

*HOW CAN THE VOICE OF THE CHILD BE  
ADEQUATELY HEARD IN FAMILY LAW  
PROCEEDINGS?*



**DAKSHA GAMAN KASSAN**

A minithesis submitted in partial fulfillment of the requirements for the degree of Masters Legum in the Faculty of Law, University of the Western Cape.

**Supervisor: Prof Julia Sloth-Nielsen**

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Recommendations



*ABSTRACT*

*How can the voice of the child be adequately heard in family law proceedings?*

D G Kassan

Masters Legum (LLM), Minithesis, Faculty of Law, University of the Western Cape

*Child participation and the right of children to be heard in matters that directly affect them, including in judicial and administrative matters, is a right that is entrenched in a number of international and regional instruments. This right is also entrenched in the South African Constitution (section 28(1)(h) of Act 108 of 1996) that provides for children to be legally represented, at State expense, in civil proceedings affecting them and this includes divorce proceedings. However, this constitutional right is limited to those circumstances where a substantial injustice would otherwise result should such legal representation not be afforded.*

*This thesis examines how the voices of children can be heard during divorce proceedings and makes recommendations as to when children involved in divorce proceedings should be granted legal representation at State expense.*

15 November 2004

**DECLARATION**

I declare that “*How can the voice of the child be adequately heard in family law proceedings*” is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name : Daksha Gaman Kassan

Date : 15 November 2004

Signed \_\_\_\_\_



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*LIST OF ABBREVIATIONS*

ACRWC	African Charter on the Rights and Welfare of the Child
SALRC	South African Law Reform Commission
UNCRC	United Nations Convention on the Rights of the Child



## **Chapter 1**

### **Introduction**

The entrenchment of children's participation rights in all matters that affect them and also the entrenchment of the child's right to be heard in official proceedings, in international human rights instruments as well as in South African Constitutional law, dictates the importance that needs to be accorded to the voices of children. In the past, children were seen as objects not worthy of expressing meaningful opinions and their views were not taken into account nor were they even sought. However, the recognition that children are autonomous individuals with fundamental human rights and views and feelings of their own, means that children should be afforded the opportunity to express such views in all matters that affect them and this includes judicial and administrative proceedings.

There are many judicial proceedings which are only limited to adults being official parties. Yet the orders made during such proceedings by the judicial authority have the potential of impacting heavily on the daily lives of children. An example of such proceedings is divorce proceedings. During divorce proceedings, even though children are involved, it is only the husband and wife seeking the divorce that are parties to the proceedings. However, the orders made during divorce proceedings could considerably affect the future living arrangements of children and therefore it is integral that an opportunity is provided for children to make their views heard during such proceedings.

Even after orders are made during divorce proceedings, these orders can be varied, rescinded or suspended, upon the application of either of the adults who were parties to the divorce proceedings. Since these so-called post-divorce proceedings (for example applications for variations, rescissions or suspensions of the initial divorce court order) have the potential to materially affect the living arrangements of children, it is vital that the children's voices are heard during these post-divorce proceedings as well.<sup>1</sup>

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<sup>1</sup> See chapter 4 for a discussion of the *Soller* case where an application was brought on behalf of the child to amend the custody order granted during the initial divorce proceedings.

Further, proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ordinarily occur after divorce proceedings have been concluded.<sup>2</sup> The purpose of the Hague Convention is to secure the prompt return of children that are wrongfully removed from or retained outside of their place of habitual residence. During these proceedings, an objection raised by the child to being returned could potentially lead to a court hearing the matter, to refuse to return the child. This illustrates the importance of hearing the views of children in judicial matters affecting them. Given that Hague Convention proceedings pertain to family law issues and concern matters relating to the rights of custody and access, similar to divorce proceedings, Hague Convention matters will also, to a degree, be explored in this thesis.



In light of the above, this thesis aims to explore how children's voices can adequately be heard during divorce proceedings and post-divorce proceedings such as applications for the variation of divorce orders. Therefore, in this thesis, reference to divorce proceedings shall include the so-called post-divorce proceedings referred to above. A brief overview of how this will be argued is presented below.

In chapter 2, the relevant articles at international law, granting children the right to be heard in official proceedings, will be examined. To this end, a particular focus will be placed on article 12 of the United Nations Convention on the Rights of the Child and article 4(2) of the African Charter on the Rights and Welfare of the Child. The extent to which children are provided the chance to make their views heard during Hague Convention (Abduction) matters will also be discussed. This chapter concludes that international law provides the necessary basis for children's voices to be heard during domestic divorce proceedings.

Chapter 3 examines whether the South African Constitutional framework provides for the right of children to be heard in divorce proceedings. This chapter further studies the primary pieces of domestic legislation governing divorce proceedings to determine

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<sup>2</sup> See a further discussion on these proceedings in chapter 2 and 3 of this thesis.

whether they provide for the child's views and preferences to be expressed and heard. The legislation governing Hague Convention (Abduction) matters is also discussed. This chapter concludes that the South African Constitution does grant children a right to be heard in all civil proceedings, which include divorce proceedings, at State expense via the appointment of a legal practitioner. However, this is not an automatic right. This chapter further concludes that the structures which have been set up, namely the Office of the Family Advocate, to safeguard the interests of minors involved in divorce proceedings, does not adequately allow for the child's views to be heard and advocated. Further, the conclusion is made that for a child's views to be adequately heard, such child requires his or her own legal representation.



Chapter 4 proceeds to examine recent case law involving applications made to courts to appoint a legal representative for the child involved in divorce proceedings. This chapter analyses the judgments delivered and studies the circumstances under which children were granted legal representation. This chapter concludes that in order to determine when it is indeed necessary and appropriate to appoint a legal representative for the child, certain criteria and guidelines need to be developed.

Finally, chapter 5 concludes this thesis with recommendations relating to the circumstances under which it would be necessary to appoint a legal representative, at State expense, for the child during divorce proceedings.

This thesis focuses on South African law, law reform proposals and case law as at **15 October 2004**.

## Chapter 2:

### The right of the child to express views and the right to be heard:

#### An interpretation of international and regional instruments

##### 1. Introduction

At international law, the general right to be heard can be found in the International Covenant on Civil and Political Rights.<sup>3</sup> While this right applies to adults and children alike, there have been specific references to the child's right to be heard in certain international instruments. These include Article 13 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Article 13 of the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors and Rule 14.2 of the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice.<sup>4</sup> To an extent, these instruments provide children with the opportunity to make their voices heard.

The United Nations Convention on the Rights of the Child of 1989 (UNCRC),<sup>5</sup> which is the most widely ratified treaty, identifies children to be the bearer of rights. Of significance is the entrenchment of the right afforded to children to express their views and make their voices heard in all matters that affect them. The African Charter on the Rights and Welfare of the Child (ACRWC),<sup>6</sup> a regional instrument, also affords children the right to be heard in all judicial and administrative proceedings.

The inclusion of these rights in these human rights instruments changes the position accorded to children in the past. Historically, children were seen as objects not worthy of expressing a meaningful opinion and their views were not taken account of or even

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<sup>3</sup> Article 19(1) provides that “everyone shall have the right to hold opinions without interference”.

<sup>4</sup> Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, 1999, pp 219-220.

<sup>5</sup> This Convention was adopted and opened for signature, ratification and accession by the General Assembly on 20 November 1989, resolution number 44/25 and came into force on 2 September 1990.

<sup>6</sup> This Charter was adopted by the Organisation of African Unity (now the African Union) on 11 July 1990 and came into force on 29 November 1999.

sought. With the entrenchment of these rights in the UNCRC and the ACRWC, the child is seen as a person capable of forming views that need to be taken into account in matters that affect his or her life.

This chapter seeks to examine the relevant provisions of the UNCRC, particularly article 12, and the provisions of the ACRWC, particularly article 4(2), in relation to the extent to which they provide the framework, at the level of international law, for children's views to be heard during divorce proceedings which form part of family law. It will further examine the extent to which the Hague Convention on the Civil Aspects of International Child Abduction provides the opportunity for children's views to be heard in proceedings conducted under this Convention.



## 2. The United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC is seen as the most comprehensive instrument encompassing the various rights of children. These rights include children's civil, political, social, cultural and economic rights. The United Nations Committee on the Rights of the Child, the body monitoring the UNCRC, has identified four articles within the UNCRC as enshrining general principles. These are article 2 (non-discrimination), article 3 (the best interests of the child), article 6 (the right to life, survival and development) and article 12 (respect for the views of the child).<sup>7</sup> In addition, various commentators have described the construction of the UNCRC as upholding the four "P's", namely protection, prevention, provision and participation rights of children.<sup>8</sup>

The most important right guaranteeing children's participation is the right entrenched in article 12, which affords a child the right to express his or her views in all matters that directly affect him or her and the right to be heard in official proceedings affecting him or her. The participation of children has become an important feature in the arena of children's rights as it gives them the possibility of self-expression in matters affecting

<sup>7</sup> Van Bueren G, *The United Nations Convention on the Rights of the Child: An Evolutionary Revolution*, Chapter 11 in *Introduction to Child Law in South Africa*, Davel CJ (ed), Juta Law, 2000, p 203.

<sup>8</sup> Van Bueren G, *op cit*, pp 202-203.

them directly. It assists in creating a culture where children are to be seen as autonomous individuals with fundamental human rights, and views and feelings of their own. They therefore need to be provided with an opportunity to be heard and express their views in matters that directly affect them. In turn, there is a corollary duty on the adult or decision-making body to consider such views and listen to the child and to give such views due weight.

Other participation rights found in the UNCRC, which will not form the focus of this chapter, include the right of the child to participate in proceedings concerning his or her legal removal or separation from his or her parents,<sup>9</sup> and the right to participate in juvenile justice proceedings.<sup>10</sup> The UNCRC also guarantees the right of the child to freedom of expression, and the right to freedom of association and assembly, as well as the right to participate in cultural life and artistic events.<sup>11</sup>

Since the focus of this thesis is the examination of how children can be afforded the opportunity to be heard in divorce proceedings, this chapter will concentrate only on the provisions of article 12 rather than on the other, minimally relevant, participation rights stated above. Article 12 specifically provides that:

*“(1) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child.*

*(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*

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<sup>9</sup> Article 9 deals with situations under which a child can be legally removed or separated from his or her parents. Article 9(2) refers to the procedural rules and due process rights to be taken into account in these proceedings by affording “all interested parties” the opportunity to participate and make their views known. Even though the child is not particularly mentioned in article 9(2) it is submitted that “all interested parties” includes such child.

<sup>10</sup> Articles 37(d) and 40(2)(b)(ii) and (iii).

<sup>11</sup> Articles 13, 15 and 31 respectively.

At the outset, it should be stated that there are two aspects contained in article 12, namely, the child's right to express his or her views (in article 12(1)), and the child's right to be heard (in article 12(2)). It is also apparent that article 12(1) is of a far more general application, in that it allows for children's views to be expressed in all matters affecting them, while article 12(2) focuses on the right of the child to be heard in specific proceedings affecting him or her.<sup>12</sup>

This chapter will proceed to critically examine how article 12 has been interpreted in international law and will explore the extent to which it serves a basis for children to express their views and be heard in private law matters, particularly focusing on divorce proceedings.



## 2.1 Interpreting article 12(1)

Article 12(1) accords to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, such views to be given due weight in accordance with the age and maturity of the child.

### 2.1.1 Assuring the right to express views

In terms of this article, States Parties are obliged to “assure” to the child the right to express his or her views. The nature of the State's obligation is indicated by the words “shall assure”.<sup>13</sup> This means that States are obliged to afford children the opportunity to be heard or express their views and participate in matters that directly affect them. Article 12(1) is not an attempt to oblige States to force or pressurize children so that they, namely the children, become the delegated decision-makers and are held accountable for

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<sup>12</sup> Gallinetti J, *Children and the right to legal representation*, LLM dissertation, unpublished, UCT, 2001, p 5 and 17.

<sup>13</sup> Detrick S, *op cit*, p 220.

their decisions.<sup>14</sup> Neither is it aimed at forcing children to express their views. Rather, the provision of the right is an attempt to persuade States to adopt and adapt the decision-making processes<sup>15</sup> that affect the lives of children, so that they are accessible to the child.<sup>16</sup> If the child then wishes to participate in the decision-making process, then the opportunity to do so is thus afforded to the child. Such adaptations include dividing up or including mechanisms in the decision-making processes so that children are able to participate in parts of the decision and are provided with an opportunity to express their views. For example, within the school setting, special councils can be established through which children could express their opinion. In law reform processes this opportunity can be granted to the children by consulting with them to hear their views on the proposals for law reform that directly affect them, thereby allowing them to inform the drafting of legislation and the development of policy.<sup>17</sup> During court hearings or judicial proceedings, such adaptations could include making the physical design of the court more child-friendly, having separate waiting rooms for children, the video-taping of evidence and sight screens to enable children to participate.<sup>18</sup>

The obligation on States to “assure” this right to children means that an opportunity for children to be heard or participate in matters, if they wish to, must be provided. It does not mean that children should be forced to do so.

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<sup>14</sup> Van Bueren G, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers, 1995, p 137.

<sup>15</sup> These decision-making processes include processes that affect the lives of children, in particular, within the school, the local community and within the family. For example, custody decisions affect the lives of children in that they impact on the future living arrangements of the children and further might affect the school they would need to attend should the family move to another neighbourhood subsequent to the finalisation of the divorce.

<sup>16</sup> Van Bueren G, footnote 14, op cit, p 137.

<sup>17</sup> For example, during the drafting of the Child Justice Bill, B49 of 2002, the South African Law Reform Commission embarked on a consultation process with children in an effort to ascertain the voices, opinions and views of children on the contents of the Bill.

<sup>18</sup> Hodgkin R and Newell P, *Implementation Handbook for the Convention on the Rights of the Child*, Unicef, 1998, p 151.

### 2.1.2 In all matters affecting the child

The duty on the State is to assure that the child has the right to express his or her views in “all matters affecting the child”. This wording does not limit the child’s participation to a closed list of instances. This implies that the State is obliged to assure to the child the opportunity to express his or her views in relation to issues in both the public and private spheres.

Public sphere issues may include participation in the drafting of legislation, contributing to policy making, affording the child the right to be heard when such child is accused of committing a crime and in other matters where the State is involved. Private sphere issues include matters concerning the drafting of contracts, property issues and issues concerning the family such as maintenance, divorce and custody disputes concerning children. By incorporating a reference to “all matters affecting the child” and particularly in relation to private sphere issues, it appears that the child has the right to actively participate in the historically closed arena of family decision-making.<sup>19</sup> In the past, children were seen as partly formed human beings and as dependent, invisible and passive family members considered to be the property of their parents. The perception often was, and perhaps still is, that parents know what is best for their children and hence that children are not to be involved in parental or family-decision making.

However, it is submitted that the broad application of article 12(1) obliges States to ensure that children have a right to express their views in all matters affecting them and this right extends to what happens within the private sphere. Hence, it extends to decisions concerning, for example, the future living arrangements and custody issues concerning the children when their parents get divorced.

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<sup>19</sup> Van Bueren G, footnote 14, op cit, p 137.

### 2.1.3 Expressing views freely

Article 12(1) grants children the right to express their views “freely” in all matters affecting them. The use of the word “freely” indicates that State Parties are required to assure to the child the right to express his or her views and the right to say as he or she pleases without interference, as well as to choose whether to express his or her views or not.<sup>20</sup> It requires such participation to be voluntary and also requires that the views and opinions expressed by the child are indeed his or her own views.<sup>21</sup> This is of particular importance when dealing with a situation where the child is involved in a family decision or a decision involving his or her parents, as the possibilities for direct and indirect influence over the child are vast.<sup>22</sup> Further, a corollary duty is also placed on the authority or decision-maker to ensure that the child has not been subject to coercion or duress in the course of his or her participation, and further that the opinion or view expressed has been informed by all available information.<sup>23</sup> The inclusion of the word “freely” is of great significance as it emphasizes the fact that States are not entitled to force the child to participate in the decision-making process but merely to assure them the right to do so.

In light of the above, it is submitted that article 12(1) has great potential in improving the protection of the rights of the child, as it places a duty on State Parties to involve children, when they wish to participate, in all matters that affect them. It does not force children to participate if they do not wish to, but nevertheless provides the legal basis for States to assure this right to the child.

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<sup>20</sup> Detrick S, op cit, p 221.

<sup>21</sup> Gallinetti J, op cit, p 22.

<sup>22</sup> Children and the creation of a new Children’s Act for South Africa, Publication based on a report compiled by the Community Law Centre, UWC, on workshops held to give effect to article 12 of the UNCRC, 2001, p 5. Report accessed at [http://communitylawcentre.org.za/children/report\\_on\\_childrens\\_rights.doc](http://communitylawcentre.org.za/children/report_on_childrens_rights.doc) on 15 August 2004.

<sup>23</sup> Children and the creation of a new Children’s Act for South Africa Report, op cit, p 5.

## 2.2 Interpreting Article 12(2)

Article 12(2) provides for the right of the child to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

The introductory words contained in article 12(2), namely, “for this purpose” refers the provisions of article 12(2) back to the provisions of article 12(1) and some of article 12(2)’s meaning must consequently be derived from article 12(1). These introductory words, “for this purpose”, contained in article 12(2) further indicate that the right to be heard under article 12(2) applies with respect to a child who is capable of forming his or her own views, and also that the views of the child are to be given due weight in accordance with the age and maturity of the child as stipulated under article 12(1). Hence, the discussion in paragraph 2.3 below referring to the internal qualifications contained in article 12(1) applies to the provisions of article 12(2).

### 2.2.1 Judicial and administrative proceedings

Article 12(2) focuses on specific instances of participation by providing the child with the opportunity to be heard in “any judicial and administrative proceedings affecting the child”. It is argued that these terms, namely, “judicial and administrative proceedings” are stated merely as examples to illustrate that the child must be afforded an opportunity to be heard in all official matters.<sup>24</sup> In addition, Lucker-Babel argues that the term “proceedings” in article 12(2) applies to the child when he or she is the main actor (for example in cases of abuse when a decision concerning his or her place of residency has to be made) as well as when the child is in a secondary position (for example in a conflictual situation related to the divorce of the parents).<sup>25</sup> Similarly, Van Bueren argues that the term “administrative proceedings” is capable of wide application and

<sup>24</sup> Lucker-Babel MF, *The right of the child to express views and to be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child*, in *The International Journal of Children’s Rights*, Vol 3, 1995, p 401.

<sup>25</sup> Lucker-Babel MF, op cit, pp 401-402.

includes divorce and custody proceedings, care proceedings, serious disciplinary proceedings and proceedings determining the status of asylum seekers.<sup>26</sup> It is thus submitted that article 12(2) affords the basis for a child's voice to be heard and the right to participate in divorce proceedings which is the focus of this thesis.

While article 12(2) is a step towards empowering children and protecting their interests by affording them the right to be heard in judicial proceedings, it could also be seen as intimidating to children as they might not want to be involved in such proceedings. They might not want to be in a situation where they have to take decisions or have to choose. This is especially the case in divorce situations where children may be reluctant to choose one parent above the other. However, where children do indeed want to be heard and are clear as to what they want their future living arrangements to be subsequent to their parents divorcing, then in such a case, article 12, and in particular article 12(2), provides the theoretical framework for the voices of children to be heard.

### 2.2.2 Forms of participation

It should further be noted that article 12(2) provides for different ways in which the child can participate in official proceedings, in that it provides for the child's voice to be heard "either directly or through a representative or an appropriate body". This means that the child can either address the court, tribunal or relevant person or body himself or herself, or the child can choose a representative or spokesperson to do so. It appears that the drafters did not require such a representative to be a legal representative and hence it implies that such a representative can be a person working in any profession, such as a social worker or even a lay-person appointed by the court as a *curator* or guardian of the child to be such child's spokesperson.

Further, article 12(2), by allowing the child's voice to even be heard directly, does not make the requirement of a representative or spokesperson an absolute one, though it could be argued that due to the technical and specialized nature of official proceedings, a

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<sup>26</sup> Van Bueren G, footnote 14, op cit, pp 138-139.

representative appointed as the spokesperson for the child would be more appropriate to assist the child in ensuring that his or her voice is heard. During judicial proceedings, such as divorce proceedings, it could be argued that a legal representative appointed for the child would be more suitable, since the legal representative would have knowledge of court processes, have the skill to draft and understand legal documents and also possess the necessary skill to advocate the views of the child and ensure that they are heard.

Finally, the child can also choose for his or her voice to be heard via an “appropriate body”. It is questionable whether this form of participation would benefit the individual child as it is argued that participation via a “body” could limit the participation of the individual child in favour of the articulation of the general interests of all children.<sup>27</sup> It is therefore submitted that, in relation to divorce proceedings which are of a personal nature, it would be much more appropriate for the child to make his or her voice heard directly or via a representative as opposed to doing so via a body.

### 2.2.3 Consistency with procedural rules of national law

Finally, article 12(2) provides that the child’s views shall be heard either directly or indirectly “in a manner consistent with the procedural rules of national law”. While it is argued that this accords a measure of flexibility and discretion to be left up to the member States to determine how the voice of the child is indeed heard, it is only open to the member States to enact procedural rules relating to the manner of the child’s participation (namely, either directly or through a representative or appropriate body), but not to enact rules restricting the child’s rights to be heard.<sup>28</sup> Van Bueren further argues that this view is emphasized by the phrase, “the child shall in particular be provided the opportunity to be heard”, and that any restrictive interpretation would undermine the child’s right to freedom of expression enshrined in articles 12 and 13(1)<sup>29</sup> of the UNCRC.<sup>30</sup>

<sup>27</sup> Gose M, *The African Charter on the Rights and Welfare of the Child*, Community Law Centre, UWC, 2002, p 128.

<sup>28</sup> Van Bueren G, footnote 14, op cit, p 139.

<sup>29</sup> Article 13(1) provides “the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”

### 2.3 Internal qualifications contained in article 12

It should be noted that there are two internal qualifications contained in article 12(1). These qualifications also apply to article 12(2) in that, as stated above in paragraph 2.2 of this chapter, the words “for this purpose” in article 12(2) refer article 12(2) back to the provisions of article 12(1). Hence, these qualifications apply to article 12 as a whole and have implications for decision-makers and child representatives when applying article 12.

The first qualification is that the rights contained in article 12 are only extended to children who are capable of forming their own views, and the second is that those views are only to be given due weight according to the age and maturity of the child in question.<sup>31</sup>



Lucker-Babel states that the capacity of a child to form his or her own views does not require that the child must be fully developed. Full development of the child is not required because once the child expresses an opinion or view, such opinion or view will be considered “in accordance with such child’s age and maturity”.<sup>32</sup> She continues to argue that the first step would therefore be to verify whether the child is in a position to have an idea on the issue in question but not necessarily on the whole spectrum of the problems in the particular case.<sup>33</sup> She further states that children can be considered as being capable of having an opinion regarding their own situation and possibly their own future, after a separation of their parents, as soon as they understand, in a child’s spirit and expression, what the issue is about and what is at stake.<sup>34</sup> According to Lucker-Babel, even an *infans* (literally one who does not speak) can participate where such child’s feelings are then interpreted by specialists trained to this effect, but then these feelings are given due weight according to his or her age and maturity.<sup>35</sup> For example, in sexual offences cases, where very young children are involved, their evidence or voices

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<sup>30</sup> Van Bueren G, footnote 14, op cit, p 139.

<sup>31</sup> See the provision of article 12(1) as stated in para 2 of this chapter.

<sup>32</sup> Lucker-Babel MF, op cit p 397.

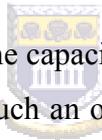
<sup>33</sup> Lucker-Babel MF, op cit, p 397.

<sup>34</sup> Lucker-Babel MF, op cit, p 397.

<sup>35</sup> Lucker-Babel MF, op cit, p 397.

can be ascertained by the use of dolls and trained specialists are used to interpret the child's actions and body language.

It should be noted that the UNCRC does not limit participation rights to children of a specific fixed age but adopts a more flexible approach in that this right is extended to children who are capable of forming their own views. By adopting this flexible approach, it is argued that the UNCRC recognises that a child's capacity to form his or her own views varies according to his or her individual development and his or her capacity to comprehend the events affecting him or her and the nature and gravity of the problem in question and is not necessarily dependent on his or her age.<sup>36</sup>



Once it is determined that the child has the capacity to form an opinion, the next step is to determine the weight to be attached to such an opinion. The view or opinion expressed by the child is examined according to the child's age (an objective element) and the child's degree of maturity (a subjective element). By referring to these two criteria, the UNCRC seeks to ensure that State Parties should not have an unfettered discretion as to when to consider and when to ignore the views of the child as "due weight" should be given to the child's views according to his or her age and maturity and both of these criteria are of equal value.<sup>37</sup>

The child's view will be given "due weight" according to the nature of the problem and to the degree of interest it represents to the child, as well as to other justified interests (such as those of parents, siblings, the surroundings, the institution, school).<sup>38</sup> The more serious and imminent the consequences of the decision are on the child, the more the child's opinion deserves to be an important consideration.<sup>39</sup> For example, in an adoption situation, the objections of a child who is of a particular age (for example, ten years old) and is of sufficient maturity, could lead to the adoption being set aside and therefore such child's views are arguably integral. By contrast, if such child is much younger and lacks

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<sup>36</sup> Lucker-Babel MF, op cit, p 398.

<sup>37</sup> Van Bueren G, footnote 14, op cit, p 136.

<sup>38</sup> Lucker-Babel MF, op cit, p 399.

<sup>39</sup> Lucker-Babel MF, op cit, p 399.

the capacity to comprehend the situation, for example a two-year old toddler, such child's views will be afforded less weight and might not lead to the adoption being set aside. Therefore, while the right contained in article 12 is extended to children who are capable of forming their own views and not limited to children of a fixed age, such views will only be given due weight according to the child's age and maturity.

#### 2.4 Nature of State's obligation and implementation of the UNCRC

All States that have ratified the UNCRC are under an obligation to ensure that the provisions in the UNCRC are respected and implemented. Under international law, the ratifying State Parties are under an obligation to give effect to the provisions of the UNCRC in their domestic law.<sup>40</sup> A ratifying State Party is further obliged to review its legislation to ensure that domestic law is consistent with the provisions of the treaty.<sup>41</sup>

The obligation placed on States to enforce the provisions of the UNCRC is specifically stated in article 4 which provides that:

*“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”*

The Committee on the Rights of the Child, the body monitoring the UNCRC, recently released a General Comment which deals with general measures of implementation of the UNCRC.<sup>42</sup> It is confirmed in this General Comment that when a State ratifies the

<sup>40</sup> Sloth-Nielsen J, *The Role of International Law in Juvenile Justice Reform in South Africa*, LLD dissertation, unpublished, UWC, 2001, p 36.

<sup>41</sup> Sloth-Nielsen J, op cit, p 36.

<sup>42</sup> General Comment No:5 (2003), General measures of implementation of the Convention on the Rights of the Child (articles 4, 42 and 44, para, 6), Committee on the Rights of the Child, Thirty-fourth session, 19 September – 3 October 2003. General Comment accessed at [www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5) on 15 October 2004. The Committee on the Rights of the Child publishes its interpretation of the content of the provisions of the UNCRC in the form of

UNCRC, it takes on obligations under international law to implement it. Implementation is the process whereby States Parties take action to ensure the realization of all the rights in the UNCRC for all children in their jurisdiction. It is noted that while it is the State which takes on obligations under the UNCRC, in the task of implementation - of making children's human rights a reality- the State needs to engage all sectors of society and the children themselves.<sup>43</sup>

Article 4 of the UNCRC requires State Parties to review their domestic legislation to ensure that it complies with the UNCRC and to ensure that the principles and provisions of the UNCRC can be appropriately enforced. It places an obligation on State Parties to adopt domestic legislation and other procedures to ensure that the rights contained in the UNCRC are implemented. The Committee on the Rights of the Child has identified a wide range of measures that are needed for the effective implementation. These include the development of special structures and monitoring, training and other activities in Government, Parliament and the judiciary at all levels.

It is important to note the distinction between the implementation of the civil and political rights in the UNCRC on the one hand, and the economic, social and cultural rights on the other. With regard to the latter three categories, these rights only have to be implemented subject to the availability of resources. This means that where there is a lack of financial and other resources, the full implementation of economic, social and cultural rights can be limited. However, with regard to civil and political rights, and in this instance particularly article 12, no such qualification applies. Ratifying States are under an obligation to ensure that the child's right to be heard is implemented immediately through "appropriate legislative, administrative and other measures". The implementation of article 12 is thus not subject to the availability of resources.

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General Comments. These General Comments are not legally binding on State Parties but they serve to offer guidance and promote the implementation of the UNCRC and assist State Parties in fulfilling their reporting obligations.

<sup>43</sup> General Comment No: 5, op cit, para 1, p 1.

It is noted in General Comment 5 that article 12, which is a core principle of the UNCRC that highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights, applies equally to all measures adopted by States to implement the UNCRC. The Committee notes that opening Government decision-making processes to children is a positive challenge which the Committee finds States are increasingly responding to. Also, given that few States have reduced the voting age below 18, there is more reason to ensure respect for the views of children in Government and Parliament. This applies to South Africa as well since one has to be eighteen years old to participate in the election process.

The Committee further stresses that if consultation is to be meaningful, then documents as well as processes need to be made accessible to the child. The Committee states that “listening” to children is relatively unchallenging but giving due weight to their views requires real change. In this regard the Committee states that “listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children’s rights.” The Committee notes that article 12 requires consistent and ongoing arrangements to hear the voices of children even though once-off events like Children’s Parliaments can be stimulating and raise general awareness. The Committee warns that involvement of and consultation with children must also avoid being tokenistic. The emphasis on “matters that affect them” in article 12(1) implies the ascertainment of the views of particular groups of children on particular issues- for example children who have experience of the juvenile justice system on proposals for law reform in that area. The Committee notes that it is important that Government develop a direct relationship with children and not one that is mediated through non-governmental organizations or human rights institutions. It is in the interest of both Governments and children to have appropriate direct contact.<sup>44</sup>

South Africa ratified the UNCRC in 1995 and by such ratification, assumed the obligations mentioned above. With regard to article 12, it is submitted that South Africa

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<sup>44</sup> General Comment No: 5, op cit, para 12, pp 4 –5.

is under an obligation to ensure that children are provided with an opportunity to express their views in all matters that affect them and the right to be heard in judicial and administrative proceedings affecting them. The provisions of the UNCRC establish norms and lay down a basis for such protection to be granted in domestic law and for children's voices to be heard in judicial and administrative proceedings. South Africa is under an obligation to ensure that these proceedings are made accessible to children, and to provide the necessary framework in South African domestic law, so that their voices can be heard. Hence, article 12 provides the basis for children's voices to be heard in domestic divorce proceedings.

### 3. African Charter on the Rights and Welfare of the Child (ACRWC)



The ACRWC is the first binding regional instrument that identifies the child as a possessor of certain rights. The ACRWC is best understood with reference to three anchoring principles, namely, the best interest of the child, the principle of non-discrimination and the primacy of the ACRWC over harmful cultural practices and customs.<sup>45</sup>

The ACRWC recognises children as people in need of protection but also as autonomous beings capable of making their views heard in domestic judicial and administrative proceedings. The ACRWC thus guarantees several participation rights, the most important being article 4(2) which affords children the right to be heard in all judicial and administrative proceedings. Other participation rights contained in the ACRWC, which will not be examined in this chapter, include the right to freedom of expression, freedom of association and assembly, and freedom of thought, conscience and religion.<sup>46</sup> There is also a guarantee of the right of every child to participate in artistic and cultural life, in the administration of justice, and the right of disabled children to participate in community life.<sup>47</sup>

<sup>45</sup> Viljoen F, *The African Charter on the Rights and Welfare of the Child*, in *Introduction to Child Law in South Africa*, Davel CJ (ed), Juta, 2000, p 219.

<sup>46</sup> Articles 7, 8 and 9 respectively.

<sup>47</sup> Articles 12, 17 and 13 respectively.

Since the focus of this thesis is to analyse how children can be afforded an opportunity to make their voices heard in divorce proceedings, only article 4(2) of the ACRWC will be discussed. The extent to which this provision provides the basis for children to be afforded such an opportunity in divorce proceedings will be examined.

### 3.1 Interpreting article 4(2)

The most important article guaranteeing children the right to be heard is contained in article 4(2) which provides that:

*“In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate laws.”*

#### 3.1.1 In all judicial or administrative proceedings

The ACRWC affords the child an opportunity for his or her views to be heard “in all judicial or administrative proceedings affecting the child.” This provision has been criticized for being quite restrictive in that by limiting this opportunity to be heard only to “judicial or administrative proceedings”, it ignores the many informal instances in which a child needs to be heard.<sup>48</sup> However, it is submitted that despite this restrictive phrase, the ACRWC, in a fashion similar to the UNCRC, guarantees the right of the child to be heard in divorce proceedings as these proceedings fit under the ambit of “judicial or administrative proceedings.”

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<sup>48</sup> Chirwa D, *The merits and demerits of the African Charter on the Rights and Welfare of the Child in The International Journal of Children's Rights*, Vol 10, No 2, 2002, p 161.

### 3.1.2 Child who is capable of communicating

The right to be heard in article 4(2) applies to a child who is “capable of communicating his or her views”.<sup>49</sup> This means that a child who is able to form an opinion but unable to communicate it may not be granted the opportunity to be heard. Children who are not able to communicate could nevertheless be able to express their views by means other than verbal or written by, for example, either using body language or exhibiting different behaviour.<sup>50</sup> The apparently restrictive nature of this phrase hence neglects and excludes children who are unable to communicate their views.

However, a strong point of the ACRWC is that article 4(2) provides for the views of the child to “be heard”. This means that the person or authority to whom the child is expressing his or her view to, must indeed listen to such child. This is unlike the provision of the UNCRC which only allows for a child to “express” his or her views. It could be asserted that the right “to express” does not necessarily imply the duty that another person has to listen to the expressed view. However, the fact that in terms of the UNCRC, “due weight” needs to be given to the expressed view means obviously that the view has to be considered and for this to happen, the view must be known to the decision-maker. Therefore the right to express a view, as contained in the UNCRC, and to have such view considered includes an obligation on the decision-maker to listen to such view. Nevertheless, the wording of the ACRWC is clearer on this point in that it emphasizes that the child must indeed be heard and listened to.<sup>51</sup>

### 3.1.3 Forms of participation

Like the UNCRC, article 4(2) contains different forms of participation through which the child’s views can be heard. The child’s views can be heard “either directly or through an impartial representative as a party to the proceedings”. The requirement for an impartial

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<sup>49</sup> This is distinguishable from the UNCRC which affords this right to a child who is capable of *forming* his or her own views.

<sup>50</sup> Gose M, op cit, p125.

<sup>51</sup> Gose M, op cit, p 126.

representative is not an absolute one as the child has the option to express his views directly to the relevant authority or tribunal during the judicial or administrative proceedings. It is submitted, that given the technical nature of these proceedings, it would be of much more benefit to the child if he or she was represented by a spokesperson or representative. It should be noted that there is no indication that such impartial representative be of a particular profession. Such representative could be a social worker, legal practitioner or even a lay-person appointed as the *curator* or guardian of the child.

However, the ACRWC differs from the UNCRC as it provides for the child's views to be heard "...through an impartial representative as a party to the proceedings." The inclusion of the phrase "as a party to the proceedings" provides the opportunity for a child to be an official party to the proceedings and it is submitted that this creates the basis for children to be included as third parties (with representation) in divorce proceedings in addition to their parents being parties. Procedurally, there are only two parties that are involved in divorce matters, namely the plaintiff and the defendant and these are usually the husband and wife seeking a termination of their marriage. Children born of the marriage are not ordinarily officially represented during the proceedings. However, the ACRWC creates a basis for such children to also be official parties in their own stead with their own representation in order to make their voices heard.

Recently, in South Africa, there have been applications made to court on behalf of children seeking their own legal representation to ensure that their wishes and desires are heard during the divorce proceedings. Courts hearing divorce matters have also, at their own initiative, suggested that the minor children involved be granted legal representation.<sup>52</sup> It is submitted that article 4(2) of the ACRWC creates the platform for this intervention on behalf of children to actually take place.

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<sup>52</sup> For a discussion of these cases see chapter 4 of this thesis.

### 3.1.4 In accordance with the provisions of appropriate laws

This provision of the ACRWC further provides that the child's views shall be taken into consideration by the relevant authority "in accordance with the provisions of appropriate laws". It has been argued that this clause gives a very wide discretion to States Parties to possibly limit and restrict this right conferred upon the child.<sup>53</sup> However, a similar clause is present in the UNCRC<sup>54</sup>. As stated earlier in paragraph 2.2.3 of this chapter, this clause in the UNCRC has been interpreted to mean that the member States are not allowed to enact rules restricting the child's rights to be heard but are only open to enact rules relating to the manner of the child's participation. It is submitted that a similar interpretation can be attributed to this clause of the ACRWC.



It should be noted that the ACRWC does not contain the phrase that the child's views be given "due weight in accordance with the age and maturity of the child" as contained in article 12(1) of the UNCRC.<sup>55</sup> The presence of this phrase has been argued to be an internal qualification of the participation right embodied in article 12 of the UNCRC.<sup>56</sup> However, it has been argued that even though article 4(2) of the ACRWC does not contain this phrase, this qualification could be interpreted as being implicit in the notion that the right contained in article 4(2) is only afforded to children who are "capable of communicating his or her views".<sup>57</sup>

Though there are certain restrictions contained in article 4(2) of the ACRWC, the provision of this right granted to children is commendable especially within the African context where children are often not perceived as autonomous beings.<sup>58</sup> Children are frequently considered to be deficient in their decision-making capabilities and deserving of protection, so that adults take decisions for them. Decisions concerning children are often made by a group of male elders and at most, children are heard indirectly, for

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<sup>53</sup> Gose M, op cit, p 127.

<sup>54</sup> Article 12(2) provides that the child views shall be heard....in a manner consistent with the procedural rules of national law.

<sup>55</sup> See para 2 of this chapter for the content of article 12.

<sup>56</sup> See para 2.3 of this chapter for a discussion of these internal qualifications contained in article 12.

<sup>57</sup> Gose M, op cit, p 127.

<sup>58</sup> Chirwa D, op cit, p 160.

example, through aunts, uncles or grandparents.<sup>59</sup> Hence, the ACRWC echoes the sentiments and principles present in the UNCRC in recognizing children not only as people in need of protection but also as autonomous individuals.

### 3.2 The nature of the State's obligations and implementation of the ACRWC

The general obligations of States that have ratified the ACRWC are provided for in article 1 that states:

*“(1) The member States of the Organisation of African Unity<sup>60</sup> Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to take the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.*

*(2) Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international convention or agreement in force in that State.*

*(3) Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.”*

The obligations for ratifying States under the ACRWC are two-fold, namely to “recognize the rights, freedoms and duties enshrined in this Charter” and to “undertake to take the necessary steps ..... to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter.” It is noteworthy that the ACRWC does not distinguish between the implementation of civil and political rights on

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<sup>59</sup> Chirwa D, op cit, p 160.

<sup>60</sup> Now referred to as the African Union.

the one hand and economic, cultural and social rights on the other.<sup>61</sup> The States obligations under article 1 of the ACRWC apply equally to both these categories of rights. However, it is argued that since certain individual provisions relating to socio-economic rights in the ACRWC do contain the limitation regarding available resources, for example, the right to education (article 11(3)) or the rights of handicapped children (article 13(3))<sup>62</sup>, such a distinction between the categories of rights is nonetheless present in the ACRWC.<sup>63</sup>

Though there are certain restrictions contained in article 4(2), as discussed above, it is submitted that implementation of this provision is not subject to the availability of resources. States Parties that have ratified this instrument are therefore under an obligation to ensure that necessary steps are taken to adopt legislative or other measures to give effect to this provision. South Africa ratified the ACRWC on 7 January 2000 and upon ratification assumed the obligations placed on it by the ACRWC. South Africa is therefore under an obligation to ensure that children are provided with an opportunity to be heard in all judicial and administrative proceedings, which includes divorce proceedings.

Further, it must be noted that article 1(2) provides that the obligations under the ACRWC shall not affect any provisions that are more conducive to the realization of children's rights contained in the law of the State Party or any other international convention or agreement in force in that State. This means that the ACRWC merely sets out the minimum standards and that the provisions of any other instrument that are more beneficial to the child or grant a higher level of protection, shall take precedence over the provisions contained in the ACRWC. Therefore, even though article 4(2) of the ACRWC contains certain restrictions and is limited to children capable of communicating their views, article 1(2) provides the basis for article 12 of the UNCRC to take precedence

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<sup>61</sup> The UNCRC distinguishes between the implementation of civil and political rights, on the one hand, and socio-economic and cultural rights on the other. The implementation of socio-economic and cultural rights is subject to the availability of resources in the UNCRC. See article 4 of the UNCRC and para 2.4 of this chapter where this is discussed.

<sup>62</sup> Both these provisions refer to progressive realization of the right concerned and article 13(3) also explicitly provides that "...States Parties ...shall use their available resources...."

<sup>63</sup> Gose M, op cit, pp 30-31.

over this provision. This means that despite the restrictions present in article 4(2) of the ACRWC, a larger number of the children will be granted the right contained in article 4(2) since the provisions of article 12 of the UNCRC will apply as it grants a higher level of protection.<sup>64</sup>

It is submitted that article 4(2) of the ACRWC establishes the necessary minimum basis to afford children the opportunity to be heard in divorce proceedings.

#### 4. Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) was adopted at the fourteenth session of the Hague Convention on Private International Law in 1980.<sup>65</sup> The primary objective of the Hague Convention is to facilitate the speedy, summary return of children who have been wrongfully removed (abducted) from, or retained outside, their countries of habitual residence.<sup>66</sup> The justification for such return is the assumption that the place of habitual residence is the forum with the most significant interest in resolving the dispute and best suited to make a determination on the merits.<sup>67</sup> A further aim of the Hague Convention is to ensure that rights of custody and access under the law where the child is habitually resident are effectively respected in the country to which the child has been removed to or is being retained.

The elements required for a wrongful removal or retention are that:<sup>68</sup>

- (a) a child must have been habitually resident in the requesting State immediately before the removal or retention, and

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<sup>64</sup> Article 12 of the UNCRC applies to children capable of *forming* their own views while article 4(2) of the ACRWC apply only to those children who are capable of *communicating* their views. See discussion above in para 3.1.2 of this chapter.

<sup>65</sup> Nicholson C, *Introduction to the Hague Convention on the Civil Aspects of International Child Abduction* in *Introduction to Child Law in South Africa*, Davel CJ (ed), Juta, 2000, p 233.

<sup>66</sup> Article 1.

<sup>67</sup> Nicholson C, *op cit*, p 234.

<sup>68</sup> Hutchinson A, Roberts R, Setright H, *International Parental Child Abduction*, Family Law, 1998, p 4. Also see article 3 of the Hague Convention.

- (b) the removal or retention must have been an act committed in breach of some aspects of the rights of custody attributed to the applicant party, according to the laws of the requesting State, and
- (c) at the time of the removal or retention, these rights were actually exercised or would have been exercised but for the removal or retention.

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply for assistance in securing the return of the child.<sup>69</sup> Such application is made either to the Central Authority of the child's habitual residence or to the Central Authority of any other contracting State to where the child has been removed. Central Authorities are designated in terms of article 6 of the Hague Convention to discharge the duties imposed by the Convention. The Central Authorities of the various States will interact with each other to achieve the objectives of the Hague Convention.

As stated, the main objective of the Hague Convention is to return the child as speedily as possible to the place from where he or she was abducted. The judicial or administrative authority before which the proceedings are brought must ordinarily order the return of the child to his or her habitual residence<sup>70</sup> unless the exceptions or defences stated below are found to be present.

These exceptions or defences are contained in articles 12 and 13 of the Hague Convention which provide that:

- (a) the child will not necessarily be returned if it is shown that the child has become settled in his or her new environment.<sup>71</sup>
- (b) The authorities of the State where the child has been removed to are not bound to return the child if they are not convinced that the person, body or institution in which custody or care of the child was vested was exercising such rights at

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<sup>69</sup> Article 8.

<sup>70</sup> Article 12.

<sup>71</sup> Article 12 specifically applies when the proceedings commenced after 12 months have elapsed since the wrongful removal or retention.

the time of the removal or retention of the child, or are convinced that such person, body or institution had consented to, or subsequently acquiesced in the removal or retention of the child.<sup>72</sup>

- (c) The authorities are also not bound to return the child where they are convinced there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>73</sup>

Of particular relevance to this thesis is the stipulation contained in article 13 that allows for the voice of the child to be heard during the proceedings, in the form of an objection being raised in regard to his or her return.



Article 13 provides that the:

*“The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”.*

The court must be satisfied that the child is of sufficient maturity and must fully consider the reasons for the child’s objection to being returned.<sup>74</sup>

It would appear that countries vary in their approach to the consideration of children’s objections, particularly with regard to the interpretation of the criteria of age and degree of maturity and to the weight to be given to the child’s expressed view. With regard to maturity, it is generally agreed that a child under the age of 12 is not at a level of maturity to express an objection in these instances.<sup>75</sup> While it is more likely that an older child will more readily be listened to, there have been instances when the views of younger

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<sup>72</sup> Article 13(a).

<sup>73</sup> Article 13(b).

<sup>74</sup> Nygh P, *The International Abduction of Children*, in *Children on the Move: How to implement their right to family life*, Doek J, Van Loon H, Vlaardingerbroek P (eds), Martinus Nijhoff, 1996, p 39.

Also see Nicholson C, *op cit*, p 239.

<sup>75</sup> Nygh P, *op cit*, p 39.

children had been given effect to. For example, in the English case of *Re S (A Minor: Custody Rights)*,<sup>76</sup> the objections of a nine year old girl were taken into account and in *Procureur de la Republique c Mme S (Trib de grande instance de Perigueux 1992)*, it was held that the wishes of a 10 year old should be consulted.<sup>77</sup> It is also important to note that some countries provide routinely for the separate representation of children in Hague Convention cases, while in other countries this is exceptional.<sup>78</sup>

As can be seen from above, proceedings under the Hague Convention do afford the children who are subject to such proceedings, an opportunity to raise objections to them being returned to their country of habitual residence thereby providing a chance for the views of children to be heard. It should be noted that such objections, raised by the child during the proceedings, could result in the court hearing the matter refusing to return the child to his or her country of habitual residence. However, this opportunity provided to the child during Hague Convention proceedings, generally occurs post-divorce and where a court has already made orders in respect of the custody and access issues concerning such children involved in earlier divorce proceedings.

The fact that a child's objections are only heard in Hague Convention proceedings and have the potential to lead to a refusal to the child being returned to his or her country of habitual residence is perhaps, it could be argued, a step which occurs too late in the process. Such child has already been subjected to the trauma of a custody battle to the extent that he or she has been subsequently abducted by either the custodial or non-custodial parent.<sup>79</sup> It is therefore submitted that had the child's views been heard and ascertained during the divorce proceedings, then the child would probably not need to have suffered the trauma of being abducted and removed to another country and thus

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<sup>76</sup> 1993 Fam 242.

<sup>77</sup> Nygh P, op cit, p 39.

<sup>78</sup> Hutchinson A, et al, op cit, p 5.

<sup>79</sup> In Hague Convention matters it is either the custodial parent that has removed the child to frustrate the access rights of the other parent or it is the non-custodial parent that has abducted the child for not being awarded custody by the court hearing the divorce matter.

again have to be the subject of custody-like proceedings under the Hague Convention.<sup>80</sup> In this light, it is arguably integral that a child's views are heard during the earlier divorce proceedings.

South Africa acceded to the Hague Convention with the promulgation of the Hague Convention on the Civil Aspects of Child Abduction Act 72 of 1996 and this Act was implemented on 1 October 1997. The Chief Family Advocate (employed in the Office of the Family Advocate)<sup>81</sup> is appointed as the Central Authority in Hague Convention (Abduction) matters. By acceding to the Hague Convention, South Africa, among its other obligations under the Hague Convention, is obliged to provide an opportunity for the objections of the child, if any, to be heard and considered during these proceedings. Even though these proceedings occur post-divorce, the views of the child that are obtained during these proceedings, have the potential to vary any divorce court order should the court of the country where the child is taken to, decide not to return the child. In the event that the court hearing the matter decides that the child should not be returned, the parent that has lawful custody of the child or access rights to the child, is then unable to exercise such rights.

The fact that a child's objections and views could lead to the judicial or administrative authority refusing to order the return of the child, underscores the importance of such objections being ascertained and heard. For this to happen resources need to be allocated and at a minimum, this might require the appointment of a representative for the child. While the Hague Convention does not expressly require a representative to be appointed for the child, the appointment of a representative might be necessary to ensure that affected children's views are heard and expressed. It is therefore submitted that South Africa is under an obligation to ensure that the views of the child are obtained during Hague Convention proceedings, even where no such right is provided for during the actual divorce proceedings.

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<sup>80</sup> It should be noted that not all Hague Convention Abduction matters concern the abduction of children where the parents are divorced. Hague Convention Abduction matters can also relate to the abduction of children where the parents have never been married to each other.

<sup>81</sup> This office was established in terms of the Mediation in Certain Divorce Matters Act 24 of 1987. See a discussion of the functions of this office in chapter 3 of this thesis.

In South Africa, the Central Authority, namely the Chief Family Advocate (or his or her delegate), will ordinarily be contacted to assist in the return of a child that has been abducted from another country and brought to South Africa. The role of the Central Authority is to assist in the speedy return of the child to his or her country of residence. However, it might occur that the child does not wish to return and such wishes are communicated to the Central Authority or the abducting parent. It is at this stage of the proceedings that it becomes necessary for the child to be represented by his or her own legal representative so that his views and objections are raised and are indeed heard by the court hearing the matter.<sup>82</sup> However, the Hague Convention does not offer any guidance on how the hearing of the child's objections are to be achieved nor as to whether such child will indeed require representation.



## 5. Conclusion

Article 12 of the UNCRC and also article 4(2) of the ACRWC provide the necessary framework and basis for children's voices to be heard in divorce proceedings. These articles provide various options for the child's voice to be heard, namely either directly, through a representative or an appropriate body and even as a party to the proceedings.<sup>83</sup> State Parties are therefore in position to choose the most appropriate form for children's participation in divorce proceedings. Ratifying State Parties, including South Africa, are under an obligation to ensure that appropriate structures, bodies and other mechanisms are put in place to ensure that the framework is put into operation to afford children the right to be heard in matters that affect them and this extends to divorce proceedings.

In addition, the Hague Convention explicitly provides for the objections of the child to be heard in proceedings under the Hague Convention. By acceding to this Convention, South Africa is similarly bound to ensure that the child's views and objections are indeed heard as the child's objections could possibly lead to the court refusing the return of the

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<sup>82</sup> See further discussion on this issue in chapter 3 of this thesis.

<sup>83</sup> See article 4(2) of ACRWC.

child thereby amending an earlier order granted by the court that heard the divorce matter.

The discussion and arguments presented in this chapter reflect that there is indeed an obligation on ratifying State Parties to ensure that children's voices are heard in divorce proceedings and this obligation binds South Africa. The next chapter will therefore explore the extent to which South African domestic law makes provision for this right and whether any law reform proposals aim to take matters any further for the protection of children involved in divorce proceedings and in Hague Convention matters.



### Chapter 3

#### South African Constitutional Framework and Current Legislation Governing Divorce Proceedings and Hague Convention (Abduction) Matters

##### 1. Introduction

It has been argued in chapter two that international law lays down the necessary basis to ensure that the voices of children are heard in matters that affect them directly and that this right extends to private law issues. It has also been argued that there are various ways in which this can be done, namely, either through the child directly, via a representative or an appropriate body or as a party to the proceedings. It has also been concluded that the right of the child to be heard extends to divorce proceedings.

Divorce proceedings are proceedings that are instituted to end a marriage relationship between the parties on the grounds of an irretrievable breakdown.<sup>84</sup> Where children are involved, it is often the parents who take decisions and enter into settlement agreements regarding the children's custody and future living arrangements. In the event of no agreement being reached between the parties, the parties may engage in potentially lengthy court disputes regarding such matters as maintenance, custody and access.

These proceedings can be traumatic for children even if they are not present at the actual hearing of the matter.

In addition, the pronouncement about where and with whom the children should reside after their parents divorce can have an enormous impact on the future lives of the children concerned. These new living arrangements can affect the children's relationship with their parents, siblings, extended family and friends, and may determine the school they attend, the neighbourhood they live in, their standard of living and many other

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<sup>84</sup> Section 4(1) of the Divorce Act, No 70 of 1979 provides that "a court may grant a decree of divorce on the ground of the irretrievable break-down of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them."

aspects of the children's daily life.<sup>85</sup> These decisions are important not only in the short term, but may have a long-term impact on the children's future prospects.<sup>86</sup>

In recognizing the importance of such decisions and the impact they may have on the lives of children, it becomes vital that the voices of children are heard in these proceedings. On the other hand, caution should be taken against unnecessarily involving children in potentially conflictual matters, such as divorce proceedings. However, in terms of international law, children do have a right to participate and be heard, if they wish to, in matters that directly affect them, and decisions taken during divorce proceedings can indeed impact heavily on their lives.



To this end, this chapter will proceed to establish the extent to which such rights are afforded to children under South African Constitutional law and in South African domestic law.<sup>87</sup>

In particular, the first part of this chapter will focus on section 28(1)(h) of the South African Constitution (Act 108 of 1996) and examine its requirements. Once the ambit of section 28(1)(h) has been explored, this chapter will proceed to examine how section 28(1)(h) has been given effect to in (any) civil proceedings affecting children. This chapter will further examine the current legislation governing divorce proceedings and the extent to which they provide an opportunity for children to be heard. Further, the extent to which children's objections are heard in Hague Convention matters will also be explored.

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<sup>85</sup> Barrat A, *The Best Interest of the Child-Where is the Child's Voice in The Fate of the Child: Legal Decisions on Children in the New South Africa*, Burman S (ed), Juta Law, 2003, p 145.

<sup>86</sup> Barrat A, *op cit*, p 145.

<sup>87</sup> It should be noted that in this thesis minimal reference has been made to comparative law. The focus of this thesis is rather on the application of the Constitutional right affording children legal representation at State expense during civil proceedings, on South African domestic law and on the recent case law pertaining to the right of the child to be heard during divorce proceedings. These cases are discussed in chapter 4 of this thesis.

## 2. Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa<sup>88</sup> is often heralded as a unique document in that it not only entrenches civil and political rights, but also socio-economic and cultural rights in the chapter containing the Bill of Rights. In addition, while all the rights in the Constitution apply to children, it also contains a specific section which deals exclusively with the rights of children. These rights are embodied in section 28.<sup>89</sup> The inclusion of these rights indeed reflects South Africa's commitment to developing a children's rights orientated culture and enshrines the principles of both the UNCRC and the ACRWC in its domestic law.



With regard to the right to be heard in article 12 of the UNCRC and article 4(2) of the ACRWC, section 28(1)(h) of the Constitution is of particular importance.

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<sup>88</sup> Act 108 of 1996.

<sup>89</sup> Section 28 provides that:

- (1) Every child has the right -
  - (a) to a name and nationality from birth;
  - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) not to be required or permitted to perform work or provide services that -
    - (i) are inappropriate for a person of that child's age; or
    - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
  - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -
    - (i) kept separately from detained persons over the age of 18 years; and
    - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
  - (h) to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
  - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

Section 28(1)(h) provides that:<sup>90</sup>

*“Every child has the right to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.”*

Section 28(1)(h) is potentially applicable to a range of civil proceedings affecting the child, including children’s court proceedings, especially where the removal of the child from the family is being contemplated; adoption proceedings; disputes concerning inheritance rights and custody disputes in divorce cases.<sup>91</sup> It should be noted that this provision had no precursor in the interim Constitution<sup>92</sup> and it should also be noted that persons over the age of eighteen years currently have no equivalent right to legal representation in civil proceedings.<sup>93</sup> This right was included at a very late stage in the Constitutional drafting process and its inclusion was met with some reservation, especially from Government officials, as it would have a severe impact on costs and the legal aid system.<sup>94</sup> It appears that submission for its insertion was made by the technical drafting committee during March 1996 following a submission received from the National Children’s Rights Committee (NCRC) to include the clause that “every child has the right to be provided with automatic legal representation by the State in all civil and criminal matters affecting the child.”<sup>95</sup> However this submission was not accepted completely and was watered down by the inclusion of the “substantial injustice” test as is currently provided for in section 28(1)(h).

It is important to note that section 28(1)(h) specifically refers to the assignment of a “legal practitioner” while article 12(2) of the UNCRC merely refers to a “representative”

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<sup>90</sup> It should be noted that this right granting legal representation for children especially in civil proceedings is in addition to the right granted to everyone (adults included) to have legal representation at State expense in criminal proceedings as provided for in section 35(3) (g) of the Constitution.

<sup>91</sup> Sloth-Nielsen J, *Children*, Chapter 23 in *South African Constitutional Law: The Bill of Rights*, Cheadle MH, Davis DM, Haysom NRL (eds), Butterworths, 2002, p 526.

<sup>92</sup> Act 200 of 1994.

<sup>93</sup> Cockrell A, *The Law of Persons and the Bill of Rights in Bill of Rights Compendium*, 1998, 3E-18.

<sup>94</sup> Kassan D, *The Voice of the Child in Family Law Proceedings* in *De Jure*, Vol 1, 2003, p 167.

<sup>95</sup> Kassan D, *op cit*, p 167.

and article 4(2) of ACRWC refers to an “impartial representative”. Further, this right applies to “every child” and is not limited to a child capable of forming and expressing his/her own views as provided for in the UNCRC, nor is it restricted to a child capable of communicating his or her own views as provided for in the ACRWC. However, the inclusion of the “substantial injustice” test, in section 28(1)(h), would suggest that there is no automatic right to legal representation for the child involved in civil proceedings and that certain guidelines are necessary to determine when a “substantial injustice” would result should the child not be granted such legal representation. Guidelines or criteria therefore need to be developed to determine when it might be necessary or appropriate to appoint a legal representative for the child during civil proceedings.



To date, some provisions have been included in legislation to give effect to the right contained in section 28(1)(h). Proposals to give effect to this right have also been made in law reform processes recently undertaken in South Africa. These include section 8A of the Child Care Act 74 of 1983 and proposals made in the Children’s Bill.<sup>96</sup> These efforts concern the right of the child to legal representation during civil proceedings that arise particularly in the Children’s Court.<sup>97</sup> They do not relate to the right of the child to legal representation during divorce proceedings but nevertheless, can lend some basis for determining the grounds under which children are entitled to legal representation, at State expense, during divorce proceedings. This chapter will now examine these existing and proposed provisions in order to clarify the extent to which section 28(1)(h) has been given effect, and the extent to which related legislation can assist in developing such guidelines to determine when children, involved in divorce proceedings, should be granted legal representation.

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<sup>96</sup> B70 of 2003. The Children’s Bill was drafted following a request by the Minister of Social Development to review and investigate the Child Care Act 74 of 1983. See para 3.2 of this chapter for a discussion on the Children’s Bill process.

<sup>97</sup> These proceedings are usually adoption matters, foster care or child-removal cases. Child removal cases involve a decision on whether the child should be removed from his or her present guardian or custodian.

3. How has section 28(1)(h) of the Constitution been given effect to in civil proceedings?

### 3.1 Section 8A of the Child Care Act 74 of 1983

The constitutional right of a child to be represented in civil proceedings has been given some institutional support in the form of section 8A of the Child Care Act<sup>98</sup> even though this section, almost nine years since adoption, has not as yet been put into operation. The Child Care Amendment Act of 1996<sup>99</sup> amended the Child Care Act to provide for the legal representation of children in the Children's Courts during civil proceedings which arise in terms of the Child Care Act.<sup>100</sup> This legislation was not only intended to cater for South Africa's legal obligations under article 12 of the UNCRC and its constitutional obligation under section 28(1)(h), but also in practical terms for situations where there exists a conflict of interests between the parent and the child.<sup>101</sup>

Section 8A of the Child Care Amendment Act states :

- “(1) A child may have legal representation at any stage of a proceeding under this Act.
- (2) A Children's Court shall inform a child who is capable of understanding, at the commencement of any proceeding, that he or she has the right to request legal representation at any stage of the proceeding.
- (3) A Children's Court may approve that a parent may appoint a legal practitioner for his or her child for any proceeding under this Act, should the Children's Court consider it to be in the best interest of such child.

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<sup>98</sup> Act 74 of 1983. In terms of the preamble, this Act seeks to provide for the establishment of Children's Courts and the appointment of Commissioners of Child Welfare; for the protection and welfare of certain children; for the adoption of children; for the establishment of certain institutions for the reception of children and for the treatment of children after such reception, and for contribution by certain persons towards the maintenance of certain children and to provide for incidental matters. The Act *inter alia*, generally provides for the protection and welfare of children in need of care (for example, the child has no parent or guardian or has been abandoned or has been physically, sexually or emotionally abused or ill-treated) and children in especially difficult circumstances (for example, children living on the streets and children exposed to armed conflict or violence).

<sup>99</sup> Section 2 of Act 96 of 1996.

<sup>100</sup> See footnote 97, *op cit*, for a description of these proceedings.

<sup>101</sup> Gallinetti J, *Position Paper on South African Children's Courts*, Children's Rights Project, Community Law Centre, unpublished, 2003.

- (4) A Children’s Court may, at the commencement of a proceeding or at any stage of the proceeding, order that legal representation be provided for a child at the expense of the State, should the Children’s Court consider it to be in the best interest of such child.”<sup>102</sup>

Section 8A has been criticized in that, while it goes a long way to afford the child the right to be heard in Children’s Court proceedings, it does not go far enough.<sup>103</sup> The Commissioner of Child Welfare<sup>104</sup> is merely given a discretion to decide whether a child should be assisted to acquire legal representation and is not obliged to consider the issue. It is argued that Commissioners should be compelled by law to consider the issue in light of constitutional and policy considerations.<sup>105</sup>



It should be noted that sections 8A (3) and (4) state that such legal representation may be provided at private or State expense if a presiding Commissioner considers that this “is in the best interest” of the child. It is argued that this ground in sections 8A (3) and (4), namely “the best interest of the child”, is broad and does not provide Commissioners with any guidelines as to when a child will indeed require such legal representation.<sup>106</sup> It is further argued that the “best interest of the child” ground contained in sections 8A (3) and (4) is similar to the “substantial injustice” qualification contained in section 28(1)(h) of the Constitution. The “substantial injustice” qualification implies that there is no

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<sup>102</sup> The rest of this section, namely, section 8A (5), (6) and (7) deal with the process to be followed and requirements to be met once the court orders legal representation for the child at State expense in terms of section 8A (4). In terms of section 8A (5), the clerk of the Children’s Court must request the Legal Aid Board to appoint a legal practitioner to represent the child. After the appointment of such legal practitioner, the matter is referred to the Legal Aid Board for an evaluation and the Legal Aid Board must compile a report on the matter- section 8A (6). The report must contain particulars regarding the financial circumstances of the child concerned, the parents or guardian of the child, whether any other legal representation at the expense of the State is available or has been provided and any other particulars which need to be taken into account. This report is submitted to the Children’s Court for consideration. After the court has considered the report, the court may order that the cost of the legal representation be recovered from the parties (or any one of the parties) to the proceedings, from the parents of the child or the guardian of the child- section 8A (7).

<sup>103</sup> Sloth-Nielsen J and Van Heerden B, *Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa* in SAJHR, Vol 12, Part 2, 1996, p 251.

<sup>104</sup> The presiding officer in the Children’s Court is referred to as the Commissioner of Child Welfare.

<sup>105</sup> Sloth-Nielsen J and Van Heerden B, op cit, p 251.

<sup>106</sup> Zaal N, *When Should Children Be Legally Represented in Care Proceedings? An Application of Section 28(1)(h) of the 1996 Constitution* in SALJ, 1997, Vol 114, Part 2, 335.

automatic right to legal representation at State expense in civil proceedings. The “substantial injustice” qualification, similarly to the “best interest of the child” ground, creates the need for the development of guidelines to assist courts in determining when legal representation for the child is indeed necessary and appropriate.<sup>107</sup> For this reason it is argued that the “best interest of the child” ground contained in sections 8A (3) and (4) is broad as it does not provide Commissioners with any guidance as to when a legal representative for a child should be granted and therefore requires the development of certain criteria.

However, section 60 of the Child Care Act, authorizes the Minister to pass regulations to implement the provisions and achieve the objectives of the Child Care Act. In this respect, regulation 4A<sup>108</sup> sought to flesh out the principle provision in section 8A of the Child Care Act by providing detailed circumstances as to when legal representation at State expense should be provided for a child in the Children’s Court. Thus, regulation 4A states that legal representation at the expense of the State shall be provided for a child who is involved in any proceedings under the Act, in terms of section 8A (5)<sup>109</sup> of the Act, in the following circumstances:

- (a) Where it is requested by the child who is capable of understanding;
- (b) Where it is recommended in a report by a social worker or an accredited social worker;
- (c) Where any other party besides the child will be legally represented in the proceedings;
- (d) Where it appears or is alleged that the child has been physically, emotionally or sexually assaulted, ill-treated or abused;
- (e) Where the child, a parent or guardian, a person in whose custody the child was immediately before the commencement of the proceedings, a foster parent or

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<sup>107</sup> Zaal N, op cit, pp 335-336.

<sup>108</sup> This regulation, regulation 4A, was inserted by Government Notice R 416 of 31 March 1998. Government Notice R 416 of 1998 amended the regulations under the Child Care Act which were published in Government Notice No R 2612 on 12 December 1986.

<sup>109</sup> See footnote 102, op cit, for an explanation of the content of section 8A(5).

- proposed foster parent, or an adoptive or proposed adoptive parent contests the placement recommendation of a social worker or of an accredited social worker;
- (f) Where two or more persons are each contesting in separate proceedings for the placement of the child in their custody;
  - (g) Where the child is capable of understanding the nature and content of the proceedings, but differences in language used by the court and the child prevent direct communication between the court and the child, a legal representative who speaks both the languages must, subject to paragraph (h), be provided;
  - (h) Where a legal representative contemplated in paragraph (g) cannot be provided, an alternative arrangement should be made, including the provision of an interpreter for the child;
  - (i) Where there is reason to believe that any party to the proceedings or any witness intends to give false evidence or to withhold the truth from the court; and
  - (j) In any other situation where it appears that the child will benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcome for the child.<sup>110</sup>

It is clear that with the introduction of regulation 4A, there is a detailed attempt to provide some clarity as to when legal representation, at State expense, should be provided for children appearing in the Children's Court to avoid a substantial injustice from resulting. Unfortunately, these provisions have not yet been put into operation, as the principle legislative instrument, section 8A, remains unpromulgated.

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<sup>110</sup> Proceedings in the Children's Court are generally regarded as public law proceedings due to the fact that the State is a party to these proceedings. These proceedings are also crucial as they concern matters referred to as "care proceedings" which potentially could lead to the removal of the child from his or her parents or legal guardian. It therefore should be noted that in the United Kingdom, in terms of the Children Act of 1989, a child could be represented by both a solicitor and a *guardian ad litem* in public law proceedings. This system is known as the tandem model of representation where the child is represented by his or her own solicitor with the assistance of a *guardian ad litem* charged with the responsibility of promoting and protecting the welfare of the child. However, there is no provision for such dual representation in private law proceedings (such as divorce) although in certain cases the child will have his or her own solicitor or the official solicitor appointed to represent him or her. See Timms J, *Children's Representation: A practitioner's guide*, Sweet and Maxwell, 1995, p 12.

### 3.2 Proposals for the legal representation of children, in the Children’s Court, in the Children’s Bill

Given the fragmented nature of the Child Care Act and its shortcomings in providing children with comprehensive protection for their well-being, a Project Committee of the South African Law Reform Commission (hereinafter referred to as the SALRC) was requested to review and investigate the Child Care Act in 1997.<sup>111</sup> Their task was to make proposals and recommendations to the Minister of Social Development for the reform of this particular branch of the law to ensure the overall protection and well-being of children. This process resulted in a draft Children’s Bill<sup>112</sup> that was handed to the Minister in December 2002.



This version of the draft Bill (hereinafter referred to as the SALRC version) contained a comprehensive clause dealing with the legal representation of children in proceedings in the Children’s Court. Clause 78 and more particularly clause 78(5) listed explicitly the situations when legal representation at State expense *must* (my emphasis) be provided. It provided a complete set of provisions allowing for children’s legal representation in the “Child and Family Court”.<sup>113</sup> This clause provided substantive guidelines to presiding officers to allow for such legal representation and also circumvented the problems and uncertainty that might have been occasioned by the discretion granted to Commissioners of Child Welfare by section 8A of the Child Care Act referred to above in paragraph 3.1 of this chapter.

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<sup>111</sup> South African Law Reform Commission, Project 110.

<sup>112</sup> This version of the Bill was drafted by the appointed project committee of the SALRC.

<sup>113</sup> Written submission on the Children’s Bill B70 of 2003 (version of the Bill that was tabled in parliament—see footnote 116 below for an explanation of the parliamentary process) made to the Portfolio Committee on Social Development by the Children’s Rights Project, Community Law Centre, UWC (Authors: Gallinetti J, Kassan D and Barday R), 27 July 2004, p 64. It should be noted that the SALRC’s project committee recommended that the current Children’s Courts be renamed “Child and Family Courts” and that they be established at both district and regional level. The current Children’s Courts are Magistrates Courts operating at district level. They do not exist as Regional Courts. The reasoning for suggesting that the “Child and Family courts” be established at district and regional levels was to increase and expand the functions and powers of the current Children’s Courts.

Clause 78(5) placed an obligation on the court to order that legal representation be provided for children involved in a matter before the “Child and Family Court” at State expense if:

- (a) it was requested by the child;
- (b) it was recommended in a report by a social worker or an adoption social worker;
- (c) it appeared or was alleged that the child had been abused or deliberately neglected;
- (d) any recommendation of a social worker who had investigated the circumstances of the child that the child be placed in alternative care, was contested by-
  - (i) the child
  - (ii) a parent or care-giver of the child
  - (iii) a person who has parental responsibilities and rights in respect of the child; or
  - (iv) a would-be adoptive parent, foster parent or kinship care-giver of the child;
- (e) two or more adults were applying in separate applications for the placement of the child with them;
- (f) any other party besides the child was or was to be legally represented at the hearing;
- (g) the court had terminated the appointment of a legal representative;
- (h) in any other situation where it appeared that the child would benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child; or
- (i) substantial injustice would otherwise result.

It should be noted that the circumstances stated in clause 78(5) are similar to those contained in regulation 4A referred to above in paragraph 3.1 of this chapter, which sought to add content to section 8A of the Child Care Act. Clause 78(5) further provided for the accreditation of legal representatives on a family law roster, as it was

acknowledged that representation of children is a special practice of law and it is necessary that practitioners be sensitive to the issues affecting children.<sup>114</sup>

Unfortunately, since the release of the SALRC version of the Children's Bill, it has undergone many excisions and changes.<sup>115</sup> The official version of the Children's Bill<sup>116</sup> (hereinafter referred to as Bill B70) that was introduced into Parliament during August 2003 contains a watered down clause relating to legal representation of children in the Children Courts.<sup>117</sup> Clause 55 of Bill B70 dealing with the issue of legal representation of children in the Children's Court is similar to section 8A of the Child Care Act referred to above and provides *inter alia* that:

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- “(1) Notwithstanding the provisions of section 54,<sup>118</sup> a child involved in a matter before the Children's Court is entitled to legal representation.
- (2) (a) a child may request the court to appoint a legal practitioner to represent him or her in such matter.
- (b) if a legal practitioner appointed in terms of paragraph (a) does not serve the interests of the child in the matter, the court may terminate the appointment.
- (3) if no legal practitioner is appointed in terms of subsection 2(a), the court must inform the parent or caregiver of the child or a person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and

<sup>114</sup> Clause 78(7) of the SALRC version of the Children's Bill.

<sup>115</sup> This occurred during the consultation process with the relevant departments concerned. After the Draft Bill is handed to the Department (in this case the Department of Social Development) that requested the investigation by the SALRC, other concerned and affected departments, such as Department of Justice, are called upon to peruse and comment on the contents of the Draft Bill.

<sup>116</sup> Bill B70 of 2003 – Section 75 version. The SALRC version of the Children's Bill was split into two parts in that it was referred to as a “mixed” Bill because it contained issues which concerned both national and provincial spheres of Government. In terms of the Constitution, namely sections 75 and 76, there are separate processes that need to be followed when deliberating on Bills not affecting the provinces and those that do affect provinces. Since the SALRC version of the Children's Bill affected both national and provincial competencies, the Bill was split into two parts. The Bill that was introduced into Parliament contained the issues affecting national government alone. This Bill is the “section 75” version of the Bill, namely Bill B70.

<sup>117</sup> It should be noted that the SALRC's recommendation that the Children's Court be renamed the “Child and Family Court” and operate at both a district and regional level was not taken forward and therefore Bill B70 of 2003 refers to the current Children's Courts.

<sup>118</sup> Clause 54 states that “a person who is a party in a matter before a Children's Court is entitled to appoint a legal practitioner of his or her own choice and at his or her own expense.”

- the child, if the child is capable of understanding, of the child's right to legal representation.
- (4) if no practitioner is appointed in terms of subsection 2(a) after the court has complied with subsection (3), or if the court has terminated the appointment of a legal practitioner in terms of subsection 2(b), the court may order that a legal practitioner be assigned to the child by the State, and at State expense, if substantial injustice would otherwise result.”

It is submitted that if Bill B70 is retained in this form, it will prove to be an ineffective attempt to give substance to section 28(1)(h) of the Constitution because of its glaring shortcomings. Firstly, while clause 55 (2)(a) provides that a child may request the court to appoint a legal practitioner to represent such child, there is no upfront duty on the court to actually inform the child that he or she has the right to request legal representation. How then would a child be able to request the court to appoint a legal practitioner for him or her if such child is not even aware that he or she has the right to do so? In order for a child to request legal representation, it is submitted that a duty be placed on the court to inform a child who is capable of understanding, at the commencement of any proceeding in the Children's Court, that he or she has the right to request legal representation at any stage of the proceedings.

Secondly, in terms of clause 55(3), only after there has been no appointment of a legal practitioner in terms of section 55(2)(a), is there a duty on the court to inform the child and child's parent or caregiver of the child's right to representation. It is submitted that this clause should be redrafted to place the obligation on the court of informing the child of his or her right to legal representation at the outset to ensure that the child is indeed aware of such a right.

Thirdly, clause 55(4) grants a discretion to the court to order that a legal practitioner be assigned to the child by the State, and at State expense, if substantial injustice would otherwise result. However, this clause fails to provide any substantive guidance to the court as to when it might be appropriate and necessary to grant the child legal

representation to avoid a “substantial injustice” from occurring. It is submitted that without these guidelines, this clause, if enacted in this form, will prove to be potentially unenforceable and might lead to inconsistency in its application due to the lack of accurate criteria. Should this clause be retained in its current form, it would result in many children not having adequate representation in civil proceedings in the Children’s Court.

As seen from the above, section 8A of the Child Care Act, the proposals made in the SALRC version of the Children’s Bill and the proposals contained in Bill B70 were an attempt to give effect to the spirit and intended scope of the application of section 28(1)(h) of the Constitution. The ambit of the application of the right contained in section 28(1)(h), *inter alia*, extends to divorce proceedings. It is therefore submitted that children are entitled to the assignment of a legal practitioner by the State, and at State expense, during divorce proceedings, if a substantial injustice would otherwise result. However, when exactly the appointment of such a legal representative for the child in divorce proceedings would be considered necessary or appropriate in terms of section 28(1)(h), is not clear.<sup>119</sup>

However, it is noted that the provisions of section 8A and the proposals contained in the SALRC version of the Children Bill as well as Bill B70 concern the legal representation of children in the Children’s Court. These provisions referred to are therefore more narrowly focused as they refer only to “care” proceedings (which include adoption matters, foster care issues and the removal of children from their parents or guardians)

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<sup>119</sup> It should be noted that revised divorce law was entered into force in Switzerland on 1 January 2004. This law, *inter alia*, introduced important innovations with regard to the legal position of children. It particularly provides that: all children involved in divorce proceedings must, in principle, be heard, either by the court or by a designated third party; and provides that the court is to order legal representation for the child in the proceedings where this is deemed necessary or where the child applies for legal representation. In terms of article 146, section 1 of the Swiss Civil Code, it is for the court to decide whether, on the basis of the following grounds, the provision of legal assistance is necessary. The grounds that the court will consider to determine whether legal representation for the child is necessary are listed in article 146, section 2 which *inter alia* include: the parents disagree with regard to the custody arrangements; there are doubts as to the appropriateness of the settlement agreement. The court must order legal representation where it is requested by the child. See Morger M, *The legal position of children in Swiss Divorce Law*, conference paper presented at Miller Du Toit Inc and the Law Faculty of UWC Family Law Conference, 1-2 April 2004, pp 7-8.

and do not extend to divorce proceedings. However, it is submitted that the efforts made by section 8A and the proposals contained in the SALRC version of the Children's Bill can inform and provide examples as to when children should be legally represented in divorce proceedings, where such protection is also lacking. It is also submitted that the situations identified by regulation 4A and also the circumstances listed in clause 78(5) of the SALRC version of the Children's Bill may certainly assist in developing the circumstances and guidelines to determine when a child should be legally represented in divorce proceedings where such guidelines are lacking.

The above discussion concerned the legal representation of children in the Children's Court. This chapter will now examine whether or not South African domestic law relating to divorce proceedings has mechanisms in place to give effect to the provisions of section 28(1)(h).



#### 4. Current legislative framework and domestic law

The Divorce Act 70 of 1979 and the Mediation in Certain Divorce Matters Act 24 of 1987 are the primary pieces of legislation governing divorce proceedings in South Africa. The extent to which they provide an opportunity for the voices of children to be heard will be critically examined and any law reform proposals suggested in this area of law will also be discussed.

##### 4.1 The Divorce Act 70 of 1979

Section 6 of the Divorce Act specifically refers to children, and seeks to safeguard their interests. It states that a decree of divorce shall not be granted unless the court is satisfied that the provisions made with regard to the welfare of the minor or dependent child are satisfactory or are the best that can be effected, and that the court has considered the recommendations and report of the Family Advocate where an inquiry was instituted.<sup>120</sup> Further, the court may cause any investigation which it may deem necessary to be carried

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<sup>120</sup> Sections 6(1)(a) and 6(1)(b).

out and make any order it deems fit in relation to maintenance, access, custody and guardianship of the minor or dependent child.<sup>121</sup>

Of particular importance to the focus of this thesis is section 6(4) which provides that:

*“For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.”*

This section grants the court a discretion to appoint a legal practitioner to represent the child during divorce proceedings. It thus provides an opportunity for the child’s voice to be heard via his or her own legal representative. Notwithstanding this provision, some authors have pointed out that the courts seldom appoint legal practitioners to represent children, probably because of the expense that would be incurred by the parties, as the section provides that the parties (the plaintiff and defendant) or one of them have to pay the costs of such representation.<sup>122</sup> It appears that section 6(4) is more often used by the courts to appoint a *curator* on behalf of the child to look after the child’s interests where the child is a beneficiary to a trust or where paternity is at issue.<sup>123</sup>

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<sup>121</sup> Sections 6(2) and 6(3).

<sup>122</sup> Palmer S, *The Best Interest Criterion: An overview of its application in custody decisions relating to divorce in the period 1985-1995 in Children’s Rights*, Keightley R (ed), Juta, 1996, p 112.

<sup>123</sup> Kassan D, op cit, p 170. At common law, in civil matters, children have limited capacity to act and can do so with the assistance of his or her parent or guardian or the parent or guardian can institute action on his or her behalf. This means that minors need to be assisted either by their parents or guardian, for example, to enter into a contract or to litigate. Where a parent or guardian fails to do so, then a *curator* can be appointed for the minor to assist the minor during such proceedings or to look after the minor’s interest. South African law makes provision for the appointment of a *curator ad litem* to act on behalf of a child if he or she does not have a parent or guardian; or if the parent or guardian cannot be found; or if the interests of the minor are in conflict with those of the parent or guardian; or if there is a possibility this could happen; or if the parent or guardian unreasonably refuses or is unavailable to assist the child. See Davel T, *The Status of Children in South African Private Law in Introduction to Child Law in South Africa*, Davel CJ (ed), Juta, 2000, p 29. The duty of a *curator* is to assist the court and the child during legal proceedings and to look after the child’s interest. A legal representative, on the other hand, acts upon the minor’s instructions and advocates on behalf of the child. The legal representative presents the minor’s views to the court and acts upon instructions from his or her client. The duties and role of the *curator* thus differs from those of the legal representative.

Although section 6(4) provides for a form of representation for a child in divorce proceedings, it is submitted that it does not comply with the provisions of section 28(1)(h) of the Constitution, since no mention is made for such legal representation to be provided at State expense. It provides that the parties themselves should cover the cost for the legal representative of the child and therefore suggests that only children of the wealthy may be able to make their voices heard. It will inevitably exclude children of poorer parents who are involved in divorce proceedings, as these parents will not be able to pay for a legal representative for their child. These parents may not themselves be represented by a legal representative, so it would arguably be unreasonable to expect them to pay for a legal representative for their child. Despite the existence of section 6(4) of the Divorce Act, it is submitted that the right afforded to children in section 28(1)(h) is not given its full effect with regard to the representation of children in divorce proceedings.



A further point is that section 28(1)(h) provides that a legal practitioner shall be appointed for the child at State expense if “substantial injustice would otherwise result”. Unlike the Child Care Act where attempts were made to provide Commissioners with guidelines as to when the State should appoint a legal representative for the child in care proceedings in the Children’s Court, there are no such guidelines contained in section 6(4) of the Divorce Act to guide the court in determining when it is crucial to appoint a legal representative for the child in divorce proceedings. In this respect, it is submitted that section 6(4) fails wholly to meet the standard provided for in section 28(1)(h).

#### 4.2 The Mediation in Certain Divorce Matters Act 24 of 1987

The Mediation in Certain Divorce Matters Act (Act 24 of 1987) creates the Office of the Family Advocate whose brief is to safeguard and protect the welfare and interests of all minor and dependent children involved in divorce proceedings and other disputes concerning custody, guardianship or access.

The promulgation of Act 24 of 1987 was a direct consequence of the recommendations made by the 1983 Hoexter Commission<sup>124</sup> which was concerned that the courts could not properly fulfill their function, stipulated in section 6(1) of the Divorce Act, of ensuring that “provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances.”<sup>125</sup> The Hoexter Commission expressed concern that in the vast majority of undefended divorces, there was no proper assessment as to whether the marriage had indeed broken down irretrievably, nor was there a sufficiently thorough investigation into the adequacy of the custody and access arrangements made for the children.<sup>126</sup> The Hoexter Commission further noted that the only evidence before the court was that which was presented by the plaintiff and only rarely would a legal representative be appointed to speak for the children involved. Consequently, the interests of the children would often be subordinated to those of the parents.<sup>127</sup>

Due to these problems relating to the children involved in divorce matters, the Hoexter Commission declared that there was a need for an approved social agency to carry out an investigation into the welfare of the children and the circumstances of the parties. The Hoexter Commission was of the opinion that an office modeled on the Canadian Family Advocate should be set up to represent the children’s interest, to give legal advice, to attempt to resolve issues in the best interests of the children and to instigate investigatory reports.<sup>128</sup> In response to this, the legislature enacted Act 24 of 1987<sup>129</sup> to, *inter alia*, safeguard the interests of children involved in divorce proceedings and other applications arising from such proceedings, concerning their custody, access or guardianship.<sup>130</sup>

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<sup>124</sup> Commission of Inquiry into the Structure and Functioning of the Courts RP 78/1983.

<sup>125</sup> Glasser N, *Can the Family Advocate adequately safeguard our children’s best interests?* in THRHR, 2002, Vol 65, p 75-76.

<sup>126</sup> Kaganas F and Budlender D, *Family Advocate*, Law Race and Gender Research Unit, University of Cape Town, 1996, p 2.

<sup>127</sup> Kaganas F and Budlender D, *op cit*, p 2.

<sup>128</sup> Kaganas F and Budlender D, *op cit*, p 3.

<sup>129</sup> This Act came into force in 1990 and the Office of the Family Advocate was thereafter established to protect the interests of children affected by divorce.

<sup>130</sup> The advantages highlighted during the debates on this Act in the House of Assembly include: that the investigations by the Family Advocate would go behind consent papers and reveal hidden disputes as well as concealed imbalances in bargaining power; the new system would speed up proceedings; that the parties would most likely accept the Family Advocate’s advice due to his or her neutral position; and most

In terms of Act 24 of 1987, the Minister of Justice may appoint officers in the public service as Family Advocates at each division of the High Court.<sup>131</sup> The Minister may also appoint one or more suitably qualified or experienced persons as Family Counsellors to assist the Family Advocate in carrying out the tasks mandated in terms of the Act as discussed below.<sup>132</sup>

Section 4 of the Act sets out the powers and duties of the Family Advocates. This section provides that the central function of the Family Advocate is to institute an enquiry to enable him or her to furnish the court with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him or her by the court.<sup>133</sup> Such an enquiry is ordinarily carried out after the commencement of a divorce action or after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act.<sup>134</sup> The Family Advocate may be requested to conduct such an enquiry either by any party to the proceedings or by the court,<sup>135</sup> or may himself or herself apply to the court for an order authorizing him or her to institute an enquiry if he or she deems it in the interest of the child.<sup>136</sup> In addition, a Family Advocate may decide or may be requested by the court, to appear at the trial or hearing and may adduce any relevant evidence.<sup>137</sup>

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importantly it was recognized that the interests of the children would be safeguarded. See Kaganas F and Budlender D, op cit, p 3.

<sup>131</sup> Section 2. Family Advocates must be qualified to be admitted to practice as an advocate in terms of the Admission of Advocates Act 74 of 1964 and must have been involved in or have experience of the adjudication or settlement of family matters.

<sup>132</sup> Section 3(1). It should be noted that Act 24 of 1987 does not specify what qualifications or experience a Family Counsellor should have, but in practice, most Family Counsellors are social workers with experience in child and family matters.

<sup>133</sup> Section 4.

<sup>134</sup> Section 4. However, in *Terblanche v Terblanche* 1992 (1) SA 501 (W), it was held that section 4 should be interpreted as encompassing also applications pending trial for interdicts or for interim custody or access or for payment of maintenance. Therefore, so-called Rule 43 applications which are initiated to seek interim orders relating to maintenance, costs, custody and access, fall within the scope of the Family Advocate's brief. See Kaganas F and Budlender D, op cit, p 4.

<sup>135</sup> Section 4(1).

<sup>136</sup> Section 4(2).

<sup>137</sup> Section 4(3).

The role of the Family Advocate has been described as being threefold: namely to monitor, mediate and evaluate.<sup>138</sup> The monitoring function is derived from section 4(2) of the Act where the Family Advocate is tasked with deciding whether, in a particular case, an enquiry is desirable. This requires the Family Advocate to monitor all court documents and settlement agreements to ensure that the arrangements made are in the best interests of the child. The Family Advocate is also tasked with the responsibility of settling matters and disputes between the parties on terms most favourable to the welfare of children. The Family Advocate tries to achieve such settlements through mediations between the parties.<sup>139</sup> The evaluation function, which is the central function, stems from the provisions of section 4 which state that the primary role of the Family Advocate is to determine what is best for the child and to advise the court accordingly. The section further provides that the Family Advocate must set up an enquiry to enable him or her to furnish the court with a report and recommendations concerning the welfare of the minor or dependant children. In order to do so, the Family Advocate needs to undertake an evaluation of the family.

It would appear that the prime function of the Office of the Family Advocate is to act as a separate body or agency that will constantly ensure that the best interests of the children are served. In order to achieve this purpose, it is submitted that as part of its evaluative function, it becomes necessary to engage such children and to hear their views on the issues at hand and on the decisions that might be taken concerning their future living arrangements.

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<sup>138</sup> Glasser N, *Custody on Divorce: Assessing the Role of the Family Advocates*, in *The Fate of the Child*, Burman S (ed), Juta Law, 2003, p 110. Also see Bosman F, *The Family Advocate and Mediation in Family Mediation in South Africa*, Hoffmann W (ed), 1992 as referred to by Kaganas F and Budlender D, op cit, p 4.

<sup>139</sup> See Kaganas F and Budlender D, op cit, p 5 who point out that the mediation undertaken by the Family Advocate differs from the process that is commonly thought of as mediation. The basic elements of mediation entail voluntary participation, equality in bargaining power, neutrality on behalf of the mediator and confidentiality. In contrast, the mediation undertaken by the Family Advocate does not meet these basic elements in that it is not voluntary, much of the process is directed at establishing facts, the Family Advocate participates actively in decision-making, the terms of the parent's agreement are not necessarily accepted and are tested against the child's best interest, and there is no confidentiality.

Family Advocates, as stated above, are legally trained persons and their function is particularly to ensure that the welfare and interests of the children are protected. However, the question remains as to whether the role fulfilled by the Family Advocate is similar to that which is envisaged in section 28(1)(h) of the Constitution which requires a legal representative to be assigned to the child, by the State and at State expense, in civil proceedings if a substantial injustice would otherwise result. In order to answer this question and also to determine whether the views of children involved in divorce proceedings are heard, it is vital to understand the way in which the Family Advocates carry out their tasks practically.

#### 4.2.1 How do Family Advocates practically undertake their tasks?



The Family Advocate, as already stated, may become involved in a dispute in three ways, namely, if requested by a party, by the court or on his or her own initiative. The pleadings of every divorce case<sup>140</sup> in which minor children are involved are examined by the Family Advocate to ensure that the proposed arrangements for the children serve the children's best interests, in so far as the circumstances allow.<sup>141</sup> On examining the information detailed on Form A,<sup>142</sup> (see annexure 1 of this thesis), the Family Advocate decides whether there is a problem or irregularity in the proposed custody arrangements which merits an enquiry from their offices (this includes so-called unopposed divorces as well). Research has indicated that there is no rigid procedure when commencing an

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<sup>140</sup> The Family Advocates Office primarily serves the High Court but may be brought into the Magisterial level divorces through the Family Courts (Divorce Courts) at the request of the presiding officer, the parties or at the recommendation of the Family Advocate's office.

<sup>141</sup> Burman S, Derman L, Swanepoel L, *Only for the Wealthy? Assessing the Future for Children of Divorce* in SAJHR, Vol 16, Part 3, 2000, p 536.

<sup>142</sup> Section 2(2) of the Regulations to the Mediation in Certain Divorce Matters Act published in Government Gazette No 12781 on 3 October 1990 stipulates that in any divorce action in which there is a claim relating to custody or guardianship of a child or in relation to access, the plaintiff must deliver to the defendant and to the Registrar of the High Court, together with a summons, an Annexure A form which has been sworn and affirmed. The Annexure A form contains questions aimed at establishing whether and by whom the children concerned are being maintained; where and with whom they are to live; who will look after the children; where they will attend school; and what arrangements have been made regarding access. The Registrar of the High Court is obliged to send to the Family Advocate a copy of the summons or application together with the completed Annexure A forms.

enquiry into a matter.<sup>143</sup> Such an enquiry may range from sending out a formal letter or making a telephone call, to a fully-fledged investigation where the parties, including the children, are interviewed.<sup>144</sup>

It should also be noted that not all enquiries that are instituted by the Family Advocate result in a full investigation or interviews with the minor children, nor does every summons (along with Form A) which is perused by the Family Advocate, result in an enquiry of any kind.<sup>145</sup> It is often the nature of the matter that will determine the extent of the enquiry. Situations where the Family Advocate will institute an enquiry include where joint custody, split custody or sole custody are sought, where the father seeks custody of very young children, and where there are allegations of domestic violence, sexual abuse, child abuse and substance abuse.



In *Van Vuuren v Van Vuuren*<sup>146</sup> the court outlined the circumstances in which the Family Advocate should take the initiative and intervene to institute an enquiry. These are:

- (a) where the Form and the particulars of the claim suggest that there are serious problems in connection with access;
- (b) where it appears that there is an intention to place young children under the custody and control of someone other than their mother;
- (c) where there is an intention to separate siblings by awarding custody and control of one child to one parent and of the other child to the other parent;
- (d) where there is an intention to award the custody and control of a child to someone other than a parent, and
- (e) where there is an intention to make an arrangement that appears to be contrary to the child's interest.<sup>147</sup>

<sup>143</sup> See Burman S, et al, footnote 141, op cit, p 539; Kaganas F and Budlender D, op cit, pp 7-8; Glasser N, footnote 125, op cit, p 79.

<sup>144</sup> See Kaganas F and Budlender D, op cit, p 8 and Kassan D, op cit, p 172.

<sup>145</sup> Interviews held with Family Advocates in the Western Cape during March 2002 to explore this issue.

<sup>146</sup> 1993 (1) SA 163 (T) to 167.

<sup>147</sup> At p 164, paras B-D.

If a full investigation is considered necessary, the Family Advocate will usually endeavour to see the whole family and may call for affidavits or other documents to assist with the enquiry.<sup>148</sup> The Family Advocate usually interviews the parents together initially for the purpose of explaining matters such as the role and neutral stance of the Family Advocate as well as the purpose of the enquiry. The parties may then be seen separately if either of them so requests. Older children, such as teenagers, may also be interviewed either by the Family Advocate or a Family Counsellor to ascertain their views and preferences regarding their future living arrangements. Younger children are not normally interviewed but are observed by the Family Counsellor to ascertain whether they appear happy and well-adjusted and to examine the attachments the child has formed with family members.



Further, the Family Advocates brief is to settle the matter between the parties on terms that will reduce conflict and be most favourable to the welfare of the child wherever possible.<sup>149</sup> For this purpose, the Family Advocate may become involved in discussion and mediation with the parties in order to try and settle any issues in the divorce that relate to the children and are impeding settlement.<sup>150</sup> Often the services of social workers or Family Counsellors are drawn upon to assist with the enquiry, and if necessary, relevant persons (such as aunts, uncles, grandparents, teachers, neighbours) who can contribute information on the family circumstances are contacted. Once this consultation process is concluded, the Family Advocate compiles a report for the court containing recommendations as to the best custody and access arrangements to be made for the child.

The reports submitted to court generally reflect the preferences of older children where they have definite views on the issues at hand. Often, these preferences expressed by the child are not always what the Family Advocate would consider to be in the best interest

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<sup>148</sup> See Kaganas F and Budlender D, for a discussion on the work of the Family Advocate, op cit, pp 6-10. Also see Burman S and McLennan F, *Providing for Children? The Family Advocate and the Legal Profession* in Acta Juridica, 1996, p 72 and Burman S, et al, footnote 141, op cit, p 539.

<sup>149</sup> Burman S and McLennan F, op cit, p 72.

<sup>150</sup> Burman S and McLennan F, op cit, p 72.

of the child.<sup>151</sup> Reasons for this are that the Family Advocate needs to consider the prevailing circumstances in each case, for example, the Family Advocate needs to consider whether the parent with whom the child prefers to stay has the necessary stability (emotional and financial) and capability to care for the child as compared to the other parent. Also, the underlying motive of the child needs to be taken into regard. For example, the child might choose a particular parent because that parent is the more lenient one. The recommendations made to the court by the Family Advocate will therefore not always correspond with the views, preferences or opinions expressed by the child.

Where the wishes of a child mature enough (for example where the child has reached the age of puberty, generally twelve years and older)<sup>152</sup> are well motivated, the Family Advocate might support and might even agree with these wishes and desires expressed by the child and incorporate them as a recommendation. It should be noted that Family Advocates caution against placing a burden of choice (i.e. having to choose between their parents) on the children and they therefore reportedly refrain or try to avoid asking direct questions related to the child's preferences.<sup>153</sup> There are also instances when a child's voice will not be ascertained or heard at all during the proceedings. This is generally the case when the arrangements on the divorce or settlement papers appear to be satisfactory and there is no need for an enquiry of any kind.

In light of the above, it is submitted that the Office of the Family Advocate creates a (limited) platform for the views of the child to be heard. This is achieved by engaging the child and incorporating his or her views in the report compiled for court. However, this is not necessarily compulsory, as the role of the Family Advocate is to make recommendations as to what is in the overall best interest of the child. Their role is not to

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<sup>151</sup> Information obtained during interviews held with Family Advocates in the Western Cape office during March 2002 to explore this issue.

<sup>152</sup> Telephone interview held with Family Advocate on 22 October 2004. It appears that on occasion the views of children as young as ten years are also incorporated into the report if their views and wishes are well motivated, informed and for the "right reasons". The Family Advocate, during this discussion, indicated that where the child is fifteen years and older, their wishes and views cannot be ignored and are generally reflected in the report to court.

<sup>153</sup> Kassan, D, op cit, 173.

represent and advocate the wishes or voice of the child. The Family Advocate does not act in the traditional sense of a legal practitioner (attorney or advocate) that will take instructions from the child and advocate those instructions over and above any considerations as to what the overall best interests of the child might be.<sup>154</sup> The position of the Family Advocate is that of an impartial and independent expert who is supposed to possess the skill and experience needed to evaluate the overall family circumstances in order to make recommendations to promote and protect the overall welfare of the child. The Family Advocate does not represent any particular party, nor the child, but rather assesses the situation to assist the court with recommendations as to the best custody and access arrangements for the child.



It is submitted that the role played by the Family Advocate is not equivalent to that which a legal practitioner appointed for the child in terms of section 28(1)(h) is intended to play for the following reasons.<sup>155</sup> Firstly, the Family Advocate is not obliged to consider the views of the child but merely has the discretion to do so. A legal practitioner, appointed for the child, is obliged to consult with his or her client and has to hear the views of his or her client. Secondly, the Family Advocate, even if he or she considers the views of the child, is not obliged to present those views to the court. A legal practitioner, on the other hand, has to act upon his or her client's instructions and has to present the views of his or her client to the court. Thirdly, even where the Family Advocate does consider and present the views of the child to the court via the report, such views of the child can be overridden by the Family Advocate's own view as to what he or she considers to be in the best interest of the child. Fourthly, the Family Advocate does not represent any particular party to the proceedings but is an independent expert who evaluates the overall family circumstances with a view to assisting the court in reaching a decision concerning the future living arrangements of the child. A legal representative appointed for the child would act as the representative of the child and advocate such child's views and opinions. Finally, the Family Advocate gets involved in the matter when he or she decides that

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<sup>154</sup> Gallinetti, J, op cit, 77.

<sup>155</sup> It should be noted that in the recent case of *Soller NO v G and Another* 2003 (5) WLD SA 430, the Judge clearly confirmed that the role of the Family Advocate is indeed different to that of a legal practitioner appointed for the child in terms of section 28(1)(h). See a discussion hereof in chapter 4 of this thesis.

there is an irregularity in the proposed custody arrangements which merits an enquiry. For example, when custody of a young infant is being awarded to some person other than the mother of the infant. On the other hand, the child will only be appointed a legal practitioner in terms of section 28(1)(h) if a substantial injustice would otherwise result. For example where the child has a definite preference and wish as to where he or she would like to live and such preferences are not given due consideration by the Family Advocate.<sup>156</sup> In this light, it is submitted that the Family Advocate does not fulfill the role that a legal practitioner would need to fulfill if appointed for the child in terms of section 28(1)(h).

#### 4.3 Hague Convention on the Civil Aspects of Child Abduction Act 72 of 1996



As stated in chapter 2, this Act was implemented on 1 October 1997 and the Chief Family Advocate is appointed as the Central Authority in Hague Convention (Abduction) matters.<sup>157</sup> The major function of the Central Authority is to act as a channel for applications under the Hague Convention.

The purpose of Act 72 of 1996 is to provide for the application of the Hague Convention in the Republic of South Africa.<sup>158</sup> The primary objective of the Hague Convention and Act 72 of 1996 is to facilitate the speedy return of children, who have been wrongfully removed from, or retained outside, their countries of habitual residence. The justification for such return is the assumption that the place of habitual residence is the forum with the most significant interest in resolving the dispute and is best suited to make a determination on the merits. It should be noted that the Hague Convention is a schedule to Act 72 of 1996 and in terms of section 231(4) of the Constitution,<sup>159</sup> it has become law in South Africa. Act 72 of 1996 hereby incorporates the substantive provisions of the

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<sup>156</sup> See chapter 4 and 5 of this thesis for a further discussion on this aspect.

<sup>157</sup> Section 3 of Act 72 of 1996.

<sup>158</sup> See preamble and section 2 of Act 72 of 1996.

<sup>159</sup> Section 231(4) provides that “any international agreement becomes law in the Republic when it is enacted into law by national legislation;...”

Hague Convention. Apart from the inclusion of sections 1 to 6,<sup>160</sup> Act 72 of 1996 does not include any further substantive provisions than that contained in the Hague Convention.<sup>161</sup>

In terms of article 8 of Act 72 of 1996, any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply for assistance in securing the return of the child. Such application is made either to the Central Authority of the child's habitual residence or to the Central Authority of any other contracting State to where the child has been removed. In South Africa, such applications will therefore be made to the Chief Family Advocate or his or her delegate.<sup>162</sup>



Article 7 of Act 72 of 1996 lists the various measures that a Central Authority can take in order to carry out its duties under the Act and secure the return of the child to his or her country of habitual residence. One such measure is “to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access.”<sup>163</sup> In this respect, the Central Authority becomes the applicant in the judicial proceedings on behalf of the person seeking the return of the child.<sup>164</sup>

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<sup>160</sup> These sections generally include a definition section, the designation of the Central Authority, the delegation of powers by the Central Authority to Family Advocates, the power of the Minister to make regulations and the short title and commencement of Act 72 of 1996.

<sup>161</sup> See chapter 2, para 4 of this thesis for a full discussion on the provisions of the Hague Convention which apply to the provisions of Act 72 of 1996.

<sup>162</sup> The Chief Family Advocate's Office is located in Pretoria.

<sup>163</sup> Article 7(f).

<sup>164</sup> It should be noted that in a recent case, *Pennello v Pennello and Another* 2004 (3) BCLR 243 (SCA), the Supreme Court of Appeal granted a cost order against the Chief Family Advocate in that the Office of the Durban Family Advocate (a delegate of the Chief Family Advocate) failed to assist the father seeking the return of his child, by initiating or facilitating the institution of judicial proceedings on his behalf. It is therefore imperative that once the Central Authority receives an application concerning a Hague Convention Abduction matter, they immediately take measures to fulfill their duties under the Convention. Often, the circumstances of the matter are that the Central Authority, as applicant on behalf of the parent seeking the return of the child, is the applicant for the parent who is allegedly abusive, violent or subjecting the child to emotional trauma. For example, the abducting parent may have abducted the child due to the fact that the other parent is physically and emotionally abusive. When the abducting parent abducts the child to escape this form of the abuse, it is the parent that has been deprived of his or her custody and/or access rights, who is also allegedly abusive, that seeks the return of the child. The Central Authority acts as

In South Africa, the choice of the Chief Family Advocate as the Central Authority presents a potential conflict of interest because the function and role of the Office of the Family Advocate is to promote and protect the welfare of children. However, in Hague Convention matters, the Family Advocate (as the Central Authority) may be obliged to return a child in circumstances in which the welfare principle may indicate that this is not the best course of action. This raises the question as to how can the Office of the Family Advocate, that is expected to ensure and promote the best interests of the child, be obliged to return the child even when not in the individual child's best interest simply because of its role as the Central Authority. It is submitted that this course of events is conceptually illogical.



Further, in terms of article 13 of Act 72 of 1996, an objection raised by the child concerned could lead to the court which hears the matter, deciding not to return the child to his or her country of residence. This implies that the views of the child are an important factor to consider when hearing inter-country abduction matters. However, neither the Hague Convention itself nor Act 72 of 1996 indicate how children's voices are to be heard and it is not clear whether a legal representative needs to be appointed for the child in these situations.<sup>165</sup>

In practice, it would appear that the child's objections come to the attention of the court through the parent that has abducted the child.<sup>166</sup> This means that unless the abducting parent raises the child's objections, there is no way in which they will be heard unless that child is in some way able to bring his or her objections to the notice of the court.

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an applicant on behalf of such allegedly abusive parent. This presents a potential conflict of interest as the Office of the Family Advocate is meant to safeguard the interest of the child and yet as the Central Authority, needs to carry out the task of initiating judicial proceedings and being the applicant on behalf of an allegedly abusive parent.

<sup>165</sup> It should be noted that the position in England and Wales is that since the issue of separate representation for children is not provided for in the Convention, the child has no right to such representation. This is the case even for those children of sufficient maturity. However, in Australia, some courts have held that where there is a clear issue as to whether a child objects to being returned, "the court has an obligation to give the child an opportunity to be heard in an appropriate manner and that is a right of the child independent of the person opposing return. Additionally ...where issues ...arise with respect to a child of (appropriate) age and maturity, there ordinarily should be separate representation." See Discussion Paper on the Review of the Child Care Act, Project 110, December 2001, p 1074.

<sup>166</sup> Discussion Paper, Project 110, op cit, p 1073.

There is also no obligation on the judicial or administrative authority to enquire into the child's views nor is it a requirement that the child be granted legal representation. However, it appears that where children of sufficient age and maturity are the subjects of these proceedings, the Central Authority requests that either a social worker, psychologist or Family Counsellor interviews the child where the child has raised an objection to being returned. Such objections are incorporated in a report which is furnished to the court.<sup>167</sup> This, however, does not necessarily happen in every case.

The discussion above has shown that the Family Advocate may not be the correct body to hear or raise these objections on behalf of the child due to the potential conflict of interest that might arise from being the designated Central Authority. Further mechanisms need to be put in place and representation for the child possibly needs to be provided. Neither the Hague Convention nor Act 72 of 1996 provide any guidance on how the child's objections, if any exist, are to be heard or ascertained. To this end, it is submitted that the requirements of section 28(1)(h) are not given effect to in Hague Convention cases in that there is no clear guidance as to who would be representing the child, whether such representation would be granted at State expense and whether legal representation for the child would need to be granted in every Hague Convention case.

5. Law reform proposals particularly with regard to the Divorce Act and the role of the Family Advocate during divorce and Hague Convention proceedings

The discussion above highlighted the gaps that are present in the current law governing divorce proceedings and also highlighted that the role of the Family Advocate is not equivalent to the role of the legal practitioner envisaged in section 28(1)(h) of the Constitution. The discussion above also presented a criticism of the existing practice in relation to Hague Convention proceedings.

However, the Project Committee reviewing the Child Care Act (see paragraph 3.2 of this chapter) attempted to formulate some law reform proposals particularly relating to these

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<sup>167</sup> Telephone interview with the Central Authority of South Africa on 18 October 2004.

three distinct areas within the purview of this study, namely, hearing the voice of the child in divorce proceedings, how the Family Advocate can assist in ascertaining the views of the child during divorce proceedings and how the voices of children can be heard during Hague Convention proceedings. This chapter will examine the extent to which these law reform proposals address the problems discussed above.

### 5.1 Law reform proposals to provide for legal representation at State expense during divorce proceedings

Given the problems related to section 6(4), as highlighted above, the SALRC, in its Review of the Child Care Act Report,<sup>168</sup> recommended retaining the provisions of section 6(4) of the Divorce Act but also recommended that the following clause be added, namely, “if the court is satisfied that neither of the parties can afford to pay for such legal representation, the court must appoint a legal representative, at State expense, if substantial injustice would otherwise result.”<sup>169</sup>

The SALRC was of the view that the regulations to the Child Care Act (regulation 4A(1) as discussed above in paragraph 3.1) provide adequate guidance as to when legal representation for the child must be provided, and could usefully be transported from the Children’s Court situation to divorce proceedings. It is submitted that if these proposals were taken forward, it would assist children in making their voices heard during divorce proceedings.

Disappointingly, these proposals have not been incorporated into the Divorce Act since no provision is made for these in the recently enacted Judicial Matters Amendment Act (16 of 2003) nor in the Judicial Matters Second Amendment Act (55 of 2004).<sup>170</sup> The

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<sup>168</sup> Review of the Child Care Act Report, Project 110, December 2002.

<sup>169</sup> Review of the Child Care Act Report, op cit, p 194. Also see para 4.1 of this chapter for the contents of section 6(4).

<sup>170</sup> Bill B70 only concerns proceedings that take place in the Children’s Court, namely care proceedings. Bill B70 does not relate to divorce proceedings. Any amendment regarding divorce proceedings and the Divorce Act would therefore be incorporated in the Judicial Matters Amendment Acts.

latter Act, however, does amend certain aspects relating to the Divorce Act<sup>171</sup> but it is silent on affording children the right to a legal representative at State expense, during divorce proceedings, as recommended by the SALRC.<sup>172</sup>

## 5.2 Law reform proposals to strengthen the role of the Family Advocate to ascertain the views of the child

The discussion above highlighted that the role of the Family Advocate is not equivalent to that of a legal practitioner appointed for the child for reasons that: Family Advocates are not obliged to consider the views of the child but only have a discretion to do so; if the child's views are considered, Family Advocates are not obliged to present them to court; where the Family Advocate does consider and present the child's views to court, such views can be overridden by the Family Advocate's own view of what is in the best interest of the child; the Family Advocate does not represent any particular party and finally the Family Advocate only gets involved in matters where he or she is of the view that there is an irregularity in the proposed custody arrangements.

The primary role of the Family Advocate is to evaluate the overall circumstances with a view to making recommendations to the court as to what would be in the overall best interest of the child. In pursuit of their evaluation they would engage and interview children who are old enough to express a preference concerning their future living arrangements. Part of their role, therefore, could surely be to canvass and ascertain the views of the child and to communicate these to the court. The Mediation in Certain Divorce Matters Act does not require the Family Advocate to hear the views of the child.

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<sup>171</sup> Section 11 of Act 55 of 2004 amends the Divorce Act to make further provision regarding pension benefits in respect of the division of assets and maintenance of the parties. Act 55 of 2004 also amends the Mediation in Certain Divorce Matters Act of 1987 so as to prescribe the circumstances in which a Family Advocate may intervene in maintenance and domestic violence proceedings.

<sup>172</sup> During a telephone interview with a legal drafter from the Department of Justice on 18 October 2004, it transpired that this is an oversight and that there is no apparent reason for this proposal not being taken forward in the Judicial Matters Second Amendment Act. However, it is not clear as to whether these recommendations will be taken forward and in what form (whether more substantive or restrictive).

In order to strengthen the role of the Family Advocate to hear the views of the child during divorce proceedings, the SALRC stated that an amendment to the regulations to Act 24 of 1987, (particularly to Form A) requiring the canvassing and *recording* (my emphasis) of the child's views would solve this problem as it would guarantee that the preferences and views of the child will actually be recorded on the relevant Form.

It is submitted that this suggestion still does not meet the minimum requirements of section 28(1)(h). Firstly, it is the plaintiff that fills in this Form A and therefore there is a risk that the Form may not accurately reflect the wishes of the child but would instead reflect the wishes of the plaintiff. Secondly, section 28(1)(h) requires that a legal representative be appointed for the child, at State expense, if a substantial injustice would otherwise result. To merely allow for the child's views to be recorded on a Form, it is argued, falls far short of affording such child his or her own legal representative who certainly has a more defined role to play, as envisaged in section 28(1)(h).

### 5.3 Law reform proposals concerning the role of the Family Advocate in Hague Convention matters and the provision of legal representation

The discussion above highlighted the potential conflict of interest that could possibly ensue given that the Family Advocate is the designated Central Authority for Hague Convention matters and therefore be obliged to return a child even where this might not be in the child's best interest. In this respect, the SALRC proposed that the Director-General of the Department of Social Development be designated the Central Authority for purposes of the Hague Convention.<sup>173</sup> However, clause 275 of Bill B70 still provides for the Chief Family Advocate to be the designated Central Authority.<sup>174</sup> Should this provision be enacted, the potential conflict of interest referred to above would inevitably still arise.

<sup>173</sup> Discussion Paper, Project 110, op cit, p 1080.

<sup>174</sup> Bill B70, if enacted, will have the effect of repealing the existing Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. See clause 306 and schedule 4 of Bill B70.

Further, as indicated, during Hague Convention proceedings, a child's objections which may surface have the potential to affect the outcome of such proceedings in that the court hearing the matter may refuse to return the child to his or her country of habitual residence. However, neither the Hague Convention nor Act 72 of 1996 is clear as to how the child's objections will be heard or ascertained.

Chapter 18 of Bill B70 refers to child abduction and clause 278<sup>175</sup> specifically provides that a legal representative *must* (my emphasis) represent the child in all applications in terms of the Hague Convention on International Child Abduction. Clause 278 thus makes the requirement of a legal representative for the child mandatory. However, there is no indication as to who would bear the costs for such legal representation or whether it would be granted at State expense. Further, clause 278 is made subject to the provisions of clause 55 of Bill B70 of 2003.<sup>176</sup> Clause 55, and particularly clause 55(4), grants the court a discretionary power to appoint a legal practitioner for the child at State expense, if substantial injustice would otherwise result. This begs the question as to which situation will prevail in Hague Convention matters since clause 278 makes it mandatory for legal representation while clause 55(4) grants the court a discretion to appoint a legal representative at State expense. Should the appointment of a legal representative in Hague Convention matters be mandatory, then there would be no need to develop any further guidelines as a legal representative would need to be appointed for the child in every Hague Convention matter.

It is submitted that while the mandatory provision for legal representation for children in Hague Convention matters is commendable, the issue of who is to bear the costs for such representation might potentially leave this provision unenforceable. If the parents of the child are to bear the costs, then again this would potentially exclude those children whose parents cannot afford such costs. If it is to be the State, it is submitted that the interpretation and application of section 28(1)(h) would require the development of

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<sup>175</sup> Clause 278 of Bill B70 provides "a legal representative must represent the child, subject to section 55, in all applications in terms of the Hague Convention on International Child Abduction."

<sup>176</sup> See para 2.2 of this chapter for a discussion of the contents of clause 55.

criteria, even in Hague Convention matters, due to the “substantial injustice” test of the Constitution.

## 6. Conclusion

This chapter has shown that section 28(1)(h) of the Constitution indeed provides the necessary framework for a legal representative to be appointed for children, at State expense, in divorce proceedings. However, the “substantial injustice” test does not render this an automatic right but rather requires the establishment of certain criteria to assist the courts in determining when a legal representative must be appointed for the child. These guidelines are lacking in the existing divorce legislation. In order to ensure that this right is indeed given effect to in practice, it is necessary for these criteria to be developed. With the promulgation of section 8A of the Child Care Act and also the drafting of regulation 4A, this chapter has further shown that it is indeed possible to develop such criteria to assist courts in determining when a child might require legal representation in divorce proceedings.

There is certainly a need to develop such criteria given that recently there have been court cases (these are discussed in chapter 4 below) concerning applications in terms of section 28(1)(h) for a legal representative to be appointed for the child involved in divorce proceedings. In a few of these cases, the appointment of a legal representative had been initiated by the presiding officer hearing the matter. Surely, in this light, Judges and children’s rights advocates are recognizing the importance of legal representation for the child involved in divorce proceedings. However, such representation is costly, and unless such legal representative is appointed on a *pro bono* basis or at State expense, many children, who will indeed require such representation, will inevitably be left without it. There is thus a need to develop criteria to assist courts in determining when legal representation at State expense should be afforded to a child during divorce proceedings to avoid a substantial injustice from resulting.

This chapter has also argued that while the Family Advocate does play a role in ensuring the overall best interests of the child involved in divorce proceedings, the Family Advocate's role is not equivalent to that of a legal practitioner appointed in terms of section 28(1)(h). The section 28(1)(h) legal practitioner has a more defined role to play when representing the child in divorce proceedings. This distinction between the role of the Family Advocate and the section 28(1)(h) legal practitioner has also been confirmed in recent case law, which will be discussed in the next chapter. While the Family Advocate gets involved in a matter either at the request of the court, a request by a party to the proceedings or at his or her own initiative, the section 28(1)(h) legal practitioner will only be appointed for the child if a substantial injustice would otherwise result. For this reason it is even more imperative to develop criteria to assist courts in determining when a child should be afforded legal representation during divorce proceedings.



Despite the lack of these criteria, divorce proceedings are a daily occurrence and large numbers of children are experiencing the trauma of being the subjects of custody disputes. Our courts are thus regularly faced with making decisions concerning the custody and access of children. The next chapter will examine some of the cases where the courts have been proactive in granting children the right to a legal representative and in applying section 28(1)(h) of the Constitution, and will examine whether, in the absence of legislation, court judgments can assist in the development of suitable criteria.

## Chapter 4

### Application of current law in practice and developments in case law

#### 1. Introduction

Since the inception of the constitutional era, there have been few cases which sought to interpret the application of section 28(1)(h) of the Constitution in family law proceedings. Such cases as have served before the courts however, sought to provide some guidance as to when a legal representative should be assigned for a child in terms of section 28(1)(h) and attempted to define those circumstances when a substantial injustice would result should such representation not be afforded.



This chapter will focus on a discussion of the evolving case law and explore the extent to which they provide guidance towards developing criteria to ensure that children are legally represented during divorce proceedings to prevent a substantial injustice from resulting. In addition, a brief critique of the cases will be provided.

#### 2. A discussion of the applicable cases

##### 2.1 *Fitschen v Fitschen* (Case No: CPD 9564/1995)

The first case concerning the application of section 28(1)(h) is an unreported case of the Cape Provincial Division, namely *Fitschen vs Fitschen*. This case entailed a custody dispute arising out of the divorce of the parents of two children, one of whom was already a teenager. The plaintiff's Counsel argued that the views of the children on which parent should be granted custody should be conveyed to the court, either through an intermediary, or through a court-appointed legal representative for the children. Support for this argument was derived from both the provisions of article 12 of the UNCRC,<sup>177</sup> and the provision in section 28(1)(h)<sup>178</sup> of the Constitution. The contention

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<sup>177</sup> See chapter 2 of this thesis where the provisions of article 12 are fully discussed.

that a legal representative or an intermediary should be appointed to convey the children's views on which parent should be granted custody was rejected. The judge did not regard the provisions of the UNCRC or section 28(1)(h) as binding upon the court, as they had not been incorporated into municipal legislation.<sup>179</sup>

It is submitted that the court erred in its finding since section 6(4) of the Divorce Act<sup>180</sup> provides that the court may appoint a legal practitioner to represent a child at the proceedings. This means that the child can make his or her views heard via the legal representative which is appointed to him or her. However, what section 6(4) fails to do is to provide that such representation may be sought at State expense. Instead this section provides that either one of the parties or both of them have to pay for the costs for the legal representative. This requirement makes the provision potentially unenforceable due to the high costs of legal fees which the parents might not be able to afford, thereby resulting in the child not being able to have a legal representative appointed. Section 6(4) thus falls short of the requirements of section 28(1)(h) which provides that such a representative be assigned by the State and at State expense.

In addition, while section 6(4) allows for a legal representative to be appointed to represent the child, the section fails to provide guidelines or list circumstances as to when this might be necessary and appropriate to avoid a "substantial injustice" from resulting. In this respect, section 6(4) does not *fully* (my emphasis) incorporate the provisions of the Constitution. However, it is argued that section 6(4) does provide for an avenue, albeit limited, to ensure that the voices of children are heard during divorce proceedings and does therefore incorporate the principles of article 12 and section 28(1)(h).

The court also found that, in view of the fact that the report of a psychologist and of the Family Advocate were provided to the court, in which the children's opinions on the appropriate allocation of the custody were mentioned, no substantial injustice would result if the children's views were not heard.

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<sup>178</sup> See chapter 3 of this thesis where section 28(1)(h) is more fully discussed.

<sup>179</sup> See Sloth-Nielsen J, footnote 40, *op cit*, p 41.

<sup>180</sup> Act 70 of 1979. See chapter 3 for a discussion hereon.

2.2 *Du Toit and Another v Minister of Welfare and Population Development and others* 2003 (2) SA 198 (CC)

Further judicial references have been made concerning the application of section 28(1)(h). For example in the *Du Toit* case, the court made an *obiter* mention of section 28(1)(h) in its judgment.

The applicants, who were partners in a long-standing lesbian relationship, wanted to adopt two children jointly. They could not do so however because the current legislation, namely the Child Care Act<sup>181</sup> and the Guardianship Act<sup>182</sup> confined the right to adopt children jointly to married couples. Consequently, the second applicant alone became the adoptive parent. A couple of years later, the applicants brought an application in the Pretoria High Court challenging the constitutional validity of sections 17(a), 17(c) and 20(1) of the Child Care Act and section 1(2) of the Guardianship Act which provide for the joint adoption and guardianship of children by married persons only.

In the High Court, the relevant provisions of the Child Care Act were challenged on the grounds that they violated the applicant's right to equality<sup>183</sup> and dignity<sup>184</sup> and do not give paramountcy to the best interests of the child as required by section 28(2) of the Constitution. In the High Court, Judge Kgomo found that these provisions of the Child Care Act and the Guardianship Act violated the Constitution and ordered the reading in of certain words into the impugned provisions so as to allow for joint adoption and guardianship of children by same-sex life partners.<sup>185</sup> The applicants then applied to the Constitutional Court for confirmation of the High Court order concerning the invalidity of the relevant provisions of the Child Care Act and the Guardianship Act in terms of section 172(2)(a) of the Constitution.<sup>186</sup>

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<sup>181</sup> Act 74 of 1983.

<sup>182</sup> Act 192 of 1993.

<sup>183</sup> Section 9 of Act 108 of 1996.

<sup>184</sup> Section 10 of Act 108 of 1996.

<sup>185</sup> The High Court judgment is reported as *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T).

<sup>186</sup> Section 172(2)(a) provides that: "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or

In the Constitutional Court, a *curator ad litem* had been appointed to represent the interests of the children who were subject to this application. In this respect, Justice Skweyiya stated that: “in matters where the interests of children are at stake, it is important that their interests are fully aired before the court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court is obliged to appoint a *curator* to represent the interests of children. This obligation flows from the provisions of section 28(1)(h)...”<sup>187</sup> The Constitutional Court noted its indebtedness to the *curator* for his assistance in that he had filed a thorough report concerning the welfare of the adoptive children and had also made submissions at the hearing.<sup>188</sup>

However, it should be noted that the role of a *curator ad litem* is different to that of an attorney or advocate.<sup>189</sup> The *curator*, though legally trained, does not act upon the child’s instructions but rather looks after the minor children’s interests. An attorney or advocate on the other hand, advocates and acts upon the instructions of his or her client and it is submitted that the legal representative envisaged in section 28(1)(h) is meant to either fulfill the role of an attorney or advocate. Despite this, it is commendable that the Judge in the present case noted the importance of having a lawyer, though in the form of a *curator*, to represent the interests of the children.

### 2.3 *Soller NO v G and Another* 2003 (5) SA 430 WLD

The *Soller* case is the first reported case that deals fully with the interpretation and application of section 28(1)(h).

The case concerned the custody of a 15-year-old boy, referred to as K, who sought a variation of his custody order on the ground that he wanted custody to be awarded to his father (the second respondent in this matter). In terms of the original divorce order, sole custody had been granted to K’s mother (the first respondent).

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any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”

<sup>187</sup> At p 201, paras F-H.

<sup>188</sup> At p 202, para B.

<sup>189</sup> See footnote 123, op cit, for a discussion of the duties of a *curator*.

From the facts of the matter, it appeared that K's father had, since the divorce order, engaged in litigation so excessive and damaging that he was declared a vexatious litigant. As a result of these legal battles, the relationship between K's parents had become extremely acrimonious, although the father maintained a good relationship with K, with whom he remained in regular communication. It also appeared that K was experiencing what was known as "parental alienation syndrome" which essentially is a post-divorce favouring of one parent at the cost of all affection for the other parent. The evidence was that the father had instructed K to be obstructive and had placed him in the position of having to choose between his parents. K himself wished to live with his father and had run away from his mother's house to do so.

The application was initially brought on behalf of K by one S (the applicant), an attorney who turned out to have been struck from the roll.<sup>190</sup> Satchwell J decided that although S was unsuitable to represent K, she was of the view that the matter required the assignment, under section 28(1)(h), of a legal representative to assist K. Accordingly, the Judge decided to appoint an alternative legal representative, namely M, to assist K. This initiative taken by the Judge reflects a child centered approach adopted by her in matters directly affecting children.

The initial application brought on behalf of K by the first attorney (S), sought an order for the appointment of himself as the legal representative of K. An order had also been sought to allow K and his parents to lead evidence about whether K should return to live with his mother (first respondent) after having run away from home to live with his father (second respondent). Finally an order was also sought for custody to be awarded to the father.

The Family Advocate in the matter and the second attorney (M) were of the opinion that, in the light of K's expressed preference, K had to be placed in the care of his father. They were also of the opinion that K's request was not as a result of duress or undue

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<sup>190</sup> This application was brought by a particular Mr S on the grounds that in this particular matter he believed that what he was doing was giving effect to section 28(2) of the Constitution, the best interest principle, since K was not able to act in his own name as he was still a minor.

influence. The court found, *inter alia*, that K should be placed in the care of his father, but that custody should remain with his mother to ensure that the father's parenting was controlled as far as possible.<sup>191</sup>

This judgment is significant in that it, *inter alia*, dealt with the distinction between the role of a legal practitioner appointed in terms of section 28(1)(h) of the Constitution and that of the Family Advocate. The judgment also dealt with the extent to which the views and desires of a child (who is mature enough to express such views and desires) should be decisive of custodial and access issues particularly in light of his alienation from one of his parents, in this case K's mother, due to the manipulation by K's father.

In light of the focus of this thesis and earlier discussions in the previous chapters, this chapter will examine closely what the court held concerning the respective roles and functions of the Family Advocate and that of the legal practitioner appointed in terms of section 28(1)(h). In addition, what the court stated in respect of the consideration of the views and interests of the child will also be discussed.

### 2.3.1 The roles and functions of the Family Advocate and the roles and functions of the section 28(1)(h) legal practitioner

As submitted in chapter 3, the role of the Family Advocate is not to act upon and advocate the child's views and instructions. His or her role is to mediate and facilitate settlement between divorcing parents, ascertain the views of the child and make recommendations to the court concerning the overall best interests and welfare of the child. It is submitted that the role which the Family Advocate plays is not equatable to that which was intended by section 28(1)(h), which requires the assignment of a legal practitioner to represent the child in civil proceedings.

In the *Soller* case, the Judge commenced by discussing the powers and duties of the Family Advocate in terms of the Mediation in Certain Divorce Matters Act.<sup>192</sup> The Judge

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<sup>191</sup> At p 433, para C.

concluded that if attempts at mediation were unsuccessful, then the Family Advocate must report to the court on the facts which were found to exist and must make recommendations based on professional experience.<sup>193</sup> The Judge stated further that:

“in so doing the Family Advocate acts as an advisor to the court and perhaps as a mediator between the family who has been investigated and the court. The Family Advocate is not appointed the representative of any party to a dispute – neither the mother, father or any child. In a sense, the Family Advocate is required to be neutral in approach in order that the wishes and desires of disputing parties can be more closely examined and the true facts and circumstances ascertained.”<sup>194</sup>



The Judge points out the significance of the fact that the Legislature inserted section 28(1)(h) into the Constitution with the full knowledge that the Office of the Family Advocate already existed. Therefore it could not be assumed that the Legislature intended the legal practitioner assigned to a child in civil proceedings in terms of section 28(1)(h) to appropriate the role, and usurp the functions, of the Family Advocate. The Judge notes that other responsibilities must be attributed to the legal practitioner and that other contributions must be expected.<sup>195</sup> These attributes the Judge specifies as:

“...an individual with knowledge of and experience of the law but also the ability to ascertain the views of a client, present them with logical eloquence and argue the standpoint of the client in the face of doubt or opposition from an opposing party or a court. Section 28(1)(h) does not allow for the appointment of a social worker, or psychologist or counsellor. What is required is a lawyer who will use particular skills and expertise to represent the child. Neutrality is not the virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador. In short, a child in civil proceedings may, where substantial

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<sup>192</sup> Act 24 of 1987. Also see chapter 3 for a discussion of what these duties and powers are in terms of the Act.

<sup>193</sup> At p 437, para F.

<sup>194</sup> At p 437, para G-H.

<sup>195</sup> At p 437, para J to p 438 para A.

injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner.”<sup>196</sup>

The Judge sums up the contrasting roles of the Family Advocate and the legal practitioner as follows:

“The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child.”<sup>197</sup>

The Judge warns that this task is not without certain limitations in that the legal practitioner does not only represent the perspective of the child but:

“the legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child’s perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece.”<sup>198</sup>

There are two key aspects which emerge from the *Soller* case. The first is the willingness by the court to appoint a legal representative for the child in terms of section 28(1)(h) even in the absence of domestic legislation. The second is that the case established that a clear distinction must be drawn between the roles and functions of the Family Advocate and that which is intended to be played by the legal practitioner assigned in terms of section 28(1)(h) of the Constitution.<sup>199</sup>

This case further provided clarity on the point that the Family Advocate is not the representative of the child but rather a neutral agent seeking to make the best possible recommendations concerning the child’s best interests and welfare. The judicial interpretation further confirmed that the Family Advocate is not required to act upon the

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<sup>196</sup> At p 438 paras B-D.

<sup>197</sup> At p 438 para E.

<sup>198</sup> At p 438, paras E-F.

<sup>199</sup> Prior to this judgment, many authors have pointed out this difference in their writings. See Kassan D, op cit and Burman S and McLennan F, op cit.

child's instructions but rather to ascertain the views of the child and place these before the court. The Family Advocate, while legally qualified, is not the representative that is envisaged by section 28(1)(h). As stated above, the legal practitioner assigned in terms of section 28(1)(h) has a very different role to play.

It should be noted that although the roles assumed by the Family Advocate and the legal practitioner might lead to an inevitable duplication of certain efforts,<sup>200</sup> they could serve to be complementary and provide greater assistance to a court that has to decide on the future living arrangements concerning children. In this respect, the Judge in the *Soller* case said the following:

“In the present case, although there has been an inevitable duplication of certain of the efforts of the Family Advocate and the legal practitioner, I do not believe that this has been subversive of the role of either of these offices. In fact, both offices have operated in a complementary manner which has been of great assistance to the Court.”<sup>201</sup>

### 2.3.2 The expressed views and best interests of the child

The Judge noted that K had made his wishes and desire to live with his father quite clear. K had done this not only by expressing his views himself, in person, to the Judge, the Family Advocate and the legal practitioner assigned in terms of section 28(1)(h) but also through his behaviour.<sup>202</sup> In this regard, the Judge refers to the occasions when K ran away from his mother's home to live with his father and to a letter written by K to his mother expressing his wish to live with his father. In addition, the Judge referred to a report of a psychologist which also indicated that K was clear in his preference and choice to live with his father. In light of this evidence, the court held that it had to be

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<sup>200</sup> These might include the child (and other members of the family) being interviewed by the Family Advocate and then also by the child's legal practitioner or the child being interviewed by the different psychologists of the different parties or social workers, which could then lead to the filing of different reports in court.

<sup>201</sup> At p 438, para I.

<sup>202</sup> At p 443, para D-J.

accepted that K had made up his mind on the issue of custody and would not be deterred by his mother or any court order ordering him to stay with his mother.

In concluding what was in the best interest of the child, the Judge noted the leading case of *McCall v McCall*<sup>203</sup> wherein Judge King suggested that the best interests could be assessed by reference to certain factors.<sup>204</sup> These criteria focus in the main on the capabilities and character of the parent and on the ability of the parent to care for the child. One of the criteria referred to by Judge King is: “the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration.”<sup>205</sup> In the *Soller* case, Judge Satchwell held that:

“although the child’s expressed wish to live with a parent was usually only a persuasive factor, it had in the present case become the determinant factor. K had clearly expressed a desire and acted upon it and was obvious that his mother, despite her suitability as a role model, was incapable of enforcing the existing custodial access arrangements on him. There were, despite the father’s clear unsuitability as a role model, obvious ties of love and affection between him and

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<sup>203</sup> 1994 (3) SA 201 (C).

<sup>204</sup> These factors include:

- (a) the love, affection and other emotional ties which exist between the parent and child and the parent’s compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires;
- (c) the ability of the parent to communicate with the child and the parent’s insight into, understanding of and sensitivity to the child’s feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called ‘creature comforts’, such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the status quo;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child’s preference, if the Court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching;
- (m) any other factor which is relevant to the particular case with which the court is concerned.

<sup>205</sup> At p 205, para G.

K. He did not beat or abuse K, provided him with food and shelter and ensured that he attended school”<sup>206</sup>.

Judge Satchwell, in arriving at this conclusion, was surely aware that K would not obey any court order that would grant custody to K’s mother. The fact that K had on numerous occasions run away from home to live with his father, despite the court order, reflected that there was love and affection between K and his father and that nothing would deter him from wanting to be with his father. The court acknowledged that K’s mother was the more suitable role-model for K, as opposed to K’s father, but the court could not ignore K’s expressed desire to live with his father. In this instance, K’s views and desires outweighed the consideration of which parent was the more suitable role-model for K. K’s views, in this matter, therefore became the determinant factor in awarding custody to his father.



In this respect the Judge stated that “K ...genuinely believes that he wants to live with his father. He has said so to every adult with whom he has come into contact...He has acted, continues to act upon and threatens to persist in acting upon this expressed view.”<sup>207</sup>

#### 2.4 *Reardon v Mauvis and others* (unreported) DCLD Case No: 5493/02

The issue of the application of section 28(1)(h) also came to the fore in a recent (unreported) matter heard in the Durban High Court, namely *Reardon v Mauvis and others*. In this matter, the plaintiff and defendant were involved in a custody dispute over their seven-year-old minor child. The plaintiff alleged that the defendant was emotionally unstable and as such unworthy of custody of the minor child while the defendant alleged that the plaintiff had sexually abused the child. Since the trial commenced, evidence had been heard from various lay witnesses and medical experts and even though twenty two days had since passed, the plaintiff had not completed

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<sup>206</sup> At p 432 para F-G.

<sup>207</sup> At p 447, para F-G.

presenting his case. After hearing much of the evidence and considering various medical reports, Govindsamy AJ concluded that it was apparent that the minor child herself displayed significant emotional instability.

During the course of testimony by the plaintiff's psychologist, Govindsamy AJ raised the issue with the parties as to whether or not the minor child should have a legal representative assigned to her in terms of section 28(1)(h) of the Constitution. Invitations for submissions on this issue were also extended to the Head of the Legal Aid Board<sup>208</sup> and the State Attorney<sup>209</sup> (as representative of the Department of Justice). The matter was adjourned to the following day to allow for the Legal Aid Board and the State Attorney's office to be present at the hearing.



At the hearing the next day, a representative of the Legal Aid Board and the State Attorney were present to make submissions. At this hearing, all parties accepted that the minor child should be separately represented and that the Legal Aid Board was the responsible functionary for the provision of legal representation in terms of section 3 of the Legal Aid Act 22 of 1969. The parties also accepted that the *nature and complexity* (my emphasis) of the case merited the appointment of Counsel of sufficient seniority and experience in matrimonial matters to effectively represent the minor child. However, the parties could not agree on how the appointment of Counsel should be made since the Legal Aid Board had the sole discretion to select and appoint Counsel. The Board did not have the power to agree to an appointment of Counsel made by the court.

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<sup>208</sup> The Legal Aid Board is an autonomous statutory body established by the Legal Aid Act (22 of 1969- as amended). The objects of the Board are to render or to make available legal aid to indigent persons as widely as possible within its financial means, to provide legal representation at State expense as contemplated in the Constitution and to provide legal services in terms of any Co-operation Agreement that may be in force between the Board and any other body from time to time. See Legal Aid Guide, 10<sup>th</sup> edition, 2002, pp 4-5.

<sup>209</sup> The Office of the State Attorney was established in terms of the State Attorney Act (56 of 1957). In terms of section 3(1) of Act 56 of 1957, the functions of the office of the State Attorney "shall be the performance in any court or in any part of the Republic of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers or by parliamentary agencies..." Section 3(3) provides that "unless the Minister of Justice otherwise directs, there may also be performed at the State Attorney's office or at any of its branches like functions in or in connection with any matter in which the Government ... though not a party, is interested or concerned in, or in connection with any matter where, in the opinion of the State Attorney or of any person acting under his authority, it is in public interest that such functions be performed at the said office...". The State Attorney routinely acts as a litigator for Government.

Govindsamy AJ then proceeded to ask the parties to make written submissions on this issue, following which he delivered a written judgment on the appointment of a legal representative on the 27<sup>th</sup> of February 2004.

In his judgment, Govindsamy AJ examines three main issues, namely, the circumstances under which a minor is entitled to legal representation in terms of section 28(1)(h), implementation of the right envisaged under section 28(1)(h) and finally, the scope and functions of the representative appointed under section 28(1)(h).

#### 2.4.1 Analysis regarding the circumstances under which a minor child is entitled to legal representation in terms of section 28(1)(h)

In addressing the circumstances under which a minor child is entitled to legal representation in terms of section 28(1)(h) of the Constitution, Govindsamy AJ commences by stating that he is mindful of the fact that:

“the drafters of the Constitution were well aware that there were many urgent and pressing demands upon the limited resources of this country. One needs only to think of the appalling state of housing, the dire lack of fresh water in several rural communities, the desperate need for medical facilities by millions and the financial hardships faced by our disabled and senior citizens to comprehend the reality of our economy. Funding for legal representation in civil proceedings pales into insignificance when compared with other pressing socio-economic demands.”<sup>210</sup>

Govindsamy AJ then refers to the measure of protection that minor children received through the common law, namely that where there was no parent or legal guardian capable of suing in respect of a minor’s claim, the minor was entitled to have a *curator ad litem* appointed on his behalf. He acknowledges that the drafters of the Constitution recognized that there may well be circumstances where, notwithstanding the common law

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<sup>210</sup> At p 4, para 9.

protection, additional protection was required by a minor child in specific instances.<sup>211</sup> Without him actually having stating this, it is submitted that Govindsamy AJ concluded that this added protection was in the form of section 28(1)(h) that provides for a legal practitioner to be assigned to the child, in civil proceedings, if substantial injustice would otherwise result. It is also argued that Govindsamy AJ saw the role of the legal practitioner assigned in terms of section 28(1)(h) as different to a *curator*.<sup>212</sup>

Govindsamy AJ defines the circumstances in which legal representation would be required under section 28(1)(h) to include any matter concerning any of the rights entrenched in section 28 of the Constitution.<sup>213</sup> If the subject matter of the litigation concerned any of these section 28 rights, then a court should not hesitate to give due consideration to the need for representation for a minor child affected by the litigation.<sup>214</sup> It should be noted that no reasons are provided as to how the Judge arrived at this conclusion.

He further states that these are not the only circumstances when regard should be had to section 28(1)(h) as:

“there may well be other compelling circumstances where the section may be invoked bearing in mind, however, that the section could not be intended to be invoked automatically as a first resort. Due and adequate consideration should be given in each case whether the absence of legal representation would result in substantial injustice to a minor child.”<sup>215</sup>

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<sup>211</sup> At p 5, para 11.

<sup>212</sup> See footnote 123, op cit, for a discussion on the role of a *curator*.

<sup>213</sup> In this regard, the Judge specifically refers to the following rights, by way of example, namely, a child’s right to:

- (i) a name and a nationality from birth (section 28(1)(a))
- (ii) to family care or parental care, or to appropriate alternative care when removed from the family environment (section 28(1)(b))
- (iii) to basic nutrition, shelter, basic health services and social services (section 28(1)(c)); and
- (iv) to be protected from maltreatment, neglect, abuse or degradation (section 28(1)(d)).

<sup>214</sup> At pp 5-6, para 12.

<sup>215</sup> At p 6, para 13.

It should be noted that Govindsamy AJ does not expressly refer to the best interest principle enshrined in section 28(2)<sup>216</sup> of the Constitution to also be a determining factor in deciding when legal representation should be assigned to the child. Surely, it is argued that if it would be in the child's best interest to have a legal representative assigned to him or her, then a court should not hesitate to consider the need for a legal representative for the minor child that is affected by the litigation.

Regarding the "substantial injustice" test in section 28(1)(h), Govindsamy AJ states that "the injustice must obviously not be insignificant. It has to result in the erosion or negation of a minor child's right to such an extent that such erosion or negation cannot be countenanced by one's sense of justice."<sup>217</sup>



Govindsamy AJ then considers whether the assistance of the Family Advocate would be adequate in the matter before him. In this regard, he concludes that the present matter is too complex for the Family Advocate to play an effective role.<sup>218</sup>

He then deals with the wording of section 28(1)(h), particularly focusing on the phrase that a substantial injustice would result. He says that a literal interpretation of this phrase means that the functionary entrusted in determining whether or not the minor child should be given legal representation, has to be in a position to decide in advance that a substantial injustice would or would not arise. He says that such a test in the majority of cases would be extremely difficult and would render the right to legal representation under section 28(1)(h) so elusive to minor children that it would be almost non-existent.

He concludes that in order to give this right meaningful content it would be proper for the functionary to find that in the absence of legal representation, a substantial injustice would probably result.<sup>219</sup> Govindsamy AJ indicates that the matter before him was

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<sup>216</sup> Section 28(2) provides that "a child's best interest are of paramount importance in every matter concerning the child."

<sup>217</sup> At p 6, para 14.

<sup>218</sup> At p 7, para 16.

<sup>219</sup> At p 9, paras 22-23.

indeed one where the absence of legal representation for the minor child would probably result in a substantial injustice.

It is not clear as to what the criteria were that Govindsamy AJ used for concluding that this was indeed a matter where the absence of a legal representative for the minor child would probably result in a substantial injustice. It appears that it might have been due to the length of time that the trial was taking, the age of the child (in this case the child was seven years old), allegations of sexual abuse by one parent and the possible impact of the acrimonious dispute on the minor child that resulted in the Judge reaching this conclusion.

It is argued that if the length of a trial is to be considered as a factor and also the fact that expert witnesses were called to give evidence (in this case the plaintiff's psychologist was called as witness and also medical reports were examined), this raises the question as to how long the trial needs to run and how many expert witnesses need to be called before a legal representative for the child is considered necessary. Would the benchmark for all cases be twenty two days, as was the time that had elapsed in this case before Govindsamy AJ raised the issue of appointing a legal representative for the child? These factors, namely the length of the trial and having to hear evidence from experts regarding the emotional stability (or instability) of one of the parents (as appears from the facts of this matter, the plaintiff alleged that the defendant was emotionally unstable and therefore not fit to be the custodian) could conceivably be taken into account, as will be discussed further below and be recommended in chapter 5, to determine the complexity of the matter. Therefore, it is submitted that in these circumstances, the appointment of a legal practitioner for the child would be considered to be necessary and appropriate.<sup>220</sup>

If the age of the child is to be considered a criteria, then the question is raised as to whether or not a three month old baby would need to have appointed a legal

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<sup>220</sup> It should be noted that it is not always possible to determine the complexity of a matter at the commencement of the proceedings and only subsequent developments during the proceedings could lead to the matter becoming complex and hence the appointment of a legal representative for the child might become necessary.

representative. Surely, as is recommended in chapter 5, if a child who is capable of understanding and has the ability to express his or her preferences requests legal representation, then legal representation must be provided.

If allegations of sexual abuse were a factor, then one would question whether or not an enquiry in the Children’s Court should be instituted instead, thereby possibly leading to the removal of the child from his or her parents. However, as will be recommended in chapter 5, even where there are allegations of emotional and physical abuse, it is argued that the appointment of a legal representative for the child during divorce proceedings might be necessary and appropriate.

While Govindsamy AJ did take a proactive and child centered approach to protect the rights of children, it is respectfully submitted that his judgment failed to provide detailed criteria to assist courts in determining when a child is entitled to have a legal representative appointed in divorce proceedings to avoid a substantial injustice from probably resulting.

#### 2.4.2 Implementation of the right

In dealing with the mechanics of implementing the right envisaged in section 28(1)(h), Govindsamy AJ examines the provisions of the Legal Aid Act<sup>221</sup> and the Legal Aid Guide.<sup>222</sup> On examination, he finds that the Legal Aid Act does not specifically empower the Legal Aid Board to provide legal assistance in terms of section 28(1)(h) of the Constitution. Prior to the Legal Aid Amendment Act<sup>223</sup> (the Amendment Act), the object of the Legal Aid Board was to provide legal aid to “indigent persons”. The Amendment Act amended the Board’s objectives to include the provision of “legal representation at State expense as contemplated in the Constitution”.<sup>224</sup> When the Act was amended in

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<sup>221</sup> Act 22 of 1969.

<sup>222</sup> The court refers to the Legal Aid Guide, 10<sup>th</sup> edition, 2002.

<sup>223</sup> Act 20 of 1996.

<sup>224</sup> Section 1 of the Legal Aid Amendment Act, 20 of 1996.

1996, the interim Constitution<sup>225</sup> was in force and hence reference to “Constitution” in the Amendment Act was a reference to the interim Constitution since the final Constitution<sup>226</sup> had not as yet been promulgated. The interim Constitution made no provision for children’s right to legal representation in civil proceedings and hence, Govindsamy AJ concluded that the Legal Aid Act does not empower the Board to render legal assistance as contemplated in section 28(1)(h).

He further commented that the Legal Aid Guide is delegated legislation which cannot confer any greater rights than it is allowed to do by the empowering legislation, namely the Legal Aid Act. So, while the Legal Aid Guide does expressly include a reference to section 28(1)(h), Govindsamy AJ found this to be *ultra vires* as there is nothing in the Legal Aid Act empowering the Board to render assistance under section 28(1)(h).<sup>227</sup> The consequence of all this was that the Court found that it could not direct the Legal Aid Board to grant legal aid assistance to the minor child under section 28(1)(h).

However, admirably, Govindsamy AJ took a proactive approach and found that the drafters of the final Constitution:

“could hardly have intended that those entitled to fundamental rights thereunder should be denied those rights simply on account of legislative or administrative inadequacies. Whilst empowering legislation and administrative measures would certainly make the exercise of those rights orderly and manageable, their non-existence cannot annihilate a right which by its nature was intended to be enforceable immediately. Almost 8 years have expired since that right was included. It would be unconscionable to deny a child that right because the mechanics for the implementation thereof have not been put in place.”<sup>228</sup>

He accordingly ordered that the minor child is “entitled to have a legal practitioner (preferably Counsel) with the skill and experience in matrimonial law to be appointed to

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<sup>225</sup> Act 200 of 1994.

<sup>226</sup> Act 108 of 1996.

<sup>227</sup> At p 15, para 43.

<sup>228</sup> At pp 15-16, para 45.

represent her...in order to advance her best interests in the custody and access disputes in the action...”<sup>229</sup> In addition, he directed the Minister of Justice and Constitutional Development to take the necessary steps to ensure the appointment of the legal practitioner to achieve the object of the order.

Ultimately, it was then the State Attorney, as the representative of the Minister of Justice and Constitutional Development that needed to ensure that a legal practitioner was appointed for the child. It should be noted that the function of the State Attorney’s Office is to be the legal representative for Government and not to serve the public.

#### 2.4.3 Scope and functions of the legal representative



With regard to the scope and functions of the appointed legal representative, Govindsamy AJ confirmed that in the present matter, the legal representative required was one that needed to be directly “involved in the cut and thrust of the litigation”.<sup>230</sup> In this regard Govindsamy AJ referred to the *Soller* case where the functions of the legal practitioner appointed in terms of section 28(1)(h) were described.<sup>231</sup> Govindsamy AJ confirmed that the present matter did not merely require the appointment of a *curator* in an advisory capacity but a legal practitioner who needed to be directly involved in the matter.

However, subsequent to the delivery of this judgment on the 27<sup>th</sup> February 2004, there have been two further judgments delivered in this matter. The first concerned an application brought by the applicant, Mr Reardon on 13 May 2004 against the Minister of Justice and Constitutional Development (as second respondent) and the Legal Aid Board (as third respondent). The applicant sought an order from the court declaring that the appointment by the second and third respondent of a particular advocate for the minor child did not comply with the order granted on 27<sup>th</sup> February 2004<sup>232</sup> because the advocate appointed lacked the necessary skill and experience in matrimonial law. The

<sup>229</sup> At p 19, para 54.

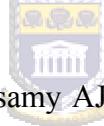
<sup>230</sup> At p 19, para 53.

<sup>231</sup> For a full discussion hereof, see para 2.3.1 of this chapter.

<sup>232</sup> In this judgment, the court ordered that the minor child was entitled to have a legal practitioner, (preferably Counsel) with the skill and experience in matrimonial law to represent her. See p 19, para 54.

applicant also sought an order directing the second and third respondent to appoint a senior legal practitioner with sufficient skill and experience in matrimonial law to represent the minor child. Following the hearing in this matter, the Govindsamy AJ granted an order directing the second respondent to reconsider the appointment of the advocate in question and to inform the court of the outcome no later than the 30<sup>th</sup> of July 2004.<sup>233</sup>

Subsequent to this development, on the 15<sup>th</sup> September 2004, Govindsamy AJ set aside his ruling made on 27<sup>th</sup> February 2004. It appears that the reasons for doing so was that there was continuous disagreement between the parties about the adequacy, suitability and experience of the choice of Counsel for the minor.<sup>234</sup>



It is submitted that even though Govindsamy AJ set aside his original order, the case is significant as it provides insight, although limited, as to when a court will consider it necessary to appoint a legal practitioner for a child during divorce proceedings.

## 2.5 Other relevant cases

Currently, there appear to be matters of a similar nature being heard in courts concerning applications in terms of section 28(1)(h). Of relevance to the discussion at hand is a matter being dealt with by the Litigation Project of the Centre for Child Law based at the University of Pretoria.<sup>235</sup> This matter concerns the child's right to be heard in family law proceedings and an *ex parte* application was brought on behalf of two sisters, aged 12 and 13 in this regard.<sup>236</sup>

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<sup>233</sup> This judgment was handed down on 5 July 2004, Case No 5493/02 DCLD.

<sup>234</sup> This information was obtained during a telephone interview on 13 October 2004 with the attorneys involved in this matter. At the time of submission of this thesis, there was no written judgment available.

<sup>235</sup> Skelton A, *Special Assignment: Interpreting the right to legal representation in terms of section 28(1)(h) of the Constitution of South Africa*, conference paper delivered at the Miller Du Toit Family Law Conference held in Cape Town, 1-2 April 2004.

<sup>236</sup> The application was brought in the name of the Centre for Child Law and the attorneys were Lawyers for Human Rights, Case Number 34054/2003, Transvaal Provincial Division.

The application arose from a ruling of the Transvaal Provincial Division to the effect that the children must go for counselling to be reunited with their father who had applied to the court to re-establish his rights of access to them. In the original divorce agreement, the father had enjoyed full rights of access to the children, but over a period of time the children had come to the conclusion that they did not want to see him anymore because of a pattern of physical and emotional abuse that he had subjected the elder sister to over many years.

The girls were deeply frustrated because they felt that no one had listened to them during the proceedings arising from the application brought by their father. They complained that the Family Advocate had spent only ten minutes with each of them and had not taken cognizance of their very strong views about their father's behaviour. They had also wanted to see the Judge, but this opportunity was not afforded to them. The girls were adamant that they would not go for counselling, despite the court order to do so.

In light of this, the Centre for Child Law decided to intervene in the matter on behalf of the children on the basis that the failure to give the children an opportunity to express their views or to give weight to their views constituted a breach of article 12 of the UNCRC. However, questions were raised as to how this intervention was to be achieved, in that the High Court had ordered that the children and their parents had to go for counselling until the girls were ready to see their father. The refusal of the girls to go for counselling placed them at risk of being in contempt of court even though they were not parties to the application in the Transvaal Provincial Division. Their mother, as custodian, would also be in contempt if she did not take them for counselling. The legal challenges facing the girls were complex and it was decided that they needed the assistance of an experienced High Court litigator. Consequently, a senior Counsel agreed to act for the girls *pro bono* and the Centre for Child Law began to draft papers for an *ex parte* application for such Counsel's appointment.<sup>237</sup>

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<sup>237</sup> Skelton A, *op cit*, p 3.

A decision needed to be taken as to what form of legal assistance was required since there were two possibilities, namely the appointment of a *curator ad litem* or the assignment of a legal representative in terms of section 28(1)(h).<sup>238</sup> The research undertaken by the Centre for Child Law and the attorneys appointed on behalf of the Centre reflected that in South African law, there were four established grounds<sup>239</sup> for the appointment of a *curator ad litem*. The only ground that was applicable in the present matter was that the interests of the minor children might possibly be in conflict with those of their parents. This potential conflict of interest existed in that the children's refusal to go for counselling may have caused their mother to be in contempt of the court as she was expected, as their custodian parent, to ensure that they fulfilled the requirements of the original court order.<sup>240</sup>



This ground for the appointment of a *curator ad litem* referred to above was established in the case of *Wolman v Wolman*<sup>241</sup> where a father was representing his minor son in an application to have his father's (meaning the minor son's grandfather's) will set aside. The potential conflict of interest arose from the fact that if the will were to be set aside, then the rights of the minors and unborn children would be prejudiced. Therefore a *curator ad litem* was appointed for the minor son to look after his interests. The Centre for Child Law and the attorneys representing them were of the opinion that their matter did not constitute a potential conflict of interest similar to that as the *Wolman* case. For this reason, they were of the opinion that perhaps a stronger or more viable approach would be to request the assignment of a legal practitioner in terms of section 28(1)(h).<sup>242</sup> It was thus decided by the Centre for Child Law and their attorneys to leave the option open of requesting the appointment either of a *curator ad litem* or a legal practitioner in terms of section 28(1)(h) of the Constitution.

The Judge before whom the matter appeared agreed that the children needed legal assistance and he favoured the assignment of a legal practitioner in terms of section

<sup>238</sup> See footnote 123, op cit, for a discussion of the distinction between a *curator* and a legal representative.

<sup>239</sup> See footnote 123, op cit, for a list of these grounds.

<sup>240</sup> Skelton A, op cit, p 4.

<sup>241</sup> 1963 (2) SA 452 (A) 459.

<sup>242</sup> Skelton A, op cit, p 4.

28(1)(h).<sup>243</sup> However, the Judge raised a technical point relating to the wording of section 28(1)(h) in that the clause required the assignment of a legal practitioner “by the State”. The Judge was of the view that this clause meant that even where the court agreed that the children should have separate legal representation, and a personally chosen legal representative was available to act *pro bono*, the mechanism to achieve this was to have that legal representative assigned by the State.<sup>244</sup> The Judge was of this view despite the fact that Counsel was available and had already agreed to act for the children on a *pro bono* and private basis.

The Judge stood the matter down to give Counsel an opportunity to establish which State body was the correct one to make the assignment and to have such assignment made. Standing the matter down for this purpose suggests that the Judge was of the view that he (as a court) did not constitute the “State” as provided for in section 28(1)(h) and therefore was not in a position to assign the legal representative for the children.

As directed by the Judge, the Centre for Child Law, on behalf of the children, approached both the Legal Aid Board<sup>245</sup> and the State Attorney<sup>246</sup> to request that an assignment as provided for in section 28(1)(h) be made at no expense to the State. The State Attorney agreed to assign the senior Counsel identified by the Centre for Child Law in terms of section 28(1)(h). The Legal Aid Board declined to do so on the basis that the assignment was not being sought at State expense but would be furnished on a private basis. However, the Legal Aid Board indicated that in other circumstances, they would have been prepared to do so. The children were thus granted legal representation following the assignment by the State Attorney. Concern has been expressed at this approach since the State Attorney is not really accessible to persons and if this is to be the model for the

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<sup>243</sup> It appears that the Judge was of the view that the case was not an appropriate one in which to appoint a *curator ad litem* because the mother of the children was available and willing to assist them, and he had no intention to usurp her function. He was also not persuaded by arguments regarding a potential conflict of interests. See Skelton A, *op cit*, p 8, footnote 19.

<sup>244</sup> Skelton A, *op cit*, p 8.

<sup>245</sup> See footnote 208, *op cit*, for the objectives of the Legal Aid Board.

<sup>246</sup> See footnote 209, *op cit*, for the functions of the State Attorney’s office.

future to ensure that children are granted legal representation, it might not prove to be very viable.<sup>247</sup>

It should be noted that at the time of submission of this thesis, no written judgment had been delivered.<sup>248</sup>

### 3. Critique of the developing case law

#### 3.1 Role of the Family Advocate versus the role of the section 28(1)(h) legal practitioner

As stated above, the *Soller* case is to be welcomed as it alludes to the prior debate in this regard that the role of the legal practitioner appointed in terms of section 28(1)(h) of the Constitution is different to that of the Family Advocate. Judge Satchwell also noted that there might be a duplication of efforts and functions by the appointed legal practitioner and the Family Advocate, but concluded further that these could be complementary and would serve to be of greater assistance to the court.

#### 3.2 Circumstances under which the appointment of a legal practitioner in terms of section 28(1)(h) is necessary or appropriate

While the case law has determined that there are distinctly different roles to be fulfilled by the Family Advocate and the legal practitioner appointed in terms of section 28(1)(h),

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<sup>247</sup> Skelton A, op cit, p 9.

<sup>248</sup> Telephone interview with staff member of the Centre of Child Law on 22 September 2004.

It should be noted that in another unreported judgment, namely *Centre for Child Law and another v Minister of Home Affairs and others* Case No: 22866/04, concerning an application brought by the Centre for Child Law relating to the protection and care of unaccompanied foreign children, Judge De Vos indicated that in her view unaccompanied foreign children should have legal representatives assigned to them by the State in terms of section 28(1)(h) of the Constitution. In her judgment she refers to the *Soller* case as well as to *S v Thomas* 2001(2) SACR 608 where legal representation for foreign citizens at State expense had been confirmed. See paras 27-30 of the unreported judgment. While this matter does not concern the rights of children to be heard in divorce proceedings, it is significant as there is a move towards ensuring that children are legally represented in all civil proceedings affecting them. A copy of this judgment is on file with the author.

it is not clear under what circumstances the appointment of a legal practitioner in terms of section 28(1)(h) is likely to be necessary or appropriate in divorce proceedings.

As stated in chapter 3, the Family Advocate, in carrying out his or her tasks, does in some cases, where the children are mature enough to express a view, ascertain such views and incorporates them into the report which is presented to court. Where the views of the child are factored into reports, and the recommendations made by the Family Advocate are similar to the wishes of the child, it is submitted that in such a case there would be no need for a legal representative to be appointed for the child. However, where there is a clear contradiction between the recommendations made by the Family Advocate and the wishes of the child as reflected in the report or where the child is of the opinion that his or her views were not considered by the Family Advocate, then, it is submitted and as will be recommended in chapter 5, that the child should be entitled to legal representation in terms of section 28(1)(h).<sup>249</sup> There might also be instances where the appointment of a legal representative is recommended by the Family Advocate in his or her report. For example the child, during the consultation process with the Family Advocate, might express this need and in these instances it is argued that it would be appropriate to appoint a legal representative for the child.

There is concern that adult litigants who are not happy with the report of the Family Advocate may try to get a “second bite of the cherry” through an application for a legal representative for the child in terms of section 28(1)(h).<sup>250</sup> For example, a situation might arise where the Family Advocate recommends that custody of a child be awarded to the father of the child. The mother of the child, who is desperately seeking custody of the child and is aggrieved by this recommendation, might then insist that the child be granted legal representation in terms of section 28(1)(h) in the hope that such a representative for the child might influence the court decision regarding custody in her favour. In this instance, it might not be the child himself or herself seeking the legal

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<sup>249</sup> Skelton A, *A child's right to legal representation in civil proceedings in terms of section 28(1)(h) of the South African Constitution*, unpublished, 2004, p 12. Paper prepared for forthcoming publication in *De Jure*.

<sup>250</sup> Skelton A, *op cit*, p 13.

representation but the mother instead. In a situation like this, the Legal Aid Board might thus be wary of what could be perceived as a duplication of resources and the Board would need to be convinced that it is the child (and not either of the parents) that is seeking legal representation in terms of section 28(1)(h). This might present some practical difficulties because children usually require the assistance of a custodian parent to get access to legal assistance.<sup>251</sup> In light of these foreseeable problems, it becomes even more necessary for adequate criteria to be developed to give effect to the right contained in section 28(1)(h) so that children are afforded the necessary protection when it is indeed required and appropriate. However, despite these problems, it is submitted, and will be recommended in chapter 5, that it might prove to be useful to appoint a legal representative for the child when a parent contests the recommendations made in the Family Advocates report so that the views and preferences of the child can be heard.



In the *Reardon* matter, Govindsamy AJ defines the circumstances under which legal representation would be required in terms of section 28(1)(h) to be any matter which has a bearing or influence on the rights included in section 28 (particularly referring to sections 28(1)(a), 28(1)(b), 28(1)(c) and 28(1)(d)) of the Constitution.<sup>252</sup> It should be noted that no reasons are provided as to how Govindsamy AJ arrives at this conclusion. However, if legal representation is to be provided in any matter which has a bearing on those rights contained in sections 28(1)(a), (b), (c) and (d), then on a reading of section 28(1)(b)<sup>253</sup> for example, it could be argued that such legal representation must be provided in every divorce matter where children are involved. The reason for this conclusion is that all divorce proceedings and the outcomes or orders made as a result of such proceedings have a bearing on the child's right to family care or parental care, and that the family circumstances of the child inevitably change due to the parents divorcing and living apart from one another. On this reasoning, legal representation for the child would then need to be provided even in the so-called uncontested divorces and where the child has no objection to the future living arrangements. It is submitted that this is not

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<sup>251</sup> Skelton A, op cit, p 13.

<sup>252</sup> See footnote 213, op cit. Also see para 2.4.1 of this chapter for a further discussion on this point.

<sup>253</sup> Every child has the right to family care, or to appropriate alternative care when removed from the family environment.

what was intended by the drafters of the Constitution, as section 28(1)(h) contains an internal limitation that such legal representation must only be provided if “a substantial injustice would otherwise result”. However, it is respectfully submitted that perhaps what the Judge could have suggested, as will be recommended in chapter 5, is that a legal representative must be provided at State expense for the child involved in divorce proceedings in any situation where it appears that the child will benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcome for the child. This wording is contained in regulation 4A(j) to the Child Care Act discussed above in paragraph 3.1 of chapter 3.

Govindsamy AJ does recognize that, apart from matters having a bearing on the rights which he specifically mentions, contained in section 28, there may be other compelling circumstances where the appointment of a legal representative might be necessary. However, he cautions that in these situations, the section should not be able to be invoked automatically. This implies that something more needs to be done or some other criteria need to be fulfilled to establish whether a legal representative might be necessary. Govindsamy AJ further states that due and adequate consideration must be given in each case as to whether the absence of a legal representative would result in a substantial injustice to the minor child. It is respectfully submitted, that this statement made by Govindsamy AJ is rather vague and does not lend any further assistance in defining the ambit of section 28(1)(h) in divorce proceedings.

### 3.3 A substantial injustice

Section 28(1)(h) contains an internal limitation in that the child’s right to legal representation in civil proceedings is limited to those cases in which a substantial injustice would otherwise occur. The cases discussed above have attempted to determine situations where a substantial injustice would possibly occur, albeit not in a very clear and accurate manner. With regard to the “substantial injustice ” issue, the Judge in the *Soller* case said that she believed that the fifteen-year-old child was entitled to be listened

to and that his views were to be given respectful and careful consideration.<sup>254</sup> She continued to assert that any decision made by that court would impact heavily on the child. She further said that the “civil proceedings concerned are of crucial importance to his current life and future development.”<sup>255</sup> However, it should be noted that this matter concerned a variation of a previous court order where custody had been awarded to the child’s mother. The child was obviously not happy with this order as he wished to live with his father and had on numerous occasions run away from home to be with his father. In this case, the court was obliged to consider the views of the child. In light of this, it will be recommended in chapter 5 that where a variation of a previous divorce order is sought, that has the likely impact of materially changing existing custody and access arrangements, then in such a case a child should be afforded legal representation at State expense. It should also be noted that in the case under discussion, the child was fifteen years old and was old enough to know what his preferences were.

In the *Reardon* case, the Judge provides further detail on the issue of “substantial injustice”, by stating that the injustice must not be insignificant and that it has to result in the erosion or negation of the child’s right to such an extent that such an erosion cannot be countenanced. It is respectfully submitted that while the Judge did attempt to provide some content to the substantial injustice test, his analysis was too vague as it did not provide sufficient clarity as to when a child should be granted legal representation in terms of section 28(1)(h) in divorce proceedings. The Judge failed to provide concrete situations or list detailed circumstances as to when it would be necessary and appropriate for a child to be granted legal representation in divorce proceedings at State expense to avoid a substantial injustice from occurring.

The drafting of regulation 4A of the Child Care Act, referred to in paragraph 3.1 in chapter 3 proves that detailed situations can indeed be more narrowly defined. It is

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<sup>254</sup> It should be noted that in Denmark, a child who is 12 years old has a right to express his or her views before a decision is taken in custody matters. The discussion can take place in court or in the judge’s or local governor’s office and there are no prescribed procedures for this. In most cases the parents will not be present, but an expert on children will be there. See Nielsen L and Frost L, *Children and the Convention: The Danish Debate in Children’s Rights: A comparative perspective*, Freeman M (ed), Dartmouth Publishing, 1996, p 84.

<sup>255</sup> At p 435, para D.

submitted that regulation 4A can indeed inform the drafting of such criteria for the legal representation of children in divorce proceedings. Further, according to Sloth-Nielsen,<sup>256</sup> the complexity of the case and the age and ability of the child to express his or her wishes could indeed be important considerations in establishing whether a substantial injustice might result. Further, the likely impact of any decision on the day-to-day life of the child – such as material changes to existing access or custody arrangements – should play a weighty role in any decision as to whether legal representation is required.<sup>257</sup>

It is respectfully submitted that the Judge in the *Reardon* matter could have gone a step further by identifying these detailed situations for appointing a legal representative for a child in divorce proceedings. For example, based on the facts of the *Reardon* case, the following criteria, as will be recommended in chapter 5, could have been listed as circumstances when a legal representative should be appointed for the child in terms of section 28(1)(h). These include, the presence of sexual allegations (though it is submitted that even allegations of emotional and physical abuse could be a determining criteria), the fact that the parties were involved in a lengthy and acrimonious dispute over the custody of the minor (though even disputes of access and maintenance issues can be additional determining criteria) and the complexity of the matter. The complexity of the matter could conceivably include looking at factors such as the length of the trial, the hearing of evidence from a number of expert witnesses and allegations that one of the parents is emotionally unstable. However, the Judge failed to list such detailed criteria. A further criteria where a child should be granted legal representation at State expense could include a situation where there is reason to believe that any party to the proceedings or any witness intends to give false evidence or to withhold the truth from the court.

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<sup>256</sup> Sloth Nielsen J, footnote 91, op cit, p 526.

<sup>257</sup> Sloth Nielsen J, footnote 91, op cit, p 527.

### 3.4 Who is better placed to ensure that a legal practitioner in terms of section 28(1)(h) is appointed?

A further issue that emerged from the cases discussed above is the question of which functionary is better placed to ensure that a child is granted legal representation in terms of section 28(1)(h). The *Soller* case<sup>258</sup> and the case brought by the Centre for Child Law, concerned applications brought on behalf of the children, requesting the court to appoint a legal representative for the children in terms of section 28(1)(h). However, in the *Reardon* matter, the question of whether the minor needed to have her own legal representative was raised by Govindsamy AJ *mero motu*. It would appear that the appointment of a legal representative for children in terms of section 28(1)(h) would be easier to achieve if Judges themselves play an active role.<sup>259</sup> Skelton asserts further that presiding officers are in a stronger position to assess whether a child needs to have a legal practitioner assigned to him or her and also whether or not a substantial injustice would result.<sup>260</sup>

## 4. Conclusion

This chapter has reflected that South African courts and children's advocates are clearly seeing the need for children to be legally represented during divorce proceedings. This need is recognized despite the existence of the Office of the Family Advocate whose role is to safeguard the overall best interest of the child involved in divorce proceedings. The basis for the appointment of such legal representation is sought through the application of section 28(1)(h) of the Constitution.

However the application of section 28(1)(h) requires the development of certain criteria in that this right afforded to children is limited to the situation where a substantial

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<sup>258</sup> It should be noted that the court itself saw the need for the appointment of the second attorney (M), after it was discovered that the initial attorney (S) was found to be struck off the roll. See paragraph 2.3 of this chapter for a full discussion of this case.

<sup>259</sup> See Skelton A, footnote 249, *op cit*, for a discussion on bringing *ex parte* applications for a lawyer to be appointed for the child in terms of section 28(1)(h).

<sup>260</sup> Skelton A, footnote 249, *op cit*, p 15-16.

injustice would otherwise result. Though the cases discussed in this chapter are not clear cut as to when it might be necessary for a legal representative to be appointed in terms of section 28(1)(h), there are certain grounds that have emerged as to when this might be necessary or appropriate.

In summary, the first is where it is clear, through other channels like the Office of the Family Advocate, that the child has a definite view and preference as to which parent he or she would like to reside with, for example, in the *Soller* case. The second ground is when the parties (plaintiff and defendant) are involved in an unusually acrimonious dispute over the custody of their minor child, for example, in the *Reardon* matter. The third ground relates to the complexity of the matter and this chapter has sought to provide some guidance as to when a matter might be considered to be complex. The fourth ground relates to the presence of allegations of sexual abuse as in the *Reardon* matter. Certainly in a case where these allegations exist and the court is entrusted with having to make an order concerning the custody of the minor child, the court needs to guard against subjecting the minor to further sexual abuse if that is indeed the case. The court would require an investigation of these allegations and it is submitted that a legal representative for the child, with the necessary skill and experience in matrimonial law, can assist in bringing these facts to the fore.

The cases discussed above are the only few that have sought to give effect to section 28(1)(h) in divorce proceedings. In doing so, they have assisted, to a limited extent, in establishing grounds and detailing circumstances as to when legal representation at State expense should be granted for a child. However, even though it is case law that is attempting to provide the necessary criteria to determine the ambit of section 28(1)(h) in divorce proceedings, it is submitted that a case-by-case development of such guidance is not desirable in that this may lead to inconsistency and uncertainty. It is submitted that the enactment of law or guidelines containing a detailed list of circumstances, as was done with regard to the Child Care Act, is perhaps the better approach to ensure that children are granted the right afforded to them in section 28(1)(h). Following the case law analysis above also by drawing on the provisions of the Child Care Act, particularly

regulation 4A, the final chapter of this thesis will thus attempt to recommend such guidelines.



## Chapter 5

### Concluding remarks and recommendations

#### 1. Introduction

The previous chapters attempted to explore from an international law, South African Constitutional law and also domestic law framework a child's right to be heard in matters affecting him or her with a particular focus on divorce hearings. This chapter will draw on the conclusions reached in the previous chapters and will attempt to make certain recommendations concerning the right of the child to be heard during divorce proceedings under the ambit of section 28(1)(h) of the Constitution.



#### 2. Concluding remarks

##### 2.1 International law versus South African Constitutional Framework

In chapter 2, it was concluded that international law lays the basis for a child's views to be heard in a range of judicial and administrative proceedings which include divorce proceedings. This right of the child to be heard is either extended to a child who is capable of forming his or her own views as in the UNCRC or to a child who is capable of communicating his or her views as in the ACRWC.<sup>261</sup>

Contrary to this, the right contained in section 28(1)(h) of the Constitution is not limited in this way but extends to all children. The only limitation contained in section 28(1)(h) is that the right is only afforded to children if a substantial injustice would otherwise result. The inclusion of this limitation therefore requires the development of certain criteria to assist courts in determining when legal representation, at State expense, for a child in divorce proceedings is necessary or appropriate. The development of such criteria will also assist in providing substance to the right contained in section 28(1)(h) thereby creating clarity as to when the protection afforded in section 28(1)(h) needs to be provided.

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<sup>261</sup> See the provisions of the UNCRC and the ACRWC and the discussion hereon in chapter 2.

## 2.2 A need for the Office of the Family Advocate

In chapter 3, the work of the Family Advocate was examined and it was concluded that the role of the Family Advocate is different to that of a legal practitioner appointed in terms of section 28(1)(h). However, the Family Advocate does indeed play a significant role in safeguarding the best interests of the child and in assisting the court with recommendations as to the best possible custody and access arrangements for the child during divorce proceedings. It is thus concluded that during divorce proceedings the Family Advocate's role is crucial.

The Family Advocate has the duty to peruse every summons where children are involved. The Family Advocate, being a Government body that provides its services at no cost, is an integral structure which was established to safeguard and promote the welfare of children involved in divorce proceedings. Their role is thus essential and is required even where a legal representative is appointed for the child to avoid a substantial injustice from resulting. In the *Soller* case the Judge pointed out that even though there was a duplication of functions between the Family Advocate and the legal practitioner appointed in terms of section 28(1)(h), they assisted the court in a complimentary fashion. It is therefore concluded that the role of the Family Advocate is fundamental to the protection of children during divorce proceedings as their duty is to ensure that the overall best interests of the child are safeguarded.

## 2.3 Developments in case law

The discussion of the cases in chapter 4 highlighted that our courts and children's rights activists are increasingly seeing the need for a legal practitioner to be appointed for the child in divorce proceedings. The case law has also attempted to define the circumstances as to when a legal practitioner should be appointed for the child in terms of section 28(1)(h). However, to allow courts to develop these criteria on a case by case analysis provides minimal guidance for Family Advocates and other courts. This approach could also possibly lead to inconsistency and uncertainty regarding the

application of section 28(1)(h). For this reason, this chapter will attempt to make recommendations as to when a legal practitioner at State expense should be appointed for the child during divorce proceedings.

### 3. Recommendations

Chapter 3 reflected that the Divorce Act does contain a section providing for the appointment of a legal representative for a child. However, chapter 3 also discussed the inadequacy and limitations of this provision to the extent that it does not comply with the provisions of section 28(1)(h).<sup>262</sup>

In light of the above, it is recommended that, with regard to the legal representation of children in divorce proceedings, the Divorce Act be amended to include the following:

“Legal representation at the expense of the State must be provided for a child who is involved in divorce proceedings in the following circumstances:

- (a) where it is requested by a child who is capable of understanding and has the ability to express his or her wishes;
- (b) where it is recommended by the Family Advocate involved in the matter;
- (c) where there is a clear contradiction between the expressed wishes of the child as contained in the Family Advocate’s report and the recommendations made by the Family Advocate;
- (d) where there are allegations of sexual, emotional or physical abuse of the child;
- (e) where a parent contests the recommendations made in the Family Advocate’s report;
- (f) where the parties to the divorce are involved in an acrimonious and lengthy dispute over the custody, access and maintenance issues;

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<sup>262</sup> See a discussion of section 6(4) of the Divorce Act in chapter 3, para 4.1 of this thesis.

- (g) the complexity of the matter which, *inter alia*, can be determined by the length of the trial, the number of expert witnesses required, allegations that a party to the matter is emotionally unstable.
- (h) where a variation of a previous order is sought that has the likely impact of materially changing existing custody and access arrangements;
- (i) where there is reason to believe that any party to the proceedings or any witness intends to give false evidence or to withhold the truth from the court; and
- (j) in any other situation where it appears that the child will benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcome for the child.



This thesis has presented an argument and reached conclusions that there are indeed situations when a child will need to be legally represented during divorce proceedings. Section 28(1)(h) has been interpreted to extend to these proceedings and provides the constitutional basis for a legal representative to be appointed for the child at State expense where a substantial injustice might result. This thesis has attempted to recommend the situations where a legal representative at State expense must be provided for the child. However, given the fact that section 8A of the Child Care Act has not as yet been put into operation, it is questionable whether these recommendations will be taken any further. Even if they are incorporated into the Divorce Act, their enforcement might be delayed, as like section 8A, due to financial constraints of the State. However, it is submitted that if South Africa wants to be considered a country protecting the rights of its vulnerable groups and developing a child rights culture, a place to start would be to hear the voices of children and hence, every effort should be made to give effect to the right contained in section 28(1)(h) of the Constitution.

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#### **E. International and regional instruments and General Comments**

1. The United Nations Convention on the Rights of the Child, 1989.
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#### **F. Legislation, Draft Bills and Bills**

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3. The Divorce Act 70 of 1979.
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**G. Case law**



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