The Best Interests of the Child Principle in Botswana

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ABSTRACT

The objective of this article is to interrogate and assess the development and application of the principle of the best interests of the child in Botswana. After a brief discussion of the principle at the international and regional levels, the article will then assess how courts in Botswana have applied this principle in various aspects of private law. These areas include, among others, custody, maintenance, adoption and access rights for unwed fathers. The article will show, through a discussion of decided cases, that the best interests of the child principle had permeated all aspects of child law even prior to the country's enactment of the Children's Act of 2009 and subsequent accession to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

1. INTRODUCTION

The use and relevance of the principle of the best interests of the child appears to have gained momentum over the past years. This is despite that it is a concept which is not susceptible to an easy definition and as such its import depends on the context. It is not only broad but is of such significance that it radiates through all aspects where the child is involved.

The objective of this article is to interrogate the best interests of the child principle, and to assess how the principle has been applied in Botswana. It is our opinion that over the years the principle has had a positive impact on promotion and protection of rights of children in Botswana. This is despite that this principle was previously accorded limited to no application especially under customary law.[1] That is, rights of the child were not necessarily at the centre of the decision-

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[1] S Morolong 'Implementing the Convention on the Rights of the Child: Developments in Botswana' (2006) *International Survey of Family Law* 67-68

making process or determination of disputes concerning or involving children. Focus was always on what the parents wanted and what they thought was an appropriate decision as regards the child. This approach was totally inadequate as it did not advance the rights of the child. Further, its precursor, the welfare principle, was largely applied when making decisions on matters relating to child custody.[2] Over the years, the best interests of the child principle was expanded to cover other aspects of life, including but not limited to adoption, custody and divorce. It has also become increasingly clear over the years that the High Court of Botswana, as the upper guardian of all minor children at common law,[3] is duty bound to have regard to the best interests of the child in reaching its decisions.[4] Viewed through the lens of child rights, the best interests of the child principle is substantively in the form of a right accruing to each and every child regardless of his/her status. It can safely be concluded that the principle is a condition precedent for the enjoyment of other rights which include protection and survival rights of children. The child is considered to be the bearer of enforceable rights and duties.

This paper seeks to interrogate how the courts in Botswana have applied the best interests of the child principle in various areas of private law. The notable areas include adoption, custody, parental rights of access, inheritance and divorce. This interrogation is however preceded by an overview of the principle, and by an indication of the understanding of the concept of a child in Botswana.

2. THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

The best interests of the child principle can perhaps be traced back to the 1924 Geneva Declaration of the Rights of the Child. According to the Declaration, mankind owed the child 'the very best that it has to give.'[5] The principle was also included in the 1959 Declaration on the Rights and Welfare of the Child. It was later adopted and given due prominence in the subsequent UN Convention on the Rights of the Child (UNCRC), 1989 and the 1979 Convention on the

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[2] Ibid.
[3] *Moremi* v *Mesotlho* [1997] BLR 7 (HC).
[4] *January* v *Gamble* MAHLB 000-464-07 [2007] BW HC 407.
[5] Preamble, Geneva Declaration of the Rights of the Child (1924) available at http://www.un-documents.net/gdrc1924.htm (accessed 27 January 2019).

Elimination of All Forms of Discrimination against Women.[6] I ts scope has since been expanded to govern a broad spectrum of stakeholders including government and other non-state actors.[7] It permeates both legal and administrative decisions affecting the child.[8] This is because the CRC[9] provides that the best interests of the child shall be a paramount consideration in all decisions concerning the child.[10] The use of imperative language in the Convention, lends support to the position that this principle should be given precedence and due prominence in any decision concerning a child. This does not mean that other considerations are of no relevance and should not be considered.

The idea that decisions concerning a child must be made due regard being had to the best interests of that child was not novel at the time of adoption of the UNCRC. Van Bueren points out that the UNCRC did not create the principle 'but rather transformed it through clearly placing it in a more holistic context.'[11] Expansive literature reveals that the principle dates back to the 20th century when civilized nations recognized that the child needed more protection.[12] An early understanding that decisions must take account of the welfare of the child thus metamorphosed into today's requirement that all decisions must be in the best interests of the child. It is now beyond doubt that the principle is central to the commitment made by states to the promotion and protection of the rights of children.[13] Accordingly, it is expected that countries must promote the best interests of the child and to allow the child to express his or her views on matters that affect his or her interests. A considerable body of literature is now dedicated to understanding the nature, content and function of this principle which, nevertheless, need not be discussed in detail in this paper.[14]

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[6] Article 16 (1) (f); and J Zermatten 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *International Journal of Children's Rights* at 484.

[7] Article 3 (1) of the CRC.

[8] Article 6; General Comment No.14 CRC/C/GC/14 (2013)

[9] Ibid. This is also echoed under section 5 of the children's Act of 2009.

[10] M Maripe 'The Recognition and Enforcement of Children's Rights in the Domestic Law: An assessment of the Child Protection Laws on Botswana in light of the prevailing international trends' (2001) 9 *International Journal of Children's Rights* at 339 at 3

[11] G Van Bueren 'Committee on the Rights of the Child' in Malcom Langford (ed.) *Social Right Jurisprudence: Emerging trends in International Comparative Law* (CUP, 2008) 575.

[12] See generally JH McLaughlin 'The fundamental truth about the best interests' (2009) 54 *Saint Louis University Law Journal* 119; R Walton 'The Best Interests of the Child' (1976) 6 *The British Journal of Social Work* 307.

[13] D Archard & M Skivenes 'Balancing a child's best interests and a child's views' (2009) 17 *International Journal of Children's Rights* at 1

[14] McLaughlin (n 12 above) 113; Y Dausab 'The best interests of the child' in O C Ruppel (ed) *Children rights in Namibia* (Macmillan Education Windhoek Namibia 2009) 145; Hodgkin R & P Newell 'Best interest of the child in

The UNCRC provides:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'[15]

It has been rightly pointed out that the above is the very basis upon which the principle rests.[16] This conclusion is brought about by the fact that since the inclusion of the principle in the UNCRC, international and regional human rights instruments have also made provision for the principle. Notable examples include the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD);[17] the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption;[18] the African Charter on the Rights and Welfare of the Child (ACRWC);[19] and the European Convention on the Exercise of Children's Rights (ECECR).[20] The principle, in its varying senses, and as captured by the various international and regional human rights instruments, simply entails that the best interests of the child shall be considered as paramount in any decision-making processes that concern the child's interests.[21]

Zermatten, in espousing the content and nature of this principle, makes two critical points.[22] The first is that the principle, as captured under article 3 of the UNCRC, does not place any duties on member states, but simply requires that the principle should be given precedence in decision-making processes on matters of interest to a child.[23] The second point is that the principle is a 'rule of procedure,'[24] the 'foundation for a substantive right', and an 'interpretative legal principle.'[25] As a rule of procedure, Zermatten posits, the principle requires that in decision-making processes affecting the child, the decision-maker must as a matter of priority consider the impact of a decision on the interest of the child/children. A description of the principle as 'the foundation for a substantive right' means that there is a guarantee by member states that the

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United Nations Children's Fund' (Eds) *Implementation handbook for the Convention on the Rights of the Child* (UNICEF Geneva 2007)

15 UNCRC, article 3(1)

16 M Freeman '*Article 3: The Best Interests of the Child*' (2007); Zermatten (n 6 above) 484.

17 Art. 23 (2).

18 Art 4 (b)

19 Art 4

20 Art 2(1).

21 Zermatten (n 6 above) 484.

22 Ibid

23 Ibid 485.

24 Ibid

25 Ibid

interests of the child/children would be given priority. As an 'interpretative principle' it means that the principle should be 'developed to limit unchecked power over children by adults.' This makes it easy for one to understand the normative content of the principle from a more practical perspective. This nuanced exposition of the principle should be deemed as complimentary to that which is provided by the Committee on the Rights of the Child.[26] Zermatten's understanding of this principle is used in this paper to help ascertain whether Botswana gives or has given effect to the dictates of the principle and if so, to what extent.

It is perhaps necessary to acknowledge that the exact nature and content of the principle remains problematic across jurisdictions.[27] Barriers to a near exact description of the principle are perhaps due to the fact that what is actually in the best interests of the child is inherently difficult to ascertain.[28] Consequently, even if one understands the principle as an interpretative legal principle, it becomes challenging to apply it to everyday life, thus limiting the development and understanding of the nature and content of the principle in the process. That notwithstanding, the principle continues to act as the basis for the protection of children in several aspects of children's rights. Issues of inter-country adoptions,[29] custody of minor children upon the divorce of their parents,[30] punishment of children in conflict with the law,[31] the rights of children generally,[32] and immigration[33] continue to be decided on the basis of what is in the best interests of the child. Thus, it has been rightly pointed out that

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[26] General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1), UN Doc. CRC/C/CG/14, 29 May 2013.

[27] See generally Freeman (n 16 above) 27 highlighting that the concept of the best interests of the child is indeterminate.

[28] The difficulties surrounding a move towards a common understanding of the principle of the best interests of the child are captured by Abdullahi An-na'im 'Cultural transformation and normative Consensus on the best interest of the child' (1994) 8 *International Journal of Law and the Family* 62; Sonia Harris-Short 'International human rights law, imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly* 131; and Glenn Cohen 'Beyond best interests' (2012) 96 *Minnesota Law Review* 1187.

[29] N Cantwell *The best interest of the child in inter country adoption* (2014) available at https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf (accessed 27 January 2019).

[30] See generally Koen Lenarts 'The Best Interests Of The Child Always Come First: The Brussels II *Bis* Regulation And The European Court Of Justice' (2013) 20 *Jurisprudence* at 1302.

[31] See generally Lahny R. Silva 'The best interest is the child: a historical philosophy for modern issues' (2014) 28 *BYU Journal of Public Law* at 415.

[32] See generally R Lee Strasburger, Jr 'The Best interests of the child: The cultural defense as justification for child abuse' (2013) 25 *Pace International Law Review* at 161.

[33] See generally *ZH (Tanzania)* v *Secretary of State for the Home Department* [2011] UKSC 4. See a detailed discussion of this decision by Jane Fortin 'Are Children's Best Interests Really Best? *ZH (Tanzania)(FC)* v *Secretary of State for the Home Department*' (2011) 74(6) MLR 932–961

> 'Although there is no standard definition of "best interests of the child," the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child.'[34]

True to the above understanding, cases across several jurisdictions have been decided on the basis of the principle. The principle has also been incorporated in statues of many countries, including African countries. The principle is also reflected in outputs of human rights agencies at both international and regional levels. The European Court of Human Rights, for example, indicated in the case of *Hokannen v Finland*[35] that in the application of the best interests of the child, emphasis should be placed on the child's freedom of expression and the child's wishes.[36] The Inter American Court of Human Rights has also categorically stated that the best interests of the child shall be of paramount consideration in the resolution of disputes concerning children.[37] For its part, in the case concerning Nubian children,[38] the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) held that in denying the children the right to be registered, the Kenyan Government acted contrary to the best interests of the child. A practice that left children of Nubian descent without acquiring nationality for a very long time failed to promote children's best interests and was in violation of the African Children's Charter. Decisions taken by the Kenyan Government were also impugned on the basis that they did not comply with the relevant international law practices as regards the best interests of the child. To that extent, and affirming the application of the principle of the best interests of the child, the Committee held that the Kenyan Government should take measures that are aimed towards ensuring that the children were registered as citizens.

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[34] Child Welfare Information Gateway 'Determining the best interests of the child' (2012) available at https://www.childwelfare.gov/pubpdfs/best_interest.pdf (accessed 28 February 2015).

[35] [1993] 19 EHHR 139.

[36] See generally van Bueren (n 11 above) 496; and *Bianchi v. Switzerland* application no.(7548/04) where the Court indicated that the passive attitude between the child's parents had caused a complete break-off between them which was not in the best interest of the child. The Court held that the behavior was contrary to the right to respect of the family.

[37] Inter-American Court of Human Rights Advisory Opinion, OC-21/14: Rights and Guarantees of Children in the context of migration and/or in need of international protection.

[38] *Institute for Human Rights and Development In Africa (IHRDA) & Open Society Justice Initiative on behalf of children of Nubian descent in Kenya* v *Government of Kenya*. (DECISION: No 002/Com/002/2009) para. 57; available at https://www.opensocietyfoundations.org/litigation/children-nubian-descent-kenya-v-kenya (accessed 27 January 2019).

The Committee has also held that incidents where children overstayed with military intelligence agencies before being handed over to child protection agencies were not in compliance with the principle of the best interests of the child.[39] These were children who were at one point recruited as child soldiers by the Lord Resistance Army (LRA) and were then supposed to be repatriated back to Uganda so as to return to civilian life. The Committee noted that they were supposed to have been placed under the care of appropriate civilian care. However, they ended up staying for up to two months with the UPDF or the military intelligence before being handed over to child protection agencies. The Committee has further held that the state had an obligation to ensure that both public and private entities apply the best interests of the child principle in all actions concerning children.[40]

The interpretation and application of this principle by international, regional and sub-regional human rights bodies serve as a reference point for Botswana in so far as the normative content and proper application of this principle is concerned. This is appropriate because decisions of these bodies offer persuasive authority to the Botswana courts when interpreting similar provisions.[41]

3. THE DEFINITION OF A CHILD IN BOTSWANA

The definition of a child in Botswana was problematic. There was no uniform legislative definition. Definitions varied from statute to statute or context to context. It was perhaps due to this anomaly that when ratifying the CRC in 1995 Botswana entered a reservation to Article 1 of the Convention which defined a child as any person below the age of 18.[42] The Children's Act of

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[39] *Michelo Hansungule & Others (On behalf of children in Northern Uganda)* v *Government of Uganda*, 15-19 April, Communication No. 1 of 2005 at para. 49 available at https://acerwc.africa/wp-content/uploads/2018/07/decision-on-uganda-comment-edited.pdf (accessed 27 January 2019).

[40] *The Centre for Human Rights, University of Pretoria & La recontre Africaine Pour La Defence Des Droits de l'homme (Senegal)* v *Government of Senegal* No. 0003/Com/001/2012 at para. 35 available at http://www.chr.up.ac.za/images/researchunits/cru/news/files/2017_senegales_talibes_v_senegal_talibe_case.pdf (accessed 27 January 2019).

[41] *Gomolemo Motswaledi v Botswana Democratic Party* [2009] 2 BLR 284 (CA); EK Quansah 'An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010) 37.

[42] It did so with a reservation that: 'The Government of the Republic of Botswana enters a reservation with regard to the provisions of article 1 of the Convention and does not consider itself bound by the same in so far as such may conflict with the Laws and Statutes of Botswana.' The Governments of Germany, Italy, Netherlands and Denmark

2009 has since adopted the CRC's definition of a child, thereby suggesting that the country's reservation to Article 1 of the CRC is no longer extant. Although varying definitions of a child in other statutes have not been amended, they may have been superceded by the definition in the Children's Act. Section 3 of the Act indicates that its provisions shall take precedence over other statutory provisions in the event of a conflict or inconsistency. The Legislature also saw it fit to align the definition of child with the age of majority. An amendment to the Interpretation Act in 2010 reduced the age of majority from 21 to 18.[43] What remains to be done is to explicitly amend and align other pieces of legislation with both the Children's Act of 2009 and the Interpretation Act.

4 ACCOMMODATION OF THE BEST INTERESTS OF THE CHILD PRINCIPLE IN SELECT BOTSWANA STATUTES

Before reference to and analysis of Botswana cases disclosing incremental development and application of the best interests of the child principle, reference must be made to important, informing statutory developments other than those indicated in the preceding section. It is contended that the first statute to refer to or, more appropriately, allude to the best interests of the child principle was the Customary Law (Application and Ascertainment) Act of 1969.[44] Section 6 of this Act provided that 'the welfare of the children concerned shall be the paramount consideration irrespective of which law or principle is applied' in any case relating to the custody of children. The 'welfare of the child' was a precursor to consideration and application of 'the best interests of the child' principle.[45] This perhaps explains why Botswana courts have in some instances used the two concepts interchangeably.[46] A curious development was the omission of the welfare principle from the Common Law and Customary Law Act published in the 1987 consolidation of the laws of Botswana. This anomaly was remedied in 2000 through the

registered objections against these reservations. See Convention on the Rights of the Child, Ratifications and Reservations, Office of the United Nations High Commissioner for Human Rights, http://www.ohchr.org/english/countries/ratification/11.htm; and F Viljoen *International human rights law in Africa* (2nd ed.2012, Oxford University Press) 386.

[43] Interpretation (Amendment) Act, No 9 of 2010 published on 19 August 2010. The entry into force of the amendment was mysteriously delayed until Statutory Instrument No 15 of 2013 set 1 March 2013 as the commencement date of the amendment.

[44] No 51 of 1969, Cap 16:01.

[45] Morolong (n 1above) 68.

[46] Ibid

Rectification of Laws (No.5) Order, 2000.[47] The literature suggests that application of the "welfare of the child" principle was somewhat limited, even in custody disputes. It assisted mainly to determine who between divorcing parents was better placed to look after children.[48]

After the 1969 Customary Law (Application and Ascertainment) Act of 1969, the next statutory development of interest was enactment of the Children's Act of 1981.[49] This also unfortunately failed to refer to or incorporate either the welfare of the child or best interests principle. This was notwithstanding that it was supposed to be a 'comprehensive piece of legislation for the care and protection of children in need and the treatment of juvenile offenders.'[50] There were only hints in some of the provisions that regard should be had to the best interests of a child. Section 28, for example, enjoined a Juvenile Court, after taking into consideration the general conduct, home environment, school records and medical history (if any) of a child or juvenile convicted of an offence, to dispose of the case in manner that did not entail incarceration.

The Children's Act of 1981 was repealed and replaced by the Children's Act of 2009 which sought to domesticate provisions of the ACERWC and the CRC. For the first time, the best interests of the child principle was also expressly incorporated into the law. Section 5 of the Act provides:

> 'A person or the court performing a function or exercising a power under this Act shall regard the best interests of the child as the paramount consideration.'

From this, the best interests of a child is not merely a guiding principle, but a paramount consideration. This means that it overrides all other principles enunciated in the Act. The guiding principles to be observed in the administration of the Act notably include not discriminating against any child on the basis of sex, family, colour, race, ethnicity, place of origin, language, religion, economic status, parents, physical or mental status, or any other status; caring for every child and protecting it from harm; parents, family and community of the child having the primary responsibility of safeguarding and promoting the child's well-being; the right of every child to a stable, secure and safe relationships and living arrangements; and giving a child's parents,

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47 SI No 74 of 2000.

48 See generally Botswana CRC Report (2003) para. 124; *Chiepe* v *Sago* [1982] 1 BLR 25; *Langebacher* v *Thipe* MC 150/1982; *Phiri v Dintsi and Dintsi* MC F29/1990.

49 No 5 of 1981

50 B Otlhogile 'Juvenile delinquency in Botswana and the 1981 Children's Ac' (1985) 18/3 *The Comparative and International Law Journal of Southern Africa* 396, 398.

relatives, guardians and others who are significant in a child's life an opportunity and assistance to participate in decision making processes under the Act.[51]

Not only does the Children's Act of 2009 require paramount consideration to be given to the best interests of a child in matters involving children, it also enumerates the factors to be taken into consideration in determining what could be in the best interests of the child. Some of the factors resemble some of the guiding principles, and some are completely different. They include the need to protect the child from harm; capacity of the child's parents, other relative, guardian or other person to care for or protect the child; the child's spiritual, physical, emotional and educational needs; age, maturity, sex, background and language; cultural, ethnic or religious identity; the likely effect on the child of any change in the child's circumstances; any wishes or views expressed by the child, having regard to its age, maturity and level of understanding; and any other factor which will ensure the general well-being of the child.[52] It is underscored in the Act that this is not a closed list of factors to be taken into account.[53] This is appropriate, considering that the principle is open to multiple interpretations depending on the context and complexities of the issues to be determined regarding a child.

Section 3 of the Children's Act 2009 discloses another important aspect to be appreciated in this account. It provides:

> 'In the event of any conflict or inconsistency between the provisions of this Act and any other legislation, the provisions of this Act shall take precedence, except where the exercise of the rights set out in this Act has or would have the effect of harming the child's emotional, physical, psychological or moral well-being or prejudicing the exercise of the rights and freedoms of others, national security, the public interest, public safety, public order, public morality or health.'

Provisions of the Act thus override inconsistent, contrary or conflicting provisions in other laws. This means that the principle of best interests of the child, which is paramount under the Act also overrides inconsistent, contrary or conflicting provisions espoused in provisions of other laws in Botswana.

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[51] Section 7 of Children's Act No 8 of 2009
[52] Section 6 (1)
[53] Section 6 (2) .

5 BOTSWANA COURTS AND THE BEST INTERESTS OF THE CHILD PRINCIPLE

Courts in Botswana have, over the years, made concerted efforts to prioritise the best interests of the child in the decisions concerning children. As indicated in the introduction, this can be demonstrated through a study of key cases on custody of children; parental access to children born out of wedlock; maintenance; and adoption.

5.1 Custody Cases

The two main custody cases to be referred to in this study are *Mazile v Mazile*[54] and *Ntshekisang v Ntshekisang*.[55] *Mazile* was disposed of before enactment of the Children's Act of 2009, but the law and pronouncements therein can easily be reconciled with the best interests of the child principle advocated by the 2009 Act *Ntshekisang*, decided after the 2009 Act, explicitly confirms that the best interests principle as the paramount consideration in custody cases.

In *Mazile* the court considered and granted the applicant, the wife, an interim order for custody of two children of the marriage, one aged two years and 11 months, and the other just over a year. The marriage was under stress and probably heading towards divorce. The respondent, who initially contested the application, changed grounds and sought custody of only the older child. The court discounted it as a 'blind view', which no longer applies, the notion that 'all mothers are better care-givers to young children'. It is not the sex of the parent, but considerations reflecting on efficiency and quality of parenthood.[56] Dow J said:

> '[T]he primary consideration will be the best interest of the child, with the following issues being amongst the indicators: (a) the suitability of the parent; (b) the desirability of keeping siblings together; (c) the availability of the parent to provide day to day care; (d) the desirability of ensuring stability and security in the lives of young children; (e) the availability of the parent to provide for the children's emotional, psychological, cultural and environmental development;

[54] [2001] 1 BLR 175 (HC)
[55] [2011] 2 BLR 894 (HC)
[56] [2001] 1 BLR 175 176.

> and (f) the suitability or otherwise of the children's existing environment, having regard to maintaining the status quo.'[57]

It is as if the court was aware of the enumeration of some factors to be taken into consideration in determining what could be in the best interests of a child under section 6 of the Children's Act, 2009.

In *Ntshekisang* Moroka J acknowledged thus the jurisprudential effect of the Children's Act, 2009:

> 'The coming into force of the new Children's Act changed the legal landscape in the handling of children's issues which courts must acknowledge and make use of. Now the concept of the best interest [sic] of the child is no longer a matter for common law or case law acknowledgment. It is a matter of statutory reality.'[58]

The plaintiff in the case, a divorced mother, sought permission to take two minor of the marriage, who were living with her, to Australia for a period of 18 moths, where she was going to pursue her studies. After canvassing the law as now reflected in the UNCRC and the Children's Act, 2009, the court found that the need to relocate to Australia by the custodial parent in pursuit of educational opportunities was clearly bona fide. The relocation would make it more difficult for the non-custodial parent to interact with the children. But it was in the best interests of the children that they should temporarily relocate with their mother to Australia. Given the traumatic events in their life, a new environment would assist in their emotional re-adjustment. The mother was also the primary caregiver, and separating her from the children at this stage would impact negatively on them. On how to ascertain the best interests of the child, Moroka J said:

> 'Giving primacy to the best interests of the child enjoins the court to adopt a two staged approach; (i) firstly to determine the child's peculiar needs from a psychological, emotional, spiritual and material perspective. The court must inquire into the age, gender, state of health of the child, whether there are any particular health concerns, the emotional stability of the child, the educational, spiritual and cultural needs of such a child. In doing so the court is

[57] [2001] 1 BLR 175, 176-177
[58] [2011] 2 BLR 894 897

> putting itself in a position to understand the critical needs of the child whose destiny it's (sic) about to reshape.
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> Children's optimum needs are sacred hence the best interests of the child must lie at the apex of the hierarchy of all competing interests. The court must identify the optimum needs of the child before anything else. The court must be alive to hierarchy of interests' attendant to the child's development and survival. It is only through this appreciation that the court can truly make a decision that is in the best interest.
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> Having identified the peculiar needs of the child, the court must proceed to the second phase and (ii) look into the suitability of the proposed custodial parent by inquiring into the parent's character, religious, cultural, economic and moral fitness. Material considerations which relate to the child's wellbeing would also play a role ...'[59]

In its application of the principle of the best interests of the child, the court rightly noted that the concept was indeterminate, making it possible for the Courts to accommodate the 'ever-changing social values, standards and customs and way of life of people.'[60]

Other case authorities have also suggested that it is imperative that custody disputes to be resolved without delay. Security and certainty about the situation can only be in the best interests of the child.[61] Whether it suitable or in the best interests of a child to award custody to one or the other parent, may require using social workers to assess the child's living conditions, (prepare a socio-economic enquiry report). Some custody disputes may be resolved without assistance by social welfare officers, but it may be advisable to involve them in contested cases.[62]

5.2 Parental Access to Children Born Out of Wedlock

[59] [2011] 2 BLR 894, 899

[60] [2011] 2 BLR 894 901. The court also applied the reasoning adopted in the South African case of *Godbeer v Godbeer* [2003] 3 SA 976.

[61] *Phibion* v *Phibion* [2001] BLR 195, Morolong (n 2 above) 69.

[62] See *Peloewetse* v *Peloewetse* [2005] 2 BLR 130(HC).

Although access is generally a right for both a child and a non-custodial parent, its exercise or enjoyment is predicated on what may be in the best interests of the child. This was explained thus by Chinyengo J in *Modisenyane v Modisenyane* (2)[63]:

> '...There is a tendency to regard access rights as rights granted in the interest of the non-custodian parent. That is not exactly the position. A child has a right to have access or to be spared access and so access is granted or denied depending on where the best interests of the child lie. Access is a two-way process. In one sense it is a right granted in the interest of the non-custodian parent and in another and more decisive sense, it is a right granted in the best interest of the child - see *V v V* 1998 (4) SA 169 (C) at p 189 C-E where it was said that the child's right to have access is complimented by the parent's right to have access to the child ...'

The seismic shift in the law on parental access to children born out of wedlock was noted and appreciated in several cases.[64] At common law, (Roman Dutch law), a father was the natural guardian of children born in wedlock. Until they came of age, he was responsible for their affairs. He therefore could not be denied custody or access without good cause. The father a child born out of wedlock, on the other hand, had no relationship with the child, although liable to pay maintenance. The mother alone was the sole guardian. The father had no inherent right of access. The patriarchal dominance of the father in instances of children born in wedlock, and the matriarchal dominance of the mother in instances of children born out of wedlock, should now be subordinated to the principle of best interests of the child encoded in the Children's Act, 2009.

The Act has also formally provided for co-parenting agreements to be concluded by biological parents of a child who are not married to one another or living together.[65] These could also provide for access, maintenance and other aspects concerning the child's upbringing. A co-parenting agreement must be in writing, and a copy filed with the clerk of the children's court in the district where the child resides. It is contended that this makes them court-sanctioned agreements, to be respected and enforced like court orders.

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[63] [2006] 2 BLR 65 (HC) 67

[64] See *Ndlovu v Macheme* [2008] 3 BLR 230 (HC); *Macheme v Ndlovu* [2009]1 BLR 120 (CA); and *Mokoti* v *Okatswa* [2011] (2) BLR 1021 (HC).

[65] Children's Act, Section 29.

5.3 Maintenance

Child maintenance is regular, reliable financial support that is aimed at helping a child to attain the basic necessities of life. These by and large entail provision of necessaries which are connected with the right of the child to be cared for by both its parents.[66] Maintenance of children is usually dependent on whether the child is born in or out of wedlock and whether customary law or the common law is applicable.

Customary law distinguishes between the duty to support children born out of wedlock and the duty to support those who are legitimised by marriage.[67] A child born out of wedlock under customary law belongs to its mother and her kin group. The legal guardian of such a child is the maternal grandfather and, in his absence, the maternal uncle. The duty of child care and protection thereof is aligned to the maternal parents of the child. This is not to suggest that the father had no obligation to support an illegitimate child. It has been held that an unwed mother could claim for maintenance of such a child under Tswana customary law, separately from any payment that would have been paid as damages for the pregnancy.[68] Customary law could nevertheless be could be assailed for the differential, discriminatory treatment of children born in and out of wedlock, and for failure to have regard to the best interests of the child. The common law position with respect to child support and maintenance was highlighted in *Moremi v Mesotlho,*[69]where the Court stated in no uncertain terms that children have a common law right of support from their parents. This right, according to the Court, arises from a sense of natural justice and filial, parental duty and affection of blood and this extends to children born out of wedlock.[70]

The statutory position is reflected in section 27 of the Children's Act of 2009, which obliges parents to care for and maintain their children. The parent also has a duty towards a child to ensure that the basis of every decision and action he/she takes in respect of the said child is in their best interests. Every child has the right to know and be cared for by both its biological parents

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66 Section 13 Children's Act.

67 I Schapera "*A Handbook of Tswana Law and Custom" (2nd* edition, 1970, Oxford University Press) at 171-172.

68 Lisimba J in *Mashabane* v *Molosankwe* [2000] 1 BLR 185 (HC) 190 acknowledged that maintenance of an illegitimate child existed under Tswana Customary law, although not in the form of period payments as is the case at common law. This was for the upkeep of the child.

69 [1997] 2 BLR 7 (HC)

70 In *Magibisela* v *Mogobe* [2002] 2 BLR 53 (CA) the court stated that in terms of the Roman Dutch common law both the mother of the child and the father are obliged to support the child according to their respective means. The obligation to support the child lapses when the child reaches the age of 21, marries or becomes self-supporting.

irrespective of their marital status. A child is also entitled to appropriate alternative care in instances they are removed, subject to their best interests, from the family environment.[71] A child born out of wedlock and who does not live with both of his/her biological parents has a right of access to both parents and maintenance by both parents. The child also has the right to be nurtured, supported and maintained by such absent parent in accordance with the provisions of the Children's Act or any other Act which deals with the care and maintenance of children.[72]

The Affiliation Proceedings Act[73] provides for determination of 'paternity of an illegitimate child' and for the making of maintenance orders for the support of the same. The orders may be sought from designated Magistrate's and Customary Courts, within five years from the birth of the child. Although passed and last amended before the Children's Act of 2009, some of the provisions of the Affiliation Proceedings Act appear to ensure that the best interests of the child are protected. For example, where the parent of a child claims to have no income from which deductions for maintenance could be made, a social worker shall be directed to assess his estate or socio-economic standing and to compile a report that will be used to determine how the parent may contribute towards the upkeep of the child.[74]

The Deserted Wives and Children Support Act[75] provides for the making of maintenance orders for wives and children who have been deserted and are without adequate means of support. In so far as children are concerned, an applicant must the child is in need of support; it has been deserted by the father; and the father is in a position to provide the maintenance.[76] Although there is no explicit reference in the Act to the best interests of the child principle, it is obvious that this is the underlying theme of the parts of the Act that specifically deal with maintenance of deserted children.

It would appear from the foregoing that customary law, common law and statute law in Botswana all appear to uphold the right of a child to be cared for and maintained by its parents.[77] The refinement brought about by the Children's Act of 2009 is to de-emphasize gender roles and pronounce that the best interests of the child must always be the primary consideration. The Act,

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[71] Children's Act, sec 13.
[72] Children's Act, sec 13(2).
[73] No 50 of 1970, as amended by Act No 8 of 1999, Cap 28:02..
[74] Affiliation Proceedings, sec 6(3).
[75] Cap 28:03 Laws of Botswana.
[76] Deserted Wives and Children Protection Act, sec 3 (2)
[77] *Montshioa v Montshioa* [1999] 2 BLR 216 (HC).

in a way, also acknowledges the important role played by fathers in the upbringing of their children. This is a welcome development, likely to contribute to strengthening of filial relationships between children and their fathers in the community.[78]

5.4 Adoption of Children

Adoption in Botswana is governed by the Adoption of Children's Act of 1952.[79] It specifies that adoption shall be effected through an order issued by a Magistrate's court. It identifies classes of persons eligible to adopt and the qualifications they should possess. It also indicates the effect of an adoption order. The Act notably requires that before an order is granted, a court must be satisfied that the applicant or applicants are qualified; of good repute and fit and proper persons to be entrusted with the custody of a child; and possessed of adequate means to maintain and educate the child.[80] The court must also be satisfied that 'the proposed adoption will serve the interests and conduce to the welfare of the child.'[81] This is clearly not inconsistent with the best interests of the child principle..[82]

Adoption of children could be viewed as either complete or incomplete.[83] Complete adoption occurs were where the adopted child is assimilated into the family of the adoptive parents. On the other hand, incomplete adoption occurs where the adopted child still maintains relations and contact with the biological parents. It has been contended that complete adoption is more conducive to the best interests of the child as it ensures a stable environment for the child.[84] From section 6 of the Adoption Act on the effect of an adoption order, Botswana appears to have a slightly less than complete adoption system. It provides that an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent. The order shall, unless otherwise provided, confer the surname of the adoptive parent on the adopted child. It shall

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[78] The Children's Act 2009 can in this sense be regarded as complementing progressive decisions in cases such as *Mfundisi* v *Kabelo* [2003]2 BLR 129(HC); *Ndlovu* v *Macheme* [2008]3 BLR 230(HC); and *Macheme* v *Ndlovu* [2009]1 BLR 120 (CA). These are cases in which the father of a non-marital child was granted access to the child notwithstanding objections or reservations of the mother, married to a different man, who could adopt the child.

[79] Cap 28:01 Laws of Botswana.

[80] Section 4 (2) (b)

[81] Section 4 (2) (c).

[82] See also *Attorney-General v Harrisson Thipe* and Others [1972] 2 BLR 6 (HC).

[83] RJV Cole *et al* "Adoption of Children in Botswana in a comparative perspective: Unpacking two models of adoption" (2013) 16 *University of Botswana Law Journal* 38.

[84] Ibid

also 'terminate all the rights and legal responsibilities existing between the child and his natural parents and their relatives, except the right of the child to inherit from them *ab intestato*.' Retention of the right of the child to inherit from its natural parents is what makes the system less than complete and, consequently, arguably not quite in the best interests of the child.[85] Section 7 of the Act, providing that a court may permit a parent or guardian of a child to have access to the child during a period not exceeding two years from the date of the order also detracts from the completeness of the Botswana system.

An additional notable feature of the adoption process in Botswana is that consent to the adoption is required from certain persons. These include both parents of the child, or if the child is illegitimate, the mother; guardians, where both parents or the mother of an illegitimate child are dead;[86] and the child itself, if it is over the age of ten.[87] Seeking the consent of the child to be adopted is progressive and probably necessary for establishing its best interests. The controversial aspect of this requirement is that only the mother's consent was required for adoption of an illegitimate child. The putative father had no part to play in the process. This was challenged in *Geofrey Khwarae v Bontle Onalenna Keakitse & Others*.[88] The facts of this case are that the Applicant was the biological father of a female minor who was allegedly a product of a brief relationship between her parents. The romantic relationship between her parents ended before she was born. The Applicant played an active role in his daughter's life by supporting her and providing her with finances and supplies. The Applicant also had access and visited the child whenever he was allowed to do so by the child's mother. The applicant was fearful that his daughter could be adopted by her mother's boyfriend, the third respondent, without his consent. He averred that he had no way of ascertaining whether the child was already adopted as he was irrelevant to the whole adoption process notwithstanding that he was the child's biological father. The Applicant was rendered irrelevant to the adoption proceedings by the fact that section 4(2) (d) (i) of the Adoption of Children's Act did not require his consent. He contended that the section, in so far as it did not require his consent for the adoption of his child because she was born out of wedlock, was unconstitutional. According to him, the section was in violation of his right to freedom from discrimination; freedom from inhuman and degrading treatment; and the right to a

[85] Ibid 41
[86] Adoption of Children's Act, sec 4 (2) (d).
[87] Section 4 (2) (e)
[88] Case No. MAHGB – 000291-14 (Unreported).

fair hearing. The Applicant's main argument was that the effect of denying unmarried fathers a legally protected relationship with their children was to discriminate unfairly against them on the basis of sex or marital status.[89] As a result, the section was contrary to section 15(3) of the Constitution.[90]

The Court held that section 4 (2) (d) (i) of the Adoption of Children's Act was unconstitutional to the extent that it does not require the consent of the father in the adoption of his illegitimate child in all cases.[91] The Court took into account the fact that the new scheme of things under the Children's Act of 2009, called for an increased involvement of both parents in the life of the child and consequently, in adoption proceedings. Above all, Dingake J rightly pointed out that the supremacy of the principle of the best interests of the child has been clearly established in Botswana.[92] Accordingly, the Court was of the view that the father's interest in the companionship and desire to take care of his child could not be ignored as it had a direct bearing on the interests of the child.[93] Further, the court was of the opinion that the underlying purpose of section 4 (2) (d) (i) of the Adoption of Children's Act – to the extent that it provided that the consent of the father is necessary where he is married and not necessary where he is not – was not shown to be reasonably necessary in an open and democratic society[94] and had, as he indicated, "grave consequences for the best interests of the child."[95]

Dingake J's decision followed an earlier decision by the Court of Appeal in *Deborah Jan Kirsten Mey* v *Joshua July*.[96] This case involved a father who was never involved in the life of his child who sought to reverse adoption that had taken place [within a period in excess of]??? three years. The Court of Appeal indicated that it was erroneous for the High Court, in making orders that sought the removal of the child from the care of her adoptive parents, to have failed to take

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[89] para. 35.
[90] Section 15(1) of the Constitution reads: 'Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.' Section 15 (3) reads: 'In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
[91] para. 221.
[92] para. 148.
[93] para. 199.
[94] para. 200.
[95] As above.
[96] Unreported, CACGB-134-13.

into account the best interests of the child.[97] In this case, the Appellant/Adoptive mother had been staying with the adoptive child since the child was three months old. The father had only seen the child once since the child was born. It was clear from the circumstances of this case that at the time of the Court proceedings, the child had already developed a bond with its adoptive parent.

The adoption was regarded as not detrimental to the best interests of the child. This was despite that the child's father was not involved or consulted during the adoption proceedings. The reasoning of the Court was that the rights of the parents, as asserted by the respondent (father), were not absolute but were subject to the child's best interests.[98] The Court of Appeal in this case concluded that in adoption proceedings, an unwed father should only expect to be consulted on the adoption of his child if he had been involved in the child's life.[99] In such a scenario, the involvement of the father in the child's welfare and upbringing would then be factors to be taken into account in deciding whether the adoption would be in the child's best interests.[100]

It is important to highlight that both the *Khwarae case* and the *Kirsten* cases took into account the best interests of the child in determining whether the adoption process under scrutiny was appropriate. In both cases the supremacy of the best interests of the child was confirmed. As already indicated, the advent of the Children's Act 2009 was perhaps an affirmation of the direction that the Courts had already taken in dismantling common law rules that ignored the best interests of the child. The decisions of the High Court in relation to access by unwed fathers indicated this momentous shift.[101] In all those cases, it was clear that the best interests of the child were a determining factor in deciding whether the father should have access to the child or not. This was in contrast to the previously applicable common law position that the mother of a child born out of wedlock had absolute control over the child.[102] Such control in practice usually resulted in instances where the father to a child born out of wedlock totally had no access to his child.[103]

5.5 Challenges and Prospects

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[97] Para. 47 & 48.
[98] para. 48.
[99] para. 61.
[100] Ibid .
[101] *Mfundisi* v *Kabelo* [2003] 2 BLR 129*; Ndlovu* v *Macheme* [2008] 3 BLR 230 (HC) upheld by the Court of Appeal in *Macheme* v *Ndlovu* [2009] 1 BLR 120 (CA).
[102] EK Quansah *Introduction to Family Law in Botswana (*4th edition 2006, Pula Press) at 144.
[103] Ibid .

Notwithstanding the successful invocation and application of the principle of best interests of the child, especially after the enactment of the Children's act 2009, challenges remain in the application of the principle to other areas of the law in Botswana. The concerning areas include treatment of children of those that Botswana's immigration laws; the right of children born out of wedlock to inherit from their father's estate; and surrogacy arrangements.

It would appear that there is hardly any regard to the best interests of children born to those being processed as illegal immigrants under Botswana's immigration laws[104] Illegal immigrants may include persons who have overstayed in the country; have been denied refugee status; have entered the country through ungazetted points; and persons without valid documents. When the parents are deported or sent to the Centre for Illegal Immigrants, children are dealt with in the same manner, even when it may not be in the best interests of the children to be incarcerated with their parents. Such situations call for different, more congenial arrangements for the children, which immigration officials appear to be unwilling to devise.

It is also taking long for customary law and the common law regarding the right of extra marital children to inherit from their father's estate to be influenced by the domestication of the best interests of the child principle through the Children's Act of 2009.[105] The common law position was reiterated in, among other cases, *Tape v Matoso*.[106] The Court of Appeal held that a woman and her 10 children, born in a 30 year adulterous relationship with the deceased, had no rights to participate in his intestate estate. Those with rights in the intestacy were the wife she did not divorce when the adulterous relationship started, and her four children. Under customary law too, the High Court stressed in *Hendrick v Tsawe*[107] that a child born outside marriage does not have the same inheritance rights as children born within marriage. It held that a son born outside marriage under customary law obtaining in Tshootsa (kalkfontein) and Botswana generally could

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[104] The relevant pieces of legislation include the Immigration Act (2011), the Refugees (Recognition and Control) Act (1968and the Prisons (Centres for Illegal Immigrants) Regulations Cap 21:03 (SI) 38.

[105] See generally O Jonas and P Gunda 'Children born out of wedlock and their right to inherit from their fathers under customary law in Botswana – *Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor'* (2015) XLVIII *CILSA* 89; O Jonas 'Extra-marital children and their right to inherit from their fathers in Botswana: A critical appraisal' (2015) 17 *European Journal of Law Reform* 93; E Macharia-Mokobi 'Lingering inequality in inheritance Law: the child born out of wedlock in Botswana' in Southern African Litigation Centre (SALC) (Ed.) *Using the courts to protect vulnerable people: perspectives from the judiciary and legal profession in Botswana, Malawi, and Zambia* (Johannesburg 2014) 140 - 148.

[106] [2007] 1 BLR 512 (CA)

[107] [2008] 3 BLR 447(HC)

not inherit from the estate of the father, unless he could show that he was legitimately adopted under customary law.

On surrogacy arrangements, the High Court in *Gofhamodimo Sithole v Lekoko Baatweng*[108] was called upon to decide on what should happen to a frozen embryo when the parties divorce. In the absence of legislation regulating such arrangements in Botswana, the court approached the matter from the perspective of the interests of the parties, not the interests of the child yet to be born. South Africa, in contrast, has legislation requiring that persons commissioning a surrogacy pregnancy 'in all respects be suitable persons to accept parenthood of the child that is to be conceived. This is conducive to consideration of the best interests of the child in surrogacy matters.[109]

Challenges in the application of the best interests principle in the areas identified may partly be due to the wording of section 3 of the Children's Act 2009. The section asserts that the Act overrides provisions of other pieces of legislation that are inconsistent with it. The section should perhaps provided that the Act shall also override inconsistent common law and custmary law rules and principles. Most areas affecting children's rights are still governed by common law and customary law rules and principles.

6. CONCLUSION

From the foregoing it can be seen that the principle of the best interests of the child is invariably used each time an issue involving children arises. It has certainly moved beyond being an interpretative tool to a principle of paramount consideration by the courts. The principle emerged and was applied as the welfare of the child principle. Courts in Botswana have played a significant role in its evolution and transformation into what the Childern's Act 2009 has codified as the best interests of the child principle.

It would appear that the resolution by the courts of disputes and issues involving children has improved significantly after the enactment of the Children's Act of 2009. It would appear that it is probably just a matter of time before the courts use the best interests principle and the Act

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[108] Case No. MHLB – 000670 – 11 (HC) (Unreported judgement).

[109] J Sloth-Nielsen 'Surrogacy, South African Style' *Family Law Newsletter* (September, 2013) 19, available at http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/1275/Sloth-NielsenSurrogacySouthAfricanStyle2013.pdf?sequence=1 (accessed 15 October 2015).

to assail common law and customary law rules that still appear to be antithetical to children's rights. It is pleasing to note that judicial officers are very much aware of the provisions and requirements of this Act, This knowledge ought to be cascaded down to other officers dealing with children's rights in Botswana, such as social workers and welfare officers. This is likely to ensure even better protection and promotion of all rights of children in Botswana.