

RD Mawdsley, JL Beckmann, E de Waal & CJ Russo

The best interest of the child: A United States and South African perspective

Summary

This article examines the different approaches taken in the United States (U.S.) and South Africa with regard to the best interests of students/learners.¹The U.S. has a tradition of invoking a best interest standard for certain kinds of decisions involving children, but that tradition has generally been limited to divorce decrees, while the emphasis in school-related matters has been on rights of parents grounded in the U.S. Constitution and in federal and state statutes. On the other hand, South Africa has enshrined the best interest of the child in its Constitution and it is of paramount importance in all matters pertaining to the child. How these two approaches differ and what the future of the parent-child relationship should be in influencing decision-making regarding learners at schools is the object of this article. The article also considers the relevant U.S. federal constitutional and state statutory interpretations as they differ from the South African constitutional language. This article asks whether the long U.S. constitutional tradition of framing children's best interests in terms of parental decision-making on behalf of their children needs to be reconsidered. Conversely, in South Africa the most important question is whether courts could very well expand the concept of a parent, while at the same time considering whether the best interest of the child standard is a fundamental right or a rule of construction.

'n Kind se beste belange: 'n Amerikaanse en Suid-Afrikaanse perspektief

Hierdie artikel bestudeer die verskillende benaderings wat die Verenigde State van Amerika (VSA) en Suid-Afrika tot die regte van leerders huldig, aangesien die twee lande 'n gedeelde belang het in die beskerming van kinderrechte. Die VSA beroep hulle tradisioneel op die beste belange-standaard vir sekere tipes besluite waarby kinders betrokke is, maar die tradisie is tot dusver oor die algemeen beperk tot egskedingsbevelle, terwyl die klem in skool-verwante sake op ouers se regte soos gegrond in die VSA Grondwet en in federale staatswette geplaas is. Aan die anderkant het Suid-Afrika die beste belange van die kind in sy Grondwet verskans as van die heel belangrikste belang in sake waarby die kind betrokke is. Hoe hierdie twee benaderings verskil en wat die toekoms van die ouer-kind verhouding behoort te wees by die beïnvloeding van besluitneming rakende leerders op skool, is die doel van hierdie artikel, terwyl daar terselfdertyd standpunt ingeneem sal word wat betref die VSA se federale grondwetlike en staats-statutêre interpretasies soos hulle verskil van die Suid-Afrikaanse grondwetlike taalgebruik. Hierdie artikel vra ook of die lang VSA grondwetlike tradisie om 'n kind se beste belange te beoordeel in terme van sy ouers se besluitneming namens hom in herooringewing geneem behoort te word. Aan die anderkant van die muntstuk is die heel belangrikste vraag in Suid-Afrika of hoewe die konsep van ouerskap sou kon ontwikkel terwyl hulle ook terselfdertyd

Prof RD Mawdsley, J.D., PhD, Roslyn Z. Wolf Endowed Chair Urban Educational Leadership, Professor of Educational Administration, Cleveland State University, OHIO, USA. Prof JL Beckmann, BA, MEd, DEd, THEd, Department of Education Management and Policy Studies, Faculty of Education, University of Pretoria. Prof E de Waal, BA, BA Hons, MEd, PhD, Associate Professor: Education Law, School of Educational Sciences, North-West University, Vaal Triangle Campus, Vanderbijlpark. Prof CJ Russo, J.D., EdD, Panzer Chair in Education, Adjunct Professor of Law, University of Dayton, OHIO, USA.

oorweging skenk aan die vraag of die beste belange van die kind 'n fundamentele reg of 'n konstruksie-reël is.¹

1. Introduction

While the notion that the best interest of the child should prevail in addressing the rights of children has popular appeal, the tradition in the United States, with some exceptions notably in instances such as abuse and neglect, has generally viewed the rights of children through the lens of the parental right to make child-rearing decisions. An example of such a decision would be that of United States parents choosing their children's education venue.² The purpose of this article is to examine two different legal approaches to the best interest of the child, one being that of the United States that entwines the rights of children with those of parents through federal constitutional and state statutory interpretations and that is not a signatory of the Convention of the Rights of the Child (Convention),³ and the other that of South Africa, a nation that is not only a signatory of the Convention, but that has enshrined the best interest of the child in its Constitution. Whether these two approaches represent fundamentally different public policies about parents and children that can elucidate the United States non-signatory status of the Convention or whether they are simply distinctions without differences is relevant in considering whether the legal tradition in the United States continues to warrant it remaining a non-signatory of the Convention. On the other hand, South African courts might need to re-consider the definition of, among other things, the concept "parent".

This Convention asserts that "[i]n all actions concerning children ... the best interest of the child shall be a primary consideration."⁴ While the Convention purports to protect the right of children not to be separated from their parents except in certain designated circumstances,⁵ it also declares that country signatories will protect the child's "right to freedom of expression ... [that] shall include freedom to seek, receive and impart information and ideas of all kinds ..."⁶ Thus, while signatories "shall respect the rights and duties of ... parents ... to provide direction to ... [children in exercising their right] in a manner consistent with [their] evolving capacities,"⁷ a potential conflict, which could very well have been spotted by the United States, is inherent in the language of the

1 While the U.S. refers to its school -going youth as "students", South Africa uses the term "learners". To avoid confusion, the latter will be used throughout this article.

2 See United States Supreme Court's recognition of this in *Meyer v Nebraska* (*Meyer*) 262 US 390, 396 (1923) and in *Pierce v Society of Sisters* (*Pierce*) 268 US 510 (1925).

3 United Nations Convention on the Rights of the Child (Convention), General Assembly Resolution 44/25 Nov 20, 1989. See *Roper v Simmons* 543 U.S. 551, 577 2005 noting that "Art 37 of the United Nations Convention on the Rights of the Child [has been ratified by] every country in the world" (except for two countries: the U.S. being one of them), forbidding the imposition of the death penalty for juveniles.

4 *Convention on the Rights of the Child*: Part I Article 3.

5 *Convention on the Rights of the Child*: Article 9 which stipulates the separation of children from parents as permitted in child abuse, child neglect and in divorce cases, but in the latter situation the child is to have access to both parents "except if it is contrary to the child's best interests."

6 *Convention on the Rights of the Child*: Article 13(1).

7 *Convention on the Rights of the Child*: Article 14.

Convention where it guides addressing instances in which the direction of a parent is at odds with the expressive rights of their children. Taken at face value alone, the Convention would require that the resolution of that conflict turn on the best interest of the child rather than the parents' best interest for the child. This on its own could be part of the reason for the United States withholding ratification.

The opportunity for, and expectation of, parental involvement in the education of their children is a staple of the American educational system.⁸ Among other things, United States educators decry the absence of parental participation in the education of their children as a contributing factor to a wide range of problems at schools, varying from poor academic performance to disciplinary infractions.⁹ While parental involvement is generally viewed as synchronistic with, and supportive of, the education provided their children at schools, such involvement can also constitute legal challenges to school decisions considered detrimental to their children's best interests.¹⁰

The importance of parental involvement at schools depends largely on a determination of who is a parent. Normally, the best interest of a child is served by parental participation in a child's education. Yet, the question remains whether United States school administrators should respond where parents divided by the custodial terms of divorce decrees disagree on some aspect of their child's education or where those who are not natural parents seek access to learner information such as the learner's education record.

School officials need to have a working knowledge of the rights of children and parents. Moreover, in today's social environment with a high divorce rate, educators need to know more than that;¹¹ they must have confidence that persons purporting to act on behalf of children are not only legally authorised to do so, but also represent the best interest of the children and are willing to report any such misgivings to the authorities. Where two or more persons claiming parental rights make competing demands on school officials such as signing consent forms for field trips, granting permission to provide medical assistance or transportation, seeking access to learner information, or removing

8 See, for example, Michigan Company Laws at § 380.10: "... the ... fundamental right of parents/legal guardians to determine & direct the care, teaching & education of their children... [P]ublic schools ... serve the needs of ... pupils by cooperating with the [their] parents/legal guardians to develop ... pupil's intellectual capabilities and vocational skills in a safe and positive environment."

9 Epstein 2001, offering a comprehensive examination of impediments, challenges and solutions to parental involvement in children's education. Mawdsley & Drake 1993:299, urban schools should design unique collaborative opportunities to encourage parental involvement, since courts are reluctant to mandate parental intervention at schools and involvement is a greater problem at these schools.

10 Mawdsley 2003:165, chronicling rights of parents to direct their children's education over the past century, contending that parents' rights 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.

11 National Vital Statistics Reports (NVSR), 2005. Table 3: the percentage persons divorced has not changed significantly over past years and still falls generally within the low 40th to high 50th percentiles.

learners from school premises, these officials are frequently called on to choose between these competing demands. However, schools do not always have the necessary official documents that indicate the legally appointed prime decision-maker on record, although establishing the custodial rights would easily resolve such matters.

The choice between or among parental 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.¹² 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 of the standards take precedence where a conflict occurs? Or should the best interest of the child be decided in a custodial decree and the best interest of the parent be left to divorce lawyers and judges?

This article therefore examines the different approaches taken in the United States and South Africa with regard to the rights of learners. In the United States, while a tradition of using a best interest standard exists for certain kinds of decisions involving children, the emphasis in school-related matters has been on the rights of parents grounded in the United States Constitution and in federal and state statutes to make educational decisions for their children. On the other hand, the drafters of the South Africa Constitution¹³ enshrined the best interest of the child by including a constitutional provision specifying that *the best interest standard* shall be used when addressing all matters that affect the child. How these two approaches differ and how they have influenced decision-making regarding learners is the object of this article.

2. Short summary of the parent-child approaches in the United States and South Africa

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. The right of the parents to direct the education of their children first received constitutional protection in the United States over eighty years ago in *Meyer*¹⁴ and *Pierce*,¹⁵ and later in *Wisconsin v Yoder (Yoder)*.¹⁶ In these cases the Supreme Court created and enforced parents' right to choose the education

12 See *Meyer*, referring to parents' right to direct education of children under the 14th Amendment's liberty clause. Also see *Zelman v Simmons-Harris* 536 US 639 (2002), upholding funding of vouchers valid for tuition at religious schools where the money is distributed to parents rather than to schools.

13 *Constitution of the Republic of South Africa*, 1996.

14 262 U.S. 390 1923.

15 268 U.S. 510 1925, invalidating state statute requiring all learners to attend public schools as violating right of parents to direct the education of their children.

16 406 U.S. 205 1972, reversing criminal truancy convictions of three parents under both liberty and free exercise clauses where they refused to enroll children at public high schools for religious reasons.

venue for their children under the liberty clause of the Fourteenth Amendment to the Constitution.¹⁷

Over the decades since *Meyer and Pierce*, federal and state courts have sought to apply this right to a variety of settings,¹⁸ while Congress and state legislatures have tried to codify the role and rights of parents in their children's education.¹⁹ While the United States Supreme Court recognised that learners have constitutional rights at schools, these rights have not, until recently, come into conflict with the parental right to make educational decisions for their children.²⁰ Given the strong presumption that parents can act on behalf of their children in educational decision-making, American courts have yet to sort out in a consistent and coherent manner the extent to which the constitutional rights of learners should take precedence over parental rights.²¹ Outside the education arena, this presumption is being tested directly in relevant scenarios where courts must resolve whether the rights of parents to make decisions for their minor children extend to granting consent for, and receiving notification of their having undergone medical procedures.²²

South Africa's approach to the parent-child relationship is different because, while the South African Constitution contains a panoply of basic rights²³ for "a

17 U.S. Const., Amend. XIV, § 1: "No state shall ... deprive any person of life, liberty, or property, without due process of law."

18 See, for example, *Troxel v Granville* 530 U.S. 57, 66 2000, finding that the law violated a mother's substantive rights "to make decisions concerning the care, custody, and control of [her] children".

19 See, for example, *Family Educational Rights and Privacy Act (FERPA)* 20 U.S.C. at § 1232g, 1232g(1)(A)(D) & (6)(b)(1): parents with children at schools receiving federal funds have the right "to inspect and review the education records of their children ... to challenge the content of such ... education records... and to prevent disclosure of ... records (with specified exceptions) ... without the written consent of ... parents." In *Gonzaga University v Doe* 536 U.S. 273 (2000) the court articulated *FERPA* in order to explain how the student had been wronged, the premise being that the learner's parent maintains the right to be notified or to request the release of information on the learner.

20 See, for example, *The Circle School v Pappert* 270 F.Supp.2d 616 (E.D. Pa. 2003), *aff'd*, 381 F.3d 172 (3d Cir. 2004), invalidating a state statute and school rule which requires school officials to notify parents if their children refused joining in the Pledge of Allegiance as violating a learner's free speech rights; consequently, the parents lacked access rights to information regarding their children's noncompliance with the requirements of the statute and rule.

21 As pointed out in the previous few footnotes.

22 *Ayotte v Planned Parenthood of Northern New England* 126 S. Ct. 961 2006, pointing out that states have a right to involve parents when their minors consider terminating pregnancies, although states cannot restrict minors' access to abortions necessary to preserve the mother's life, and remembering that some pregnancies require such immediate medical action that prior parent notification is impossible.

23 *Constitution of the Republic of South Africa*, 1996: section 28(1):

"(1) Every child has the right –
to a name and a nationality from birth;
to family care or parental care, or to appropriate alternative care when removed from the family environment;
to basic nutrition, shelter, basic health care services and social services;
to be protected from maltreatment, neglect, abuse or degradation;
to be protected from exploitative labour practices."

person under the age of 18 years”,²⁴ it contains no corresponding protections for the rights of parents.²⁵ The common law “best interest of the child” principle that governed the apartheid era in custody and access cases under the pre-1996 South African Constitution has been elevated to constitutional status so that “[a] child’s best interests are of paramount importance in every matter concerning the child”.²⁶ While this broad constitutional status has become the “benchmark [for] review[ing] all proceedings in which decisions are taken regarding children,”²⁷ it is not without limitations and cannot be used to suborn the rights of parents and siblings. This was pointed out in *Jooste*²⁸ where the court’s finding for avoiding the unintended effect of affording a child protected status over others in the family suggests that the constitutional provision is a *guideline* rather than a substantive legal rule.²⁹ In this regard the court sounded a warning against the “wider formulation [of section 28(2) as being] ostensibly so all-embracing” that a child’s best interests would take priority over any and all other justifiable interests of parents, siblings and other involved parties.³⁰ Such a “wide formulation” of applying the rule of law horizontally would imply averting, among other things, the incarceration or discharge of the parent if it were not in the child’s best interest, which could “clearly not have been intended” by the law.³¹

With regard to the South African scenario, one needs to remember that the ground-breaking political changes the country has experienced since the first democratic elections in 1994 have brought about extensive changes also in the education dispensation.³² While the South African Constitution caused revolutionary changes in the constitutional history of the country,³³ the adoption of the South African Schools Act³⁴ initiated an innovative period for national education,³⁵ especially at public school level. This came in direct reaction to the era of education under the apartheid dispensation when the Christian National Education structure attempted establishing a national religion based on racial inequality and segregation.³⁶ The democratic South African Schools Act thus specifically aims at establishing national unity³⁷ within the new education structure.

Unlike the United States with its more than 200 year tradition and experience, the South African Constitution contains no explicit or implicit grant of authority of parents regarding their children’s education except as including

24 *Constitution of the Republic of South Africa*, 1996: section 28(3).

25 In *Jooste v Botha (Jooste)* 2000 (2) SA 199 (T) at 207H the court referred to the *South African Constitution* as not obligating parents to “love and cherish their children or to give them their attention and interest.”

26 *Constitution of the Republic of South Africa*, 1996: section 28(2).

27 *Grootboom v Oostenberg Municipality* 2000 3 BCLR (C) 2881.

28 2000 (2) SA 199.

29 *Jooste v Botha*: 210 C-E.

30 *Jooste v Botha*: 210 C.

31 *Jooste v Botha*: 210 C.

32 Louw 2005:191.

33 Rautenbach *et al.* 2003: 2

34 *South African Schools Act* 84 of 1996.

35 Roos 2003:481.

36 *Schools Act*. Preamble.

37 National Policy on Religion and Education (National Policy) section 25.

them within the broad grant to “everyone” of a constitutional right to “a basic education”³⁸ and “further” education “which the State [should make accessible] through reasonable measures”.³⁹ Although parents have no constitutional grant of authority to act for their children, children in South Africa not only have a right “to family care or parental care,” but also “to appropriate alternative care when removed from the family.”⁴⁰ Following on the lack of constitutional support for parents, the basic statute governing South African education⁴¹ refers to the “rights” of all parents, albeit this language is only part of a broader reference to “uphold[ing] the rights of all learners, parents and educators”.⁴²

3. Examining the best interest standard of the child: A comparative perspective

3.1 The best interest standard in the United States

With regard to parents making educational decisions for their children, the best interest test has gained judicial acceptance in the United States in resolving disputes between parents with joint custody and in supporting the educational choices of custodial parents. Judicial determinations of custody in divorce decrees are critical in terms of the relative rights of parents as reflected in the following observation by an appellate court in Tennessee, in *Anderson v Anderson*:⁴³

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.⁴⁴

In *Anderson*, the court held that the best interest of the child was the appropriate standard in evaluating whether a mother could remove her child from the public school and home-school her.

Since the divorce decree created a joint custody relationship between the parents, the appellate panel ruled that the trial court could “break the tie”⁴⁵

38 Constitution of the Republic of South Africa, 1996: section 29(1)(a).

39 Constitution of the Republic of South Africa: section 29(1)(b). Also see *Jooste* (n 25) 210C-E § 29 which contains rights to both “a basic education” and “further education” for “everyone” which would of course include children.

40 See footnote 23

41 *South African Schools Act*: Preamble.

42 *South African Schools Act*: Preamble.

43 56 S.W.3d 5 (Tenn. Ct. App. 1999).

44 56 S.W.3d 5 (Tenn. Ct. App. 1999): at 7-8.

45 56 S.W.3d 5 (Tenn. Ct. App. 1999): at 8.

between the mother who provided the primary physical residence and the joint custody father. According to the court, creating a presumption in favour of the mother's choice of home schooling over the father's choice of her remaining in public school would relegate him to "a powerless position" and "render meaningless" the joint custody relationship.⁴⁶ In upholding the order denying home instruction as "focus[ing] on the best interests of [the child]"⁴⁷, the court found persuasive the child's poor academic performance and attendance at the public school, the mother's having only a high school diploma, and her full-time employment to support the need for the child to stay in a structured school environment. While not finding the mother unfit, the court agreed that "[she] has neither the time, nor the detachment, nor the ability to, by herself, manage the educational needs of this child."⁴⁸

The best interest claim is frequently invoked to resolve whether financial support could be assigned to a parent to pay for non-public education. Over half of the states have statutes permitting courts to decide, in assigning support responsibilities between parents, the extent to which the best interests of children are served by the particular needs of special or private schools.⁴⁹ Whether the best interest of children demands that non-custodial parents pay for private education is generally framed by attendance and satisfactory performance at private schools prior to the dissolution of marriages. 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."⁵⁰ If the best interest of children demands that they continue to attend religious schools, the objection by non-custodial parents who are compelled to pay for tuition does not violate the establishment clause "where the payments [are] made on the children's behalf rather than the [non-custodial 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".⁵¹

3.2 The best interest standard in South Africa

The prominence of the best interest standard provision in South Africa reflects its inclusion in section 28(2) of the post-apartheid South African Constitution. However, despite its inclusion, the provision has generated differences as to whether it is a new constitutional right or just an interpretive rule that essentially is a restatement of the pre-existing family law rule from common law. Following from this, two separate views have emerged, one that all children have a

46 56 S.W.3d 5 (Tenn. Ct. App. 1999).

47 56 S.W.3d 5 (Tenn. Ct. App. 1999): at 9.

48 56 S.W.3d 5 (Tenn. Ct. App. 1999).

49 See, for example, Bergmann & Wetchler 1995:483-485.

50 *Will v Ristaino* 701 A.2d 1227 1234 (Md. Ct. Spec. App. 1997), upholding apportioning of children's private school costs 65% to noncustodial and 35% to custodial parent, less than noncustodial parent's 76% proportionate share of parties' income, and determining that noncustodial parent, who had monthly income of approximately \$2 100, could afford expenses of private school tuition.

51 *Smith v Null* 757 N.E.2d 1200 1204 (Ohio Ct. App. 2001), affirming that a noncustodial father had to pay tuition for his children to attend a Catholic school.

constitutional “best interest” right,⁵² the second that it does not directly embody a right, but only assists courts in choosing between competing options.⁵³

Since the adoption of the South African Constitution, relatively few cases in South Africa have explicated the meaning of section 28(2) in the context of educational decision-making. Still, the few decisions interpreting the section suggest that the best interest of the child could be both a fundamental right and a rule of construction.

In *R. v H. and Another*,⁵⁴ an appeals court reprimanded a non-custodial father’s denigration of the custodial mother and her family as not showing the kind of conduct one would expect from a father who holds his child’s best interest at heart. In invoking section 28(2) of the South African Constitution, the court acknowledged the best interest standard to be “a universal principle ... found in most ... international instruments ... dealing with the rights of a child.”⁵⁵

In South Africa’s post-apartheid admission of black learners to formerly all-white schools, application of the best interest standard has become complicated by the country’s language policy that permits schools to determine the language of instruction.⁵⁶ Thus, under what circumstances must a school that has selected a particular language as its medium of instruction be required to admit learners who want instruction in another language and how should the best interest test be used in such a conflict of interest?

In *Laerskool Middelburg v Departmentshoof, Mpumalanga Department van Onderwys (Middelburg)*,⁵⁷ an Afrikaans-medium elementary school refused admission to 20 learners seeking instruction in English, reasoning that it had been designated under the *South African Schools Act* as an Afrikaans language school and did not have to accept other languages, even though at the time it was the only public school within the area of Middleburg in the Mpumalanga

52 See, for example, *Bannatyne v Bannatyne* 2003 SA 363 (CC) at § 24 & 25, holding that a mother suing for a contempt order for her ex-husband’s failure to provide for maintenance pursuant to a divorce decree had a constitutional claim under the best interest section 28(2), reasoning that:

“Children have a right to proper parental care. It is universally recognised in the context of family law that the best interests of the child are of paramount importance ... [O]ur country has committed itself to giving high priority to the constitutional rights of children. It has provided the legal infrastructure through the Act thereby giving effect to the imperative contained in section 28 of the Constitution.”

53 See, for example, *Sonderup v Tondelli* 2001 1 SA 1171 (CC), ruling that a limitation in sec 28(2) was reasonable & justifiable in rejecting a constitutional challenge to the *Hague Convention on Civil Aspects of International Child Abduction Act* 72 of 1960.

54 2005 6 SA 535 (C).

55 *Constitution of the Republic of South Africa*: at § 9.

56 *Constitution of the Republic of South Africa*: section 29(2):

“Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account equity; practicability; and the need to redress the results of past racially discriminatory laws and practices.”

57 2003 4 SA 160 (T).

Province.⁵⁸ Nonetheless, without taking action under the South African *Schools Act* to change the school's language policy, provincial education authorities administratively withdrew the Afrikaans school's power to admit learners resulting in the school being forced to admit the 20 English speaking learners.

Although the court was sympathetic to the Afrikaans school's plight that its due process had been denied by the government's action, it invoked the "best interest" standard as a fundamental right that could be used when balancing conflicting rights of competing parties. In this case, the court specifically had to weigh the school's right to fair administrative action against that of the interest of the learners who had been dragged into this unpleasant dispute caused by the respondents.⁵⁹ While the court declared that it would have decided for the school had the case reached it prior to the learners' enrollment, the best interest standard demanded that the children who had now already attended the Afrikaans school for nine months and who desired to stay at the school be allowed to continue there.⁶⁰ However, the court ordered the respondents to pay all the costs involved in the case ("punitive costs"⁶¹), including those of the curatrix *ad litem* whom the court had appointed to investigate the interests of the learners, since the respondents were more concerned about forcing the school to change their language policy than they were about the learners' best interests.⁶²

Conversely, an appellate case from a different province, *Western Cape Minister of Education and Another v Governing Body of Mikro Primary School (Mikro)*,⁶³ suggested given a set of facts almost identical to those in *Middelburg* that the best interest of 21 English speaking learners placed in an Afrikaans medium school needed to be viewed with more flexibility than merely treating their presence there as a fundamental right. *Mikro* posited that, in assessing whether the interests of the children would be served by continuing at the Afrikaans language school, one had to consider that "[t]he fact that they are at present happy does not guarantee that they will in future years be happy as a very small minority in a school that is otherwise an Afrikaans medium school" or "that they would be less happy at another school." Indeed, the *Mikro* court suggested that "[i]t is unknown whether or not it would be possible to cater adequately for [the 21 students'] educational needs ... if they remain[ed] in such a small group."

Clearly, *Middelburg* and *Mikro* interpreted the best interest standard in section 28(2) of the South African Constitution differently in terms of the degree of protection accorded to learners by that section. *Middelburg* suggests that the constitutional best interest standard is similar to a property interest under the

58 The nine provinces in South Africa serve basically the same function as states in the United States except that education, which is a state function under the 10th Amendment of the United States Constitution, is a national function in South Africa. The nine provinces are Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Northern Province, North-West, Western Cape: *South African Constitution*: section 103(1).

59 *Laerskool Middelburg v Departmentshoof*: 177J

60 *Laerskool Middelburg v Departmentshoof*: 178D-H.

61 *Laerskool Middelburg v Departmentshoof*: 165A-B.179D.

62 *Laerskool Middelburg v Departmentshoof*: 178I-179C.

63 2005 2 All SA 37 (C).

Fourteenth Amendment of the United States Constitution, while *Mikro* suggests the constitutional best interest standard as only being a rule of interpretation useful when balancing competing interests.

The best interest standard is most dramatically demonstrated in South Africa where at issue is the right of minors to obtain abortions without parental involvement. In the recent South Africa abortion rights case, *Christian Lawyers Association v Minister of Health (Christian Lawyers)*,⁶⁴ the Court upheld the constitutionality of a statute permitting abortions for minors without parental notification or consent where the party providing abortion services has determined that the minor is mature enough to consent to an abortion without parental involvement. In rejecting a facial challenge that the statute interfered with the rights of parents by permitting minors of varying ages to obtain abortions without a specific age limit for parental notification,⁶⁵ the Court concluded that:

[T]he Act serves the best interest of the pregnant girl child (section 28(2)) because it is flexible to recognise and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority. It cannot be in the interest of the pregnant minor girl to adopt a rigid age-based approach that takes no account, little or inadequate account of her individual peculiarities.⁶⁶

Christian Lawyers needs to be contrasted with *Ayotte v Planned Parenthood of New England (Ayotte)*⁶⁷ where the Court acknowledged the power of states to require parental notification (and, even consent),⁶⁸ except where the mother's health or the need for emergency abortions precluded such notice. Ironically, the Court in *Christian Lawyers* relied extensively on United States Supreme Court abortion decisions framing the right to abortion as one of privacy implied under the United States Constitution's liberty clause.⁶⁹ Whether this means that the South African Constitutional Court considers the best interest of the child to be a substantive right comparable to the right of privacy under the United States Constitution is not clear. While such a conclusion seems likely, questions have arisen over whether the best interest standard in section 28(2)⁷⁰ should be a substantive right, seeing that it does not provide a reliable or determinate

64 2005 1 SA 512 (T).

65 *South African Constitution*: section 28(1)(b): "Every child ... the right to family care or parent care."

66 *Christian Lawyers Association v Minister of Health*: § 56.

67 126 S. Ct. 961 (2006).

68 44 states have parental involvement (consent or notification) laws. 38 states have explicit exceptions for health or medical emergencies. See Cal. Health & Safety Code Ann.: § 123450 (West 1996); Ill. Comp. Stat., ch. 750: § 70/10 (West 2004); Mass. Gen. Laws, ch. 112: § 12S (West 2004); Mich. Comp. Laws: § 722.902(b), 722.905 (2002); Ohio Rev. Code Ann.: § 2919.121(D) (Lexis 2003).

69 The South African Constitutional Court cited United States law to support its claim of privacy in making abortion decisions. See *Roe v Wade* 410 United States 113 (1973), invalidating a statute criminalising abortion during first trimester as violating woman's right to privacy under the liberty clause of the 14th Amendment; *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 (1992), holding that requiring a wife to tell her husband she intends to secure an abortion is a violation of the liberty clause.

70 *Constitution of the Republic of South Africa*, 1996.

standard and it creates the danger of social engineering where public officials are entitled to decide what are in the best interests of children.⁷¹ Yet, *Christian Lawyers* strongly suggests that section 28(2), by its mere presence in the South African Constitution, is just such a right. Moreover, the section 28(2) protection afforded children under *Christian Lawyers* is broad enough to separate a child (in this case a girl) in South Africa from her parents in a way that has not been successful in the United States.⁷²

It remains to be seen just how pervasively the South African Parliament and courts will use section 28(2) to isolate parental decision-making from schools. Clearly, such attempts at exclusion in the United States would encounter resistance under federal and state legislation and constitutional protections.

The choice of the standard to be used is only one half of the problem faced that school administrators face, because that measure must then be applied to the different voices demanding to be heard. Even assuming, under either the best interest or constitutional right to make educational choices standards, that parents have a right to speak for their children, that does not answer the question as to which of competing natural parent voices should be heard, or the extent to which parental voices could include persons other than natural parents.

4. Speaking for the child

4.1 Speaking for the child in the United States

Most litigation in the United States relating to disputed claims by parents involves disagreements between custodial and non-custodial parents. The extent to which persons may involve themselves in a child's education in the United States is evaluated under the Constitution along with state and federal statutes, while it is pursuant to national statutes in South Africa. In the United States, the constitutional overlay of a parent's liberty clause right to make educational decisions for a child is very much influenced by state law and the terms of divorce decrees.

The recent pledge of allegiance case, *Elk Grove Unified School District v Newdow (Newdow)*,⁷³ has drawn attention to a subset of education litigation

71 Currie & De Waal 2005:618.

72 Judicial efforts to separate parent interests from those of their children have been limited. See *The Circle School v Pappert, Hansen v Ann Arbor Pub Schs*, 293 F.Supp.2d 780 (E.D. Mich. 2003), finding that excluding a clergy participant from a panel on homosexuality and religion during diversity week violated her free speech, the establishment clause and equal protection claims, but dismissing parents' liberty clause claim because it would amount to restricting the flow of information in public schools. In South Africa, see *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50 (T), directing departments and other participants to remedy their conduct in dealing with unaccompanied foreign children and to appoint a legal representative for each child "if substantial injustice would result," referencing *South African Constitution: section 28(2)*.

73 542 U.S. 1 (2004).

that features competing demands by custodial and non-custodial parents. In *Newdow*, the Supreme Court refused to address the merits of a non-custodial parent's (father) 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.⁷⁴ The custodial mother in *Newdow* did not object to her daughter's participation in the pledge and, thus, was not a party to the suit.⁷⁵ However, the Court determined that, to the extent that the father in *Newdow* lacked standing under California law as a non-custodial parent to make educational decisions for his daughter, it would not address his constitutional establishment clause question.⁷⁶ On remand, a federal trial court in California agreed that since the father had not been granted the right under the divorce decree to make educational decisions for his child, his claim had to be dismissed.⁷⁷

In *Crowley v McKinney* (Crowley),⁷⁸ 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 non-custodial parent.⁷⁹ In *Crowley*, the divorce decree declared that the custodial mother "shall have the sole care, custody, control and education of the minor children." The decree also declared that both parents "shall have joint and equal rights of access to records that are maintained by third parties, including . . . their education . . . records."⁸⁰ The non-custodial father claimed that under the liberty clause's right of parents to direct the education of their children, the school principal and superintendent where his children attended failed to adequately supervise his child in response to complaints of bullying, refused to permit him on the school grounds to serve as a playground monitor to protect his child, and refused to provide him with information regarding his child.⁸¹

In setting aside the father's liberty clause claim to direct the education of his children, the court observed that "[these cases] concern the rights of parents

74 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 "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."

75 The mother's (Banning) motion to intervene based on her award of sole custody was denied since the father retained rights with respect to the child's education and general welfare. The court determined that the father had free speech rights under state and federal constitutions to object to unconstitutional state action violative of the establishment clause and the mother had no right to insist that her daughter be subjected to unconstitutional pledge requirements. However, the 9th Circuit reached this outcome in noting that the noncustodial father had standing to object to the unconstitutional action affecting his daughter. *Newdow v U.S. Congress* 313 F.3d 500 (9th Cir. 2002), a finding invalidated on appeal to the Supreme Court.

76 A federal trial court in California announced that parents have "joint legal custody," but that Banning (mother) "makes the final decisions if the two ... disagree." *Newdow* 542 U.S. at 124 S.Ct. 2310.

77 *Newdow v Congress of the U.S.*, 383 F.Supp.2d 1229 (E.D. Cal. 2005).

78 400 F.3d 965 (7th Cir. 2005), cert. denied, 126 S. Ct. 750 (2005).

79 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."

80 750 ILCS at 967.

81 750 ILCS at 967-968: the latter refusal based on his being the non-custodial parent.

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 non-custodial parent's claim."⁸² More pointedly, the Seventh Circuit noted that the father surrendered his only federal liberty clause right, 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," in the divorce decree.⁸³

Crowley indicates that the custodial responsibilities for children determined in divorce decrees by a best interest of the child standard are not readily assailable by challenging school authorities under constitutional theories, despite the dissenting judge's lament that "a non-custodial parent's fundamental rights are not entitled to the same degree of protection as those of the custodial parent."⁸⁴ While the dissent'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,"⁸⁵ the solution is a state court's reassessment of the best interest of the child under a divorce decree,⁸⁶ not a broad constitutional frontal assault on school officials.⁸⁷

Both *Newdow* and *Crowley* demonstrate the difficult dilemma facing school administrators who must implement state statutory curricular requirements, but who may be called on 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. Similar difficulties could arise under federal state statutes with varying definitions of a parent where administrators must decide whether the person seeking access to learner records, school facilities, or other information is entitled to the access demanded.

82 *Crowley*, 400 F.3d at 968.

83 *Crowley*, 400 F.3d at 971.

84 *Crowley*, 400 F.3d at 975.

85 *Crowley*, 400 F.3d. The dissent cited the relatively high percentages of divorces as related to marriages in 2003; also referencing National Center for Health Statistics (NCHS): Table 3.

86 Federal courts usually defer in family law issues to state law. See *Bryden v Davis* 522 F.Supp. 1168 (D. Mo. 1981). Family law exception to jurisdiction does not prevent federal courts from intervening where federal statutes, such as 18 U.S.C. § 228, criminalises failure to pay child support obligations. *U.S. v Nichols* 113 F.3d 1230 (2nd Cir. 1997), recognising separation of powers & states' rights.

87 Rights in divorce decrees can raise protectable constitutional claims under the liberty clause for a custodial parent. Compare *Wright v Wright* 1999 WL 674306 (Mass. Super. Ct. 1999), finding that a state statute granting a noncustodial parent access to learner 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 learner records under the liberty clause, to *Bergstrand v Rock Island Bd of Educ Sch Dis (Bergstrand)* 514 N.E.2d 256 (Ill. App. Ct. 1987), ruling that a trial court lacked jurisdiction over the claim of a non-custodial 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 suit on the basis that failure to include the custodial parent as a necessary party could have resulted a deprivation of the custodial parent's liberty clause right to make decisions for her children.

In *Taylor v Vermont Department of Education (Taylor)*,⁸⁸ the Second Circuit, in the only other federal appellate court case to date (other than *Crowley*) addressing the competing custodial and non-custodial claims, sorted out competing demands under the Individuals with Disabilities in Education Act (IDEA)⁸⁹ and the Family Educational Rights and Privacy Act (FERPA).⁹⁰ The plaintiff, a non-custodial 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 as well as the right to challenge the content of her child's records. A state trial, in fashioning a divorce decree, "place[d] the parental rights and responsibilities for the child ... both legal and physical fully with the defendant-father . . . [and had] allocate[d] all legal rights and physical rights regarding the choice of schooling for the child ... to the father."⁹¹ The mother was accorded "a right to reasonable information regarding the child's progress in school and her health and safety."⁹²

Under IDEA, parents are accorded an extensive catalogue of rights, among which are: consent to evaluations;⁹³ inclusion as members of the Individualized Education Program (IEP)⁹⁴ teams of their children; IEEs at public expense;⁹⁵ examination of the records of their children;⁹⁶ written prior notice when school officials propose or refuse to initiate or change the identification, evaluation, or educational placement of children;⁹⁷ to serve as members of groups making decision regarding placements;⁹⁸ and, an impartial due process hearing to challenge issues associated with the education of their children.⁹⁹ However, this list of rights means little without a definition of a "parent."

The 2004 Reauthorisation 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 1997.¹⁰⁰ 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."¹⁰¹ With this expanded definition of a parent, Congress "establishe[d] a range of persons who may be considered a parent for purposes of IDEA, but did not require that any and all such persons must be granted statutory rights."¹⁰² Sorting out who is entitled to represent the child's interests as a parent under the IDEA's broadened definition has thus apparently been shifted to the school administrator and to the courts when litigation ensues.

88 313 F.3d 768 (2nd Cir. 2002).

89 20 U.S.C.: § 1400 *et seq.*

90 20 U.S.C.: § 1232g.

91 *Taylor* 313 F.3d: at 772-773.

92 *Taylor* 313 F.3d: at 772-773.

93 20 U.S.C.: § 1414 (a)(1)(C).

94 20 U.S.C.: § 1414 (d)(1)(B).

95 20 U.S.C.: § 1415 (b)(1).

96 20 U.S.C.: § 1415 ((b)(1).

97 20 U.S.C.: § 1415 (b)(3), (c).

98 20 U.S.C.: § 1414 (f).

99 20 U.S.C.: § 1415(f).

100 See *Taylor v Vt Dep't of Educ* 313 F.3d: 777.

101 20 U.S.C.: § 1401 (23). This statutory addition is reflected in language in the 1999 Department of Education regulations. See 34 C.F.R.: § 300.20 (a)(1) & (3).

102 *Taylor* 313 F.3d: at 778.

In *Taylor*, the Second Circuit rejected a non-custodial mother's view that both parents under the IDEA "presumptively enjoy privileges under the statute"¹⁰³ until the state brings proceedings to terminate their parental status, observing that her 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."¹⁰⁴ 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 panel looked to state law where the trial court, by revoking the plaintiff's right to participate in her child's education, led inevitably to the conclusion that she lacked standing to demand a hearing on the appropriateness of her daughter's education.

At the same time, the Second Circuit allowed the plaintiff's section 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."¹⁰⁵ Thus, under the IDEA, even non-custodial parents retain the right to "reasonable information regarding the child's progress in school and her health and safety"¹⁰⁶ and on remand a federal trial court would have to determine what would constitute "reasonable information."¹⁰⁷ The mother did not have section 1983 access under FERPA to learner records¹⁰⁸ 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."¹⁰⁹ The divorce decree granted the father "all legal rights over education" and 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]."¹¹⁰

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

103 *Taylor* 313 F.3d: at 778-79.

104 *Taylor* 313 F.3d: at 779.

105 34 C.F.R.: § 300.562 (c).

106 *Taylor* 313 F.3d at 786.

107 *Taylor* at 787. 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.

108 The 2nd Circuit applied *Gonzaga Univ Doe* 536 U.S. 273 (2002) that prohibited a section 1983 claim for an unauthorised disclosure of education records to apply as well to a denial of access to education records.

109 34 C.F.R.: § 99.4.

110 *Taylor* 313 F.3d at 792.

a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare"¹¹¹ opens up the door for access to learner 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. *Taylor* leaves unclear how school administrators and courts might address demands by persons other than parents where those making demands lack state claim under divorce decrees or custody orders. Nothing in the IDEA precludes determinations of parents on some kind of hierarchy among the competing persons or, in the alternative, that competing persons may not all be entitled to represent a child. *Taylor* deference to state law 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, especially when parental conduct falls below minimum state standard.

Most states have enacted statutes with language declaring that both custodial and non-custodial parents have the same rights regarding access to learner records, but with the general proviso that such rights are subject to court orders to the contrary.¹¹² These statutes, while 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 non-custodial parent based on provisions in divorce decrees. The extent to which school administrators have the time and training to interpret divorce decrees 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.¹¹³ Complicating the problem is that most state laws concern only access to records, leaving unaddressed the knottier issues of non-custodial parents seeking to compel action by school administrators based on information acquired from the records. In addition to the demand for education records,¹¹⁴ the demands of non-custodial parents can extend to decisions regarding their children's curriculum,¹¹⁵ or assertion of procedural rights in discipline situations.¹¹⁶

111 20 U.S.C.: § 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).

112 See 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."

113 See *Wright v Wright* 1999 WL 674306 (Mass. 1999): school officials included as defendants along with the plaintiff's former wife in records-access and intentional infliction of emotional distress claims by a noncustodial father.

114 See *In re Marriage of Schenk* 39 P.3d 1250 (Colo. Ct. App. 2001), finding that a noncustodial father was entitled to access to his child's educational and medical records where he was entitled to parenting time under the divorce decree.

115 See *Bergstrand* in footnote 87.

116 See *Mills v Phillips*, 407 So.2d 302 (Fla. Dist. Ct. App. 1981), ruling that noncustodial father lacked standing to enjoin a school board from suspending his child.

Newly formulated statutes in a few states permitting parents to petition school boards concerning a broad range of curriculum-related issues regarding their children afford similar broadened perspectives of the definition of a parent.¹¹⁷ For example, although it is the exception to the rule under the *Texas Parents Rights and Responsibilities Act*, parents have access “to all written records of a school district concerning the parent’s child,”¹¹⁸ can review their child’s teaching and test materials,¹¹⁹ can remove their child temporarily from classes conflicting with their religious or moral views,¹²⁰ and can petition a 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.¹²¹ Under the statute, a parent “includes a person standing in parental relation,” although “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.”¹²²

The notion that a parent can be defined as a person “standing in parental relation” suggests, but 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.¹²³ Perhaps, the broadening of the definition of a parent would in most cases serve the best interest of children, even where multiple persons are entitled to information regarding a child, but such broadened definitions would most assuredly become invitations to litigation in at least two situations: (1) Where access to information is challenged by one person qualifying as a parent against another such person; (2) where the school administrator seeks by court order to determine whether granting any person or persons qualifying as a parent access to learners and/or learner information serves the best interest of the child.

Similar statutes in other states have generated little reported judicial or legislative assistance in resolving conflicts between custodial and non-custodial parents where they disagree regarding curricular matters.¹²⁴ One possible outcome in litigation resulting from school administrators having made decisions favorable to non-

117 See Tex. Educ. Code Ann.: § 26.003-26.010, enacted in 2000 as the *Parents Rights and Responsibilities Act*.

118 Tex. Educ. Code Ann.: § 26.004: the records are for attendance, test scores, grades, disciplinary actions, counselling, psychological services, applications for admission, health and immunisation information, teacher and counsellor evaluations, and reports of behaviour patterns.

119 Tex. Educ. Code Ann.: § 26.006.

120 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.”

121 Tex. Educ. Code Ann.: § 26.003.

122 Tex. Educ. Code Ann.: § 26.003.

123 For an interesting perspective on residency, see Waltz & Park 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”.

124 See Reilly 2005:84.

custodial parents, but objectionable to custodial parents, is that the administrator's action could be immune from liability under state sovereign immunity statutes.¹²⁵

The obvious problem for school officials facing competing demands from those making parental claims is that, where claims flow from divorce decrees, school officials will be brought into conflicts involving divorce agreements to which they were never parties. Just how much time and energy school administrators should have to spend in addressing the competing demands of divorced parents, in what appears to be the outward manifestation of an ongoing internecine dispute, and is an open question. The expansion of the definition of a parent to include persons who are not natural parents (or not legal guardians) only serves to magnify the significance of the problem. What is at stake is not only the best interest of the education of children, but also the best interest of the school as a whole that demands administrator attention to a myriad number of other problems.

4.2 Speaking for the child in South Africa

Theoretically, South Africa, with its constitutional provision protecting the best interest of the child, should provide useful insights into addressing competing demands among parents under the *South African Schools Act* that defines a parent as:

- (a) the parent or guardian of a learner;¹²⁶
- (b) the person legally entitled to custody of a learner; or
- (c) the person who undertakes to fulfill the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school.¹²⁷

However, similar to the broadened definitions of a parent under the United States federal and state statutes discussed above,¹²⁸ the South African Schools

125 See *Pauley v Anchorage Sch. Dist* 31 P.3d 1284 (Alaska 2001), affirming a grant of summary judgment in favour of a principal and school board that were sued by custodial father for negligent interference with his parental rights by releasing child to noncustodial mother; the court found that the principal's verifying the mother's identity discussing the matter with a police officer was sufficient to constitute a discretionary act under the state's immunity law.

126 *South African Schools Act*: § 1 (IX). A learner is "any person receiving education or deemed to be registered in terms of sec 46." Section 46 addresses requirements for establishing independent schools.

127 *South African Schools Act*: § 1 (XIV).

128 Regarding the first category of "the parent or guardian of a learner," one author has suggested that "it is wide enough to include all natural and adopting parents" although "it is not clear whether ... the father of an extra-marital child is to be regarded as a parent for these purposes." See Visser 1997:627. As to the second category, "the person legally entitled to custody of a learner," Van Heerden & Clark 1995:112 have suggested that this category does "not [apply] to parents and guardians" although the category may refer to what in South Africa is "the Supreme Court [serving as] the upper guardian of all minors." The third category is the broadest of all and could transcend even extended family situations to include any person who assumes any obligation on behalf of learners

Act provides no clear indication of how school administrators or courts are to sort out access to educational information by those who meet the definition of a parent.

The development of a definition of parents in South Africa is an “intense[ly] scrutiniz[ed]” area of private law,¹²⁹ resulting in attention not only being paid to the relationship between natural parents, but also being extended to tribal understandings of the family. Under South African apartheid-era common law, “although the parental power over legitimate minor children [was] shared by both parents, the father’s authority was superior to that of the mother, the mother being confined to participation with the father in the custody of the child’s person and the care and control of his or her daily life.”¹³⁰

The post-apartheid Guardianship Act of 1994 changed this common law presumption in favour of the father by providing that “a woman shall be the guardian of her minor children born out of a marriage and such guardianship shall be equal to that which a father has under the common law in respect of his minor children.”¹³¹ In 1997, the Natural Fathers of Children Born Out of Wedlock Act, in reversing the South African common law that did not acknowledge the natural father of an extra-marital child as a parent, provided that a court could grant the father access rights to or custody or guardianship of the child, but not “unless the court is satisfied that it is in the best interests of the child.”¹³²

Beyond what would be considered to be a nuclear approach to parenthood, the South African Constitution recognises “systems of personal and family law under any tradition or adhered to by persons professing a particular religion,”¹³³ an approach “aimed at the extended family” in tribal and clan systems in South Africa’s indigenous peoples.¹³⁴ This constitutional acknowledgement that “the child’s right to family care extends not only to the nuclear family ... but also to the extended family,”¹³⁵ broadens what already is a broad definition of a parent under the *South African Schools Act*.

such as paying their fees. See *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C), holding that only a custodial parent was responsible for public school fees under the *South Africa Education Affairs Act (SAEA)*, but that statute defined a parent more restrictively than *South African Schools Act*: § 102(A)(1): “the parent of such child or the person in whose custody the child has been lawfully placed.” Thus, while a person who does not meet the definition of a parent under *SAEA* cannot be compelled to pay a child’s school fees, that would not mean that the same person might meet the definition of a parent under the *South African Schools Act* for purposes of gaining access to s at school and their information.

129 See Boshoff 1999: 277.

130 Van Heerden & Clark 1995:140.

131 *Guardianship Act* of 1994: § 1(1). This Act accords parental rights to those not natural parents. See *Ex parte Kedar & Another* 1993 (1) SA 242 (W), with the court awarding joint guardianship of an illegitimate child to the mother of the child & the mother’s employer.

132 *Natural Fathers of Children Born Out of Wedlock Act* of 1997: § 2(1), 2(2)(a).

133 *South African Constitution*: section 15(3)(a)(ii).

134 Robinson 1998:332.

135 Robinson 1998:333.

The three categories of parents under the *South African Schools Act* are likely to provide any South African school administrator with an almost unfathomable challenge in deciding who is a parent.¹³⁶ Since the three categories are stated in the alternative with no indication as to whether the sequence communicates an order of priority, educators are left with the unenviable task of deciding whether they must acquiesce to demands from all persons who satisfy one or more of the parent definitions or whether they are expected to apply the best interest standard in deciding among those claiming to be parents.

Arguably, South Africa's constitutional requirement in section 28(2) that "[a] child's best interests are of paramount importance in every matter concerning the child" should be the standard used to resolve conflicts among parent contenders. Contrary to the United States where the approach to determining educational access to children (learners) is driven by the constitutional rights and statutory definitions of parents, South Africa would seem to have the advantage in short circuiting this process by subordinating parental claims to the best interest of learners. Thus, any person meeting a statutory definition of a parent in the *South African Schools Act* would become simply part of a larger collection of persons eligible for participation as a parent with the ultimate decision to be made based on what is best for the learner. Section 28(2) codifies a learner-centered approach to controlling access to learners and learner information at schools and, whether one views this codification as a fundamental right or a rule of statutory construction, the outcome of parental demands stand to be framed differently than in the United States.

The scarcity of South African school-related parent conflict litigation compared to the considerably greater number of cases in the United States reflects, perhaps, that the best interest of the child standard has been interpreted and applied successfully by school administrators. More likely, the dearth of litigation may reflect a lack of awareness by both South African parents and learners of statutory definitions and constitutional provisions, as well as a lack of resources to challenge whatever decisions are being made. As resources are made available, and those persons satisfying parent status under applicable statutory definitions aggressively assert their claims against school officials, the open question is the extent to which the purpose and emphasis of section 28(2) would change. To what extent would the constitutional provision become a vehicle for learners to assert their independence from parental claims? The separation of learner rights from those of their parents is only in its infancy in the United States, largely because of the overarching constitutional and statutory rights accorded parents, but learners in South Africa have a ready-made constitutional vehicle to assert their freedom from parent intrusion, if only on paper and in theory. Whether South Africa is prepared for this kind of conflict

¹³⁶ For an example of the confusion created by statutory definitions of parent, see *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C), holding that only a custodial parent was responsible for public school fees under *SAEA*, but that statute defined a parent more restrictively than the *South African Schools Act* as "the parent of such child or the person in whose custody the child has been lawfully placed." See *SAEA* § 102(A)(1).

and what the consequences from such conflict would be on the education system remains to be seen.

5. Conclusion

The approaches taken in the United States and South Africa in evaluating the role of parents in educational decision-making reflects different starting points. In the United States, the critical starting point remains the constitutional rights of parents to direct the education of their children. Furthermore, this constitutional right is augmented by federal and state statutes according rights of access to parents under broadened definitions of what it means to be a parent.

In South Africa, on the other hand, the best interests of the child are enshrined in the nation's South African Constitution. However, similar to the United States, South African school administrators need to interpret a broad definition of a parent.

Neither country has given much consideration to providing school officials with useful and practicable information as to how to address multiple and competing demands by those claiming to fit the definitions of a parent. Yet, in the United States, courts have not demonstrated much inclination to expand the definition of a parent either beyond those who are natural parents and those accorded rights of access to learners and learner information under divorce decrees.¹³⁷ The cutting-edge litigation in the United States has not involved the definition of a parent but, rather, whether the constitutional rights of learners could take precedence over the constitutional rights of parents to make decisions on their behalf.

The situation in South Africa seems more fluid. Thus, no clear direction has yet emerged as to whether the constitutional best interest standard will be used to determine who qualifies as parents under the *South African Schools Act*. Since South Africa lacks the American constitutional tradition of protecting the rights of parents, courts in South Africa could very well grant multiple accesses to learners and learner information for those persons satisfying a statutory definition of a parent. In the end, the question for the future is whether the constitutional best interest standard might be used successfully by learners to block parents' access to learner information, especially considering that parents have no countervailing constitutional right of access. Most likely, the resolution of this dispute will depend on whether section 28(2) is considered to be a fundamental right or a rule of construction, but in either case, even that issue will not be resolved without additional litigation.

137 See *Troxel v Granville* 530 United States 57, 66 2000, invalidating a state statute permitting any person, in this case paternal grandparents, to petition for visitation rights, finding the statute violating the substantive rights of a mother "to make decisions concerning the care, custody, and control of [her] children."

Bibliography

- BERGMANN BR AND WETCHLER S
1995. Child support awards: state guidelines vs public opinion. *Family Law Quarterly* 29(3):483-493.
- BOSHOFF A
1999. Towards a theory of parents and children. *Tydskrif vir die Suid-Afrikaanse Reg* 2:276-284.
- CURRIE I AND DE WAAL J
2005. *The Bill of Rights Handbook*. 5th ed. Cape Town: Juta.
- EPSTEIN JL
2001. *School, family, and community partnerships: preparing educators and improving schools*. Boulder, Colorado: West View Press.
- LOUW LP
2005. Religie-onderwys in die brandpunt: gereedheidsvlak van Suid-Afrikaanse opvoeders vir 'n multikulturele bedeling. *Nederduitse Gereformeerde Tydskrif* 46(1&2):191-199.
- MAWDSLEY R
2005. The Third Circuit Court of Appeals strikes down Pennsylvania's pledge of allegiance statute: what are the implications for education? *Education Law Reporter (West)* 196: 1-18.

2003. The changing face of parents' rights. *Brigham Young University Education and Law Journal* 165:175-80.
- MAWDSLEY R AND DRAKE D
1993. Involving parents in the public schools: legal and policy issues. *West's Education Law Quarterly* 2(1): 1-14.
- NATIONAL VITAL STATISTICS REPORTS (NVSR)
2005. Table 3: 53(16) (March 2005). Retrieved from www.cdc.gov/nchs.
- NATIONAL CENTER FOR HEALTH STATISTICS (NCHS)
2004. National vital statistics reports (Table 3) 52: 22. (June 10 2004).
- RAUTENBACH C, JANSEN VAN RENSBURG F AND PIENAAR GJ
2003. Culture (and religion) in constitutional adjudication. *Potchefstroom Electronic Law Journal* 1(6):2-20.
- REILLY LK
2005. Family law goes to school: *School laws every practitioner needs to know to assist divorcing parents*. Retrieved from www.michbar.org/journal/pdf/pdf4article840.pdf
- ROBINSON JA
1998. The child's right to parental and family care: Some brief remarks: section 28(1) of the 1996 Constitution *Obiter* 19(2)329-339.
- ROOS R
2003. Legal requirements for school rules and disciplinary sanctions. *Koers* 68(4):481-498.
- VAN HEERDEN B AND CLARK B
1995. Parenthood in South African law – equality and independence? Recent developments in the law relating to guardianship. *South African Law Journal* 112(1): 140-151
- VISSER PJ
1997. Some principles regarding the rights, duties and functions of parents in terms of the provision of the South African Schools Act 84 of 1996 applicable to public schools. *Tydskrif vir die Suid-Afrikaanse Reg* 4 626-636.
- WALTZ JR AND PARK CR
2005. *Evidence, cases and materials*. 11th ed. New York: Foundation Press.