion of such reports at trial also limits appellate review, as higher courts cannot evaluate the same evidence considered by the trial court.¹⁵¹

¹⁴¹ A multidisciplinary approach involving professionals like social workers and psychologists is crucial for comprehensively assessing a child's best interests, as these professionals bring diverse expertise to evaluate a child's developmental, social, and emotional needs within their familial context. This collaborative assessment process identifies and prioritizes family and child needs, helping to determine the most appropriate interventions and decisions, especially in complex situations such as custody disputes or child protection cases.

¹⁴² There are ongoing concerns about whether legal frameworks adequately address parental alienation, with critics citing a lack of recognition, training, and consistent intervention strategies within the courts. Challenges include identifying parental alienation, integrating therapeutic solutions, and a potential lack of coordination between legal, mental health, and child protection agencies. Solutions often involve judicial education, early intervention through therapeutic reunification programs, and a greater emphasis on the best interests of the child, treating alienation as a form of family violence or abuse.

¹⁴³ What is the effect of parental alienation on children? See also FF Susanna 'The Impact of Parental Alienation on Children' (2020).

¹⁴⁴ Joan S Meier and Vivek Sankaran, "Breaking down the Silos That Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals," *Va. J. Soc. Pol'y & L.* 28 (2021): 275.

¹⁴⁵ Laurie S Kohn, "Justice Delayed by Design: The Harms of Our Protracted Divorce System," *Villanova Law Review* 70, no. 1 (2025): 169–218.

¹⁴⁶ Kohn, "Justice Delayed by Design: The Harms of Our Protracted Divorce System." 160.

¹⁴⁷ Lloyd D Mazur and Charles P Rose Jr, "The Adversary Process in Child Custody Proceedings," *W. Res. L. Rev.* 18 (1966): 1731.

¹⁴⁸ The term "investigating agency" is used broadly here to include welfare agencies, court investigators, domestic relation investigators, court welfare workers, probation officers, juvenile officers, officers of social service departments, departments of public assistance, departments of domestic conciliation, police departments, departments of public welfare, friends of the court, psychiatrists, and psychologists.

¹⁴⁹ Robert J Bregman, "Custody Awards: Standards Used When the Mother Has Been Guilty of Adultery or Alcoholism," *Family Law Quarterly*, 1968, 384–412.

¹⁵⁰ The statement reflects a core principle of due process, where a fair trial requires that all decisions are based solely on the formal court record, ensuring impartiality and preventing reliance on outside information that could introduce prejudice, bias, or inaccuracy into the legal process. This perspective emphasizes transparency, accuracy, and accountability within the judicial proceedings, as the court record serves as the exclusive foundation for judgments, appeals, and reviews.

¹⁵¹ A legal principle where reports or statements not made under oath carry a higher risk of inaccuracy and misleading information because they bypass the scrutiny of sworn testimony. Consequently, the exclusion of such reports from a trial protects the integrity of the legal process by preventing unreliable evidence from being considered. This exclusion also supports robust appellate review,

Consequently, there is a general rule against using undisclosed social worker reports that are not formally admitted into evidence, consistent with the principle that a court should not consider material unknown to the parties. Even when the report author testifies in court, hearsay concerns may persist if the sources remain confidential.¹⁵² On the contrary, a more liberal perspective argues that properly prepared investigative reports provide judges with richer, more reliable information about family circumstances. Such reports can reduce contentious accusations, shorten proceedings, and provide practical guidance on custody and visitation arrangements, even if they pose certain due-process challenges. Regardless of the approach adopted, the central concern remains the child's best interests. The courts, therefore, face a difficult choice.¹⁵³ They may strictly adhere to due process requirements and risk being insufficiently informed about family realities, or they may treat child custody proceedings as non-adversarial, using investigative reports freely while potentially limiting a party's ability to challenge adverse information.

Adversary vs Non-Adversary Proceedings

Some scholars suggest that child custody proceedings are not truly "adversarial" but resemble informal hearings in which the court acts to protect the child as a ward.¹⁵⁴ This perspective prioritises the child's welfare over strict procedural technicalities, allowing the court greater flexibility to make decisions in the child's best interests. Child custody proceedings occupy a unique place in the legal system because they do not fit neatly into the traditional adversarial litigation framework.¹⁵⁵ In an adversary proceeding, the court primarily resolves disputes between opposing parties by weighing evidence, applying strict procedural rules, and safeguarding each party's rights.¹⁵⁶ This model is well-suited to matters such as contract disputes or criminal trials, where the contesting parties have distinct, often competing interests. However, custody disputes differ in both purpose and character. They are less about one parent "winning" or "losing" and more about ensuring that decisions serve the child's best interests.¹⁵⁷ In this sense, custody hearings often resemble non-adversarial proceedings, where the court acts less as a neutral referee between parties and more as a guardian of the child's welfare.¹⁵⁸ In effect, the child is treated as a ward of the court, and the judge assumes an inquisitorial role, seeking the most reliable information to determine what arrangement will promote stability, safety, and healthy development.¹⁵⁹ This shift in focus has significant implications for due process. If the proceedings are approached strictly adversarially, courts may exclude valuable evidence, such as social worker reports, because it does not

ensuring that appellate courts have access to the same properly vetted evidence as the trial court, allowing for a fair and accurate evaluation of the original proceedings.

¹⁵² Hearsay concerns can persist even if the report author testifies, because the confidential sources they relied on are still not subject to cross-examination, which is a primary reason hearsay is deemed unreliable. While the author can affirm their report, they cannot testify to the credibility of their sources, and without the sources being available, their information remains unverified and therefore potentially still constitutes hearsay.

¹⁵³ Courts in South Africa face a conflict in child custody cases between adhering to due process—which allows parties to challenge information—and the need for a flexible, child-centered approach that considers the realities of the family, even if it means relying on investigative reports in a less adversarial manner. This often leaves courts with a difficult choice: prioritize formal legal procedures, potentially hindering their understanding of the family's true circumstances, or embrace a less adversarial system that risks suppressing parties' rights to contest evidence.

¹⁵⁴ *Williams v Guynes* 97 S.W.2d 988 (Tex. Civ. App. 1936) where the court stated: The proceedings are necessarily informal. It is the right and duty of the trial court to ascertain all facts and to make such investigation of conditions which in his judgment will assist him in reaching a proper solution of the child's problems. Technical rules of practice are not to have controlling effect. The controlling issue on the merits is which custodian is for the child's best interest. The pleading in such cases is considered of little importance, and the judge exercising the jurisdiction of a chancellor has broad equitable powers. Id 989. Helen Simpson, "The Unfit Parent: Conditions under Which a Child May Be Adopted without the Consent of His Parent," *U. Det. LJ* 39 (1961): 347; Paul Sayre, "Awarding Custody of Children," *The University of Chicago Law Review* 9, no. 4 (1942): 672–92.

¹⁵⁵ Mazur and Rose Jr, "The Adversary Process in Child Custody Proceedings." 1-23.

¹⁵⁶ Adversary proceedings are a form of civil litigation where a plaintiff and defendant present their cases before a judge or jury, who then weighs the evidence to make a ruling.

¹⁵⁷ Custody disputes are centered on the best interests of the child, a principle that overrides parental desires and focuses on the child's well-being, health, and developmental needs rather than a parental win or loss. This "best interests of the child" standard is a guiding force in the legal system and requires evaluating a comprehensive set of factors to determine the most suitable living arrangement and care for the child.

¹⁵⁸ 'Child custody and guardianship in divorce' <https://divorceattorneycapetown.co.za/child-custody-and-guardianship-in-divorce/> (Accessed 13 September 2025).

¹⁵⁹ 'The Best Interest of the Child' <https://centreforchildlaw.co.za/wordpress21/wpcontent/uploads/2019/02/issue19.pdf> (Accessed 13 September 2025).

meet the technical requirements for admissibility.¹⁶⁰ Although this preserves procedural fairness for the parents, it risks depriving the court of insights into the child's living environment and emotional well-being.¹⁶¹ On the other hand, treating the matter as non-adversarial allows the court to admit a broader range of information, including investigative reports, expert assessments, and informal observations. This approach prioritises substance over procedure but raises concerns about fairness to the parties, who may not have the opportunity to challenge or rebut the information relied upon by the court. The courts must strike a delicate balance. Although child custody disputes cannot be treated as purely adversarial contests, due process protections should not be abandoned.¹⁶² The challenge lies in crafting procedures that both respect the rights of the parents and equip the court with the information necessary to make decisions centred on the child's best interests. This hybrid approach reflects the reality that custody proceedings are unique, requiring flexibility in legal process while never losing sight of the paramountcy of the child's welfare.

RECOMMENDATIONS

This study proposes the following recommendations:

Protecting children in custody disputes, particularly where abuse is alleged, requires more than well-drafted laws and international promises. What is needed is a child-centred system that works reliably in practice.

- First, the implementation of the Children's Act must be strengthened through consistent judicial training on child abuse, trauma, and the best-interests standard. Judges, magistrates, and legal practitioners should be equipped to recognise subtle patterns of abuse and to treat children's safety as a priority rather than a procedural afterthought.
- Second, greater institutional support is essential. Family advocates, social workers, and psychologists play a crucial role in custody matters, yet chronic under-resourcing undermines their effectiveness. Increased funding, reduced caseloads, and clearer inter-agency coordination would significantly improve decision-making and protect children from slipping through systemic gaps.
- Third, South Africa should move beyond formal compliance with international instruments such as the UN Convention on the Rights of the Child and the African Charter by actively integrating their principles into daily court practice. This includes standardised guidelines for handling allegations of abuse and meaningful mechanisms for monitoring judicial consistency.
- South Africa should strengthen the Children's Act 38 of 2005 by ensuring that institutions responsible for protecting children are held accountable through stronger enforcement, proper monitoring, and compulsory reporting of abuse and neglect cases.
- South Africa should take stronger steps to give practical effect to international children's rights instruments such as the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child by fully integrating their principles into domestic law and improving child-friendly access to justice.
- Ultimately, child protection in custody disputes must be treated as a living process, one that places children's lived realities, dignity, and safety at the heart of every decision. Laws set the foundation, but it is a thoughtful, consistent, and well-resourced application that turns legal protection into real protection.

¹⁶⁰ Under a strict adversarial system, social worker reports may be excluded if they fail to meet technical admissibility requirements, such as being considered hearsay or not reliably gathered and presented. The adversarial process, with its focus on challenging evidence, prioritizes technical accuracy and thorough testing, which can lead to the exclusion of even valuable evidence if it doesn't conform to strict legal standards, such as those for expert opinions or the elimination of hearsay.

¹⁶¹ Kyndra C Cleveland and Jodi A Quas, "What's Fair in Child Welfare? Parent Knowledge, Attitudes, and Experiences," *Child Maltreatment* 27, no. 1 (2022): 53–65.

¹⁶² In South African law, courts must indeed strike a delicate balance in child custody disputes by upholding the best interests of the child as paramount while simultaneously ensuring that the due process rights of all involved parties, including the child, are respected. This means a child-centred approach is required, where the adversarial nature of traditional legal proceedings is tempered by a focus on the child's specific circumstances, but this child-focused approach does not negate the fundamental rights of all parties to fair treatment and a proper hearing, as stated in the provided text, which highlights the need for a balanced perspective.

CONCLUSION

Protecting children in custody disputes, especially where abuse is involved, requires more than legal safeguards written in statutes or international agreements. It requires a living, breathing process that consistently places children's safety and wellbeing at the centre. South Africa has strong laws, such as the Children's Act, and has signed global commitments to protect children, but these frameworks only work if they are applied with care, fairness, and consistency. Too often, gaps in implementation, uneven judgments, and resource shortages mean children fall through the cracks. The Children's Act and related judicial system provide important safeguards, but gaps in implementation, uneven judicial application, and resource constraints weaken their impact. What is needed is an approach that treats children's protection as an ongoing responsibility before, during, and even after court proceedings so that their voices are heard and their needs are met in practice, not just on paper. Only then can the promise of "the best interests of the child" become more than a legal phrase and truly shape children's everyday realities. A critical review of South Africa's domestic and international legal frameworks shows that, while the best interests of the child are firmly rooted in law, their consistent protection in custody disputes involving abuse is far from guaranteed. Although South Africa's international obligations under instruments such as the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child reinforce these protections, translating these commitments into daily court practice remains incomplete.

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