

# THE 'BEST INTERESTS OF THE CHILD', PARENTS' RIGHTS AND EDUCATIONAL DECISION-MAKING FOR CHILDREN: A COMPARATIVE ANALYSIS OF INTERPRETATIONS IN THE UNITED STATES OF AMERICA, SOUTH AFRICA AND AUSTRALIA

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*The 'best interests of the child' is a principle that guides much decision-making about children's futures, albeit a principle without explicit conceptualisation for practice. In addressing competing rights of parents, children and school administrators, or even competing demands among those claiming parental interests, to make educational decisions and determine children's best interests, the three countries in this paper afford an overlapping kaleidoscope of legal perspectives. All three countries discussed in this paper have written constitutions, but only the Constitution of the United States of America (United States) has been interpreted to contain an implicit right of parents to make education decisions for their children. While the Constitution of South Africa, like that of the United States, contains a Bill of Rights, it protects the rights of children without mentioning parents. Australia, which has no Bill of Rights in its Constitution, protects children under statute and common law.<sup>1</sup> Both South Africa and Australia are signatories of the United Nations Convention on the Rights of the Child (CRC)<sup>2</sup> which influences their interpretation of best interest of the child. The United States, one of only two countries in the world (the other being Somalia) that is not a signatory, must balance the rights of children with parents' constitutional right to direct the education of their children. South Africa's Constitution, unlike that of Australia and the United States, expressly provides that the best interest of the child is the governing principle in addressing all matters involving the child. This paper explores the ways these three countries recognise the best interests of the child but differ in implementation of that concept, examining along the way the different legal issues and contestations that emerge, with particular emphasis on educational matters. The import of the United States and South African approaches for Australia are also examined.*

## I PARENTAL INVOLVEMENT, EDUCATIONAL DECISION-MAKING AUTHORITY AND THE BEST INTERESTS OF THE CHILD IN THE UNITED STATES OF AMERICA

The opportunity for, and expectation of, parental involvement in the education of their children is a staple of the American educational system, not just because of an implied constitutional right (discussed later), but also through direct legislative intent at the state level.<sup>3</sup> The absence of

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parent participation in their children's education has been decried by educators as a contributing factor to a wide range of problems in schools, from poor academic performance to disciplinary infractions.<sup>4</sup> While parent involvement is generally viewed as synchronistic with, and supportive of, the education provided their children in schools, such involvement can also constitute legal challenges to school decisions considered detrimental to their children's best interests.<sup>5</sup>

Normally, the best interest of a child will be served by parent participation in the child's education. One issue school administrators face is how to respond with respect to parents' rights and the best interests of the child, where parents divided by the custodial terms of a divorce decree disagree on some aspect of their child's education — an area of significance given today's social environment with high divorce rates<sup>6</sup> — or where persons who are not natural parents seek access to student information.

The choice between, or among, parent demands requires a standard for determining which to accommodate. While the best interest of the child seems like a natural standard to use, parents in the United States have a constitutional right to direct the education of their children. Thus, how does the best interest of the child standard align with the rights of parents to make decisions for their children and should one standard, and which, take precedence where a conflict occurs?

The United States has a long judicial and statutory history of protecting the role of the parent to make educational decisions on behalf of their children. As noted earlier, the right of the parents to direct the education of their children was first given constitutional protection in the United States over eighty years ago in *Meyer v U.S* (*Meyer*)<sup>7</sup> and *Pierce v Society of Sisters* (*Pierce*),<sup>8</sup> and more recently in *Wisconsin v Yoder* (*Yoder*),<sup>9</sup> where the Supreme Court created and enforced such a right under the liberty clause of the Fourteenth Amendment to the *Constitution*.<sup>10</sup> Over the intervening eight decades since *Meyer* and *Pierce*, federal and state courts have sought to apply this right to a variety of settings<sup>11</sup> while Congress and state legislatures have sought to codify the role and rights of parents in their children's education.<sup>12</sup> While the Supreme Court has recognised that students have constitutional rights in schools, a further issue that is beginning to arise for the courts occurs when children's rights come into conflict with the parents' right to make educational decisions for their children.<sup>13</sup> A further basic issue that arises in the United States, given the implied parental right, depends very much on a determination of who is a parent. Given the strong presumption that parents can act on behalf of their children in making educational decisions, courts in the United States have yet to sort out in a consistent and coherent manner the extent to which the constitutional rights of students should take precedence over the rights of parents.<sup>14,15</sup> The issue may not just be constitutional but who should have priority in determining the best interests of the child — parents, children or schools.

## II EXAMINING THE BEST INTEREST STANDARD OF THE CHILD IN THE UNITED STATES

Although not a signatory to the CRC, the legal concept, 'best interest of the child', has emerged over time in common law in the United States, through family law. It occurs in the United States almost solely in only two situations: (1) where courts must determine parental responsibilities between parents who are separating or being divorced; and (2) where courts are severing temporarily or permanently the parent-child relationship, frequently involving some form of child abuse. These two situations generally invoke interpretations of state law, although, as evident in the attendant discussion, federal issues concerning the federal constitutional and statutory rights of parents to make decisions for their children frequently can be superimposed on the state's definitions of best interest of the child. Worth noting, though, is that the state law

interpretations of best interest of the child in educational settings are very much a twentieth century development.

The nineteenth century American common law viewed the interests of the child as a balancing between the interests of the parents and those of the school. Rarely, if ever, did courts frame the issue as to what would be best for the child. The best interest test has found judicial acceptance in the United States in supporting the educational choices of a custodial parent. In the United States, a court's custody determination in a divorce decree is critical in terms of the relative rights of parents as reflected in the following observation by a Tennessee appeals court in *Anderson v Anderson*.<sup>16</sup>

An initial custody decision, once final, creates new legal relationships between the parents themselves and between each parent and the child. It also creates a new family unit now commonly referred to as a 'single parent family.' This new family unit is entitled to a similar measure of constitutional protection against unwarranted governmental intrusion as is accorded to an intact, two parent family. A divorce does not significantly lessen a custodial parent's child rearing autonomy, and the courts cannot intrude into the educational decisions made by a custodial parent unless these private decisions were illegal or were affirmatively harming the child.<sup>17</sup>

In *Anderson*, the court held, despite expressing reluctance to interfere in parental decision-making rights regarding education or family matters, that the best interest of the child was the appropriate standard in determining whether a mother could remove her child from the public school and home-school her. Because the divorce decree had created a joint custody relationship between the parents, the appeals court ruled that the trial court was permitted to 'break the tie'<sup>18</sup> between the mother who provided the primary physical residence and the joint custody father. In this case, the court found that to create a presumption in favor of the mother's choice of home schooling over the father's choice of the child's continuation in the public school would relegate the joint-custody father to 'a powerless position' and 'render meaningless' the joint custody relationship.<sup>19</sup> The appeals court found persuasive the child's poor academic performance and attendance at the public school, the mother's holding only a high school diploma, and her full-time employment to support the need for the child to stay in the structured environment of the public school. While not finding the mother unfit, the appeals court accepted the trial court's conclusion that, 'Mother has neither the time, nor the detachment, nor the ability to, by herself, manage the educational needs of this child',<sup>20</sup> in upholding the trial court's decision denying home instruction as 'focus[ing] on the best interests of [the child]'.<sup>21,22</sup>

### III SPEAKING FOR THE CHILD IN THE UNITED STATES

Most of the litigation in the United States involving disputed claims by parents has involved disputes between custodial and noncustodial parents. The recent pledge of allegiance case, *Elk Grove Unified School District v. Newdow* (*Newdow*),<sup>23</sup> has drawn attention to a subset of education litigation that features competing demands by custodial and noncustodial parents. In *Newdow*, the US Supreme Court refused to address the merits of a noncustodial parent's (father's) challenge that California's statutory provision for teacher-led recitation of the pledge of allegiance, with its phrase 'under God,' in every public school violated the establishment clause.<sup>24</sup> The custodial parent (mother) in *Newdow* did not object to her daughter's participation in the pledge and, thus, was not a party to the lawsuit.<sup>25</sup> However, the Supreme Court determined that, to the extent that the father in *Newdow* lacked standing under California law as a noncustodial parent to make educational

decisions for his daughter, it would not address the father's constitutional establishment clause question.<sup>26,27</sup>

In *Crowley v McKinney (Crowley)*,<sup>28</sup> the Seventh Circuit in a 2-1 decision shielded the best interest of child decision reflected in a divorce decree from broad constitutional assaults by a noncustodial parent.<sup>29</sup> In *Crowley*, the divorce decree declared that the custodial parent (mother) 'shall have the sole care, custody, control and education of the minor children' while also providing that both parents 'shall have joint and equal rights of access to records that are maintained by third parties, including ... their education ... records'.<sup>30</sup> The noncustodial parent (father) claimed under the liberty clause's right of parents to direct the education of their children that the principal and superintendent of the school his children attended had failed to adequately supervise his child in response to complaints of bullying, had refused to permit him (the father) on school grounds to serve as a playground monitor to protect his child, and had refused to provide him with information regarding his child.<sup>31</sup> In sweeping aside the father's liberty clause claim to direct the education of his children, pursuant to *Meyer v Nebraska*,<sup>32</sup> *Pierce v Society of Sisters*,<sup>33</sup> and *Wisconsin v Yoder*,<sup>34</sup> the court observed that '[these cases] concern the rights of parents acting together rather than the rights retained by a divorced parent whose ex-spouse has sole custody of the children and has not joined in the noncustodial parent's claim'.<sup>35</sup> More pointedly, the Seventh Circuit noted that the only federal liberty clause right plaintiff had, namely 'the right to choose the school and if it is a private school to have a choice among different types of schools with difference curricula', had been surrendered in the divorce decree.<sup>36</sup>

The *Crowley* decision indicates that the custodial responsibilities for a child determined in a divorce decree by a best interest of the child standard are not readily assailable by challenging school authorities under constitutional theories, despite the *Crowley* dissenting justice's lament that 'a noncustodial parent's fundamental rights are not entitled to the same degree of protection as those of the custodial parent'.<sup>37</sup> While the dissenting justice's observation may be accurate that 'the majority's rule would result in quite a few children "left behind" in the sense that the states could with impunity deprive one of the two parents of the right to participate in the child's education',<sup>38</sup> the solution is a state court's reassessment of the best interest of the child under the divorce decree,<sup>39</sup> not a broad constitutional frontal assault on the school.<sup>40</sup>

Both *Newdow* and *Crowley* demonstrate the difficult dilemma facing a school administrator who must implement state statutory curricular requirements but who may be called upon to address competing demands by divorced parents that underscore an ongoing (and, perhaps, bitter) dispute between parents as to which one can make educational choices for their child. Further difficulties arise under federal state statutes that have varying definitions of a parent where administrators must decide whether the person seeking access to student records, school facilities, or other information is entitled to the access demanded.

In *Taylor v Vermont Department of Education (Taylor)*,<sup>41</sup> the Second Circuit Court of Appeals, in the only other federal circuit court decision to date (other than *Crowley*) addressing the competing custodial and noncustodial claims, sorted out competing demands under the *Individuals with Disabilities in Education Act (IDEA)*<sup>42</sup> and the *Family Educational Rights and Privacy Act (FERPA)*.<sup>43</sup> In this case, plaintiff-noncustodial mother demanded access to her child's records and an independent educational evaluation (IEE) at public expense under IDEA and, under FERPA, access to her child's records and the right to challenge the content of her child's records.

The state trial court in *Taylor*, in fashioning a divorce decree, had 'place[d] the parental rights and responsibilities for the child ... both legal and physical fully with the defendant-father ... [and

had] allocate[ed] all legal rights and physical rights regarding the choice of schooling for the child ... to the father'.<sup>44</sup> The mother was accorded 'a right to reasonable information regarding the child's progress in school and her health and safety'.<sup>45</sup>

Under IDEA, parents are accorded an extensive catalogue of rights, among which are: consent to evaluation;<sup>46</sup> inclusion as a member of their child's Individualised Education Program (IEP);<sup>47</sup> an independent education evaluation at public expense (IEE);<sup>48</sup> examination of child's records;<sup>49</sup> written prior notice when a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child;<sup>50</sup> member of group making decision regarding placement;<sup>51</sup> and, an impartial due process hearing.<sup>52</sup> However, this list of rights means little without a definition of a 'parent'. The 2004 *Reauthorization* of IDEA expanded the definition 'parent' beyond that of a 'legal guardian' and 'an individual assigned ... to be a surrogate parent' that had been added in 1997.<sup>53</sup> The term, 'parent', now also includes 'a natural, adoptive, or foster parent of a child', and 'an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare'.<sup>54</sup> With this expanded definition of a parent, the United States Congress has 'establishe[d] a range of persons who may be considered a parent for purposes of IDEA, but does not require that any and all such persons must be granted statutory rights'.<sup>55</sup> Sorting out who is entitled to represent the child's interests as a parent under the IDEA's broadened definition has thus seemingly been shifted to the school administrator and to the courts when litigation ensues.

In *Taylor*, the Second Circuit rejected the noncustodial plaintiff's (mother's) view that both parents under IDEA 'presumptively enjoy privileges under the statute'<sup>56</sup> until the state has brought a proceeding to terminate their parental status, observing that plaintiff's interpretation could lead to one of two unacceptable results: (1) if all persons granted parental rights under the statute exercised them, one would have 'the absurd result that natural parents, guardians, and persons acting in the place of a parent may all exercise the same rights simultaneously'; or, (2) IDEA would be interpreted as 'set[ting] up a hierarchy, so that natural parents presumptively enjoy privileges under the statute while the other persons listed ... may exercise IDEA rights only when there has been a complete termination of a natural parent's status or the natural parents are deceased'.<sup>57</sup> In the absence of the IDEA or its regulations determining which person has authority to make claims on behalf of a child under IDEA, the court looked to state law where the trial court in this case, by revoking the plaintiff's right to participate in her child's education, led inevitably to the conclusion that plaintiff lacked standing to demand a hearing on the appropriateness of her daughter's education.

However, the Second Circuit allowed plaintiff's s 1983 records access claim under the IDEA where a regulation 'presumed that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce'.<sup>58</sup> Thus, under the IDEA, even a noncustodial parent retains the right to 'reasonable information regarding the child's progress in school and her health and safety'<sup>59</sup> and on remand a federal district court would have to determine what would constitute 'reasonable information'.<sup>60</sup> Plaintiff, though, did not have s 1983 access under FERPA to student records<sup>61</sup> where, although a FERPA regulation provides that 'either parent' has 'full rights' under the statute, that access is denied where a school is provided with 'a court order ... or other legally binding document relating to such matter as divorce, separation, or custody that specifically revokes these rights'.<sup>62</sup> The divorce decree granted the father 'all legal rights over education' because '[t]he decision to

bring a FERPA hearing to challenge the content of [the daughter's] records certainly [fell] within the authority given to the natural father to make educational determinations on behalf of [his daughter]'.<sup>63</sup>

The litigation under the IDEA with its broadened definition of a parent to include 'an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare'<sup>64</sup> opens up the door for access to student information by those who are not natural parents. The notion that residency alone might confer parental rights under the IDEA represents a significant expansion of the concept of a parent. The Second Circuit's decision in *Taylor* leaves unclear how school administrators and courts might address demands by persons other than parents where the person making the demand has no state claim under a divorce decree or custody order. Nothing in the IDEA precludes a determination of a parent on some kind of hierarchy among the competing persons or, in the alternative, that competing persons may not all be entitled to represent the child. The *Taylor* court's deference to state law, though, suggests, perhaps, that the best interest of the child which is the critical factor in determining custodial rights in a divorce decree might also be the appropriate standard for resolving competing demands.

However, the IDEA with its responsibility imposed on public school districts to find and evaluate students (using a school psychologist) who may be eligible for special education services and then provide such services depending on the nature of a disability presupposes that parents would want their children to receive special education services. In a recent, troublesome decision, *Fitzgerald v Camdenton R-III School District (Fitzgerald)*,<sup>65</sup> the Eighth Circuit Court of Appeals held that a public school district could not use a statutory administrative hearing procedure [referred to as a due process hearing] to compel the parents of a home-schooled child to have the child evaluated to determine whether the child had a disability and was in need of special education services. In interpreting an IDEA provision that a school district 'may' use a due process hearing to compel evaluation where 'the parent of [a] child does not provide consent for an initial evaluation a school district',<sup>66</sup> the Eighth Circuit rebuffed the district's efforts. The court held that, given the discretionary language in the statute, the school district had no authority to compel evaluation where parents refused consent, privately educated their child, and waived all IDEA benefits. The child at the time of the *Fitzgerald* decision was 14 years old and no effort was made to discuss what the best interest of the child might be in terms of determining whether that child had a disability, or, indeed, what the views of the 14-year-old child might have been regarding an evaluation. Because the child had been in the public schools for several years prior to his removal by his parents and the request for evaluation reflected observations by school personnel, one wonders whether such parent veto power will serve the long-term best interests of a child who may be adversely affected in the future by a disability that could have been addressed while the child was still in school. Whether the United States Congress will choose to amend this part of the IDEA in a future reauthorization remains to be seen, but even if Congress were to grant school districts the authority to compel evaluations, such authorisation will most likely be challenged under the liberty clause right of parents to make educational decisions for their children.

Some states have enacted statutes with language declaring that both custodial and noncustodial parents will have the same rights regarding access to student records, but with the general proviso that such rights are subject to court orders to the contrary.<sup>67</sup> These statutes, although facially permitting public school administrators to treat both parents equally, can serve to complicate the administrators' decision-making process where the custodial parent demands that the school

deny the requests of the noncustodial parent based on provisions in divorce decrees. The extent to which school administrators have the time and training to interpret the orders of divorce courts is problematic. Such competing demands made on school administrators suggest that they may become (as in *Newdow*) parties to litigation that is, in reality, a continuation of the domestic dispute that led to the divorce in the first place.<sup>68</sup> Complicating the problem is that most of the state statutes concern only access to records, which leaves unaddressed the knottier issues of noncustodial parents seeking to compel action by school administrators based on information acquired from the records. In addition to the demand for education records,<sup>69</sup> the demands of noncustodial parents can extend to decisions regarding their children's curriculum,<sup>70</sup> or assertion of procedural rights in discipline situations.<sup>71</sup>

Newly formulated statutes in a few states permitting parents to petition school boards concerning a broad range of curriculum-related issues regarding their children have also broadened perspectives of the definition of a parent.<sup>72</sup> For example, under the *Texas Parents Rights and Responsibilities Act*, parents have access 'to all written records of a school district concerning the parent's child',<sup>73</sup> can review their child's teaching and test materials,<sup>74</sup> can remove their child temporarily from classes conflicting with their religious or moral views,<sup>75</sup> and can petition the school principal to add a course, allow their child to attend a course for credit above the child's grade level, and allow the child to graduate early.<sup>76</sup> Under the statute, a parent 'includes a person standing in parental relation', although this 'does not include a person as to whom the parent-child relationship has been terminated or a person not entitled to possession of or access to a child under a court order'.<sup>77</sup> The notion that a parent can be defined as a person 'standing in parental relation' suggests, although certainly does not compel, a finding that a parent could be a person based on factors other than natural parenthood, such as distant family relationships or even just residency.<sup>78</sup> Perhaps, the broadening of the definition of a parent will in most cases serve the best interest of children, even where multiple persons are entitled to information regarding a child, but such broadened definitions will most assuredly become invitations to litigation in at least two situations: where access to information is challenged by one person qualifying as a parent against another such person; or, where the school administrator seeks by court order to determine whether granting access to students or student information by any person or persons qualifying as a parent serves the best interest of the child.

Similar statutes in other states have to date generated little reported judicial or legislative assistance in resolving conflicts between custodial and noncustodial parents where they disagree regarding curricular matters.<sup>79</sup> However, the judgments recorded so far, and accompanying or framing legislation, show that the issue of who determines the child's best interests in education is expanding in complexity in the United States.

#### IV BEST INTEREST OF THE CHILD AND SOUTH AFRICA

##### A *The Impact of International Law on South African Judicial Decision-Making*

International concern for the well-being and best interests of the child has emerged as a matter of prime importance in South Africa in recent years. When South Africa ratified the *International Convention on the Rights of the Child*<sup>80</sup> in June 1995, it contracted an international obligation to bring the laws of South Africa into conformity with the provisions of the *Convention*, since there is a general rule of treaty law that, upon ratification, a State Party assumes an obligation to give effect to that treaty's provisions in domestic law.<sup>81</sup>

The significance of the *Convention* concerns the heightened status that it enjoys in the South African legal framework due to major features of the *Convention* that are guaranteed in s 28 of the *Constitution*.<sup>82</sup> One of the foundational rights of the *Convention*, that the best interests of the child should be of primary importance in all matters affecting the child, has been enshrined in s 28(2) of the *Constitution*.<sup>83</sup> In at least two court cases<sup>84</sup> the South African courts have held that the reach of the best interests principle cannot be limited to the rights specified in s 28(1)<sup>85</sup> and that they must be interpreted to extend beyond those specific rights. It follows that the best interests principle can potentially affect a vast arena of judicial activity.

With regard to education specifically, the *Wittmann* case<sup>86</sup> looked at a mother who demanded that her daughter not be compelled to join the religious observances at her German private school. The court referred to articles 2 and 8 of the *African Charter on Human and People's Rights*<sup>87</sup> and article 9 of the *European Convention on Human Rights*<sup>88</sup> which recognise the right to freedom of religion, before it concluded that this right could validly be waived in terms of s 15(2) of the *Constitution*.<sup>89</sup> This section did not apply to private schools and their regulations.

## V THE BEST INTEREST STANDARD IN SOUTH AFRICA

Intensive debate about the best interest standard has taken place in many reported judgments. What is best for a specific child cannot be determined with absolute certainty. The courts are left with the task of determining the best interests of the child, yet there is no simple and easily applicable way of establishing these interests.<sup>90</sup> The problem remains whether the court should attend to everything that affects the child or whether certain considerations should be disregarded.

In custody disputes the South African court has the duty to award custody on the basis of what it believes to be in the best interests of the child. When dealing with the concept best interests of the child, the first question that needs to be addressed is whether the child's interests should be viewed from a short-term, medium-term or long-term perspective. The second question is whether these interests should be viewed from a subjective or objective point of view.<sup>91</sup>

Although the *Convention on the Rights of the Child* does not define these best interests, it would appear that adult decision-makers should determine them, based on objective criteria rather than the child's subjective wishes.<sup>92</sup> It thus becomes clear that the best interests of the child cannot be determined with absolute certainty, but that they rest largely on speculation.<sup>93</sup>

Unfortunately, during divorce proceedings, children can become the victims, since the adversarial legal process itself exacerbates their suffering in the sense that it can focus on the rights of the parents instead of the needs of the children.<sup>94</sup>

## VI SPEAKING FOR THE CHILD IN SOUTH AFRICA

Determining the best interests of the child in custody cases remains in the hands of the presiding judge, since the State has an obligation to safeguard the welfare of children. At the same time it is evident that the conflict between parental authority and the child's best interests is still unresolved in South African case law. The interests of children have been conceptualised in terms of parental interests.<sup>95</sup> While most parents are motivated to protect their children's emotions, there may be emotions that could compromise these intentions during divorce proceedings.<sup>96</sup>

In *McCall v McCall (McCall)*<sup>97</sup> the court set out guiding factors that a court must take into account when granting an application concerning custody of children.<sup>98</sup> The applicant must satisfy



the court that he or she has the intelligence, character, sense of responsibility and understanding to exercise the custody of a child in a manner that will be in the best interests of the child. The parent should thus possess the necessary skills and responsibility to fulfil the role as custodian parent in all respects. In *McCall*, the court was concerned with two separated parents who competed for the custody of their 12-year-old son. Custody was awarded to the father because his child stated a clear preference to be placed in his father's care. The court held that if the child had the necessary intellectual and emotional maturity to express his or her preference and to make an informed and intelligent judgment, weight should be given to the child's preference. What should therefore be considered, is what is in the best interests of the child.

Arguably the most famous example concerning a nominally children's rights related issue is that contained in the efforts of an unmarried father to pursue the acquisition of some legal title in respect of his biological son. In the first three cases<sup>99</sup> *Fraser* attempted to discredit the placement order of the children's court, questioned various procedural issues, attacked certain regulations of the *Child Care Act 74 of 1983* and raised a range of issues related to equality. The latter included accusing the court of unfair discrimination against the father of children born out of wedlock on the grounds of race, religion, gender and marital status. In *Fraser v Children's Court (Fraser)*<sup>100</sup> the Constitutional Court condemned the section of the *Child Care Act* that obviated the need to obtain the consent of the father of an illegitimate child to adoption. Yet, even though the Constitutional Court required new legislation to be drafted, which has occurred,<sup>101</sup> no aspect whatsoever concerning a children's right argument was raised in these first three court decisions. Issues related to equality dominated these cases. Children's rights only came into play three years after litigation had commenced, in *Fraser v Naude and another*.<sup>102</sup> The Court's consideration of the best interests of *Fraser's* child being paramount outweighed the usual procedural ground for setting aside lower court decisions, such as whether there are reasonable prospects of success on the merits of the case. Thus, the court found, since three years had elapsed since the child's first placement, and seeing that the child was comfortable with his adoptive parents, his best interests determined that litigation concerning the adoption should not continue.<sup>103</sup> The best interests of the child were therefore valued stronger than that of the interests of justice.<sup>104</sup>

In *Minister for Welfare and Population Development v Fitzpatrick and others (Fitzpatrick)*,<sup>105</sup> the focus of the legal challenge was on adoption provisions that prohibited non-nationals from adopting South African children.<sup>106</sup> The applicants, having four children of their own, took in foster children while staying in South Africa. Liable to transfer back to their country of origin, the couple wished to adopt a foster child who had been living with them for two years and thus asked the Constitutional Court to declare the prohibition unconstitutional.

Approaching the matter from the paramountcy of the best interests of the child, the Court in *Fitzpatrick* held that this prohibition was too blunt and all embracing an instrument.<sup>107</sup> The Court found that it was obviously in the best interests of this child to remain with his caring family. At the same time the Court mentioned the fact that article 21(b) of the UN *Convention*<sup>108</sup> supported the reasoning of the Court and that the obligation to consider the principle of subsidiarity, that is, inter-country adoption, stemmed from the imperative found in the *Constitution*.<sup>109</sup>

Another case of note is that of the *The Government of the Republic of South Africa v Grootboom and others (Grootboom)*<sup>110</sup> in which a group of families, including young children, were evicted from land which they had lawfully occupied. Their belongings were destroyed and their living quarters were bulldozed, leaving them literally stranded without shelter during a period of severe rains. They challenged the Court to compel the local municipality to provide them with minimum shelter, access to water and access to basic sanitation.<sup>111</sup> While the lower

court decision upheld the claim on the basis of the children's right to shelter<sup>112</sup> rather than on the basis of s 26 described above, the Constitutional Court upheld the claim that the state had failed to meet the obligation placed on it to provide emergency housing relief for people in desperate need. Part of the judgment turned to the children's rights clause and the implications of a child's right to shelter. This Court held the view that the rights specified in s 28(1)(c)<sup>113</sup> were largely reflective of components of the duty of parental support as established in common law and that this section must be understood in that context. Therefore, these rights must be read together with the right of the child to family care or parental care or to appropriate alternative care when removed from the family environment,<sup>114</sup> the former section encapsulating the scope of care that children should receive in our society and the latter ensuring that children receive proper parental or familial care.<sup>115</sup> The Court stated that, where children are in parental or familial care, the state's obligation would normally entail passing legislation and creating enforcement mechanisms for the maintenance of children and their protection from abuse, neglect or degradation.<sup>116</sup> Concerning the provision of aspects such as land, housing, food and social assistance, the judgment implies that the state only needs to provide these on a programmatic and co-ordinated basis, subject to available resources. *Grootboom* thus means that children have no *a priori* claim to basic provisioning deriving from s 28 of the *Constitution*.<sup>117</sup> Moreover, the concern of the lower court that the best interests of the children should be the paramount concern<sup>118</sup> was supplanted with the warning that the carefully constructed constitutional scheme for the progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand.<sup>119</sup>

South African education takes place within the South African legal system, in the context of the *Constitution*. However, learners' rights are not co-extensive with those of adults.<sup>120</sup> The equal protection clause of the *Constitution*<sup>121</sup> is an example of a situation where certain limitations are inherent in the very definition of the concept. *Equal protection* then requires per definition that unequals, such as learners and educators, be treated unequally.<sup>122</sup> The courts are challenged with not only defining and interpreting the rights and interests of learners so as to protect them against abuse, but also with ensuring that the duty and responsibility of educators to exercise control and discipline over the educational process are not undermined.

## VII BEST INTERESTS OF THE CHILD AND PARENTS' ROLES IN EDUCATIONAL DECISION-MAKING IN AUSTRALIA

### A *Contexts for Decision-Making Rights in Australia*

The Australian Constitution (Commonwealth of Australia Constitution Act 1900) (*Constitution*) contains little reference to education, parents' or children's rights.<sup>123</sup> However, schools in Australia are highly regulated by federal and state legislation with curriculum and other educational matters governed by legislated authorities at the state (or territory) level.<sup>124</sup> While education is generally held to be a state policy area,<sup>125</sup> the Federal Government in recent times has been increasingly wielding policy-made power through financial allocations to the states requiring compliance with funding conditions. These statutes are directed at all sectors: government (or public) schools; and non-government schools, comprised of Catholic schools and independent (including other secular) school sectors. The availability of public funding on a per capita student basis to all schools, regardless of sector, ensures that legislated control can be strong and is observed. State system authorities establish or accredit curriculum that schools are to follow, and essentially establish all processes such as external reporting and accountability

guidelines. In Australia, parents have limited capacity to direct children's schooling apart from the choice of school their child will attend.<sup>126</sup> Overall, in Australia, in comparison to the United States where individual rights are strongly entrenched and a mechanism for rebutting state control, and in South Africa with the clear constitutional intent about children's rights and best interests, Australia appears to be a strongly state-directed nation.

An example of this is the recent legislative amendment regarding home schooling in Queensland. Announced as reforms recognising that home schooling is a legitimate alternative form of schooling, the new legislation however tightens the control on when this can occur. Parents need to be registered and to provide a 'summary of the educational program to be used, or learning philosophy to be followed, for the home education'.<sup>127</sup> Further, parents must also ensure the child receives a 'high quality' education and agree to provide 'to the chief executive a written report on the educational progress of the child'.<sup>128</sup> Clearly this leaves open to contestation two further matters. First what would happen if the Chief Executive decided to direct parents to have a child assessed externally, as in the United States case *Fitzgerald*?<sup>129</sup> If the parents refused, the Chief Executive has the authority to deregister the home-schooling environment. However, specialist assessments can require medical assessments and parental approval even for children in schools. The second issue is what standard will be used to deem if a child's educational progress is satisfactory, given the parents submit a curriculum or philosophy to be followed. This example demonstrates the way legislative power, and state authority, appear to preempt concepts of parental rights in education in Australia.

As in the United States, parental involvement in education is seen as critical to children's success. The Federal and State ministers of education have identified parents as 'the first educators of their children'.<sup>130</sup> Parents are promoted as partners in the education process with schools. However, the reality appears to be that legislation, particularly in education, focuses more on the responsibilities of parents to meet government-imposed requirements, than rights. A parent who does not ensure their child attends school during the compulsory years may be fined \$1000, or fined if their child does not participate in work or training in the 'participatory' years following compulsory education.<sup>131</sup>

As Australia does not have a Bill of Rights, individuals in Australia, either adult or child, do not have individual rights in the sense assigned directly to or implied for individuals under the United States Bill of Rights, or the United States and South African *Constitutions*. On the part of children, however, as a signatory to the *United Nations Convention on the Rights of the Child* (UNCRC),<sup>132</sup> Australia has incorporated the basic principles of the *Convention* — decisions to be made in the 'best interests of the child'<sup>133</sup> and children to have increased involvement in decision-making about their future in accordance with their growing capacity<sup>134</sup> — into a number of legal areas, that, as in South Africa, can impact on educational matters.

While the best interests principle is not directly incorporated into statutes regarding education provision,<sup>135</sup> the principle has influenced the development of other areas of law affecting children including state and federal disability and antidiscrimination acts, and common law in medical areas. Australian law also recognises, in principle, the growing competence of the child to make decisions about their own futures, through the importation of the *Gillick*<sup>136</sup> principle:<sup>137</sup>

The proposition endorsed by the majority in that case was that parental power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacities and maturity grow and that this rate of development depends on the individual child.<sup>138</sup>

A minor is, according to this principle, capable of giving informed consent when he or she 'achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.<sup>139</sup>

However, in such contexts, judgments have been noted to endorse a child's capacity but to be decided in terms of the veto power of adults,<sup>140</sup> reflecting the obiter by Lord Scarman that

[p]arental rights ... do not wholly disappear until the age of majority. ... But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law ... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.<sup>141</sup>

although the sense of many Australian family law cases is that in most situations a child's best interests is framed by adults and parents' rights.

The incorporation of the best interests of the child principle into Australian law is most clearly demonstrated in revisions to family law undertaken in 1995. Conflicts regarding educational matters that test parents' rights and the best interests of the child have emerged in this area.

## VIII THE BEST INTERESTS OF THE CHILD STANDARD IN FAMILY LAW IN AUSTRALIA

While not as explicitly as in South Africa, the incorporation of the best interests principle into family law in Australia does purport to bestow rights on children that their best interests should be a primary concern in all matters that affect them, including their education. Family law in Australia is governed by a federal act, the *Family Law Reform Act*, a revision of the *Family Law Act 1975* undertaken in 1995.<sup>142</sup> The new act introduced major revisions to family law through changed terminology and concepts of parenting for resolution of family disputes. Parents do not have 'custody' of the child but may be determined to be the 'residential' parent with whom the child resides and the parent normally expected to manage the day to day decision-making for the child. Shared parenting is expected, often with complex access and shared residential arrangements. Most importantly, the family law perspective is that parents have responsibilities to the child, rather than a sense of 'property' ownership. 'Parental responsibility' includes 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children',<sup>143</sup> including decisions about education. The standing principle then, is that in the situation of a family breaking up both parents will be expected to be involved in decision-making regarding, and monitoring of, their child's education, unless a specific order is made in the courts to the contrary — for example, restricting the contact between one parent and the child.<sup>144</sup>

Child protection acts in Australia are also based on the best interests principle. For example, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) states that 'the paramount consideration in the provision of children's services is the best interests of children'<sup>145</sup> with parents to 'have both a right and a responsibility to be involved in the making of decisions by a children's service in so far as those decisions affect their children'.<sup>146</sup>

## IX SPEAKING FOR THE CHILD IN AUSTRALIA

In general most Australian legislation regarding education and decision-making about children's education refers to parents or carers,<sup>147</sup> guardians or other adults with the responsibility for the child, reflecting the many familial circumstances in modern society and perhaps reflecting

the generally more secular nature of Australian society in comparison to the United States, and possibly South Africa. Public acceptance of non-traditional families and recognition that many families have one parent, de facto relationships is well established.<sup>148</sup> However, such legislation avoids the issue as to who has priority in a hierarchy of parents or carers.

As in the United States, the concept of parent is broad in different contexts and state legislative differences reflect different cultural attitudes to the 'parent', although individuals in similar relationships in different states may meet the different guidelines. For example, in Tasmania, persons who can apply to have a person's status as parent declared include:

- (a) a person who alleges that a specified person is the parent of a particular child;
- (b) a person who alleges that the relationship of parent and child exists between that person and a particular child;
- (c) a person with a direct and proper interest in the result who wishes to determine whether the relationship of parent and child exists between 2 specified persons.<sup>149</sup>

Of specific relevance to education, the Queensland government defines parent, for the purposes of homeschooling, as:

- (1) A parent, of a child, is any of the following persons—
  - (a) the child's mother;
  - (b) the child's father;
  - (c) a person who exercises parental responsibility for the child.
- (2) However, a person standing in the place of a parent of a child on a temporary basis is not a parent of the child.
- (3) A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.
- (4) A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.
- (5) Despite subsections (1), (3) and (4), if—
  - (a) a person is granted guardianship of a child under the *Child Protection Act 1999*; or
  - (b) a person otherwise exercises parental responsibility for a child under a decision or order of a federal court or a court of a State;then a reference in this Act to a parent of a child is a reference only to a person mentioned in paragraph (a) or (b).<sup>150</sup>

These definitions do not establish a hierarchy but do leave open to interpretation a large number of people who may be potentially regarded as parents. The definitions leave open to interpretation the manner in which an adult cohabiting in a household with a child could establish a parental relationship, notwithstanding (2) above. The implications are that issues in settling conflicting claims to direction of a child's educational progress may be as broad as in the United States for school administrators.

Family law arrangements are usually settled through mediation and self-management processes.<sup>151</sup> It is usually only when disputes arise regarding one party wanting to change previously agreed arrangements, such as residence, that the disputes reach the Family Court. Disputes have usually occurred between parents of a child, whether in married or de facto relationships,<sup>152</sup> although in some cases, another adult with responsibility or who would like to assume responsibility, such as a grandparent, has challenged for guardianship. A parent granted 'residence' rights may not necessarily have priority in educational decision-making, in the absence of a specific order restraining the other parent. There is again a tendency in Australia for

government agencies to come into play to take guardianship of a child when disputes about care arise.

A very fulsome analysis of the historical discussion of the balance between the best interests of the child and the rights of parents is provided in the recent case, *W & R*.<sup>153</sup> This case, as do most family law cases where children's education issues emerge, centred on the wish of one parent to relocate, usually interstate but also internationally, thus affecting the children's access to the non-residential parent, and matters such as the continuation of their current schooling. In *W & R*<sup>154</sup> one parent (mother) wished to relocate internationally but retain residential parent status, considerably reducing the contact of children with the father and changing the circumstances of the children's lives, including schooling.

The Family Court in *W & R* summarises international and Australian case law of relocation issues for parents and children, and the balance between parental rights and the best interests of the child.

... The aim and essential issue is always how to achieve the best interests for each child affected. Beyond these statements of legal principle, however, lies the discretionary realm of uncertainty and unpredictability. Best interests are values, not facts, they are not susceptible to scientific demonstration or conclusive proof. ...<sup>155</sup>

The discussion considered the balance between the lives of the adults involved 'moving on' and the likely impact of the possible outcomes of the case, and the 'best interests' of the child. In their judgment, the Family Court in *W & R* referred to an earlier case determined prior to the family law reforms, but still followed post reforms, that had stated as principle that '[a] very important aspect of a child's best interests, their Honours observed, is to live in a happy home environment'.<sup>156</sup>

In that earlier case, the direction of the argument had been that the rights of the parents (adults) were subservient to the 'best interests' of the child.

The Full Bench specifically discarded the contention that the freedom of movement and the right of a woman having the role of a primary carer to equal treatment without discrimination before the law under international instruments or their legitimate interest in improving their generally poorer economic and social positions following separation and divorce, might take precedence over the best interests of the child.

Their Honours made it clear that conditions may be placed on a resident parent concerning where he or she may live where this is in the best interests of the child, and that where the freedom of the parent to move impinges upon or is inconsistent with the best interests of the child or children, the former must give way to the later.<sup>157</sup>

In a subsequent family law case series, *AMS and AIF*,<sup>158</sup> Kirby J in the High Court had noted 'that requiring a resident mother to demonstrate compelling reasons to relocate was not warranted by the paramountcy principle or the practicalities affecting parents ... parents enjoy as much freedom as is compatible with their obligations with regard to the child'.<sup>159</sup> The danger seen to emerge in these cases was that decisions could focus on whether the relocating parent should be *permitted* to move, a decision looking at the balance on a parent's right and the burden they had to prove to establish an imperative for the change, rather than on the effect of such changes on the child's welfare, including the possible positive benefits for the child of the change to the parent's circumstances. Justice Kirby held that '[t]he paramount consideration is the child's best interests, but this is not the same as the 'sole' or 'only' consideration',<sup>160</sup> a principle that has been taken up in subsequent judgments. The Court undertook serious considerations of the benefits to

the mother of relocating to New Zealand, possible improvement of her lifestyle, qualifications and earning power, and its impact on the children. In this case, however, the resolution of the court was that the mother should not relocate and that the status quo should be maintained. In an interesting change to the usual description of the stalwartness of children in family law cases regarding their resilience in relocating and starting new schools, the court stated

I assess the mother, as does the court counsellor, to be a resilient woman who is capable and resourceful enough to make the best of her situation, whatever the outcome of these proceedings is, and to always act in the children's best interests.<sup>161</sup>

The nature of future schooling was a stated consideration in the decision.

The children are well established in their neighbourhood, school and sporting activities. And, while they would probably adjust to a move to New Zealand, nothing was filed by the mother from the school she intends to send them to so as to allow me to compare and contrast what it offers with what the children are currently receiving.<sup>162</sup>

From this most recent decision, it would appear that the courts are assuming the role of determining the nature of the best interests of children in education, and the child's best interests may be paramount to parents' rights to direct their own activities.<sup>163</sup>

#### *A Parental Engagement in Children's Education in Practice in Australia*

An issue that has emerged in the United States context is the responsibility of school authorities to respond to the rights of parents to have information about their child and to direct the future education of their child — an issue that has ended up in the United States courts and, with the broadening definitions of parents, is likely to increase as an area of litigation. In keeping with the state system authority approach to education in Australia, guidelines are provided to schools on how to manage family law matters. While it is the expectation of the *Family Law Act* and court that all parents should be able to obtain information about their child's progress at school, some state guidelines indicate that this is not automatic. For example, the Victorian guidelines on *Student care and supervision*<sup>164</sup> indicate that:

Section 4.6.2 Reports on a student's progress at school may be supplied to an estranged parent/guardian only under the conditions set out in 4.6.5.2. (Parental responsibility for children, not available at time of writing.)

Similar Queensland guidelines<sup>165</sup> provide interesting documentation of the status of guidelines prior to and post the Family Law act reforms. For example, while the earlier regulations refer to 'custody' and are more restrictive regarding non-custodial parent access, post-reform regulations, such as those below, are positive about parental access.

4.16 In the absence of orders to the contrary, both parents can see teachers to discuss their children's educational progress and to receive copies of school reports about their children, and any other information which schools generally provide to parents.

4.17 Principals must not restrict the responsibilities of one parent at the request of the other parent unless legal documentation, usually a Family Court order covering specific issues, is produced to support the restriction.

4.18 When both parents retain parental responsibility but they are unable to agree on matters relating to their children's education or general welfare, the principal may suggest they attend family and child counselling to resolve the dispute away from school.

### Contact by parents

5.12 Unless the Family Court has made a parenting order covering specific issues restricting contact, a parent who does not usually live with the child may contact his or her child at school as set out in paragraphs 5.1 and 5.2.

5.13 If an order restricts a parent's contact with his or her children, principals should follow the guidelines set out above in paragraphs 5.3 to 5.11 when non-resident parents seek contact with their children at school.<sup>166</sup>

These guidelines, while recommending external counseling to resolve parental disputes (4.18), do not offer schools advice on how to act to deal with conflicting parental opinions if they arise. No cases of conflict over access to children's records appear to have reached the courts. However, public reports and research<sup>167</sup> on non-residential parent access to children and their role in education indicate that joint parental access to information about their child's progress, and capacity to direct educational decisions, may be limited in practice. One parent has reported he does not receive school newsletters foreshadowing school events because the school argued it could not afford to duplicate costs.

So long as court orders do not prevent it, schools may provide this information to both parents, but not every school is clear on that responsibility, says Wayne Butler, executive secretary of the Shared Parenting Council of Australia. 'Some schools haven't caught up with the fact that non-residential parents have equal right of shared parental responsibility under the *Family Law Act of 1975*,' he says. 'But they (principals and teachers) are expected to teach children at school, not understand the *Family Law Act*.'

The problem is that unless a court order specifically details a nonresidential parent's rights in relation to their child's education and school activities, it is open to interpretation.<sup>168</sup>

Baker and Bishop surveyed over two hundred non-residential parents about their involvement in their children's education.<sup>169</sup> Most indicated they had little or no involvement, nearly all indicated that they wanted more. The participants in the study were self-selecting and may have been those with most difficulties in gaining access. However, the research was conducted after changes to the *Family Law Act* and under the principle of co-parenting responsibilities and the outcomes indicate that the principles of 'best interest' of the child and parental access may not be understood by schools.

Non-residential parents reported a number of areas which hindered school involvement, such as work commitments, distance to school, custody issues and school policies. Of particular concern was 'conflict with ex-partner', indicating that domestic/separation issues spilled over into the school environment, effectively assigning a 'gate-keeping' role to the residential/custodial parent. This is of concern, as the apparent policy of schools of only negotiating with the residential or custodial parent, for fear of being caught up in conflict between separated parents, may in fact, exacerbate that conflict while excluding the non-residential parent from participating in the school community.<sup>170</sup>

While not wanting to overgeneralise from the small study, Baker and Bishop concluded that

[t]here appears little indication that new Family Court laws, designed to increase the involvement of non-residential parents in their children's lives following separation and divorce, have led to little, if any increased school involvement in W.A. There appears to be real confusion and a lack of awareness of the Department of Education's new policies amongst school personnel and little evidence the updated policies are leading to increased school involvement for non-residential parents. These findings are particularly disturbing



in light of the Department of Education's revisions to the *School Education Act* (1999), which pointedly place emphasis upon 'partnerships with parents'.<sup>171</sup>

In the absence of parental rights in Australia, some parents may in effect be losing access to decision-making about their children's education, becoming in consequence disenfranchised. The best interests of the child will reside with the residential parent unless amicably resolved or the conflict reaches the Family Court. In the meantime, schools in Australia may be anxiously awaiting conflicts that they may need to deal with as the implementation of the *Family Act* revisions, and the import for joint responsibilities, do filter through, with even Australia becoming an increasingly litigious society. Their roles and responsibilities are an area of education law that is still very much undetermined.

## X CONCLUSION

As reflected in this paper, decision-making about children's educational futures is complex when conflicts arise. In the United States, South Africa and Australia, the concept of the best interests of the child has judicial and, in South Africa and Australia, legislative support. However, how this is determined depends on the issue at hand, and competing rights and authorities to make the decisions emerge. International conventions are intended to provide social binding across cultures. While the best interest of the child has the facial appearance of a concept that should be the readily preferable one in all disputes, such is not always the case. Other interests may intervene with the result that those interests take preference over the best interest of the child. Thus, factors that come into play in determining school placement or an academic program for a child may differ for the competing interests of parents' rights, children's rights, and school and state authority and legislation. The common law notion that parents represent the best interest of children becomes blurred where the competing demands focus on the disagreement between custodial and noncustodial (or nonresidential) parents. Even constitutional rights, be they the rights of parents in the United States or children in South Africa, are not necessarily dispositive in resolving conflicts where the rights are limited in their application.

This brief analysis of different interpretations, applications and conflicts regarding the standard of the best interests of the child in education in these three nations shows that further conceptualisation of the principle of best interests would be helpful. As noted in our South African analysis, is this about short-term, medium-term or long-term benefits? Is this an objective or subjective process? In the end, perhaps the *UN Convention on the Rights of the Child*, because of its almost universal adoption among the countries of the world, may have the broadest impact on and most scope in developing a common interpretation of the best interest of the child. A common interpretation would not only sort out those interests competing to represent the demands of children but would provide guidelines for school officials as to how they should address competing interests in a manner that only minimally disrupts a child's life. The time and resources invested in litigating the best interest of the child seldom presents a positive return for children whose personal lives and education are disrupted by the legal conflicts and may not work towards the best interests of the child.

## ENDNOTES

1. For a list of federal and state child protection legislation, see <[www.aihw.gov.au/publications/cws/cpa00-01/cpa00-01-x03.pdf](http://www.aihw.gov.au/publications/cws/cpa00-01/cpa00-01-x03.pdf)> at 24 September 2006.
2. The *Convention* contains 54 articles explicating four core principles: nondiscrimination; devotion to

the best interests of the child; the right to life, survival, and development; and respect for the views of the child. <[www.unicef.org/crc/index.html](http://www.unicef.org/crc/index.html)> at 28 September 2006.

3. See, eg, *Tex. Educ. Code* § 4.001. The first objective of the state's Public Education Mission and Objectives is that 'Parents will be full partners with educators in the education of their children.' See also, *Tex. Educ. Code* § 26.003(a) ('Parents are partners with educators, administrators, and school district boards of trustees in their children's education. Parents shall be encouraged to actively participate in creating and implementing educational programs for their children'.) A more comprehensive statement can be found at *Mich. Comp. Laws* § 380.10 ('It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with the pupil's parents and legal guardians to develop the pupil's intellectual capabilities and vocational skills in a safe and positive environment.').
4. See Joyce Epstein, *School, Family, and Community Partnerships: Preparing Educators, and Improving Schools* (2001) (comprehensive examination of impediments, challenges and solutions to parent involvement in their children's education). See generally, Ralph Mawdsley and Daniel Drake, 'Involving Parents in the Public Schools: Legal and Policy Issues' (1992) 76 *Ed. Law Rep.* 299 (suggesting that, because courts have been reluctant to mandate parent intervention with schools and because parent involvement is a greater problem in urban schools, urban schools must design unique collaborative opportunities to encourage parent involvement in their children's education).
5. See generally, Ralph Mawdsley, 'The Changing Face of Parents' Rights' (2003) B.Y.U. *Educ. & L.J.* 165 (chronicling the rights of parents to direct their children's education over the past century, contending that the rights of parents to address issues within public schools are not as extensive as under common law, despite intervening state and federal legislation affording some rights of access).
6. See National Centre for Health Statistics, (2005) 53 *National Vital Statistics Reports* 16, March 7, 2005, Table 3, <<http://www.cdc.gov/nchs>> at 28 September 2006. The percentage of persons divorced has not changed significantly over the past several years and still falls generally within the low 40<sup>th</sup> to high 50<sup>th</sup> percentiles.
7. 262 US 390 (1923).
8. 268 US 510 (1925) (invalidating state statute requiring all students to attend public schools as violating right of parents to direct the education of their children).
9. 406 US 205 (1972) (reversing criminal truancy convictions of three parents under both the liberty and free exercise clauses where the parents for religious reasons refused to enroll their children in public high schools).
10. *US Const.*, Amend. XIV, § 1 ('No state shall ... deprive any person of life, liberty, or property, without due process of law').
11. See, eg, *Troxel v Granville*, 530 US 57, 66 (2000) (citing for support to *Yoder*, as well as other cases) (invalidating a state statute permitting any person, in this case paternal grandparents, to petition for visitation rights, finding that the statute violated the substantive rights of a mother 'to make decisions concerning the care, custody, and control of their children.'). While this right of parents to direct the education of their children pursuant to *Meyer*, *Pierce*, and *Yoder* is still viable, it has been limited to the rights of parents to select their children's venue of education and does not apply to making educational curricular choices within schools. Cf *Veschi v Northwestern Lehigh Sch. Dist.*, 788 A.2d 382 (Pa. 2001) and *Barrett v Steubenville City Schs.*, 388 F.3d 967 (6<sup>th</sup> Cir. 2006) (recognizing the rights of parents to choose a private school and still have a child with disabilities eligible to receive special education services, and to choose a private school for a child without losing a job as a public school teacher) with *Fields v Palmdale Sch. Dist.*, 447 F.3d 1187 (9<sup>th</sup> Cir. 2006) and *Mozert v Hawkins County Bd of Educ.*, 827 F.2d 1058 (6<sup>th</sup> Cir. 1987) (refusing parents the right to determine a reading series that a public school must provide a child, and to permit parents the right to prohibit standardised surveys questions to be asked their children). (For a description of the workings of the US federal court system and districts, see Ralph Mawdsley, 'The United States Federal Judiciary: Its Structure and Jurisdiction' (2005/6) 10(2)/11(1) *Australia and New Zealand Journal of Law and Education* 95).

12. See, eg, *Family Educational Rights and Privacy Act* (FERPA), 20 USC. § 1232g. Under FERPA, parents with children in schools receiving federal funds have ‘the right to inspect and review the education records of their children’, ‘to challenge the content of such student’s education records’, and the right to prevent disclosure of students records (with specified exceptions) ‘without the written consent of their parents’: 20 USC. §§ 1232g (1)(A) and (D), and (6)(b)(1).

*Protection of Pupil Rights Act* (PPRA), 20 USC. § 1232h. The PPRA requires parent notification of, and consent to, surveys, analysis or evaluation financed by federal funds that might reveal information as to,

- (1) political affiliations or beliefs of the student or the student’s parent;
- (2) mental or psychological problems of the student or the student’s family;
- (3) sex behavior or attitudes;
- (4) illegal, anti-social, self-incriminating, or demeaning behavior;
- (5) critical appraisals of other individuals with whom respondents have close family relationships;
- (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
- (7) religious practices, affiliations, or beliefs of the student or student’s parent; or
- (8) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program): 20 USC. § 1232h (b);

*Individuals with Disabilities Education Act* (IDEA), 20 USC. § 1400 et seq. Congress declared as one of its purposes in enacting IDEA to ‘strengthen the role of parents and ensure that families of such children have meaningful opportunities to participate in the education of their children at school and at home’: 20 USC. 1400(5)(B).

*Parents Rights and Responsibilities Act* (PRRA) *Tex. Educ. Code Ann.* §§ 26.003-26.010, provides parents with the following rights: access ‘to all written records of a school district concerning the parent’s child’; petitioning the school principal, ‘with the expectation that the request will not be unreasonably denied’, to add a course, to permit their child ‘to attend a class for credit above the child’s grade level’, and to permit the child to graduate early if all courses required for graduation have been completed; and entitlement to review all teaching and test materials to be used by their children and ‘to remove the [their children] temporarily from a class or other school activity that conflicts with the parent’s religious or moral beliefs’.

13. See, eg, *The Circle School v Pappert*, 270 F.Supp.2d 616 [179 *Ed. Law Rep.* 705] (E.D.Pa. 2003), *aff’d*, *The Circle School v Pappert*, 381 F.3d 172 [191 *Ed. Law Rep.* 629] (3d Cir. 2004) (invalidating under the free speech clause a state statute, and school rule enacted pursuant to the statute, requiring that school officials notify parents if their children refused to participate in the Pledge of Allegiance to the American flag as violating the plaintiff student’s free speech rights; because the statute ‘clearly discriminate[d] among students based on the viewpoints expressed’, the effect of this decision was that parents had no right of access to information regarding their children’s noncompliance with the requirements of a state statute and school rule). The *Circle School* case does not drive as sharp a wedge between parents and their children as the facts might suggest, especially when one considers that the plaintiffs in the case representing their minor child were the parents.
14. See, generally, Ralph Mawdsley, ‘The Third Circuit Court Of Appeals Strikes Down Pennsylvania’s Pledge Of Allegiance Statute: What are the Implications for Education?’ (2005) 196 *Educ. L. Rep.* 1, 13-17.
15. Outside the education arena, this presumption is being tested directly in non-education abortion rights cases where courts are called upon to determine whether the rights of parents to make decisions for their children extend to granting consent for, and receiving notification of, a minor child’s abortion. For the most recent Supreme Court visitation of this abortion issue, see *Ayotte v Planned Parenthood of Northern New England*, 126 S.Ct. 961 (2006) (remanding case to district court for declaratory judgment that might salvage New Hampshire parent notification statute, but Court emphasised three

clear principles in the area of abortions and minor children: states have a right to involve parents when a minor considers terminating her pregnancy; states cannot restrict a minor's access to an abortion necessary to preserve the life of the mother; and, some pregnancies require such immediate medical action that prior parent notification is not possible).

16. 56 S.W.3d 5 (Tenn. Ct. App. 1999).
17. *Ibid* 7-8.
18. *Ibid* 8.
19. *Ibid*.
20. *Ibid*.
21. *Ibid* 9.
22. The best interest claim is also frequently invoked to determine whether financial support can be assigned to a parent to pay for nonpublic education. Over half of the states have statutes permitting courts to decide, in assigning support responsibilities between parents, the extent to which a child's best interest is served by the particular needs of a special or private school. See generally, Barbara R. Bergmann and Sherry Wetchler, 'Child Support Awards: State Guidelines vs Public Opinion' (1995) 29 *Fam. L.Q.* 483, 485. See, eg, *Md. Code*, § 12-204(i)(1), *Colo. Rev. Stat.* § 14-10-115 (13)(a), and *La. Rev. Stat.* § 9:315.6 (1) (permits allocation between parents of 'Any expenses for attending any special or private elementary or secondary schools to meet the particular needs of the child'). Whether the best interest of a child demands that a noncustodial parent pay for private education is generally framed by the child's attendance and satisfactory performance at a private school prior to the dissolution of the marriage. In the expression of one state appeals court, '[a] child's successful continuation of his or her education in a proven academic environment is generally found to be in his or her best interests'. (See *Will v Ristaino*, 701 A.2d 1227, 1234 (Md. Ct. Spec. App. 1997), upholding trial court's apportioning costs of children's private school education 65 per cent to noncustodial parent and 35 to custodial parent, which was less than noncustodial parent's 76 per cent proportionate share of parties' income, and determining that noncustodial parent, who had monthly income of approximately \$2100, could afford expenses of private school tuition.) If the best interest of the child demands that a child continue attendance at a religious school, the objection by a noncustodial parent payment being compelled to pay for such attendance does not constitute a violation of the establishment clause 'where the payments [are] made on the children's behalf rather than the [noncustodial parent's] and, to the extent the children [are] receiving religious instruction, it [is] consistent with their religious and moral beliefs as determined by their custodial mother': (*Smith v Null*, 757 N.E.2d 1200, 1204 (Ohio Ct. App. 2001), upholding requirement that noncustodial father pay for attendance of children at Catholic school).
23. 542 US 1, 124 S.Ct. 2301 [188 *Ed. Law Rep.* 17] (2004).
24. See *Cal.Educ.Code* § 52720 (Technically, the California statute does not require the recitation of the pledge of allegiance. The statute requires at the beginning of each school day 'appropriate patriotic exercises', which can be satisfied by '[t]he giving of the Pledge of Allegiance to the Flag of the United States of America').
25. The mother's (Banning) motion to intervene based on her award of sole custody was denied where under custody order father retained rights with respect to child's education and general welfare and court determined that father had free speech right under state and federal constitutions to object to unconstitutional state action violative of the establishment clause and mother had no right to insist that her daughter be subjected to unconstitutional pledge requirements. However, the Ninth Circuit Court of Appeals reached this decision after finding that the noncustodial father had standing to object to unconstitutional action affecting his daughter: *Newdow v US Congress*, 313 F.3d 500 (9<sup>th</sup> Cir. 2002), a finding invalidated on appeal to the Supreme Court.
26. Subsequent to the court of appeals decision in *Newdow*, a California trial court, at a hearing on September 11, 2003, announced that the parents have 'joint legal custody', but that Banning (the mother) 'makes the final decisions if the two ... disagree': *Newdow*, 542 US 1, 124 S.Ct. at 2310.
27. On remand, the federal district court in California agreed that the father had not been granted the right under the divorce decree to make educational decisions for his child and, therefore, dismissed his claim: *Newdow v Congress of the US*, 383 F.Supp.2d 1229 [201 *Ed. Law Rep.* 915] (E.D. Cal. 2005).

28. 400 F.3d 965 [196 *Ed. Law Rep.* 50] (7<sup>th</sup> Cir. 2005), *cert. denied*, 126 S.Ct. 750 (2005).
29. See 750 ILCS § 5/602.1a where the best interest of the child is used to determine any diminution of ‘parental powers, rights, and responsibilities’.
30. 400 F.3d 965, 967.
31. *Ibid* 967-68. Plaintiff also raised equal protection and free speech claims that the Seventh Circuit remanded for further fact finding as to whether the school principal had been treated plaintiff differently because of animus and had retaliated against plaintiff because of his complaints.
32. 262 US 390 (1923) (invalidating state statute prohibiting teaching in any language except English and reversing conviction of teacher in religious school teaching in German).
33. 268 US 510 (1925) (invaliding state statute requiring parents to send their children to public schools).
34. 406 US 205 (1972) (upholding reversal of Amish parents’ fines imposed for refusing to send their children to high school pursuant to state’s compulsory attendance law).
35. *Crowley*, 400 F.3d 965, 968.
36. *Ibid* 971.
37. *Ibid* 975.
38. *Ibid*. The dissent references the relatively high percentages of divorces as related to marriages in 2003. See *ibid* referencing National Center for Health Statistics (NCHS) (2004) 52(22) *National Vital Statistics Reports* June 10, 2004, Table 3. While the statistics for 2004 vary somewhat from those cited by the court for 2003 (eg, 42% in comparing divorces to marriages in Illinois for 2003 as compared to 40.3% for 2004), the percentages for most states still fall generally within the same low 40<sup>th</sup> to high 50<sup>th</sup> percentiles. See above n 6. Both Reports at <<http://www.cdc.gov/nchs>> at 28 September 2006.
39. Federal courts generally will defer in family law issues to state law. See, eg, *Bryden v Davis*, 522 F.Supp. 1168 (D. Mo. 1981). However, the family law exception to jurisdiction will not prevent federal courts from intervening where a federal statute, such as 18 USC. § 228, criminalises failure to pay lawful child support obligations. See *US v Nichols*, 113 F.3d 1230 (2d Cir. 1997).
40. Rights in divorce decrees can raise protectable constitutional claims under the liberty clause for a custodial parent. Cf *Wright v Wright*, 1999 WL 674306 (Mass. Super. Ct. 1999) (finding that a state statute granting a noncustodial parent access to student academic records ‘unless the custodial parent provides to the principal of the school documentation of any court order which prohibits contact with the child’ did not create a protectable right of access to student records under the liberty clause) with *Bergstrand v Rock Island Bd. of Educ. Sch. Dist.*, 514 N.E.2d 256 [42 *Ed. Law Rep.* 1289] (Ill. App. Ct. 1987) (finding that a trial court lacked jurisdiction regarding the claim of a plaintiff-noncustodial parent, with joint control rights under the divorce decree, to prohibit his children’s enrollment in sex education where the custodial parent was not a party to the lawsuit; failure to include the custodial parent as a necessary party to plaintiff’s litigation could result in a court entering a decision in derivation of the custodial parent’s liberty clause right to make decisions for her children).
41. 313 F.3d 768 [172 *Ed. Law Rep.* 87] (2d Cir. 2002).
42. 20 USC. §§ 1400 *et seq.*
43. 20 USC. § 1232g.
44. *Taylor*, 313 F.3d 768, 772-773.
45. *Ibid*.
46. 20 USC. § 1414 (a)(1)(C).
47. 20 USC. § 1414 (d)(1)(B).
48. 20 USC. § 1415 (b)(1).
49. 20 USC. § 1415 ((b)(1).
50. 20 USC. § 1415 (b)(3) and (c).
51. 20 USC. § 1414 (f).
52. 20 USC. § 1415(f).
53. See *Taylor v Vt. Dep’t of Educ.*, 313 F.3d 768, 777.
54. 20 USC. § 1401 (23). In fact, this statutory addition is reflected in language in the 1999 Department of Education regulations. See 34 C.F.R. § 300.20 (a)(1) and (3).
55. *Taylor*, 313 F.3d 768, 778.

56. Ibid 778-79.
57. Ibid 779.
58. 34 C.F.R. § 300.562 (c).
59. *Taylor*, 313 F.3d 768, 786.
60. The court granted this request with the admonition that it did not mean every last cover letter, transmittal sheet, or scrap of paper that happens to be contained in L.D.'s files. Possibly it might not even cover more substantive original documents or notes if the information contained therein was substantially incorporated in reports or if plaintiff had been otherwise informed of their content. Further, it [did] not place an affirmative obligation on defendants to create any documents or provide additional explanation: Ibid 787.
61. The Second Circuit applied the Supreme Court's decision in *Gonzaga Univ. v Doe*, 536 US 273 [165 *Ed. Law Rep.* 458] (2002) that had prohibited a section 1983 claim for an unauthorised disclosure of education records to apply as well to a denial of access to education records. For FERPA's requirements regarding disclosure, see 20 USC. § 1232g (b)(1) ('No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following ...'). Regarding FERPA's provision concerning records-access, see 20 USC. § 1232g (a)(1) ('No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.'). A FERPA regulation, similar to the one above for IDEA, provides that 'either parent' has 'full rights' under the statute but these rights do not apply if a school is provided with 'a court order ... or other legally binding document relating to such matter as divorce, separation, or custody that specifically revokes these rights.': 34 C.F.R. § 99.4.
62. 34 C.F.R. § 99.4.
63. *Taylor*, 313 F.3d 768, 792.
64. 20 USC. § 1401 (23). In fact, this statutory addition is reflected in language in the 1999 Department of Education regulations. See 34 C.F.R. § 300.20 (a)(1) and (3).
65. 439 F.3d 983 [206 *Ed. Law Rep.* 837] (8<sup>th</sup> Cir. 2006).
66. 20 USC. § 1414(a)(1)(D)(ii)(I).
67. See, eg, *Colo. Rev. Stat.* § 14-10-123.8 ('Access to information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to any party allocated parental responsibilities, unless otherwise ordered by the court for good cause shown'); *Conn. Gen. Stat.* § 46B-56 (e) ('A parent not granted custody of a minor child shall not be denied the right of access to the academic, medical, hospital or other health records of such minor child unless otherwise ordered by the court for good cause shown'); *Ind. Code* § 20-10.1-22.4-2 (requiring that all nonpublic or public schools 'allow a custodial parent and a noncustodial parent of a child the same access to their child's education records' unless '(1) a court has issued an order that limits the noncustodial parent's access to the child's education records; and (2) the school has received a copy of the court order or has actual knowledge of the court order'); *Mass. Gen. Laws* 208 § 31, *Mass. Gen. Laws* 71 § 34H ('The entry of an order or judgment relative to the custody of minor children shall not negate or impede the ability of the non-custodial parent to have access to the academic, medical, hospital or other health records of the child, as he would have had if the custody order or judgment had not been entered'; however, upon receipt of a request for student information from a noncustodial parent, a public elementary or secondary school must notify the custodial parent that the information will be provided within 21 days 'unless the custodial parent provides to the principal of the school documentation of any court order which prohibits contact with the child, or prohibits the distribution of the information'); *Mich. Comp. Laws* § 722.30 ('Notwithstanding any other provision of law, a parent shall not be denied access to records or information concerning his or her child because the parent is not the child's custodial

parent, unless the parent is prohibited from having access to the records or information by a protective order’); *S.C. Code Ann.* § 20-7-100 (‘Each parent, whether the custodial or noncustodial parent of the child, has equal access and the same right to obtain all educational records and medical records of their minor children and the right to participate in their children’s school activities unless prohibited by order of the court’).

68. See, eg, *Wright v Wright*, 1999 WL 674306 (Mass. 1999) (school officials included as defendants along with plaintiff’s former wife in records-access and intentional infliction of emotional distress claims by noncustodial father).
69. See *In re Marriage of Schenk*, 39 P.3d 1250 (Colo. Ct. App. 2001) (finding that noncustodial father was entitled to access to child’s educational and medical records where father was entitled to parenting time under divorce decree).
70. See *Bergstrand v Rock Island Bd. of Educ.*, 514 N.E.2d 256 [42 *Ed. Law Rep.* 1289] (Ill. App. Ct. 1987) (finding that, in noncustodial parent’s injunction relief to prevent his child from enrollment in sex education and disease instruction classes, custodial mother was a necessary party and therefore court lacked jurisdiction to render decision on the merits of plaintiff’s request). In this case, state statute provided that ‘[n]o pupil shall be required to take or participate in any class or course in comprehensive sex education if his parent or guardian submits written objections thereto ... ’ and that ‘no pupil shall be required to take or participate in instruction on diseases if a parent or guardian files written objection thereto ... ’: 105 ILCS 5/27-9.1, 105 ILCS 5.27-11. The *Berstrand* court provided no insights as to what basis a court, after adding the custodial mother as a party, should use in deciding between the custodial and noncustodial parents’ views.
71. See *Mills v Phillips*, 407 So.2d 302 [1 *Ed. Law Rep.* 139] (Fla. Dist. Ct. App. 1981) (finding that noncustodial parent lacked standing to enjoin a school district from suspending his child).
72. See *Tex. Educ. Code Ann.* §§ 26.003-26.010 (enacted in 2000 as the *Parents Rights and Responsibilities Act*).
73. *Tex. Educ. Code Ann.* 26.004 (The records are: attendance records, test scores, grades, disciplinary records, counseling records, psychological records, applications for admission, health and immunization information, teacher and counselor evaluations, and reports of behavior patterns).
74. *Tex. Educ. Code Ann.* 26.006.
75. *Tex. Educ. Code Ann.* 26.006. However, ‘a parent is not entitled to remove the parent’s child from a class or other school activity to avoid a test or prevent the child from taking a subject for an entire semester’, nor does this provision ‘exempt a child from satisfying grade level or graduation requirements in a manner acceptable to the school district and the [state education] agency’.
76. *Ibid* 26.003.
77. *Ibid* 26.003.
78. For an interesting perspective on residency, see Jon Waltz and Roger Park, *Evidence: Cases and Materials* (11<sup>th</sup> ed, 2005) 72 (quoting from I Kings 3: 16-28 where the two women contesting for a baby before King Solomon ‘dwell[ed] in one house’).
79. See Laura Reilly, ‘School Laws Every Practitioner Needs to Know To Assist Divorcing Parents’ (2005) 84 *Mich. B. J.* 32 (commenting that Michigan state courts have no existing judicial guidelines to interpret possible conflicts between divorced parents regarding a state statute that requires, concerning a school’s provision of ‘reproductive or other sex education instruction’, that a parent or guardian be notified in advance ‘of his or her rights to observe the instruction and to have the pupil excused from the instruction’, except that a court would probably have to decide a conflict on the basis of ‘the best interests of the child’.) For the relevant state statute, see *Mich. Comp. Laws* § 388.1766a.
80. UN *Convention on the Rights of the Child*, opened for signature 20 November 1989.
81. See J Dugard, *International Law* (1994) 53.
82. *Constitution of the Republic of South Africa Act 108 of 1996*. See Julia Sloth-Nielsen, ‘Children’s Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child’ (2002) 10 *The International Journal of Children’s Rights* 137.
83. A child’s best interests are of primary importance in every matter concerning the child.
84. See *Minister of Welfare and Population Development v Fitzpatrick* 2002 (7) BCLR 713 CC [17],

*Fraser v Naude* 1999 (1) SA 1 CC.

85. 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, care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitive labour practices;
  - (f) not to be required or permitted to perform work or provide services that –
    - (i) are inappropriate for a person of the 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 53, the child may be detained only for the shortest appropriate period of time, and has the right to be –
    - (i) 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.
86. See *Wittman v Deutscher Schulverein, Pretoria and others* 1998(4) SA 423 (T).
87. See Articles 2 and 8 of *African Charter on Human and People's Rights* (1981) which recognises the right of every individual, which includes children, to freedom of religion.
88. See *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950).
89. Religious observances may be conducted at state or state-aided institutions, provided that –
- (a) those observances follow rules made by the appropriate public authorities;
  - (b) they are conducted on an equitable basis; and
  - (c) attendance at them is free and voluntary.
90. See Elsje Bonthuys, 'Epistemological Envy: Legal and Psychological Discourses in Child Custody Evaluations' (2001) 118 *South African Law Journal* 329.
91. See J Heaton, 'Some General Remarks on the Concept "Best Interests Of The Child"' (1990) 53 *Tydskrif vir Romeins-Hollandse Reg* 96.
92. See A Barratt, 'The Best Interests of the Child – Where is the Child's Voice?' in Burnam (ed), *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2002) 150.
93. See Heaton, above n 91, 96
94. Bonthuys, above n 90, 300-331.
95. Ibid 337.
96. Ibid 300-331.
97. 1994 (3) SA 201 (C) at 204J-205G.
98. a. In determining the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his/her physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are as follows:
- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
  - (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
  - (c) the ability of the parent to communicate with the child and the parent's insight into and, understanding of and sensitivity to the child's feelings;



- (d) the capacity and disposition of the parent to give the child the guidance which he /she requires;
  - (e) the ability of the parent to provide for the basic physical needs of the child, the so-called ‘creature comforts’, such as food, clothing, housing and the other material needs generally speaking, the provision of economic security;
  - (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
  - (g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
  - (h) the mental and physical health and moral fitness of the parent;
  - (i) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the status quo;
  - (j) the desirability or otherwise of keeping siblings together;
  - (k) the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
  - (l) the desirability or otherwise of applying the doctrine of same sex matching;
  - (m) any other factor which is relevant to the particular case with which the court is concerned.
99. See *Fraser v Children’s Court, Pretoria North* 1997 (2) SA 218 (T); *Fraser v Children’s Court Pretoria North* 1997 (2) SA 261 (CC); *Naude and another v Fraser* 1998 (4) SA 539 (SCA).
100. 1997 (2) SA 261 (CC).
101. See Julia Sloth-Nielsen, ‘Children’s Rights in the South African Courts: An Overview Since Ratification of the UN *Convention on the Rights of the Child*’ (2002) 10 *The International Journal of Children’s Rights* 153, reporting that the *Adoption Matters Amendment Act* was passed in 1998; the rights of fathers of extra-marital children to approach a High Court for an order granting access, custody or guardianship of such children was provided for in the *Natural Fathers of Children born out of Wedlock Act 86 of 1997*.
102. See *Fraser v Naude and another* 1999 (1) SA 1 (CC).
103. *Ibid* [9], [10].
104. *Ibid* [7].
105. 2000 (7) BCLR 713 CC.
106. See s 18(4)(f) of the *Child Care Act 74 of 1983* which proscribed the possibility of foreign citizens and person who do not qualify to become naturalised adopting a South African child.
107. 2000 (7) BCLR 713 CC, [20].
108. States Parties which recognise an/or permit the system of adoption ... shall ... recognise that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.
109. Section 39(1)(b): When interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law.
110. 2000 (11) BCLR 1169 (CC).
111. See s 26(1) of the *Constitution*: Everyone has the right to have access to adequate housing. Article 26(1)(b): Everyone has the right to have access to ...sufficient...water. Section 26(2): The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
112. See art 28(1)(c): Every child has the right ... to basic nutrition, shelter, basic health care services and social services.
113. Every child has the right ... to basic nutrition, shelter, basic health care services and social services.
114. See n 6.
115. See *Grootboom* 2000 (11) BCLR 1169 (CC), [76].
116. *Ibid* [78].
117. See Sloth-Nielsen, above n 101, 149.

118. See *Fraser v Children's Court, Pretoria North* 1997 (2) SA 218 (T) at 287(c) and 288(i-j).
119. See *Fraser v Naude and another* 1999(1) SA 1 (CC), [71].
120. See W Bray, 'Human Rights and Education' 12 *South African Journal of Education* 1.
121. Section 9
- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
  - (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
  - (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
  - (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
  - (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
122. See J Van der Vyver, 'Constitutional Problems of Children and Young Persons' in JA Robinson (ed), *The Law of Children and Young Persons in South Africa* (1997) 265, 268-269.
123. Section 51(xxii) provides authority to the federal government to make laws with respect to parental rights and s 51(xxiiiA) in matters pertaining to a range of endowments including 'benefits to students', the latter inserted in 1946.
124. It is interesting to observe the degree to which the Federal and state governments in Australia continue to legislate in so many areas rather than allow common law development to resolve conflicts. For example, retiring Justice McPherson noted 'that one of the remarkable changes to the legal system in the past 40 years was the erosion of common law by legislation passed by Parliament (statute law). ... until the 1960s, Queensland's entire statute law consisted of 20 volumes of about 600 pages each. ... since 1988, there had been 60,000 pages of statute law passed, and the quality of some of it was questionable.' (*The Courier Mail*, Brisbane Australia, 25 September 2006) <<http://www.news.com.au/couriermail/story/0,23739,20468388-3102,00.html>> at 25 September 2006.
125. *Attorney-General (Vict.) v Ex Rel. Black v The Commonwealth* (1981) 146 CLR 559, [38].
126. *Attorney-General (Vict.) v Ex Rel. Black v The Commonwealth* [1981] HCA 2; (1981) 146 CLR 559: Paragraph 14 cited the (now defunct) *Schools Commission Act* 1973 s13(4)(b) as to '(t)he prior right of parents to choose whether their children are educated at a government school or a non-government school'.
127. *Education (General Provisions) Act 2006* (Qld) s 208(1)(c)(ii).
128. *Education (General Provisions) Act 2006* (Qld) s 217 (b), (c); similarly the *School Education Act 1999* (WA) s 51 allows for external moderators to be appointed to provide an assessment of a home-schooled child's progress.
129. See n 65, 439 F.3d 983 [206 *Ed. Law Rep.* 837] (8<sup>th</sup> Cir. 2006).
130. 'Adelaide Declaration' Ministerial Council on Education, Employment, Training and Youth Affairs, *Common and Agreed National Goals for Schooling in Australia*, (1999) <[http://www.dest.gov.au/sectors/school\\_education/policy\\_initiatives\\_reviews/national\\_goals\\_for\\_schooling\\_in\\_the\\_twenty\\_first\\_century.htm](http://www.dest.gov.au/sectors/school_education/policy_initiatives_reviews/national_goals_for_schooling_in_the_twenty_first_century.htm)> at 25 May 2006.
131. *School Education Act 1999* (WA) s 38 Breaches; *Youth Participation in Education and Training Act 2003* (Qld) s 19 Obligation to ensure participation.
132. *Convention on the Rights of the Child*, opened for signature 20 November 1989 (ratified by Australia December, 1990).
133. See, eg, *Child Protection Act 1999* (Qld) s 5((1): This Act is to be administered under the principle that the welfare and best interests of a child are paramount.

Example—The chief executive is making a decision under this Act, concerning a child, in circumstances where there is a conflict between the child’s welfare and best interests and the interests of an adult caring for the child. The conflict must be resolved in favour of the child’s welfare and best interests; *Family Law Act 1975* (Cth) s 60B (object of the act), s 65E (on parenting orders), s 67L (on location orders) and s 60CC (how a court determines the ‘best interests’).

s 60CC(1) ... in determining what is in the child’s best interests, the court must consider the matters set out in subsections (2) and (3).

60CC(2) Primary considerations

The primary considerations are:

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

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

60CC(3) Additional considerations

Additional considerations are:

- (a) any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views;
- (b) the nature of the relationship of the child with:
  - (i) each of the child’s parents; and
  - (ii) other persons (including any grandparent or other relative of the child) ...

134. *UN Convention of the Rights of the Child*, art 12.

135. However, there is recognition of these principles in various regulations and policies of the state authorities. For example, the Foreword to the section in Department of Education and the Arts (Queensland) Manual Part LL-08 on Family law matters affecting state educational institutions notes that the activities of principals must be ‘guided by the principle expressed in the *Family Law Act 1975*, that children’s best interests must be advanced’.

136. *Gillick v West Norfolk AHA* (28) (1986) AC 112, most notably referred to in Australian caselaw in *Secretary, Department of Health and Community Services v J.W.B. and S.M.B. (Marion’s Case.)* (1992) 175 CLR 218.

137. This also leaves medical practitioners the difficulty of determining whether parental consent is needed or whether it is sufficient. If the child is deemed able to make decisions, then parents would not be informed, such as in abortion cases. See Western Australia Law Reform Commission, *Discussion Paper on Informed Consent to Medical Treatment Responsibility for Making Decisions and Medical Treatment*, (1992) 77(1) 3.7. ‘There is no rule that the consent of a parent is either always required or always sufficient authority for the performance of medical treatment upon a minor. One view is that the minor’s incapacity is fixed not by age but by the minor’s actual incapacity to understand and come to a decision about a particular medical procedure’, 12; ‘Another view is that even if a minor does understand the full implications of a decision there may still be circumstances where a parent or the State might wish to overrule the decision in the minor’s ‘best interests’. Accordingly, at the present time the responsibility for decision-making in matters of medical care is shared between the child, the parent and doctors exercising professional discretions, subject to overview by the State through welfare authorities and the courts. In consequence, a doctor dealing with a child may be left in doubt as to whether a child can give consent, whether anybody else’s consent is necessary, and when and how to obtain it’, 21. Available through <[www.austlii.edu.au](http://www.austlii.edu.au)> at 24 September 2006.

138. *Gillick v West Norfolk AHA* (28) (1986) AC 112, cited in *Secretary, Department of Health and Community Services v J.W.B. and S.M.B. (Marion’s Case.)* (1992) 175 CLR 218, [16].

139. *Secretary, Department of Health and Community Services v J.W.B. and S.M.B. (Marion’s Case.)* (1992) 175 CLR 218, [19], citing Lord Scarman in *Gillick* at 189.

140. John R. Morss, ‘But for the Barriers: Significant Extensions to Children’s Capacity’ (2004) 11

- Psychiatry, Psychology and Law* 319, 320.
141. *Secretary, Department of Health and Community Services v J.W.B. and S.M.B. (Marion's Case.)* (1992) 175 CLR 218, [19], citing Lord Scarman in *Gillick* at 183-184.
  142. The constitutional applicability of the Act and federal jurisdiction of the *Family Law Reform Act 1995* versus state acts was challenged in *AMS v AIF and AIF v AMS* [1999] HCA 26. The case involved the common scenario of a parent who wished to move interstate with a child, changing access compliance for the non-residential parent. The Act was found to be within jurisdiction and family law matters are regarded as federal matters, especially for relocation cases.
  143. *Family Law Act 1975* s 61B.
  144. See, eg, *W & R* [2006] FamCA 25, where the assumption that both parents would be involved in decision-making was noted, including education decisions, unless otherwise ordered to be the specific responsibility of one parent under a specific issues order.
  145. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 202(a).
  146. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 202(c).
  147. See, for example, the federal funding act, *Schools Assistance (Learning Together — Achievement Through Choice And Opportunity) Act 2004* that requires schools to provide school reports to ‘the parents, guardians or other persons who have care and control of each child’ (s 15), where ‘guardian’ is defined as including ‘a person who has been granted (whether alone or jointly with another person or other persons) guardianship of the child under the law of the Commonwealth or of a State or Territory’ (s 4), and ‘parent’ is not defined.
  148. For example, the Australian Bureau of Statistics defines a family as ‘two or more persons, one of whom is at least 15 years of age, who are related by blood, marriage (registered or de facto), adoption, step or fostering, and who are usually resident in the same household’, noting the number of one-parent families increased by 53 per cent between 1986 and 2001. Australian Bureau of Statistics, *Australian Social Trends, 2003* (2003) <<http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/2559632155bf56b8ca2570eb00835396!OpenDocument>> at 28 September 2006.
  149. *Status of Children Act 1974* (Tas) s 10(1).
  150. *Education (General Provisions) Act 2006* (Qld).
  151. Similarly, the issue of financial support for private education fees is not usually a major dispute, if the children were in private education prior to a relationship breakup, given the prevalence of private education (non-government) in Australia. It would be an expectation during a maintenance order and family settlement that provision for children to continue such schooling would be made, if the joint financial circumstances of the parents allowed. Such maintenance orders may be required for children to complete an essential education programs post the schooling years. This is not to say that maintenance orders are not a regular source of ongoing dispute, nor that maintenance as ordered by the court is regularly paid.
  152. Recent media attention has reported a case in Australia of a boy divorcing his parents. More media attention has followed the ruling that the journalists reporting the case had committed a serious breach of s 26 of the *Children and Young Persons Act* by identifying the boy, now under the responsibility of a carer. <<http://www.abc.net.au/mediawatch/transcripts/s1473150.html>> at 24 May 2006.
  153. [2006] FamCA 25.
  154. [2006] FamCA 25; both parents were originally from New Zealand and had moved to Australia. After separation, the Family Court ruled that their three children would reside with the mother on condition she did not relocate. The father applied for a reversal to the residential order as the mother wished to relocate to New Zealand, arguing better education and employment opportunities for herself and resultant better conditions for her children, and to be closer to her family. Even without relocation, the father wanted shared residential status. The mother’s response was to seek to retain the residential status, with preference for relocation.
  155. *W & R* [54], [55].
  156. *W & R* [69], citing discussion in *B and B: Family Law Reform Act 1995* (1997) FLC 92-755.
  157. *W & R* [71], [72].
  158. (1999) 199 CLR 160.

159. *W & R* [85], citing *AMS v AIF* (1999) 199 CLR 160 at 224.
160. *W & R* [93], citing *AMS v AIF* (1999) 199 CLR 160 at 207.
161. *Ibid* at 369(g).
162. *Ibid* at 369(d).
163. The mother's right to relocate without children was not identified in the case but may lead to other possible legal challenges if the Family Court sought to deny such.
164. Victorian Government *Schools Reference Guide* <<http://www.eduweb.vic.gov.au/referenceguide/default.htm>> at 25 May 2006.
165. Department of Education and the Arts (Queensland) *Manual Part LL-08: Family Law Matters Affecting State Educational Institutions*. <<http://education.qld.gov.au/corporate/doem/legalleg/ll-08000/sections/procedur.html>> at 24 May 2006.
166. *Ibid*.
167. R Baker & G Bishop, 'Non-Residential Parents: The Forgotten Partners in Children's Education' (2003) 4 *Nuance* 36.
168. 'Caught in a crossfire', *The Age* (Australia), July 11, 2005.
169. Eighty-six per cent were fathers, 14 per cent mothers.
170. Baker & Bishop, above n 167, 10.
171. *Ibid* 12.

