

## THE SEXUAL ORIENTATION OF A PARENT AS A FACTOR WHEN CONSIDERING CARE

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### SUMMARY

Section 28(2) of the Constitution states that a child's best interest is of paramount importance in every matter concerning the child. Section 9 further provides that every person is considered equal before the law and has the right to equal protection and benefit of the law. Several grounds are listed relating to the unfair discrimination of persons, including their sexual orientation. The concept of care is incorporated in the Children's Act, and it entails a comprehensive description of parents' daily life regarding children and the powers and duties expected to ensure the general protection, well-being and best interests of the child.

The aim of this contribution is to discuss the sexual orientation of a parent as a factor when considering care and the extent to which courts may give consideration to such a factor. The article will also address the question of whether or not the role of a parent's sexual orientation in determining the best interests of the child has changed since the common law concept of custody was *replaced* by the concept of care in the Children's Act. In this article, care and the best interests of the child will be discussed first. International law will be considered thereafter, followed by a discussion on the approach of our courts, pre- and post-1994, in order to come to a conclusion and make recommendations.

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**KEYWORDS:** Care; Custody; Sexual orientation; Best interests of the child; African Charter on the Rights and Welfare of the Child; Convention on the Rights of the Child