# Child Participation: The Right of Children to be Heard in Family Law Matters Affecting Them.

**Kelly-Anne Cleophas**



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

**Supervisor: Prof Julia Sloth-Nielsen**

15 November 2013

# TABLE OF CONTENTS

## KEYWORDS

Child

Participation

Child Participation

Right to be heard

Express views freely

Age, maturity and stage of development

Views given due weight

Evolving capacities

Family law matters

## DECLARATION

'I declare that Child Participation: The Right of Children to be Heard in Family Law Matters Affecting Them is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references'.

Signed …… (Student)

Signed …… (Supervisor)

# CHAPTER 1 : INTRODUCTION

The person most affected by many family law matters, whether in divorce or other parental rights and responsibility disputes is the child. But the child was traditionally not given an opportunity to be heard or raise an opinion. Under English Common law, the child was considered a movable article of personal property and was used for bartering and negotiating.[1]

The Convention on the Rights of the Child (the CRC) ushered in a new era in children's rights. Article 12 was an innovation with regard to child participation and hearing the children's voice in matters that affect them. A general practice has appeared in recent years, which has been broadly conceptualized as "participation", although this term itself does not appear in the text of article 12.[2] The Committee on the Rights of the Child[3] have formulated a helpful definition of the concept of "participation" as it has evolved over the years. The term can be described as:



> '[The] ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.'[4]

The Children's Act incorporates into South African law the international recognition of a child's right to participate. Section 10 of the Children's Act expressly gives children the right to express their views in an appropriate manner in any matter which concerns the child. The

[1] Eitzen T (1986) 'A Child's Right to Independent Legal Representation in a Custody Dispute: A Unique Legal Situation, A Necessary Broad Standard, The Child's Constitutional Rights, The Role of the Attorney Whose Client is the Child', 19 *Family Law Quarterly* 58.
[2] Committee on the Rights of the Child, General Comment No. 12 (2009) - The right of the child to be heard, 5 (hereafter General Comment No. 12(2009)).
[3] This is the monitoring body of the CRC established in terms of Article 43 thereof.
[4] 'Every Child's Right to be Heard': Resource Guide to General Comment No. 12, G. Lansdown (2005), UNICEF Innocenti Research Center (ISBN: 88-89129-15-8) 11 available from www.unicef.org/rc (last accessed 5 August 2013) (hereinafter Resource Guide to General Comment No. 12).

most common family law matter that is litigated in South Africa and that will inevitably have a profound effect on a child's life is care and contact disputes.[5] Although such decisions will have a major impact on their lives, children are usually not parties to such proceedings, even if the child holds a strong view about his or her preference. Despite the Constitutional Court recognising children's right to participate in proceedings that affect them[6], this right is not always realised in practice.

South Africa adheres to the best interest principle. This principle was adopted into the South African Constitution[7], is reinforced in section 9 of the Children's Act 38 of 2005 and South Africa is a state party to the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child which all place the best-interest principle in high regard.[8] It is therefore essential that children's best interest be realised in all matters affecting them and that they be given an opportunity to share their views and it be given due weight when determining their best interests. This paper will explore how children's right to be heard, specifically in family law matters, is being implemented in South Africa and whether existing legislation, measures and practices are adequate to realise children's rights and in keeping with the best-interest principle.



In the light of the above, this thesis seeks to explore how children's right to be heard, specifically in family law matters, is being implemented in South Africa and whether existing

[5] The Children's Act replaced the traditional terminology of "custody" and "access" with "care" and "contact". See *WW v EW* 2011 (6) SA 53 (KZP).
[6] *AD and Another v DW and Others (Center for Child Law as* Amicus Curiae*)* 2008 (3) 184 (CC) para 38; *Bhe and Others v Magistrate, Khayelitsha and Others (Commission of Gender Equality as* Amicus Curiae*)* 2005 (1) SA 580 (CC) para 55; *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) 375 H-J; *Du Toit and Another v Minister of Welfare and Population Development and Another (Gay and Lesbian Equality Project as* Amicus Curiae*)* 2003 (2) SA 198 (CC) para 21; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 75.

[7] Section 28(2) Constitution of the Republic of South Africa, Act 108 of 1996.
[8] Article 3 of the CRC states the best interests of the child shall be a primary consideration. Similarly, Article 4 (1) of the African Charter on the Rights and Welfare of the Child states that best interests of the child shall be the primary consideration.

legislation, practices and procedures are adequate to ensure that children are given an opportunity to express their views and have those be given due weight. A brief overview of the structure of this work is presented below.

In Chapter 2 the main focus will be an examination of Article 12 of the CRC and Article 4 of the African Charter on the Rights and Welfare of the Child. The relationship between Article 12 and other provisions of the CRC will also be explored. The similarities and contrast between these two instruments will be explored by way of comparison. The international legal history which culminated in the adoption of a provision such as article 12 will also be included at the outset.

Chapter 3 will explore whether current legislation is sufficient to guarantee that children's voices will be heard in matters that affect them. The chapter will examine previous legislation to conclude whether provisions in the current Children's Act are sufficient to ensure that children's voices are heard in judicial proceedings. The chapter will also look at the different forums in which children may need to be legally represented and what provisions are in place to ensure such legal representation. The chapter will also look at certain mechanisms that the legislature has provided to ensure that a child's right to access to courts is realised.

Chapter 4 will consider whether current procedures are sufficient to guarantee that children's voices will be heard in matters that affect them. The methods of participation which will be assessed, include, the appointment of a separate legal representative for the child, the appointment of a curator *ad litem*, relying on family advocate reports and recommendations, expert evidence and reports or judicial interviews. Case law will be analysed with specific reference to the method used to bring the child's view before the court.

The procedures available in South Africa will be compared to those available in Australia to determine whether there are any lessons that South Africa can learn from that jurisdiction.

Finally, chapter 5 concludes this work with recommendations relating to a proposed team approach in family law matters.

# CHAPTER 2 : THE RIGHT OF A CHILD TO BE HEARD IN INTERNATIONAL AND REGIONAL INSTRUMENTS

## 1. INTRODUCTION

The focus of this chapter is the detailed examination of Article 12 of the CRC and Article 4 of the African Charter on the Rights and Welfare if the Child (the Charter). An exploration of the relationship between Article 12 and various articles of the CRC will follow a legal analysis of Article 12 of the CRC. A comparison between Article 12 of the CRC and Article 4 of the Charter will also be included. A brief exploration of the international legal history of children's rights instruments and a child's right to be heard will also be discussed at the outset.



## 2. INTERNATIONAL LEGAL HISTORY

The first international document recognising the special status of children was the 1924 Declaration of the Rights of the Child ("the 1924 Declaration"), adopted by the Fifth Assembly of the League of Nations. Even though this document had several major limitations and did not contain a right of the child to be heard, it laid the foundation for the international movement for children's rights. The 1924 Declaration focussed on children's "care and protection" rights, providing that the child must be 'fed', 'nursed', 'reclaimed', 'sheltered', and 'succored'. The 1924 Declaration was a document of 'moral and political nature' and was not considered legally binding.[9]

On 20 November 1959 the United Nations adopted the Declaration of the Rights of the Child ("the 1959 Declaration"). The 1959 Declaration in effect encompassed all the rights set

[9] Spitz LM (2005), 'Implementing the U.N. Convention on the Rights of the Child: Children's Rights Under the 1996 South African Constitution', 38 *Vanderbilt Journal of Transnational Law* 856.

forth in the 1924 Declaration and expanded on the rights that children enjoy and how they were to be guaranteed. The 1959 Declaration directed 'parents…men and women as individuals, and … voluntary organizations, local authorities and national Governments'[10] to recognise the rights included therein and to strive for their observance. The welfare of children had traditionally been considered the responsibility of the family but with the advent of the 1959 Declaration this responsibility was also shifted to the community and the State.[11] A further significant contribution that the 1959 Declaration made to the international child law platform was that unlike the 1924 Declaration which used the language '[t]he child must be given…', the 1959 Declaration framed rights in the following form, '[t]he child shall enjoy…' . The change in language illustrates that children were no longer regarded as objects of international law but as rights-bearing subjects of international law.[12] Despite these advances, the 1959 Declaration did not include a provision which provided for the consideration of the child's views nor a right to freedom of expression. The 1959 Declaration, like the 1924 Declaration, was not a legally binding international instrument.



In 1978 Poland proposed that the rights of the child should be enshrined in a Convention, the Polish representatives attached a draft of such a Convention to this proposal. The draft was merely a reformulated version of the 1959 Declaration and consequently included no provisions on the right of the child to be heard.[13] It is only when Poland submitted its revised version in 1979 that it included an Article 7, which eventually became the current Article 12. Article 7 gave children the right to express an opinion 'in matters concerning his own person' and enumerated a list of matters to which this right would apply, namely, marriage, choice of occupation, medical treatment, education and recreation. This

[10] Preamble of the 1959 Declaration.
[11] Spitz (2005) 858.
[12] Spitz (2005) 859.
[13] Krappmann L (2010) 'The Weight of the child's view (Article 12 of the Convention on the Rights of the Child)' 18 *International Journal of Children's Rights* 503.

formulation was seen as being too broad and was replaced by the phrase 'all matters affecting the child'. Further proposals to narrow the scope by referring to 'all matters affecting the *rights* of the child' were rejected. The difference seems subtle but the present formulation does provide for comprehensive protection of not only rights but daily needs of the child.[14]

By 1982 an open ended working group was established by the Commission on Human Rights to facilitate the completion of the Convention. The final version of the Convention was a result of 'a series of complex negotiations and compromises among government delegations which often had conflicting social, political, legal, economic and religious orientations.'[15] The Convention on the Rights of the Child has now almost been universally ratified, with only the United State of America and Somalia that have not done so.

## 3. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

### 3.1 Article 12 of the United Nations Convention of the Rights of the Child



Article 12 of the CRC provides:

*'1. States 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 views 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.'*

[14] Krappman (2010) 503-504.
[15] see Mahery P (2009) 'The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law' in Boezaart T (ed) *Child Law in South Africa* Juta & Co, Ltd: Cape Town 331.

The right of all children to be heard and taken seriously by decision-makers is a unique provision in a human rights treaty. Article 12 speaks to the legal and social status of children, who, on the one hand lack full autonomy of adults but, on the other, are subjects of rights.[16] Article 12 of the Convention establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the 'subsequent right' for those views to be given due weight, according to the child's age and maturity.[17]

The inclusion of Article 12 in the CRC is a departure from the long-standing view that children are incompetent, lack responsibility, are in need of protection and therefore, still in a phase of preparation for life – 'in short: The child is an incomplete human being.'[18] Children's right to be heard was a new concept in international law and posed a challenge to the mind-sets held in many countries and communities throughout the world. However, over the past 20 years, many governments, alongside civil society organisations, have begun to come to terms with the implications of this new obligation to recognise children as citizens, as participants and as active contributors to decisions in their own lives. Introducing the necessary measures to fulfil the responsibility has been a challenge for many governments and there seems to be a lack of understanding among governments as to what it means to listen to children.[19]



The rights contained in the CRC are usually categorized according to the 3 "Ps" which are:

**P**rovision: The right to provision of basic needs, such as right to education, the highest attainable standard of health.

**P**rotection: The right to protection from harmful act and practices.

[16] General Comment No. 12(2009) 5.
[17] General Comment No. 12 (2009) 8.
[18] Krappmann L (2010) 502.
[19] Resource Guide to General Comment No. 12.

**P**articipation: The right to participate in decisions that affect their lives.[20]

Of further importance are the four general principles in the CRC which are fundamental to the implementation of the entire CRC. The Committee on the Rights of the Child have the four principles as; non-discrimination (Article 2), the best interests of the child (Article 3), the right to life, survival and development (Article 6) and respect for the views of the child (Article 12).[21]

It has been argued that the right to be heard is capable of immediate implementation and direct application as it not of a general nature with vague outline and it is a provision described in sufficient detail.[22] The fact that the Committee has identified the right to be heard as one of the fundamental values of the CRC, means that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.[23] Participation can be seen as a substantive right as children have the right as a matter of principle to be listened to and taken seriously. Participation can also be described as a procedural right through which children can act to protect and promote the realisation of other rights.[24] Participation is thus conceptualised in the CRC as 'a procedural right through which children can act to protect and promote the realisation of other rights'.[25]



[20] For a full discussion on the three "Ps" see Mahery P (2009). See also Lurie J (2004) 'The Tension Between Protection and Participation – general Theory and Consequences as related to rights of Children, Including Working Children' *Inter-University Centre Journal of Social Work Theory and Practice* 7.7.

[21] For a full discussion of the general principles see Mahery (2009).

[22] Lűcker-Babel M (1995) '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' 3 *International Journal of Children's Rights* 395.

[23] The other fundamental values include, the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests.

[24] Lansdown (2005) 17. Participation is indeed an entrenched concept in international law. The General Assembly of the UN in their resolution adopted at the 27th Special Session implored State Parties to join in a global movement that will help to build a world fit for children by upholding the commitment to listen to children and ensure their participation. It resolved that, "[c]hildren and adolescents are resourceful citizens capable of helping to build a better future for all. We must respect their right to express themselves and to participate in all matters affecting them, in accordance with their age and maturity." See UN General Assembly, *A World Fit for Children*, A/RES/S-27/2, 11 October 2002.

[25] Resource Guide to General Comment No. 12, 17.

## A. Paragraph 1 of Article 12

### i "Shall assure"

'Shall assure' refers to the obligation on the State to provide an opportunity to the child to freely express their view. There is no scope within this to exercise discretion as State Parties are under a strict obligation to implement this right by the adoption of appropriate measures.[26] Specifically, with regard to legal proceedings Kassan suggests that judicial proceedings should be adapted and can include making the physical design of the court more child-friendly, for example, having separate waiting rooms for children, the video-taping of evidence and sight screens to enable children to participate.[27] The obligation on the State includes ensuring mechanisms are in place to encourage children to share their views on all matters affecting them, but also that those views be given due weight.[28]

Under no circumstances should the child be forced or pressurised to express a view. There is no obligation on the child to express his or her view. The child has the choice to do so or not. The only obligation encompassed in the phrase 'shall assure' is the obligation on the State to provide the opportunity for a child to be heard or participate, if he or she chooses to.

### ii "Capable of forming his or her own views"

In formulating the CRC, the drafters first referred to the "age of reason". It is fortunate that this ambiguous phrase was deleted in favour of "the child who is capable of forming an own view".[29] The Committee on the Rights of the Child points out that this aspect should not operate as a limitation on the exercise of the right to be heard by some children or

[26] General Comment No.12 (2009) 8.
[27] Kassan D, *How can the voice of the child be adequately heard in family law proceedings,* LLM Minithesis, unpublished, UWC, 2004 8.
[28] General Comment No. 12 (2009) 8.
[29] Krappmann (2010) 504.

groups of children. There should therefore be no exclusion of children because they have not reached a specific age. The Committee implores States not to introduce age limits, either in law or in practice, on the right of the child to express his or her views. The phrase places an obligation on the State to assess the capacity of the child to form an autonomous opinion to the greatest extent possible.[30]

The departure point should be that the child is not under a duty to prove his or her capacity. On the contrary, the Committee emphasises that there is a presumption that a child has the capacity to form her or his own views and that States should recognize that he or she has the right to express them.[31] Children of younger ages or children who experience difficulty in making their views heard, for example children with disabilities, also have a right to express their views and States have to foster sensitivity to the ways children communicate.[32] 'Article 12 requires recognition of and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.'[33]



The Committee clearly states that it is not necessary that the child has full knowledge of all aspects of the matter affecting her or him, but that he or she has sufficient grasp of the situation to be capable of appropriately forming her or his own views on the matter.[34] This implies that we should first verify if the child is in a position to have an idea on the issue in question but not necessarily on the whole spectrum of problems facing him or her. After a separation of the parents, for instance, it is possible for children to have a considered opinion

[30] General Comment No. 12(2009) 9.
[31] General Comment No. 12 (2009) 9.
[32] Krappmann (2010) 507.
[33] General Comment No.12 (2009) 9.
[34] General Comment No.12 (2009) 9.

on their own situation and possibly their own future, when they understand, in their child-like way, what the issue is about and what is at stake.[35]

### iii "The right to express those views freely"

'Freely' once again points to the choice that the child has to express his or her view. The free choice that the child is given entails that his or her views must be shared without any pressure on him or her to share and the child must not be subjected to any undue influence or be manipulated in any way. Lűcker-Babel correctly points out that '[t]he absence of freedom, which by definition interferes with the child's opinion and renders the application of Article 12 impossible.'[36]An essential element of 'freely' is that the child should share his or her *own* perspective on the matter and not the views of others.

State Parties are under an obligation to ensure conditions that take account of the individual child's social situation and make efforts to create an environment wherein the child feels respected and secure enough to freely express his or her own views. To ensure that a child's right to be heard is effectively realised, the child must be informed about matters, options and possible decisions to be taken and the consequences of the possible decisions. This obligation falls on those responsible for hearing the child's views (for example social workers, judges or legal representatives) and by parents or guardians. The right to information also entails that the child be informed beforehand that he or she has a right to share his or her views and be informed of the procedure or the conditions under which he or she will be asked to express his or her views.[37] Ignorance of what to expect or what rights he or she is entitled to may lead to undue stress and trauma for the child. If the child is not



[35] Lűcker-Babel M (1995) 397.
[36] Lűcker-Babel (1995) 399.
[37] General Comment No.12 (2009) 10.

provided with all the relevant information, it cannot be expected of the child to make an informed decision.

Undue influence on the child will in all likelihood lead to the child's views not being taken into account. The Committee has, in fact, pointed out that 'judges should not consider the child's opinion if he finds out that the child expresses an opinion influenced by the position of one of his or her parents, or that circumstances under which the opinion is expressed are not favourable to free expression (stress, fear, inhibition of the child).'[38]

It must be emphasised that Article 12(2) only requires that the child's opinion be considered. It does not command that the child's expressed view must be implemented. The child's right to be heard therefore does not imply that the child will replace the adult in the decision-making process. The adult remains responsible to make the decision. Free choice of the child does not entitle the adult decision-maker to passively accept the child's choice. The right as contained in Article 12 consists of the child communicating an opinion or even a wish, not the right to be the decision-maker.[39]



**iv "In all matters affecting the child"**

This phrase is the basic condition that must be respected and embodies the second qualification of the right to be heard. The child has the right to be heard if the specific matter or issue to be decided affects them. It is also argued that Article 12 seems to have a more limited effect and should be applied in situations that 'concretely affect a specific child.'[40] The Committee, however, has indicated that this qualification should be understood broadly and 'matters' also covers issues not specifically mentioned in the CRC. It often happens that children who are capable of expressing their own views are denied the right to be heard in

[38] General Comment No.12 (2009) 10.
[39] Lűcker-Babel (1995) 399.
[40] Lűcker-Babel (1995) 396.

matters that obviously affect them. This troubling situation has been identified by the Committee, who have urged States Parties to listen to children's views wherever their perspective can enhance the quality of solutions.[41]

**v "Being given due weight in accordance with the age and maturity of the child"**

This clause in essence refers to the capacity of the child. The capacity of the child to form views and to express them will have a direct effect on the weight that the court attaches to the child views. Article 12 requires more than just giving the child who is capable of forming a view the opportunity to express his or her views, the child's views have to be seriously considered when the child is capable of forming her or his own views.[42]

Article 12 makes it clear that age is not the determining factor with regard to the weight that should be attached to the child's views. Research confirms that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view. Chronological age does not necessarily determine a child's level of understanding. Maturity is difficult to define but in the framework of Article 12, it is the capacity of a child to express her or his views on issues in a reasonable and independent manner. It has been pointed out that the greater the impact of the outcome on the child's life, the more relevant the proper assessment of the maturity of the child is. Children's capacity, therefore, has to be assessed on a case-by-case basis.[43]

Lűcker-Babel points out that this phrase contains both an objective element and a subjective element. 'Once the capacity of discernment is established, the view expressed by the child will be examined not only in the context of what has been said but also according to



[41] General Comment No.12 (2009) 10.
[42] General Comment No.12 (2009) 11.
[43] General Comment No.12 (2009) 11.

the child's age (objective element) and degree of maturity (subjective element).'[44] Mahery correctly argues that even though age and maturity determines the weight to be attached to the views of the child it does not undermine the right of the capable child to express his or her views freely.[45]

In the CRC structure, the best interest of the child (Article 3) does not necessarily constitute the preeminent factor in coming to a decision. [46] Similarly, the views of the child will not be the determinative factor. The degree of weight that the child's views will carry will take into account factors such as, the nature of the problem, the degree of the interest it represents to the child and other justified interests (those of parents, siblings, the surroundings, the institution etc.). It has been pointed out that the greater consequences of the decision on the child, the more the child's opinion deserve important consideration.[47]

## B. Paragraph 2 of Article 12

### i The right "to be heard in any judicial and administrative proceedings affecting the child"



Article 12(2) specifically emphasises that a child must be given the opportunity to be heard in 'any judicial and administrative proceedings affecting the child'. The application of article 12(2) is broad and includes all judicial proceedings affecting the child, without limitation, for example, separation of parents, custody and care disputes, adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies. Administrative

[44] Lűcker-Babel (1995) 399.
[45] Mahery (2009) 322.
[46] The CRC makes some exceptions. For example Article 21 relates to adoption and it provides that the best interest of the child shall be *the* paramount consideration.
[47] Lűcker-Babel (1995) 399.

proceedings include, for example, decisions about children's education, health, environment or living conditions.

The terms 'proceedings' includes matters that are initiated by the child, for example cases of abuse, and matters where the child is in a secondary position, such as parental separation and adoption.[48] The Committee points out that proceedings must be accessible and child-appropriate. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age.[49]

**ii "Either directly, or through a representative or an appropriate body"**

Skelton and Davel argue that the CRC caters for two manners in which a child can express his or her view, namely through participation or representation. Participation would refer any procedure that allows the child to be heard directly, without an intermediary. These procedures would include children being consulted about their views and preferences or children becoming parties to the legal proceedings and thus being able to request specific remedies or relief. Representation, on the other hand, refers to procedures where the child would have some kind of adult representation in legal proceedings.[50]



A child who has indicated that he or she wishes to share his or her views on a matter, has the option of choosing the manner in which those views may be shared. The Committee is in favour of children being heard directly and recommends that, wherever possible, the child must be given this opportunity. The child must also have the opportunity to deliver input on the method chosen. If a representative for the child is to be appointed, it is crucial that the views of the child be transmitted correctly to the decision-maker by the

[48] The Committee goes further and urges State parties 'to introduce legislative measures requiring decision makers in judicial or administrative proceedings to explain the extent of the consideration given to the views of the child and the consequences for the child.' General Comment No.12 (2009) 11.
[49] General Comment No.12 (2009) 11. See also Lűcker-Babel (1995) 401.
[50] Davel C & Skelton A (2007) *Commentary on the Children's Act* Juta: Cape Town 2-13.

representative.[51] The Committee, however, points out that there is a risk of conflict of interest between the child and their parent, where the parent acts as their representative. The representative must at all times be aware that he or she represents the interests of the child and not the interests of other persons (be it parents, institutions or other bodies). [52]

### iii "In a manner consistent with the procedural rules of national law"

This clause entails that rules of procedure must be adhered to and non-compliance may mean that the decision can be overturned, substituted, or referred back for further juridical consideration. The Committee stresses that this clause should not be interpreted as 'permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right.'[53]

## 3.2 The relationship with right to be heard and other provisions of the CRC

### 3.2.1 Article 12 and Article 5: Evolving capacity of the child[54]



Article 12 walks the line between the child's dependency on the family and liberty of expression. While a child falls within the scope of application of the CRC, he or she is considered to be dependent on the protection and benefits of adults; however, the child is also provided a right of participation. It has been argued that Article 12 should be read in the light of Article 5, which refers to the child's evolving capacity to exercise his or her rights.[55] Both Article 5 and Article 12 have been identified as linked to the development of the person of

[51] The representative can be the parent(s), a lawyer, or another person (inter alia, a social worker).
[52] General Comment No.12 (2009) 12.
[53] General Comment No.12 (2009) 12.
[54] *Article 5:*
States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.
[55] Lűcker-Babel (1995) 394.

the child and both articles have a fluid nature in accordance with the stages of development of the child. [56]

The CRC protects 'the responsibilities, rights and duties, of parents to guide and educate their children themselves.'[57] Article 5, however, makes it clear that this guidance must be in a 'manner consistent with the evolving capacity of the child'.[58] The role that parents play in their child's development must therefore progressively develop with the child's growth.[59]

### 3.2.2 Article 12 and Article 3: Best Interest of the Child[60]

To establish what is in the best interest of the child, the views of the child is of crucial importance. The relationship between Article 3 and Article 12 is complementary. The two general principles reinforce each other and neither can be correctly applied without the consideration of the other. The Committee emphasises the crucial relationship between these two provisions in its General Comment on the best interests of the child by stating;



> 'Article 12 of the Convention provides for the right of children to express their views in every decision that affects them. Any decision that does not take into account the child's views or does not give their views due weight according to their age and

[56] Lűcker-Babel (1995) 397.
[57] Lűcker-Babel (1995) 394.
[58] Lűcker-Babel (1995) 394.
[59] Lűcker-Babel (1995) 394.
[60] *Article 3:*
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

maturity, does not respect the possibility for the child or children to influence the determination of their best interests.'[61]

Article 3 establishes the objective of achieving the best interests of the child and Article 12 provides the procedure for reaching the goal of hearing the child's voice in matters affecting him or her. The voice of the child must therefore be respected in reaching any decision which purports to be in the best interest of that child. The Committee supports this view by stating that, 'article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.'[62]

The best interests of the child can be classified as a procedural right as it is the standard that has to be met by any decision-maker in any matter affecting the child and the best interest of the child has to be taken into consideration in all their decisions. States Parties to the CRC are compelled to assure that decision-makers hear the child as stipulated in Article 12.[63]



Although it recognised that the relation between these two provisions is of a complementary nature, it is doubtful that Article 12 can be fully implemented if it violates the provisions of Article 3.[64] The Committee also recognises that there are potential negative consequences of an irresponsible implementation of the right to be heard. In particular the Committee refers to cases involving younger children and occasions where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. Those responsible must, therefore, 'undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.'[65]

[61] Committee on the Rights of the Child, General Comment No. 14 (2013) – The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) 13.
[62] General Comment No.12 (2009) 18.
[63] General Comment No. 12 (2009) 18.
[64] Lűcker-Babel (1995) 394.
[65] General Comment No. 12 (2009) 10. See also Lurie (2004) 8.

### 3.2.3 Article 12 and Article 13: Freedom of Expression

Article 13 is similar to the provisions of other international instruments, namely Article 19 of the Universal Declaration of Human Rights (1948) and Article 19 of the International Covenant on Civil and Political Rights (1966).

Although similar in 'spirit', Article 13 and Article 12 do differ with regard to the arena a child would exercise these rights. Article 13 empowers a child to participate in the social and political life by expressing his or her opinion and receiving and exchanging information and ideas.[66] These two provisions are distinguishable as follows, on the one hand, Article 12 contains internal qualifications with regard to the person of the child. In terms of Article 12 the child must be capable of forming a view and weight attached to those views depends upon the age and maturity of the child. Article 13, on the other hand, contains no such limitations and is of general application.[67]

Freedom of expression is only curbed by the restrictions enunciated in Article 13(2), which states, '[t]he exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.' This restriction is framed in such a way that it is clear that it will only step into operation in very limited circumstances. The drafters of the CRC must have intended that a child's freedom of expression must not easily be restrained.

### 3.2.4 Article 12 and Article 9: Separation of the child from the family

In relation to the child's right to be heard and the family, Article 9 specifically refers to situations where one of the parents is living separately and a decision must be made as to the child's place of residence. Any determination made must be in the best interest of the

[66] Lűcker-Babel (1995) 394.
[67] Lűcker-Babel (1995) 394.

child. Article 9(2) goes further to illustrate the direct relationship these provisions have with each other by providing that in any proceeding where a determination such as above has to be made 'all interested parties shall be given an opportunity to participate in the proceedings and make their views known.'[68] The child may not be specifically mentioned in this provision but an inference can be safely drawn that a child will be an 'interested party' in the separation proceedings of his or her parents.[69] Article 9(2) illustrates that the drafters of the CRC catered for the child's view to be taken into account in family law matters that affect him or her.

The CRC is most probably the single most important document relating to children's rights. However, like all other United Nations human rights treaties, it has no direct method of enforcement and no sanctions for noncompliance with its provisions. State parties are presumed to have ratified the CRC in good faith and with the intention of implementing its standards. The only mechanism to monitor the implementation of the CRC by State parties are the periodic reports that State parties must submit to a eighteen member committee of experts showing what measures have been taken in their country to implement the CRC.[70]



## 4. THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

### 4.1 Background

The African Charter on the Rights and Welfare of the Child ("the Charter") was adopted in July 1990 by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) and came into force on 29 November 1999. The African human rights system is the first regional system to adopt a treaty specifically dealing with children's rights and provides for the promotion, protection and monitoring of the rights and welfare of

[68] Article 9(2) of the CRC.
[69] Lűcker-Babel (1995) 394.
[70] See Article 44 of the CRC.

children. The African regional system has thought it necessary to take further steps to protect children's rights at a 'supra-national level' and so providing a voice for Africa's children.[71]

It is argued that the Charter is a necessary instrument because it takes the virtues of African culture, heritage, historical background and the values of African civilisation into consideration. It is these elements of African life that inevitably influence the concept of the rights and welfare of the child. The unique socio-economic, cultural, traditional and developmental circumstances is a critical situation facing most African children and the Charter takes special note of these circumstances.[72] Ehlers and Frank submit that the intention of the Charter is to afford African children additional protection in the light of their particularly vulnerable position.[73]

Although the Charter recognises that the African child occupies a unique and privileged position in African society and that for full harmonious development of his/her personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding,[74] participation by children on issues that affect them is often met with opposition from people who see it as undermining adult authority within the family. It is also argued that despite the fact that children participate considerably in the daily work of their communities and, like adults, they are seen as having a responsibility to contribute to the subsistence of their families, 'children's participation in matters affecting them has met with formidable opposition from adults in social and political structures.'[75]



[71] Lloyd A (2002) 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child', 2 *African Human Rights Law Journal* 13.

[72] Lloyd (2002) 180.
[73] Ehlers L and Frank C (2008) 'Child Participation in Africa' in Sloth-Nielsen J (ed) *Children's Rights in Africa – A Legal Perspective,* Ashgate, Farnham, Surrey, England 113.
[74] Preamble of the Charter.
[75] Ehlers and Frank (2008) 124.

The key participation provisions in the Charter are article 4(2) and Article 7.[76] Present discussion will, however, focus on the provisions of Article 4(2).

Article 4(2) of the Charter 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 law.'*

The CRC and the Charters provisions should be seen as complementary and mutually reinforcing. Like the CRC, the Charter is based on four principles which aid the interpretation of the Charter as a whole. These principles are non-discrimination, best interest of the child, the right to life, survival and development and the views of the child. Similar to the CRC, the underlying idea of the participation principle is that children have the right to be heard and to have their views taken into account in any proceedings affecting them.[77]



It is argued that the Charter confirms or strengthens the global standards contained in the CRC. Article 1(2) of the Charter and Article 41 of the CRC address the question on which level of protection a State should adhere to if that State has ratified both instruments. Both these provisions provide that their provisions do not affect 'any provisions that are more conducive to the realisation' of children's rights. Accordingly, where the Charter contains

[76] Article 7: Freedom of Expression - 'Every child who is capable of communicating his or her own views shall be assured the right to express his opinion freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.'

[77] Olowu D (2002) 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child',10 The International Journal of Children's Rights 129.

stricter provisions, the stricter provisions prevail.[78] Viljoen also submits that the guiding principle in resolving interpretative disputes between these two instruments should be that 'the best interest of the child shall be the primary consideration.'[79]

### 4.2 Comparison between the Charter and the CRC

It is notable that the Charter does not include a provision on respect for the views of the child in general, but entitles only the child to the right to be heard in judicial and administrative procedures. The Committee on the Rights of the Child has stressed that children's right to express their views in all matters affecting them is a free standing right.[80]

Du Toit correctly argues that a child's right to participation in the Charter is both stronger and weaker than its equivalent in the CRC.[81] The main difference between the provisions under discussion concerns the conception of the child's ability to express an opinion. The CRC refers to a child who is 'capable of *forming*…views', while, the Charter refers to children 'capable of *communicating* … views'. Participation is therefore only conditional on the child's ability to communicate his or her views. The Charter is in this instance phrased in a more restrictive way than the CRC because a child may not be able to verbally communicate a view but could have formed a view.

The Charter, conversely, does not contain the further limitations of child's age, maturity and stage of development as determinative of the weight that should be attached to the child's views. It could be argued that this limitation can be read into the words 'capable of

[78] Lloyd (2002) 22. It is recognized that the Charter contains stricter provisions with regard to the recruitment of child soldiers (article 22), child betrothal (article 21(2)), other harmful and cultural practices (article 21(1)) and child refugees (article 23 provides that internally displaced children receive the same protection as refugees).
[79] Article 4(1) of the Charter. Viljoen F (2009) 'The African Charter on the Rights and Welfare of the Child' in Boezaart T (ed) *Child Law in South Africa* 338.
[80] United Nations Committee on the Rights of the Child, 43rd Session , "Speak, Participate and Decide – The Child's Right to be Heard" , Day of General Discussion, 15 September 2006 – Introduction 1 Submissions available at http://www.ohchr.org/english/bodies/crc/discussion.htm (last accessed 6 January 2013).
[81] Du Toit C (2009) 'Legal Representation of Children' at 95 in Boezaart T (ed) *Child Law in South Africa* Juta & Co, Ltd: Cape Town. 98.

communicating his or her views'.[82] Viljoen submits that this limitation may not only pertain to the child's age but also to the level of education and articulateness of the child.[83]

With regard to how the child's views are to be weighed, the fact that the CRC provides that 'due weight' must be given to the child's views ensures that the views must be made known to the decision-maker. The Charter provides that the child's views must be taken into consideration. It is submitted that if the decision-maker is obliged to give due weight to the child's views, a decision cannot be made freely as the decision-maker must be able to show how the child's views effected his decision.[84]

The African Charter goes a step further than the CRC by providing in Article 4(2) that the child may participate through an 'impartial representative as a party to the proceedings' which would place the child's representative on even footing with the other parties. The Charter therefore specifically provides for a procedure through which the child may place his or her views before the court.[85]



The CRC and the Charter both allow the child to participate, directly or indirectly, through the appointment of a legal representative. Appointing separate legal representation for a child is a form of participation and will not be necessary in every matter concerning the child.[86] Ideally the child will have the opportunity to choose from various participation methods, how he or she would like to share his or her views.

[82] Gose M (2002) The African Charter on the Rights and Welfare of the Child Community Law Centre, University of the Western Cape 127.
[83] Viljoen F (2009) 338.
[84] See Gose (2002) 126 where he argues along these lines.
[85] *Brossy v Brossy* (602/11) [2012] ZASCA 151 (28 September 2012) – Submissions by the Amicus Curiae para 23.
[86] Du Toit (2009) 98.

The limitation clause of the Charter further states that the child's views shall be taken into consideration 'in accordance with the provisions of appropriate law'. This phrase in the Charter gives wide discretion to State parties and limits the right conferred on the child.

## 5. CONCLUSION

The CRC and the Charter both have stronger and weaker aspects. The CRC apply to children who are able to form a view and the Charter apply to children who are able to communicate their views.

The chapter establishes that Article 12(2) relates specifically to the to the right of the individual child to participate in judicial and administrative proceedings such as divorces. Article 12(1) refers to the right of the child to express his or her views freely in *all matters* affecting him or her and creates a general right of participation. It is concluded that the Charter encompasses a comprehensive set of children's rights and confirms or strengthens the global standards contained in the CRC.

# CHAPTER 3 : THE EVOLUTION OF LEGISLATION WHICH PROVIDE FOR CHILD PARTICIPATION IN JUDICIAL PROCEEDINGS

## 1. INTRODUCTION

In order to fulfil its international obligations, South Africa must implement the rights contained in international legal instruments in its domestic legislation. The Committee on the Rights of the Child specifically recognises the obligation to implement the right of participation in the context of divorce proceedings specifically and General Comment No. 12 provides that'…all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes'.[87] This chapter will therefore deal with the domestication of child's right to be heard in family law matters which affect them. The main focus of the chapter will be one aspect of this right, which is the right to legal representation for children in such matters.



The appointment of legal representation for children as a method of participation has seen much development in legislation. The right to legal representation is but subsection within the broader right to be heard. Legal representation is therefore a method to realise the child's right to be heard. Carnelley observes that '[c]hildren have the right to be heard and have their expressed views considered if they are of a suitable age, maturity and stage of development, it is submitted that not all children (even those of a suitable age, maturity and stage of development) would require, desire or be entitled to separate legal representation at state expense.'[88]

[87] General Comment No.12 (2005) 15.
[88] Carnelley M (2010) 'The Right to Legal Representation at State Expense for Children in Care and Contact Disputes – A Discussion of the South African Legal Position with Lessons from Australia' 31:3 *Obiter* 644.

The question to be addressed in this chapter is whether current legislation is sufficient to guarantee that children's voices will be heard in matters that affect them, whether this be done through a legal representative or otherwise.

The chapter will look at different legislative provisions and draw from the criticism and praise it received to conclude whether provisions in the current Children's Act are sufficient to ensure that children's voices are heard in judicial proceedings. The chapter will also look at the different forums in which children may need to be legally represented and what provisions are in place to ensure that a child that should be legally represented is indeed so represented. The chapter will also look at certain mechanisms that the legislature has provided to ensure that a child's right to access to courts is realised.

In South Africa legal representation for children is mostly seen in three main types of proceedings, namely children's court enquiries, civil proceedings where a curator *ad litem* is appointed and family law matters.[89] Family law matters involving children are usually matters related to divorce proceedings or post-divorce disputes regarding maintenance for the children or care and contact of the children.[90] Children's court proceedings usually include adoption matters, foster care or child-removal cases.[91] Civil proceedings can entail an array of matters from alienation of a child's property to personal injury claims to enforcement of constitutional rights.

## 2. LEGAL REPRESENTATION OF CHILDREN AND THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.

[89] Sloth-Nielsen J (2008) 'Realising Children's Rights to Legal Representation and to be Heard in Judicial Proceedings: An Update' 24 *South African Journal on Human Rights* 498.
[90] Sloth-Nielsen (2008) SAJHR 502.
[91] See Section 45 of the Children's Act on matters the Children's Court may adjudicate.

## 2.1 Section 28 of the Constitution

South Africa ratified the CRC on 16 June 1995[92] and thereby agreed to 'respect and ensure' the rights of children as set forth in this international instrument.[93] South African courts are required to have regard to the international and regional instruments when interpreting any legislation relating to children.[94]

Section 28 of the 1996 Constitution grants specifically defined rights to children in addition to those rights given to all citizens.[95] Section 28 has been described as 'a mini-charter of rights created for children only.'[96] Section 28 provides a further layer of protection by specifying that a child's best interests are of paramount importance in every matter concerning the child.[97] South Africa's Constitution has been hailed internationally as a prime example of a constitution which protects and advances children's rights.[98]

Children's interests are best protected when they are treated as independent legal subjects rather than objects of adult concern. It has been observed that the inclusion of children's rights in the Constitution ensures that children have the grounds and institutional means to influence the decisions affecting their own lives. Section 28, therefore, seeks to achieve the



[92] See Olivier M (2000) 'The Status of International Children's Rights Instruments in South Africa' at 197 in CJ Davel (ed) *Introduction to Child Law in South Africa* Juta & Co, Ltd: Cape Town

[93] Article 2 of CRC.

[94] Section 39 of the Constitution obliges courts to consider international l.a.w. when interpreting the Bill of Rights.

[95] Section 28(1) clearly states 'every child' has the rights listed in the section. The South African Constitution confirms this by stating in section 7(1) that the Bill of Rights '…enshrines the rights of all the people in our country…' and most of the rights in the Bill of Rights are afforded to 'everyone'. Section 28(3) determines that children, for the purposes of section 28, are persons under the age of eighteen years. There are certain rights that are not afforded to children, such as the right to vote.

[96] Bekink B & Brand D (2000) 'Constitutional Protection of Children' at 173 in Davel CJ (ed) *Introduction to Child Law in South Africa* Juta & Co, Ltd: Cape Town.

[97] Section 28(2).

[98] Skelton A (2009) 'Constitutional Protection of Children's Rights' at 265 in Boezaart T (ed) *Child Law in South Africa*, Juta & Co, Ltd: Cape Town.

mandate of Article 12 of the CRC, providing that 'in all matters affecting the child, the views of the child [will be] given due weight. [99]

## 2.2 Section 28(1)(h) of the Constitution

### 2.2.1 Interpreting Section 28(1)(h)

Section 28(1)(h) allows for the legal representation for children and reads as follows:

*'(1) Every child has the right -*

*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;'*

Section 28(1)(h) reflects the rights contained in Article 12(2) of the CRC.[100] In terms of this provision, child participation will therefore have to be accomplished by (legal) representation.[101]



In comparison with article 12 of the CRC, section 28(1)(h) has been found to provide a more secure right to legal representation. A weakness of article 12 that has been identified is that it allows for alternatives to legal representation.[102] Section 28(1)(h) only provides for only 'legal practitioners' to represent a child in court, while article 12(2) of the CRC refers to a 'representative' and the African Charter provides for an 'impartial representative'. Du Toit

[99] Spitz (2005) 878.
[100] Tobin has identified South Africa as one of twenty countries that have constitutional provisions dedicated to children's rights. Tobin also observes that there is a growing trend to include provisions that guarantee participatory rights of children, freedom of expression and respect for their opinions and thoughts in accordance with their age and level of maturity. See Tobin J (2005) 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' 21 *South African Journal on Human Rights* 110 and 116.
[101] 2-20 Commentary on the Children's Act. The inclusion of the right to legal representation in civil proceedings was met with some reservation, especially from the Government officials, as it would have a severe cost implication for the legal aid system. Kassan (2004) 36.
[102] Zaal N & Skelton A (1998) 'Providing Effective Representation for Children in a new Constitutional Era: Lawyers in the Criminal and Children's Courts' 14 *South African Journal on Human Rights* 541.

points out that section 28(1)(h) only mentions the appointment of a legal practitioner for a child and does not refer to any broader right of participation attaching to children.[103]

Section 28(1)(h) entitles every child to legal representation at state expense in civil proceedings, if substantial injustice would result if the child were unrepresented.[104] This provision is not limited by the capability of the child to form and express his or her view as provided for in the CRC , but applies to 'every child'. It is also is not limited to the extent that it only applies to a child who is capable of communicating his or her own views, as provided for in the African Charter. [105]

It is has been correctly argued that the constitutional right is awarded irrespective of whether the child is a party to proceedings, otherwise directly involved or affected by the judicial proceedings where they are not directly before court. For example in the divorce proceedings of their parents or contact and care disputes in respect of a child, the child will not be directly before court but such proceedings will inevitably affect the child's life. The enforcement of this constitutional right has, however, posed some problems, especially regarding the interpretation of the phrase "substantial injustice".[106]



### 2.2.2 The "substantial injustice" test

The application of section 28(1)(h) raises the question whether the inclusion of the phrase "substantial injustice" indicates that children do not have an automatic right to legal representation in civil proceedings or whether the right to legal representation in civil matters only arises if substantial injustice would otherwise result.

It has been pointed out that the "substantial injustice" test narrows the scope of the right especially in comparison with its international and regional counterpart in article 12(2)

[103] Du Toit C (2009) 96.
[104] 3C38 *Bill of Rights Compendium*, Butterworths Durban: 1996
[105] Kassan (2004) 37.
[106] Kassan (2004) 37.

in the CRC and article 4(2) of the African Charter.[107] Du Toit draws a comparison between section 28(1)(h) and section 35(3)(g) in terms of which legal representation has to be assigned to an unrepresented criminally accused person at state expense.[108] In terms of section 35(3)(g) the right to legal representation arises once an accused person is unrepresented and requests legal representation.[109] Du Toit concludes that the 'assignment' of a legal practitioner in section 28(1)(h) and the 'assignment' of a legal practitioner in section 35(3)(g) must be based on the same principle.[110]

Zaal and Skelton also make the comparison between section 28(1)(h) and section 35(3)(g). They point out that the right to legal representation created by the Final Constitution is limited in scope and dependent on a 'vague, predictive ground – the "substantial injustice" test – which may prove somewhat difficult to delineate in practice.'[111] Skelton also points out that, 'the difficulty with the wording of section 28(1)(h) is that it fails to de-link the right children to have separate legal representation in civil matters from the assignment of the right by the state and at state expense. In this regard, it differs from the right to legal representation in criminal matters provided for in section 35 of the Constitution, which establishes firstly, the right to have legal representation, and secondly, to have a legal representative assigned by the state at state expense.'[112]



[107] Sloth-Nielsen (2008) SAJHR 503.
[108] Section 35(3)(g) of the Constitution reads as follows: "Every accused person has a right to a fair trial, which includes the right… (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;".
[109] The Child Justice Act 75 of 2008, which came into force on 1 April 2010, extensively addresses the legal representation of children in criminal proceedings in the newly formed Child Justice Courts in Chapter 11. Section 82(1) specifically provides "[w]here a child appears before a child justice court in terms of Chapter 9 and is not represented by a legal representative of his or her own choice, at his or her own expense the presiding officer *must* refer the child to the Legal Aid Board for the matter to be evaluated by the Board as provided for in Section 3B(1)(b) of the Legal Aid Act , 1969." (my emphasis) Section 83(1) further provides that no child appearing before a child justice court may waive his or her right to legal representation.
[110] Du Toit (2009) 104.
[111] Zaal & Skelton (1998) 541.
[112] Skelton A (2008) 'Special Assignment: Interpreting the Right to Legal Representation in terms of Section 28(1)(h) of the Constitution of South Africa' in in Sloth-Nielsen J & Du Toit Z (eds) *Trials & Tribulations,*

Case law has dealt with the interpretation of 'substantial injustice' extensively and courts have endeavoured to spell out factors that should be taken into account in concluding whether the non-appointment of a legal representative will result in substantial injustice. The "substantial injustice" test, therefore, invites courts to consider each case on its own facts.

In *Centre for Child Law and Another v Minister of Home Affairs and Others*[113] the court considered when legal representation for children is appropriate and necessary. This case dealt with the detention of a number of foreign unaccompanied children at a repatriation camp and who were facing imminent and unlawful deportation. The court observed that the inaccessibility of legal representation in the adjudication process had further exacerbated the crisis now existing in the treatment of unaccompanied foreign children. The court recognised that these children are particularly vulnerable and there was a risk that these children's rights would be violated if they were not legally represented.

Section 28(1)(h) has been interpreted in conjunction with the international law by the Constitutional Court to give effect to children's right to participation. The Constitutional Court has used section 28(1)(h) to appoint a curator *ad litem* to protect the interests of very young children despite the fact that it was open to them to do so in terms of the common law. In *Du Toit and Another v Minister of Welfare and Population Development and Others (Gay and Lesbian Equality Project as Amicus Curiae)*[114] the court stated that where there is a risk of substantial injustice the court is obliged to appoint a curator *ad litem* for the child and that obligation flows from section 28(1)(h) of the Constitution. The court emphasised that in

*Trends & Triumphs: Developments in International, African and South African Child and Family Law*, Juta & Co, Ltd: Cape Town 225.

[113] 2005 (6) SA 50 (TPD) par 581-590C.

[114] 2003 (2) SA 198 (CC) par 3.

matters where children's interests are at stake those interests must be 'fully aired' before the court so as to avoid substantial injustice to those children 'and possibly others.'[115]

Legal Aid South Africa has also attempted to determine what the content of "substantial injustice" is in its 2012 Guide. In terms of the 2012 Guide, the following factors must be considered before a child may receive legal representation in a civil case at state expense:[116]

- 'The seriousness of the issue for the child, for example, if the child's constitutional rights or personal rights are at risk.
- The complexity of the relevant law and procedure.
- The ability of the child to represent himself or herself effectively without a lawyer.
- The financial situation of the child or the child's parents or guardians.
- The child's chances of success in the case.
- Whether the child has a substantial disadvantage compared with the other party in the case.'



The Legal Aid Guide 2012 continues that: '[i]f a child is assisted by his/her parents or guardians, who exceed the means test and can afford to provide legal representation for the child, yet fail, refuse or neglect to do this, then legal aid will be provided to the child if substantial injustice would otherwise result. If this happens, Legal Aid SA may institute proceedings against the parents or guardians to recover these costs if:

[115] Par 3.
[116] Par 4.18.1 of the Legal Aid Guide 2012, 12th Edition, available from www.legal-aid.co.za last accessed 30 July 2013.

-the parents or guardians could afford to provide legal representation for the child as part of their duty of support, and

-they neglect, failed or refused to provide legal representation for the child.'[117]

It is has been correctly argued that the proper interpretation of section 28(1)(h) is to recognise a child's right to legal representation as a separate right. The requirement that 'substantial injustice would otherwise result' applies only if legal representation for the child is to be provided at state expense.[118]

### 2.2.3 Implementation of the right to separate legal representation

A issue that must be considered is the court's role in ensuring the implementation of this right. All relevant factors and circumstances will have to be evaluated. It has been argued that the court should at least ensure that a child in legal proceedings whether criminal or civil, must have been informed of his or her right to legal representation.[119] This is essential especially where the child is directly involved in the proceedings.



In in *R v H and Another*[120] the court went further than just informing the children of their right to representation and the child's right to separate legal representation was raised *mero motu* by the court.[121] Judge Moosa appointed a legal representative for the child in terms of section 28(1)(h), after consultation with the parties, the Family Advocate and the Legal Aid Board. The court also relied on the provisions of article 12 of the CRC in considering the appointment of a legal representative. The judge considered the following factors in deciding that it was appropriate to assign a legal representative for the child: the drastic nature of the relief sought by the mother which would sever all contact between the

[117] Par 4.18.3 of the Legal Aid Guide 2012.
[118] *Brossy v Brossy* (602/11) [2012] ZASCA 151 (28 September 2012) – Submissions by the Amicus Curiae par 74-76.
[119] Bekink & Brand (2000) 193.
[120] [2006] 4 All SA 199 (C)
[121] Par 6.

child and his father; the possibility that the best interests of the child may not be compatible with the interests of the custodian parent; the interests of justice required that the child's views be articulated; and the appointment of a separate legal representative may be in the best interests of the child.[122] Judge Moosa appointed a legal representative for the child to articulate the child's views and represent his interests in the proceedings. The legal representative was also subsequently joined as second defendant to the proceedings.

The court confirmed in the case of *Legal Aid Board v R*[123] that a child may apply directly to the Legal Aid Board for a legal representative to be appointed in terms of section 28(1)(h) of the Constitution. In *casu* a twelve-year-old girl approached Childline for assistance in the divorce matter of her parents where her custody was in dispute. The court observed that where the court is dealing with acrimonious litigation regarding the custody of a child, it was a necessary conclusion that substantial injustice to the child would result if the child were not afforded the assistance of a legal practitioner to make his or her voice heard.[124] Acting Judge Willis found that questions about where a child is to live and which parent will be making the most important decisions in the child's life is of crucial importance to the child. The child will be subject to those decisions and must live with the consequences; it is therefore vitally important that her views are taken into consideration when making these decisions.



The court held that the Legal Aid Board was entitled at the state's expense to render assistance to a minor in the discharge of the State's obligation in terms of section 28(1)(h) of the Constitution if the failure to do so would otherwise result in substantial injustice.[125] The

[122] Par 6.
[123] 2009 (2) SA 262 (D).
[124] Par 20.
[125] Par 3. In *R v M* (Unreported) Case number: 5493/02, Durban High Court, which preceded *Legal Aid Board v R* Govindsamy AJ explores the Legal Aid Act 22 of 1969 and the Legal Aid 2002 and comes to the conclusion that the Act does not specifically empower the Legal Aid Board to provide legal assistance in terms of section 28(1)(h). Govindsamy AJ then proceeded to order that the Minister of Justice and Constitutional Development

court further held that the Legal Aid Board was not constrained by a need to obtain either the consent of the child's guardian or that of any person exercising parental responsibilities and rights in relation to the child, or an order of court.[126] The case of *Legal Aid Board* confirms that a court order assigning legal representation is not necessary nor is it necessary for the court to decide whether legal representation of the child is necessary. Legal Aid South Africa may assign legal representation for children at their own discretion according to the Legal Aid South Africa Guidelines.[127]

## 3. LEGAL REPRESENTATION AND PARTICIPATION OF CHILDREN IN FAMILY LAW MATTERS

### 3.1 Legislative Framework Prior to the Children's Act 38 of 2005

There have been some efforts made to provide legislation to give effect to the right in section 28(1)(h). The first of the effort was the 1996 amendment to the Child Care Act,[128]with the inclusion of section 8A. However, this provision never became operative.[129] Section 10 of the Children's Act is now meant fulfil this constitutional mandate.

A piecemeal approach to child legislation with the several amendments to the Child Care Act proved unsatisfactory in the light of the constitutionalisation of the children's rights



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and not Legal Aid take the necessary steps to ensure that a legal practitioner is appointed for the child. See Skelton (2008) for further discussion on this judgment which Govindsamy AJ later set aside.

[126] Par 35. It is submitted that the Legal Aid Board could also have applied to the court for the appointment of a *curator ad litem* in terms of section 14 of the Children's Act.

[127] *Brossy v Brossy* (602/11) [2012] ZASCA 151 (28 September 2012) – Submissions by the Amicus Curiae par 74-76.

[128] See the Child Care Act 74 of 1983 and the Child Care Amendment Act 96 of 1996.

[129] For full discussion on Section 8A and its accompanying Regulation 4A see Sloth-Nielsen J & Van Heerden B (1997) 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' *Stellenbosch Law Review* 262 and Sloth-Nielsen J & Van Heerden B (1996) 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law developments in South Africa' *South African Journal on Human Rights* 251; Zaal N (1997) 'When should Children be Legally Represented in Care Proceedings?' An Application of Section 28(1)(h) of the 1996 Constitution' 114 *South Africa Law Journal* 336; Mosikatsana T (1997) 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution' 3 *Michigan Journal of Race and Law* 365.

and the ratification of the CRC.[130] Similarly, with the ratification of the African Charter on 7 January 2000 it became clear that South Africa's child care and protection legislation needed to be re-worked into a comprehensive piece of legislation that dealt with the rights contained in these instruments. It is the preceding occurrences that were the main driving force for the total overhaul of South Africa's legislation on child care and protection.[131]

### 3.1.1 Divorce Act 70 of 1979

Section 6(4) of the Divorce Act 70 of 1979 permits a divorce court[132] to 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.

Section 6(1)(a) of the Divorce Act 70 of 1979 provides that a court shall only grant a decree of divorce if it is satisfied that the provisions made for the welfare of any minor or dependant child of the marriage are satisfactory or are the best that can be affected in the circumstances. Section 6(1)(b) further provides that if the Family Advocate has instituted an enquiry, the court must consider the Family Advocate's report and recommendations before granting a decree of divorce. Courts often rely on the Family Advocate to ascertain the views of the children and to introduce those views in his or her report.



The court must aim for the best possible, or at least near best possible outcome for the children involved. The outcome which is least disruptive to the children's lives should be considered as the best possible outcome. The nature of divorce proceedings and the accompanying emotions may make this a difficult task for courts. However, section 6(4) in

[130] Keightley also points out that the Constitution and the CRC worked in tandem to extend the influence of international norms over many areas of South African national law related to children. Keightley R (1996) 'Children and the Legal System: An Overview of Issues Raised by Contributors' at 3 in Keightley R (ed) *Children's Rights* Juta &Co, Ltd: Cape Town.

[131] Sloth-Nielsen J & Van Heerden B (1999) 'The Political Economy of Child Reform: Pie in the Sky' in Davel CJ (ed) *Children's Rights in a Transitional Society* Protea Book House: Pretoria 108.

[132] Divorces previously fell within the exclusive jurisdiction of the High Court but the Jurisdiction of the Regional Courts Amendment Act 31 of 2008, which came into effect on 9 August 2010, has given Regional Court civil jurisdiction to deal with matters previously dealt with by High Courts only.

effect asks courts to look beyond the acrimony of the parties and aim for an outcome that will benefit the children. It is submitted that this outcome would be more likely if the children are given an opportunity to submit their views, if they wish to do so. Section 9 of the Children's Act further supports this submission and provides that, '[i]n all matters concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance, must be applied.' A court seized with a divorce matter must therefore appoint a legal representative for the child affected by such a matter, if it's in the best interest of that child.

In the past, however, courts have rarely employed this power to appoint legal representatives for children affected by their parent's divorce or matters incidental thereto, for example variation of care and contact disputes, maintenance orders, and applications brought under the Hague Convention on the Civil Aspects of International Child Abduction (which is now regulated by the Children's Act).[133] Section 6(4) of the Divorce Act was more often used to appoint a curator *ad litem* for children.[134]



Section 6(4) has not been without criticism. Firstly, it has been pointed out that the Divorce Act provisions do not meet the constitutional requirement because it does not contain the 'substantial injustice' test as contained in section 28(1)(h).[135] Second, the court could only employ this provision where the parties are wealthy because parties who are not well-off will rarely be able to afford the appointment of another attorney or advocate. Third, the provision does not provide the option of state-funded legal representation, even in instances where 'substantial injustice' would otherwise result.[136]

### 3.1.2 Mediation in Certain Divorce Matters Act

[133] Sloth-Nielsen (2008) SAJHR 503.
[134] Du Toit C (2009) 104.
[135] Sloth-Nielsen (2008) SAJHR 503.
[136] Kassan (2004) 49.

Mediation in Certain Divorce Matter Act 24 of 1987 established the Office of the Family Advocate. The Office of the Family Advocate has a duty to protect the interests of children affected by divorce or in any dispute regarding the contact with and care of a child, such as an unmarried father's request for contact with his child. Although the procedure that the Office of the Family Advocate employs will be discussed in detail the chapter to follow, it is apt at this stage to mention their core functions, which are:

- Monitoring of pleadings and settlement agreements regarding the parental responsibilities and rights in respect of the children of divorcing parents. The Family Advocate must ascertain the parenting arrangements contained therein are *prima facie* in the best interest of the child.
- Mediation of disputes regarding parental responsibilities and rights in order to find a workable solution for the parties and which is in the best interest of the child involved. The Family Advocate will assist the parties as an independent, neutral third party to arrive at a settlement regarding matters concerning the child.
- Assessment of the parents and the children in order to make a meaningful recommendation to the court regarding the parental responsibilities and rights with respect to the children involved.[137]



These functions are all derived from the central aim and purpose of the Office of the Family Advocate, which is to ensure that in all matters which may affect a child the best interest of the child is protected and are paramount.[138]

[137] Kaganas F & Budlender C (1996) Family Advocate Law, Race and Gender Research Unit, University of Cape Town 4-6.

[138] For a further discussion of Section 28(1)(h) of the Constitution, section 6(4) of the Divorce Act and the duties and functions of the Family Advocate see Kassan D (2008) 'Children's Right to Legal Representation in Divorce Proceedings: Proposed Guidelines Concerning when a Section 28(1)(h) Legal Practitioner might be deemed be necessary or Appropriate' in Sloth-Nielsen J & Du Toit Z (eds) *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law*, Juta & Co, Ltd: Cape Town.

## 3.2 Legal Representation and Participation in the Children's Act 38 of 2005

The distinction between participation and representation is made at the outset of this Chapter. Legal representation realizes the child's right to participate in judicial proceedings 'through a representative…, in a manner consistent with the procedural rules of national law.'[139]

### 3.2.1. Child Participation - Section 10

The participation principle is ever present in the Children's Act and at the core of the participation in the Children's Act is section 10.[140] In terms of section 10 of the Children's Act 38 of 2005, which came into effect on 1 July 2007,

> '*(e)very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.*'



Section 10 incorporates article 12(1) of the CRC into South African domestic law and many of the considerations which is applicable to article 12(1) would be equally applicable in considering section 10. Section 10 confirms the positive obligation on decision-makers to listen and take the views of children seriously both in terms of international law and domestic

[139] Article 12(2) of the CRC.

[140] On review of the Child Care Act, the South African Law Commission recommended extensive provisions regarding legal representation for children in the new Children's Act in order to give effect to section 28(1)(h) of the Constitution and the international law. The recommendation specifically listed the situations when legal representation should be appointed for the child. These included the following circumstances: if it was requested by the child; it is recommended by the social worker; it appears that a child was abused or deliberately neglected; if any recommendation in respect of placement of the child is contested by the child or the child's parent or caregiver; if two or more adults are applying in separate applications for the placement of the child with them; if the court has terminated the legal representation of the child; or if substantial injustice would otherwise result. (See South African Law Commission Project 110 *Review of Child Care Act* Discussion Paper 103 (December 2001) par 631 pp 98-100).

law. In deciding how much weight should be given to a child's view in any particular matter, the 'twin criteria' of age and maturity must be considered.[141]

Similar to article 12, so too section 10 has been identified as a general principle of the Children's Act.[142] The participation principle in section 10 must therefore be taken into consideration when interpreting the whole of the Act. This submission is supported by section 6(2)(a) of the Act which states that 'all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act.'

Boezaart and De Bruin, correctly argue, the right to participation is a gateway to the right of the child to legal representation in civil matters as set out in section 28(1)(h) of the Constitution. However, the application of section 28(1)(h) is broader than section 10 as it applies to 'every child'. Section 10 is limited to children who are of such age, maturity and stage of development as to be able to participate in an appropriate way.[143]



The inclusion of a general right of participation for children was a significant step taken by the legislature. *Fitschen v Fitschen*[144] illustrated that there was a definite gap in the legislation with the court holding that Article 12 of the CRC had not been incorporated into domestic law and, therefore, the appointment of a separate legal representative for the child was also not justified in the circumstances as the court was in possession of psychologist and Family Advocate reports.

[141] Davel & Skelton (2007) 2-13.
[142] Barrie G (2013) 'Giving due consideration to views expressed by the child in family law proceedings: The Australian experience and lessons for South Africa' 1 *Tydskrif vir die Suid Afrikaanse Reg* 124.
[143] Boezaart T & de Bruin D (2011) 'Section 14 of the children's Act 38 of 2005 and the Child's capacity to litigate' 44(2) *De Jure* Fn 117.
[144] Unreported Case number 9564/95, Cape Provincial Division, 31 July 1997.

It is submitted that such a shift does require a mind shift on the part of litigants, legal practitioners, the presiding officers and other professionals. In *DG v DG,*[145] the court noted that the Children's Act brought about a fundamental shift in the parent/child relationship which prevailed in the pre-constitutional era. The Court was enjoined by the Act to give due consideration to the views of the children, who were of an age and level of maturity to make an informed decision. The court noted that although sections 10 and 31 of the Act recognises a child's right to be heard in any major decisions involving him or her, the applicant's two experts advocated that the children's voices not be heard in this case.

Section 10 makes it clear from the outset of the Act that the opinion of the child is one aspect in the determination of the child's best interests that can no longer be ignored. It is somewhat unfortunate that the views of the child were not expressly listed in section 7 of the Children's Act as factors to be considered when determining the child's best interests,[146] nevertheless, it is submitted that provision is a guiding principle to the application of the whole Act.



### 3.2.2 Access to court - Section 14

Section 14 provides that 'every child has the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of the court.' The section addresses the question whether it is possible for children to institute proceedings in a court.[147]

#### 3.2.2.1 The Common Law Position of the Child's Capacity to Litigate

The common law position regarding a child as a party to litigation has remained unchanged until parts of the Children's Act come into force in 2007. When considering the

[145] [2010] JOL 25706 (E).
[146] Carnelley (2010) 643.
[147] Boezaart & De Bruin (2011) 416.

child's capacity to litigate, the common law distinguished between the child's capacity as an *infans* and as a minor.[148] In common law the *infans* was a child under the age of seven years old and had no capacity to litigate in his or her own name. The parent or guardian of the *infans* had to sue for or be sued on behalf of the *infans*. The *infans* was, however, the party to the lawsuit and not the parent or guardian. The parent or guardian had to represent the *infans* in court because the *infans* did not have independent standing in court.[149]

The capacity of a minor to litigate in common law was limited and the general sense was that minors had no *persona standi in iudicio.* A minor could therefore not institute court proceedings or defend legal proceedings without the assistance of their parents or guardians. The natural guardian of a minor would need to assist such a minor when issuing summons and act in a representative capacity for such a minor when the minor was sued.[150]

The question whether section 14 had removed the common law restriction was discussed but left undecided by the Supreme Court of Appeal in *Legal Aid Board in re Four Children.*[151] Four children approached the Legal Aid Board for assistance in a relocation dispute between their divorced parents. The court observed that the immediate hurdle to be overcome was that a minor is not generally competent to engage in litigation without the assistance of his or her guardian. In this case their guardians were disqualified from doing so because they would have had a conflict of interest.[152] All that was required to overcome this hurdle, the court stated, was for the children – or the Justice Centre[153] on their behalf – to ask

[148] Boezaart & De Bruin (2011) 417.
[149] Boezaart & De Bruin (2011) 418.
[150] Boezaart & De Bruin (2011) 418.
[151] Unreported Case number 512/10,Supreme Court of Appeal, 29 March 2011. This matter emanates from a High Court application the children instituted in their own name with the assistance of the Legal Aid Board for an order interdicting their mother from moving them to Pretoria. Schoeman J found that the children did not have legal capacity to litigate and a curator *ad litem* must be appointed before the children may institute proceedings without the assistance of a guardian. *DG v DG* [2010] JOL 250706 (E).
[152] Par 6.
[153] The Legal Aid Board performs its function through several Justice Centres which are spread throughout the country. The Justice Centres employ attorneys and candidate attorneys to provide legal representation to the indigent.

the court to appoint a suitable employee of the Justice Centre as *curator ad litem* in the exercise of its ordinary discretion.[154]

The Justice Centre did not follow the above route and the case was presented instead as an application for the appointment of a legal practitioner under section 28(1)(h) of the Constitution. The Justice Centre argued that it wished to assure the court that 'we act in this application only to give the children the voice that they need to enforce their best interests'.[155] The order that was sought was declaratory relief to the effect that:

'That where Legal Aid South Africa assigns a legal representative to a child in terms of its Constitutional mandate to act in the best interest of that child, that the said child will have *locust standi* to litigate to protect a constitutional right without the consent of that child's parent/s or without the consent of the Court.'[156]

The Supreme Court of Appeal made no order as the case before it was not an appeal and the court has no original jurisdiction to consider an application for a declaratory order.[157] It is correctly submitted by Boezaart and De Bruin that section 14 did not remove the common law restrictions on a child's capacity to litigate.[158]



### 3.2.2.2 Interpretation and Application of Section 14

[154] Par 15.
[155] Par 17.
[156] Par 21.
[157] In this case neither the parents nor the children were before the Appeal Court. The Legal Aid Board stated that it brought the appeal to gain clarity on its position and in the public interest. It seems that the children did not authorize the proceedings and were not aware that the proceedings had been brought. The court observed that the children were distressed at the proceedings before the Appeal Court and felt that their privacy had been invaded. The proceedings also had no more direct effect on the children as because the family difficulties had been resolved and both parents once again lived in the same city and the harmonious arrangement that prevailed before had been restored. Par 3-7.
[158] Boezaart & De Bruin (2011) 418.

It has been argued that the child's common law capacity to litigate has been extended by section 14 if one makes a literal interpretation of the words 'every child' in section 14.[159] Section 14 makes no distinction at all between children below the age of seven (an *infans* in common law) and children older than seven.

Section 14 is of general application and is not limited to matters relating to the Children's Act. The only requirement is that the court which is approached has jurisdiction to hear the matter.[160] Section 14 is in line with section 34 of the Constitution which grants everyone the rights to access to courts. Section 14 provides the means by which a child is to have access to courts, i.e. by assistance from a guardian, parent or legal representative.[161]

Section 14 also links up with section 28(1)(h)[162] because the child may need the assistance of a legal representative to bring a matter to court. Section 28(1)(h) of the Constitution does not specifically mention the child's right of participation but such a right can be implied in civil proceedings as section 28(1)(h) provides for a method of participation. In bringing a matter to court, a child will in all likelihood require the assistance of a legal representative and will need to obtain such representation before approaching a court. It is submitted that section 14 relates to the institution of legal proceedings and its operation cannot be dependent on the assignment of a legal representative by a court first.

Section 14 takes the issue one step further by creating an entitlement to such assistance in bringing a specific matter to court. The section 18(3)(b) places a corresponding obligation on parents and guardians to represent children and to assist them.[163] Section 18(3)(b) of the

[159] Heaton J (2008) *Law of Persons* 3 ed (2008) LexisNexis, Durban; 4 ed (2012) 92.
[160] Section 45 of the Children's Act stipulates the matters that the Children's Court may deal with.
[161] Heaton points out that section 14 confers the right on a child to have his or her limited capacity to litigate supplemented by assistance of a parent, guardian, *curator ad litem*, or the High Court as upper guardian of all children. Heaton (2008) 89.
[162] Davel & Skelton (2007) 2-19.
[163] Boezaart & De Bruin (2011) 419.

Act states that '…a parent or other person who acts as guardian of a child *must* - …(b) assist or represent the child in administrative, contractual and other legal matters;'[164]

In the event that the child's parents or guardians are unable or unwilling to assist the child in bringing a matter to court, it is submitted that such a child will be entitled apply directly to the Legal Aid Board for assistance, without the consent of his or her parent or guardian.[165]

Section 14 extends a child's right to participate in terms of section 10 by securing the child's right to access to courts and so to initiate civil proceedings.[166] It is submitted that both sections 10 and 14 align with section 28(1)(h).[167] However, Davel points out that section 14 is not as limited as section 28(1)(h) because it does not include the "substantial injustice" test. Davel further indicates that the word 'assisted' in section 14 has a more extensive application than 'representation' as found in section 28(1)(h) of the Constitution. [168] Coupled with the guarantee of legal representation entrenched in section 28(1)(h) of the Constitution, children are assured that there is always assistance in the form of legal representation available.[169]



When comparing section 14 with Article 12(2) of the CRC and Article 4(2) of the African Charter, the section should be interpreted extensively to allow the broadest possible platform for the voice and views of children to be heard and considered in court. Section 14 refers to "every child" and places no limitation on the right of access to court.[170]

A case which considered the question of a child's capacity to litigate was *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk.*[171] The children involved were two girls of age fourteen and twelve. The mother alleged that the children did not want to have contact with

[164] My emphasis.
[165] Davel & Skelton (2007) 2-24.
[166] Boezaart & De Bruin (2011) 429
[167] Boezaart & De Bruin (2011) 429.
[168] Davel (2007) 2-23
[169] Boezaart & De Bruin (2011) 432.
[170] Boezaart & De Bruin (2011) 432.
[171] [2005] JOL 14218 (T).

their father due to his violent behaviour. The father alleged that the mother was unreasonable and actively alienating the children from him. The court ordered that the parents and the children undergo therapy to attempt to normalise the family situation. The children, however, refused to submit to treatment.

The court observed that while the parents were flinging allegations at each other for the cause of the children's feelings, the children had not had an opportunity to state their views or to have their interests independently put before the court. In order for the court to have a balanced presentation of the situation, the children or someone on their behalf must put their case before court.

The court considered whether the children should be joined as parties to the proceedings as they had a clear interest in the outcome of the proceedings. The court held that to give proper effect to section 28(1)(h) the court is entitled to join the children as parties to proceedings affecting their best interests. Further, the court held that unless the children were joined as parties, they would not be able to appeal against an adverse order. The court was in favour of appointing a legal representative in terms of section 28(1)(h) of the Constitution.[172] It is therefore submitted that section 14 would have given these children the opportunity to seek assistance from elsewhere, as their parents were unable to assist.



### 3.2.3 Enforcement of Rights - Section 15

Section 15 states that 'anyone listed in this section has the right to approach a competent court, alleging that any rights in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

[172] The court, however, was of the view that the State Attorney should appoint a legal representative in terms of section 28(1)(h). Par 5.

This provision gives the child who is affected by or involved in the matter the right to approach the court for appropriate relief, specifically if a right in the Bill of Rights[173] or in the Act has been infringed or threatened. Section 14 gives the child the right to be assisted in bringing such a matter to court for appropriate relief and, thus, provides the procedure on how the child who is affected by or involved in a matter is to approach the court for appropriate relief. Section 14 and section 15 work in tandem to secure the child's right to access to courts to obtain appropriate relief. Section 14 guarantees the child the right to demand assistance either from a parent or guardian and if they are unable or unwilling, to demand the assistance of legal representative in terms of section 28(1)(h) of the Constitution. The child's right of access to courts can thus also be implied from section 28(1)(h).[174]

Section 15 extends the participatory right in section 10 by securing the child's right to access to a competent court where there has been infringement of a right in the Bill of Rights or a right as provided for in the Children's Act. With all these provisions working in tandem, there can be no doubt that the child has the opportunity and the right, to approach the court and demand assistance to do so.



### 3.2.4 Parental Responsibilities and Rights

The Children's Act does not include a specific section providing for separate legal representation for the child in all matters as a general principle, but provides for legal representation for the child in different chapters of the Children's Act.

[173] With regard to infringement of rights in the Bill of Rights see *Minister of Education v Pillay* 2008 (1) SA 474 (CC) where Chief Justice Langa observed that 'It is always desirable, and may sometimes be vital, to hear from the person whose religion or culture is at issue. That is often no less true when the belief in question is that of a child. Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf.' See also *Antonie v Governing Body, Settlers High School and Others* 2002 (4) SA 738 (C), a 15 year-old Rastafarian girl successfully brought an application in her own name to challenge the school governing body's decision to find her guilty of serious misconduct for wearing her hair in dreadlocks.
[174] Boezaart & De Bruin (2011) 429.

Section 29, in Chapter 3 of the Act which deals with parental responsibilities and rights, does, however, assist in providing for legal representation for the child in certain circumstances. Section 29(6) states that the court may appoint a legal representative for the child and may order that the parties to the matter or any one of them be held responsible for payment of the legal costs.[175] Echoing section 28(1)(h) of the Constitution, the section also makes provision for the court to order that the State be responsible to pay the cost of such representation, if substantial injustice would otherwise result. Section 29(6) is, however, not of general application and Section 29(1) limits the application of section 29(6) to applications brought in terms of certain sections.[176]

The Children's Act provides several more mechanisms to ensure that children's voices are heard in parental responsibilities and rights matters.[177] For instance, the implication of the child's right to participation is that due consideration must be given to the views and wishes of the child in the development of any parental responsibilities and rights agreement in terms of section 22, bearing in mind the child's or children's age, maturity and stage of development.' A person who has parental responsibilities and rights in respect of a child may confer specific parental responsibilities and rights on a person who did not have any parental responsibilities and rights prior to the agreement.



[175] Section 29 specifically states that it is subject to section 55 of the Act. Section 55 is included in Chapter 4, which regulates all the aspects of the Children's Court. Section 55 will be discussed below, under the heading of Children's Court Proceedings. It has also been identified that section 29 is comparable to section 6(4) of the Divorce Act 70 of 1979. This section was not commonly employed by courts to appoint legal representation for children. Section 6(4) was discussed above under the heading, Divorce Act 70 of 1979.

[176] Section 29(6) applies only to applications brought in terms of: section 22(4)(b) – parental responsibilities and rights agreements must be made an order of court; section 23 – assignment of contact and care to interested person by order of court; section 24 – assignment of guardianship by order of court; section 26(1)(b) – person claiming paternity may apply to court for an order confirming paternity and; section 28 – termination, extention, suspension or restriction of parental responsibilities and rights.

[177] Section 31(1)(a) also provides that 'before a person holding parental responsibilities and rights in respect of a child takes any decision…involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.' See *DG v DG* in this regard.

In implementing section 22, the legislature has ensured that general participation principle in terms of section 10 is complied with throughout the process. The first mechanism that ensures that the child's voice is heard is contained in section 22(5), which provides that before registering a PRR Agreement or before making it an order of court, the Family Advocate or the court must be satisfied that PRR agreement is in the best interest of the child. The Family Advocate must confirm that; (1) information about the content of the PRR Agreement has been furnished to the child/children, bearing in mind the child/children's age, maturity and stage of development and; (2) the child/children have been given an opportunity to express their views and that these views have been given due consideration.[178]

The second mechanism is contained in section 22(6)[179] which states, that a child, with leave of the court, may bring an application to amend or terminate a parental responsibilities and rights agreement. Granting the child the opportunity to bring an application, with leave of the court, is present throughout Chapter 3 of the Children's Act and similar provisions can found in Section 34(5)(b) and 28 (3)(c).[180]



It is evident that where a is child granted the right to approach a court, such a child will need legal assistance to approach a court to obtain permission to bring the application. The Children's Act therefore indicates that children will be able to obtain legal representation independent of the court, i.e the legal representative does not have to be assigned by the

[178] General Regulations Relating to Children 2010, Form 5 to the Regulations.
[179] Section 22 read with Regulation 7 (General requirements pertaining to Parental Responsibilities and Rights Agreements) and Regulation 8 (Mediation and participation of the child concerning Parental Responsibilities and Rights) of General Regulations Regarding Children, 2010.
[180] See Bekink M (2012) '"Child Divorce": A Breaking from Parental Responsibilities and Rights due to the Traditional Socio-Cultural Practices and Beliefs of the Parents' *Potchefstroom Electronic Law Journal* 15(1) 195 for a full discussion on the suspension or termination of parental responsibilities and rights.

court.[181] The relation between section 14 and section 28(1)(h) of the Constitution becomes apparent[182] once again.

The Children's Act provides children with access to the courts in several of its provisions and the participation principle is present throughout the Act. A further example of such participation is section 33 read with regulation 10 and 11, which makes provision for the participation of the child in the preparation of a parenting plan. Regulation 11 makes it clear that a child must be consulted during the development of the parenting plan, and granted an opportunity to express his or her views, which must be accorded due consideration, bearing in mind the child's age, maturity and stage of development. Regulation 11 goes further and requires that the content of the parenting plan must be shared with the child.

The question that arises is whether the provisions provide enough specificity about how these rights and opportunities are to be utilised by children. Procedural aspects regarding the implementation of these substantive rights and remedies may be somewhat lacking from the Children's Act but it is submitted any omissions can be easily addressed with further regulations to the Act and also looking at the existing rules of the relevant court. It is therefore submitted that current legislation is sufficient to provide children with an opportunity to voice their views. The Children's Act does employ many mechanisms to ensure that children are not excluded from the decision-making process in matters that affect them. What is needed is major efforts in information sharing and education to make individuals, potential litigants and children aware of these rights and opportunities.

## 4. LEGAL REPRESENTATION AND PARTICIPATION OF CHILDREN IN CHILDREN'S COURT PROCEEDINGS

[181] Du Toit (2009) 106.
[182] Boezaart & De Bruin (2011) 421.

The Children's Act prescribes that all processes followed in the court 'must be designed to avoid adversarial procedures'.[183] Section 60(3) goes further and requires that proceedings in these courts 'must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved…'. The investigatory and co-operative approach of the Children's Court is conducive to ensuring the best interest is established and familial relations are preserved. It is observed that the adversarial approach followed in ordinary civil matters would be counter-productive in a court that mostly deals with children's residential placements, parental rights and responsibility disputes and family services.[184] Care and protection proceedings in the Children's Court are informal and inquisitorial, while divorce and care and contact proceedings are by their nature much more adversarial nature.[185] It is also submitted that the family law system would do good to expand this approach to all other forums dealing with family law matters. This submission is supported by the general principle in the Children's Act that, '[i]n any matter concerning a child an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.'[186]



The Children's Act extends the jurisdiction of matters in which a Children's Court may adjudicate.[187] It is observed that by allowing the Children's Court to hear parental responsibilities and rights disputes, more children will have the opportunity to have their voices heard because the Children's Court is more accessible to the public. This section will therefore focus predominantly on how children are heard in parental responsibilities and rights disputes heard by the Children's Court.

[183] Section 52(2).
[184] Pillay & Zaal (2011) 'Protecting Parties from Ambush: Some Recommendations on Discovery in Children's Court Litigation' 128(4) *South African Law Journal* 635.
[185] Du Toit (2009) 101.
[186] Section 6(4) of the Children's Act.
[187] Section 45(1) of the Children's Act sets out which matters the children's court may adjudicate.

## 4.1 Legal Representation of Children – section 55

Children's Act provides in section 55 that where a child involved in a matter before the children's court is not represented, and the court is of the opinion that it would be in the best interest of the child to have legal representation, the court must refer the matter to the Legal Aid Board.[188] This is a welcome provision in the Children's Act as children in the children's court especially require representation. This court has the power to move children into institutions or places of safety for long periods, which is a drastic change of circumstances and which can be traumatic for the child. Even more so when the child does not receive the opportunity to have his or her view put before the court.[189]

Section 55 leaves the decision to appoint a legal representative for the child in the discretion of the Presiding Officer. The Presiding Officer must decide whether it will be in the best interest of the child to have legal representation. Boezaart and De Bruin observe that 'the deprivation of the child's liberty in a children's court matter is no less traumatic than the deprivation of the child's liberty in a criminal matter.'[190] For instance, where the child is removed and placed in temporary safe care without a court order in terms of section 152. Although the removal must be reviewed as soon as possible, there is no automatic right to legal representation for the child. Section 55 requires that the Presiding Officer must first consider whether legal assistance would be in the best interests of the child. Only once this determination is made is the matter then referred to the Legal Aid Board, who in turn applies



[188] The Legal Aid Board referred to in section 2 of the Legal Aid Act 22 of 1969. The Legal Aid Board has for the past few years been operating under the name of 'Legal Aid South Africa'. For the purposes of clarity, I will refer to the organization as the 'Legal Aid Board'.
[189] Zaal & Skelton (1998) 542.
[190] Boezaart & De Bruin (2011) Fn 93.

the "substantial injustice" test before appointing a legal representative for the child at state expense.[191]

Presiding officers have no guidelines or regulations on which to rely when exercising this discretion. It is submitted that the lack of guidelines will lead to the application of the section being inconsistent. Some presiding officers will frequently appoint a legal representative for the child, whilst, others will refrain from doing so due to the uncertainty of how and when the section should be applied.[192] The number of conflicting orders and reasons stemming from the Children's Court was apparent in the case of *NM v Presiding Officer of the Children's Court, District of Krugersdorp and Others*.[193] While the case dealt with the confusion by the Children's Court in the interpretation of section 150(1)(a) of the Children's Act, which deals with the applications for foster care and foster care grants, the court raised the preliminary issue of legal representation on behalf of the children.

The appeal court identified the question which needed to be addressed as whether or not there is a duty upon the Presiding Officer to instruct legal representation for the children or to inform the appellant that she may approach the Legal Aid Board for legal representation for the children.[194] The court confirmed that the Presiding Officer has a duty to at very least inform the appellant (maternal grandmother of the children) that she could approach the Legal Aid Board for assistance for the children.[195] The court emphasised that the children's rights must be jealously guarded particularly in matters which may adversely affect them.

Section 55 makes it clear that Legal Aid must assist the child if the court so orders and provide a legal representative 'where a child…is not represented'. Legal Aid has an inescapable duty to a child who is not represented already.



[191] Boezaart & De Bruin (2011) Fn 93.
[192] Du Toit (2009) 107.
[193] 2013 (4) SA 379 (GSJ); [2013] 3 All SA 471 (GSJ) (12 April 2013).
[194] Par 5.
[195] Par 7.

## 4.2 Participation of Children – Section 61

Section 61 of the Act applies to proceedings in the Children's Court which include both care and protection hearings and care and contact applications.[196] Section 61 places a clear obligation on a Presiding Officer to allow the child to express his or her views and preferences if the court finds that the child is of an age, maturity and stage of development to participate in the proceedings.[197] Although the obligation lies with the Presiding Officer to provide the child with the opportunity to express his or her views, the choice remains with the child whether to participate or not.[198] The decision of whether the child has the capacity to participate is left to the Presiding Officer to determine. Section 61(1)(b) requires the Presiding Officer to record the reasons if a finding is made that the child cannot participate. This indicates that the Presiding Officer must consider the child's capacity to participate.[199]

The most significant feature of section 61 is the express provision that the child has a right to choose to participate. The expression of choice is significant because it unfortunately does not appear in any of the other participatory provisions of the Children's Act. A child that has chosen to participate need not participate in every matter during court proceedings. There is the possibility that child may be placed in an impossible situation should the child be forced to testify on statements made by the child to social workers or psychologists. It is thus submitted that the child must have a choice of how he or she wants to participate and the



[196] Section 150(1) of the Act includes a list of circumstances under which a child can be considered to be in need of care and protection.

[197] Section 61(1) states, 'The Presiding Officer in a matter before a Children's Court must – (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so;

[198] The child's opportunity to be heard in removal matters came before the Constitutional Court in *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC). The court held that the representations by the child would allow the court to determine whether the removal was in the best interest of the child and without an opportunity for the child to be heard, the provisions sanctioning removal could not survive constitutional scrutiny.

[199] Gallinetti J (2007) 'The Children's Court' in Davel & Skelton (eds) *Commentary on the Children's Act* 4-1.

available options must be put to the child at the outset. A child may choose not to participate directly or at all.[200]

## 5. CONCLUSION

Section 28(1)(h) guided the way for legislature to draft enabling legislation which indeed brings international standards into domestic legislation. Further practical or procedural provisions may also be useful to ensure that children and all other parties know how to realise the rights given by legislation. Detail regarding how the available legislative remedies should be accessed is essential.

An important omission is the child's views in section 7 as one of the factors that must be considered in determining what is in the best interests of the child. Such an inclusion would have undoubtedly strengthened the position of the participation principle in the Children's Act.



As put by Taylor et al[201], '…despite the political and legislative recognition of children's participation rights internationally, this is just the first step towards embedding authentic, meaningful and well evaluated participatory processes to help ensure children, and what they say, are respected in family law settings.'

[200] Du Toit (2009) 99.
[201] Taylor N, Fitzgerald R, Morag T, Bajpai A and Graham A (2012) 'International Models of Child Participation in Family Law Proceedings following Parental Separation / Divorce' 20 International Journal of Children's Rights 671.

# CHAPTER 4 : DEVELOPMENTS IN CASE LAW AND COMPARATIVE ANALYSIS OF THE CURRENT REPRESENTATION AND PARTICIPATION PROCEDURES

## 1. INTRODUCTION

The question to be addressed in this chapter is whether current procedures are sufficient to guarantee that children's voices will be heard in matters that affect them. This chapter will discuss the development of case law with regard to the court taking the child's views into consideration. Case law will be analysed with specific reference to the method used to bring the child's view before the court, be it by appointing a separate legal representative for the child, a curator *ad litem*, relying on family advocate reports and recommendations, expert evidence and reports or judicial interviews. The procedures available in South Africa will be compared to those available in Australia to determine whether there are any lessons that South Africa can learn from that jurisdiction.



While there might be a theoretical right to be heard, this is not always realised in practice.[202] 'A crucial aspect of implementation is domestication of the rights in national legislation and judicial precedent, followed by implementation in practice.'[203] Before the adoption of sections 10 of the Children's Act and section 28(1)(h) of the Constitution, the courts were inconsistent about hearing the voice of the child. The attitude of the courts ranged from express consideration of the child's views,[204] to instances where the views of the child

[202] Carnelley (2010) 641. Pillay and Zaal, available empirical research findings indicate that there is frequently a discrepancy between what ought to happen and what actually happens in regard to hearing the views of children. Pillay R and Zaal N (2005) 'Child-interactive video recordings: A Proposal for Hearing the Voices of Children in Divorce Matters' 122 *South African Law Journal* 685.

[203] Sloth-Nielsen (2008) SAJHR 495.

[204] *French v French* 1971 (4) SA 298 (W) the court held that 'the wishes of the child will be taken into account', in the case of 'more mature children' through consideration of their' well-informed judgment, albeit a very subjective judgment.' (299H) ; *Manning v Manning* 1975 (4) SA 659 (T) 661G-H; *Mathews v Mathews* 1983 (4) SA 136 (SE) 141B; *Märtens v Märtens* 1991 (4) SA 287 (T) 294C-D; *McCall v McCall* 1994 (3) SA 201 (C) The Court in *McCall v McCall* observed that in the decisions of *Manning v Manning* and *Märtens v Märtens* where it was made clear that 'if the Court is satisfied that the child has the necessary intellectual and emotional

were deliberately not considered and the courts failed to mention the children's wishes.[205] Children's wishes were ignored or not considered for various reasons, including where the evidence in this regard was insufficient or contradictory or the children's preferences could carry no weight because the children concerned were too young or immature or had been influenced by a parent.[206]

In most decisions where the child's views come up for consideration the courts tend to focus on the question of whether or not the child should be regarded as competent to make a choice. The court generally determines the child's competency with the help of the resources at its disposal, whether that be expert reports, the legal representative of the child, a report by a curator *ad litem* etc. The reported cases seldom discuss the reasoning behind the chosen method of presenting the child's views to the court or the efficacy of the chosen method .

In matters dealing with where children will live, who they will have contact with, where they will go to school and what extra-curricular activities they may participate, the child's views are crucial as it is the child who will ultimately be subject to the decision of the court. In order to determine the child's bests interests, the court must have sufficient information, including the child's views and wishes on the possible outcomes of legal



maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each parent of his parents, in other words to make an informed judgment, weight should be given to his expressed preference.'(207H-J); *Meyer v Gerber* 1999 (3) SA 650 (O) the Court followed a different approach, by taking into consideration the child's maturity rather than the child's age. (656); *I v S* 2000 (2) SA 993 (C) 997D-E; *Lubbe v Du Plessis* 2001 (4) SA 57 (C) 73E-I; *Prins v Claasen* [2008] JOL 21693 (SE) 6; *Potgieter v Potgieter* (Unreported) Case number: 215/2006, SCA, 30 March 2007, par 20; *Blumenow v Blumenow* (2008) JOL 21382 (W) par 28.

[205] *Greenshields v Wylie* 1989 (4) SA 898 (W) 899G-H; *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W); *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C )court dismissed the children's feelings out of hand, holding that their reasons for not wanting to leave their home were 'so childishly immature that I am satisfied that it would be unwise and indeed irresponsible to have any regard to such preferences as are supposed to have been expressed.' 439J. The mother of the children in this case was in a lesbian relationship. This case has been rejected in our law because of the blatantly discriminatory conclusion the court came to.

[206] *Stock v Stock* 1981 (3) SA 1280; *Van der Linde v Van der Linde* 1996 (3) SA 509 (O) 513H-I; In *B v P* 1991 (4) SA 113 (T) 119C-D.

proceedings.[207] This chapter will focus on the methods of placing children's views before the court regarding these issues.

## 2. REPRESENTATION PROCEDURES AVAILABLE TO CHILDREN INVOLVED IN OR AFFECTED BY FAMILY LAW MATTERS

### 2.1 Separate Legal Representative in terms of section 28(1)(h) of the Constitution

In recent years there has been a shift in the South African courts' attitude towards the appointment of legal representatives for children.[208] It was previously accepted that the views of the child were sufficiently canvassed by psychological or social work experts involved in the case, or by the Office of the Family Advocate, but the increased use of separate legal representatives indicates that in some instances this method of participation may be the most appropriate. The voice of the child, as represented by a separate legal representative, can play an important role in assisting the court in determining what would be in the best interests of the child. [209] The child's legal representative is on even footing with the other parties and the child is assured that his or her wishes will be placed at the forefront of the court proceedings. It should be emphasised that this does not mean that the child's wishes will be decisive.

The matter of *Soller NO v G and Another*[210] is the first reported case that deals fully with the interpretation of section 28(1)(h). The court expressed that '[t]he significance of section 28(1)(h) lies in the recognition, also found in the CRC, that the child's interests and

[207] *Brossy v Brossy* (602/11) [2012] ZASCA 151 (28 September 2012) – Submissions by the Amicus Curiae par 30-31.
[208] Du Toit (2009) 100-101.
[209] Carnelley (2010) 641.
[210] 2003 (5) SA 430 (W).

the adults' interests may not always intersect and that a need exists for separate legal representation of the child's views.'[211]

### 2.1.1 Appointment of a Separate Legal Representative

An initial question which comes up for consideration is who may appoint the separate legal representative (SLR) for the child. It is has been established that a child may approach the Legal Aid Board directly and a parent or guardian's consent is not required for the appointment of a legal representative from the Legal Aid Board.[212] Carnelley refers to the persons listed in section 38 of the Constitution[213] and also identifies the parent-litigant, a curator *ad litem*, the family advocate, or the court as possible persons or entities which may appoint a SLR for a child.[214]

A definitive list of circumstances where a SLR should be appointed is not advisable and it is submitted that each case has to be evaluated on its merits to determine whether a SLR for the child is required. A child does not need separate legal representation in every family law matter affecting the child. The child's views can adequately be put before the court and his or her right to participate fulfilled through other agencies such as the Family Advocate.[215] The Draft Guidelines for Legal Representatives of Children in Civil Matters (2010)[216] states that 'legal representation of a child is a form of participation where the normal avenues of participation are not available or sufficient for whatever reason.' Kassan also cautions against unnecessarily involving children in conflictual matters.[217] It is



[211] Soller NO v G and Another 434-435 paras 7-8.
[212] See *Legal Aid Board v R.*
[213] 'anyone acting in their own interests; anyone acting on behalf of a child who cannot act in its own name; anyone acting as a member of, or in the interests of, a group or class of persons, anyone acting in the public interest; or an association acting in the interest of its members.'
[214] Carnelley (2010) 646.
[215] *Brossy v Brossy* – Submissions by the Amicus Curiae para 31.
[216] Draft Guidelines for Legal Representatives of Children in Civil Matters (2010) 7 (copy on file with author). These draft guidelines were prepared by the Centre for Child Law, in consultation with Legal Aid South Africa. The Guidelines were submitted to Legal Aid South Africa in 2011 but does not have any 'status' yet.
[217] Kassan (2008) 228.

emphasised that sharing his or her views remains the choice of the child and further the choice of participation method is also that of child.

Case law and several authors have considered the factors that may indicate the need to appoint a SLR for a child. There seems to be some consensus on the following factors:

- The age, maturity and ability of the child to express his or her own views;
- The length and acrimony involved in the litigation regarding parental rights and responsibilities in respect of the child;[218]
- The complexity of the matter;
- Where there are conflicting expert reports;
- The likely impact the final decision will have on existing care and contact arrangements and the child's daily life;
- Where there is reason to believe that a party to proceedings or a witness intends to give false evidence or is withholding information from the court;
- Where there is a contradiction between the recommendations of the Family Advocate and the child's expressed views;
- Where there have been allegations of sexual, emotional or physical abuse of the child.[219]



The Draft Guidelines identify these additional situations in which separate legal representation of a child may be required. The Draft Guidelines aims to identify the kind of situation where it is advisable for the child to be legally represented.[220]

[218] *In Ex Parte van Niekerk and Another: In re Van Niekerk v Van Niekerk* 2005 JOL 14218 (T). , Judge Hartzenberg held that: 'The father wants the court to find that the mother is unreasonable and influencing the children against him, whereas the mother wants the court to find the father is a violent and mentally sick person. Both parents may be wrong. Only if the children or somebody on their behalf puts their case… will a court have a balanced presentation of the situation.' (par 7)

[219] Sloth-Nielsen J(2002) 'Children' in Cheadle, Davis & Haysom (eds) *South African Constitutional Law: The Bill of Rights* 526 – 537; Carnelley (2010) 649; Kassan (2008) 236-238; *Brossy v Brossy* – Submissions by the Amicus Curiae para 37, *Family Advocate v R, R v H* 2005 (6) SA 535 (C) 539.

- ‘Where a child of sufficient age and maturity is strongly expressing a view and a desire to participate and their views are based on realistic expectation, i.e. the child cannot instruct that his parents must not get divorced;
- Where there are real issues that relate to cultural or religious differences that are affecting the child;
- If there are issues relating to the sexual orientation of either or both parents (or other person having significant contact with the child) that are likely to steepen the conflict;
- Where there are issues of significant physical or mental health problems in relation to either party or a child or other person having significant contact with the children;
- When a child of mature years is expressing strong views, and giving effect to those views would mean changing a long standing care arrangement or denying one parent access completely;
- Where one of the parties proposes removing the child permanently from the court’s jurisdiction;
- In an adoption where a parent or third person is opposing the adoption;
- Where it is proposed that siblings be separated;
- In any matter in respect of Chapter 17 of the Children’s Act.’[221]



### 2.1.2 The Role of the Separate Legal Representative

The role of the SLR will depend, *inter alia*, on the nature of the proceedings, the age, maturity and stage of development of the child and the extent to which the child wishes to participate.[222] Older children may require the assistance of a SLR who will act on their instructions and follow their instructions during litigation. This is referred to as client-

[220] Draft Guidelines (2010) 7.
[221] Draft Guidelines for Legal Representatives of Children in Civil Matters (2010) 8.
[222] Du Toit (2009) 109. Also *Brossy v Brossy* – Submissions by the Amicus Curiae par 46-47.

directed representation. If a child does not have the capacity to give instructions then the legal representative acts as a best-interests representative advocating for the objective best interests of the child. The role that the SLR will play is dependent on which of the models of representation is applicable to the situation. The determining factor in the choice of model is the capacity of the child and not the nature of the case.[223] However, it is submitted that the nature of proceedings and the court in which the matter is heard (e.g. Children's Court, Maintenance Court or High Court) does have some impact on the model of representation which would be appropriate.[224] The SLR, however, must be clear about his role from the outset.[225] The Draft Guidelines make it clear that it is not for the legal representative to assess the capacity of the child.[226] The models of legal representation will now be discussed in more detail.



### 2.1.2.1 Models of legal representation

#### 2.1.2.1.1 Client-directed legal representative

In the *Soller* case, Satchwell J describes the role of the legal representative as follows:

> '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. This task is not without certain inbuilt limitation. The practitioner does not only represent the perspective of the child concerned.

[223] Carnelley (2010) 649-650. Carnelley also observes that 'the child can never totally direct the litigation as the client remains a child. Carnelley also submits that the distinction between the models of representation is fallacious as the constitutional best-interest principle would be applicable to, and the paramount consideration in, all matters relating to the child. Carnelley submits that there is only one model for legal representation of children and that is the best-interest legal representation.' It is respectfully submitted that the models of representation are necessary to ensure that children's interests are protected in all instances, whether the child is able to provide instructions or not.

[224] *Brossy v Brossy* – Submissions by the Amicus Curiae par 46-47.

[225] Carnelley (2010) 649-650.

[226] The matter of *BS and Another v AVR and Other* (Unreported) case no 7180/2008 (South Gauteng High Court), 26 June 2008 dealt with the capacity of the children to give instructions and to understand the litigation process. There was a further risk that they may be called to give oral testimony and that they would be cross-examined on their affidavits. The court required that a report be filed by an expert to indicate whether the children did have the capacity to understand the litigation and the meaning of the oath. It is submitted that this may not be necessary in every matter where the child is assigned a legal representative but where the children are young and there is some doubt as to the their capacity, it might be advisable to get an expert report from the outset. The legal representative's role will then also be clear from the outset.

> 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.'[227]

The court in *Soller* confirms the following attributes of the legal representative for a child:

> '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 from the standpoint of the client in the face of doubt or opposition from an opposing party or a court…'[228]

If the SLR is appointed to act as a client-directed representative a standard attorney-client relationship is created and the attorney or advocate will fulfil the same duties as he or she would in representing an adult. This form of representation is only possible where the child is of sufficient age and maturity and has the capacity to give instructions.[229] It needs to be pointed out that the child's capacity need not be akin to that of an adult and does not refer to the technical legal meaning of legal capacity.[230]



The client-directed legal representative's general obligations are to advocate the child's position and advise the child.[231] Judge Satchwell confirms this role by stating that '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.'[232]

The Draft Guidelines also raises the issue that the representative should consider bringing an application on behalf of the child to join as an intervening party. The circumstances will dictate whether the child should be joined as a party to proceedings.

[227] 440E-F.
[228] 437F-H
[229] Draft Guidelines for Legal Representatives of Children in Civil Matters (2010) 4-5.
[230] Du Toit (2009) 109.
[231] Draft Guidelines for Legal Representatives of Children in Civil Matters (2010) 4-5.
[232] 440C.

Factors such as the child's age and maturity and the child's views and wishes should guide the SLR's decision. It has been pointed out that it might be advisable to join the legal representative *nomine officio* rather than the child, where the child is very young.[233]

If the child is joined the child's representative will have all the entitlements other legal representatives have, i.e. calling and cross-examining witnesses, service of all court documents, submitting oral or written argument and the right to appeal. The Draft Guidelines submit that the best interest legal representative would also benefit from these opportunities if he or she applied for the joinder of the child.[234]

#### 2.1.2.1.2 Best interest legal representative

This form of representation requires that the representative ensures that the best interests of the child are protected and that the views and wishes of the child are conveyed to the court. The role of a best interest legal representative has been described as similar to that of a curator *ad litem* in the High Court.[235]. In *B and Others v G* the court approved the notion that 'in cases where very young children are involved, the role of the legal representative would be more akin to that of a curator *ad litem*, while with older children, the legal representative would take instructions from the child, act in accordance with those instructions and represent the child. '[236]



[233] *Brossy v Brossy* – Submissions by the Amicus Curiae par 48-52.
[234] Draft Guidelines for Legal Representatives of Children in Civil Matters (2010) 15.
[235] *Brossy v Brossy* – Submissions by the Amicus Curiae para 46.
[236] 2012 (2) SA 329 para 12, the court referring to Davel & Skelton *Commentary on the Children's Act* (17-21). Also in *Family Advocate v R*, Adv Dyer which was appointed as the child's legal representative in accordance with section 279 of the Children's Act described his role as more of curator *ad litem*. From an objective stance he could inform the court of the child's wishes and views, from his personal interviews with the child and in the context of the psychologist reports that he could access. In this case, Mr Dyer concluded from his interviews with J that although he could not give instructions because he could not foresee the consequences, J could express his opinion. His task was therefore to summarise evidence, represent the interests of the child and give an opinion to the court. For instance he had to consider whether there was influence on J by his mother or other family members. And if there was, whether this tainted the child's views. These are not conclusions a legal representative can safely come to as it is the area of psychology. That is why Mr Dyer stressed that assistance expert opinion is crucial. Telephonic interview with Adv E Dyer on 10 April 2013.

This model is suitable for children who are either too young or immature to give instructions. Such children they may still be able to express views and wishes, which must be elicited and taken into account by the child legal representative. This model is also suitable for a child who is unable (due to an ongoing condition) or unwilling to participate. [237]

The best interest representative must at all times act in an unfettered and independent manner in the best interest of the child. He should come to an independent judgement of what would be in the best interest of the child.[238]

The best interest representative must place the child's views before the court, even if it conflicts with his own views. The views of the child however, must be placed within the context of the child's age, maturity and background. The weight that should be attached to the child's expressed views is for the court to decide and not the legal representative. Recommendations of the representative should be based on legal considerations and examination of factual and expert evidence.[239] Carnelley observes that the legal representative must be appropriately protective of the child's views[240]and do all possible to minimize the trauma to the child associated with the proceedings.

## 2.2 Curator *ad litem*

### 2.2.1 Appointment of a Curator *ad litem*

A key method in the common law to bring children's interests before the court in civil proceedings is through the appointment of a curator *ad litem*. A curator *ad litem* is appointed

[237] Draft Guidelines for Legal Representatives of Children in Civil Matters (2010) 4-5.
[238] Draft Guidelines for Legal Representatives of Children in Civil Matters (2010) 4-5.
[239] Draft Guidelines for Legal Representatives of Children in Civil Matters (2010) 5.
[240] Carnelley (2010) 650-651.

by the court to conduct proceedings on behalf of another person who lacks the capacity to litigate.[241]

In South African law there are four recognized grounds for the appointment of a curator *ad litem* for a child, namely where: (i) The minor is without parents or guardian; (ii) A parent or guardian cannot be found or is not available (for example, due to an accident); (iii) The interests of the minor are in conflict with those of the parent or guardian, or there is a possibility of such a conflict,[242] or; (iv) The parent or guardian unreasonably refuses to assist the minor.[243]

The court has a wide discretion to appoint a person to substitute the guardian. The court's discretion also includes supplementing or altering the ordinary authority of a curator insofar as the matter requires and if it is necessary. The court's discretion is only guided by the best interest of the child.[244]



As Sloth-Nielsen importantly points out that a curator is usually appointed by the court to represent the *interests* of a child (in contrast to *views*) where these may be affected.[245] Reported judgment to date confirm that a curator *ad litem* to assist a child in matters that may possibly affect the interests of that child. Sloth-Nielsen points out 'that presumably children's views would be considered by the curator in establishing 'best interests''.[246]

### 2.2.2 The Role of the Curator *ad litem*

[241] Previously, only the High Court could appoint a curator *ad litem.* However, section 33 of the Magistrates Court Act makes it possible for the Magistrates' Court to appoint a curator *ad litem* in any case where such a curator is required or allowed by law for a party to any proceedings.
[242] In *Legal Aid Board in re Four Children* the court observed that where there is a conflict of interest where the guardians of the children cannot assist them in instituting litigation, the 'ready and simple mechanism to overcome it' is the appointment of a curator *ad litem* . See also *Adams v Adams* (unreported case number: A106/11) Cape Town High Court, 1 February 2012, where a curator *ad litem* was appointed on the suggestion of the court. Legal aid was approached to assist with the appointment of a curator *ad litem* as such an appointment was not within the parties means.
[243] Davel & Skelton (2007) 2-24. See also Skelton A (2008).
[244] *Legal Aid Board in re Four Children* Par 13.
[245] Sloth-Nielsen (2008) 500.
[246] Sloth-Nielsen (2008) 502.

A curator is appointed to examine the circumstances surrounding the child (or children) in a particular situation. One of the further functions of the curator is also to determine whether it is necessary for a legal representative to be appointed for the child. [247] The court will appoint a curator *ad litem* where there is a risk of injustice in general.[248] In *Centre for Child Law v Minister of Home Affairs, t*he court first appointed a curator *ad litem* to represent the interests of the unaccompanied foreign children. The powers and duties of the curator include investigating the circumstances and making recommendations to the court regarding the future treatment of the children. While reporting back to the court, the curator successfully applied for an order in terms of section 28(1)(h) whereby the commissioner of child welfare was instructed to appoint a legal practitioner for each of the children at the repatriation centre.[249] The legal representative in terms of section 28(1)(h) would in turn 'present and argue the wishes and desires of the children'.

The distinction of the role of a legal representative and a curator *ad litem* therefore becomes clear. It is submitted, however, that 'legal practitioner' as used in section 28(1)(h) should be interpreted broadly to include the appointment of a curator *ad litem* as well. These are both forms of child participation and as illustrated above, both can be used depending on the circumstances of the case and the ability of the child to direct litigation.*[250]*

It is submitted that the role of the curator *ad litem* can be beneficial in family law matters[251] but that the real value of such appointments lies in cases which deal with public

[247] Carnelley (2010) FN 52.
[248] Carnelley (2010) FN 52. See *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as amicus curia)* 2003 (2) SA 198 (CC) par 3; *S v M (Centre for Child Law as amicus curiae)* 2007 (2) SACR 53 (CC); and *AD v DW (Center for Child Law as amicus curiae)* 2008 (3) SA 183 (CC).
[249] Par 13. The court appointed the curator *ad litem* as the children's legal representative in terms of section 28(1)(h), referring to *Soller v G* where the task of a legal practitioner in terms of section 28(1)(h) is set out, and added that all unaccompanied children that find themselves in South Africa illegally should have a legal representative appointed to them by the State. (Par 27)
[250] Du Toit (2009) 97.
[251] See specifically In *AD v DW* (Centre for Child Law as Amicus Curiae; Department for Social Development as intervening Party) 2008 (3) SA 183 (CC). where an American couple for sole guardianship of Baby R, in order for them to remove her to the United States, with the view to adopting her there. The Constitutional Court

interest matters. The crucial contribution which a curator *ad litem* can make was recognised by the Constitutional Court in *Christian Education South Africa v Minister of Education*, which dealt with the abolishment of corporal punishment and religious rights, where the court stated the following:

> We have not had the assistance of a curator ad litem to represent the interests of the children. It was accepted in the High Court that it was not necessary to appoint such a curator because the State would represent the interests of the child. This was unfortunate. The children concerned were from a highly conscientised community and many would have been in their late teens and capable of articulate expression. Although both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.[252]



## 2.3 The Office of the Family Advocate

Despite the theoretical availability of legal aid for at least some cases, the presence in court of a separate legal representative for a child in family law matters remains uncommon. Courts therefore tend to rely heavily on family advocates as a neutral source of information about children in divorce cases and care and contact disputes. [253] It is therefore imperative to determine how accurately the family advocates and family counsellors who assist them

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appointed a curator *ad litem* and the court made an order by agreement between the parties incorporating a recommendation which the curatrix made in her report. The court noted with regard to the report of the curatrix: 'The report of the curatrix was particularly helpful in regard to establishing the ripeness of the matter for an expedited hearing.' Para 61.It should be noted that the curatrix's appointment was extended to enable her to act on behalf of Baby R in the adoption proceedings.

[252] 2000 (4) SA 757 (CC) 787. See also *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality project as Amicus Curiae*) 2003 (2) SA 198 (CC) the case dealt with the discrimination against a same-sex couple with regard to the joint-adoption of a child. The court had a thorough report filed by a *curator ad litem* appointed by a court *a quo* regarding the welfare of the couple's teenage children and of children (born and unborn) in general, who may be affected by the court's order.

[253] Pillay and Zaal (2005) 687.

reflect the views of the children and whether this system is sufficient to ensure the realisation of children's participatory rights.

### 2.3.1 The Involvement of the Family Advocate

The functions of the Family Advocate were originally restricted to High Court matters[254] but the legislative mandate of the Office increased significantly with the introduction of new legislation[255], as well as mandatory mediation provisions in the Children's Act[256] and the extension of this work to all lower courts.[257]

The Family Advocate will be assisted by suitably qualified family counsellor or experienced social workers[258] in making an enquiry after the institution of a divorce or after an application has been lodged for the variation, rescission or suspension of an order with regard to custody or guardianship of, or access to a child.[259] Upon conclusion of the enquiry,

[254] Section 2(1) of Act 24 of 1987.

[255] Some of the functions which the Children's Act has added to the Family Advocate's Office are:
The referral of a dispute between two unmarried parents of the child regarding paternity for mediation in terms of section 21(3) of the Children's Act; The registration of a parental responsibilities and rights agreement; Providing input in terms of section 23(3)(a) of the Children's Act in the application for an order granting care of and contact with the child; an application in terms of section 28(3)(e) of the Children's Act for the termination, extension, suspension or restriction of parental responsibilities and rights; The preparation of a report and recommendations in terms of section 29(5)(a) of the Children's Act as read with section 29(6) of the Children's Act regarding the appointment of a legal practitioner; Involvement in major decisions involving the child in terms of section 31(1); Involvement in terms of section 33(5)(a) in the formulation of parenting plans; Involvement in the formalities of family plan in terms of section 34(3)(b)(ii)(aa). See Boezaart & De Bruin (2011) Fn 123

[256] In determining the best interest of the child, section 7 of the Children's Act requires that a factor that must be taken into account is 'which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.' For further discussion of mediation in the children's Act see Schneider C (2007) 'Mediation in the Children's Act 38 of 2005' Miller Du Toit Conference – 26 January 2007 available at www.famac.co.za/mediation/in-the-childrens-act (accessed 26 September 2013).

[257] See the Jurisdiction of the Regional Courts Act 31 of 2008. See also Regulation 4A of the Regulations made under the Mediation in Certain Divorce Matters Act 24 of 1987, which provides for the circumstances in which court may cause investigation to be carried out by the Family Advocate in maintenance inquiries and domestic violence proceedings.

[258] In *Terblanche v Terblanche* 1992 (1) SA 501 (WLD) the court discussed to some extent the function and duties of the Family Advocate. The court held that '[t]he Family Advocate is particularly well equipped to perform such functions and duties, having at his or her disposal a whole battery of auxiliary services from all walks of life, including family counselors appointed in terms of the Act and who are usually qualified social workers, clinical psychologists, psychiatrists, educational authorities, ministers of religion and any number of other persons who may be cognizant of the physical and spiritual needs or problems of children and their parents or guardians, and who may be able to render assistance to the Family Advocate in weighing up and evaluating all relevant facts and circumstances pertaining to the welfare and interests of the children concerned.'

[259] Act 24 of 1987 still refers to the pre-Children's Act terminology of 'custody' and 'access'. Section 1(2) of the Children's Act 38 of 2005 provides that "in addition to the meaning assigned to the terms 'custody' and 'access' in any law and common law, the terms must be construed to mean 'care' and 'contact' as defined in the Children's Act.

the Family Advocate must furnish the court with a report and recommendations on any matter concerning the welfare of each minor or dependant child of the marriage or regarding such matter as is referred to him by the court.[260] The Family Advocate may be requested to conduct such an enquiry either by any party to the proceedings or the court, or the Family Advocate may apply to court for authorization to institute an enquiry into a matter before the court, if it appears that an enquiry is needed.[261] The Family Advocate may also, if he or she deems it in the interest of the child concerned and if so requested by the court, appear at a trial or hearing and adduce any relevant evidence. The Family Advocate may then also cross-examine any witness giving evidence.[262]

Where the parties are in agreement about the care and contact arrangements of the children, their decision will effectively be made an order of court, with Family Advocate merely endorsing their settlement agreement. It is possible for the Family Advocate to investigate the arrangement and make a recommendation to the contrary but this is seldom done, especially where the arrangement is *prima facie* satisfactory.[263]



*Van Vuuren v Van Vuuren*[264] contains guidelines on when a Family Advocate ought to investigate the arrangements regarding children. An order authorising an enquiry must be applied for if it is envisaged that:

- Custody of a young child will not be awarded to the child's mother;
- Siblings will be separated;
- Custody will be awarded to a person other than the child's parent;

[260] Section 4(1) of Act 24 of 1987.
[261] Section 4(1) and 4(2) of Act 24 of 1987.
[262] Section 4(3) of Act 24 of 1987.
[263] Carnelley(2010) 649.
[264] 1993 SA 163 (T)

- An arrangement regarding custody or access will be made which is prima facie not in the child's interests.

### 2.3.2 The Role of the Family Advocate

The Act does not set out the procedure that the Family Advocate's office must employ to conduct the enquiry. Similarly, the Regulations made under the Act do not provide a procedure and states only that '[t]he Family Advocate shall…institute an enquiry in such manner as he may deem expedient or desirable.'[265]

The modus operandi of the Family Advocate's office has become established over the years and the accepted practice is that when conducting an enquiry, the Family Advocate will conduct interviews with the parents to ascertain their personal circumstances and the details of the dispute. The Family Advocate will also interview the child and allow him or her an opportunity to be heard. The Family Advocate will record the views of the child in its report and will consider them in making a recommendation. The Family Advocate's office maintains that the interview with the child prevents the child from having to appear in court.[266]

As identified by Kassan, 'the Office of the Family Advocate creates a (limited) platform for the views of the child to be heard'[267] because the Family Advocate is not obliged to include the child's views in the report for the court. The views of the child will not have an overriding effect on the recommendation that Family Advocate will make. 'The role of the family advocate is to make recommendations as to what is the overall best interest of the

[265] Regulation 5 on the Regulations made under the Mediation in Certain Divorce Matters Act 24 of 1987, Government Gazette 12781 of 3 October 1990.
[266] Office of the Family Advocate http://www.justice.gov.za/FMAdv/f_main.htm (last accessed 29 September 2013).
[267] Kassan (2004) 57.

child. (which may in some instances be contrary to the expressed wishes of the child) Their role is not to represent and advocate the wishes or voice of the child.'[268]

The court in *Soller v G* confirmed the role of the Family Advocate as 'a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer.'[269] The court further confirmed that the Family Advocate is not appointed as a representative of any party to a dispute – neither the mother, father or the child. The Family Advocate's role is to assist the court by considering all the relevant facts and to make a balanced recommendation. The Family Advocate must approach all matters in a neutral fashion in order that the wishes and desires of disputing parties can be more closely examined and the true facts and circumstances ascertained.[270]

It is imperative that the Family Advocate be absolutely independent to ensure that the recommendations it makes cannot be attacked due to a lack of impartiality. The court will make its decision based on best interests of the child bearing in mind the Family Advocate's report and recommendations.[271] In any case, however, a court is permitted to reject the Family Advocate's report *in toto* or to accept the factual findings yet make an order that materially differs from the Family Advocate's recommendations.[272]

It has been pointed out that in many instances, where the Family Advocate investigates and makes a recommendation incorporating the views of the child (presuming the child is mature enough to express their views) this will suffice and the child's interests

[268] Kassan (2004) 57.
[269] *Soller v G and Another* 2003 (5) SA 430 (W) par 27.
[270] *Soller NO v G* par 23.
[271] Skelton (2008) 224. See *I v S* 2000 (2) SA 993 (C) where the court found that it could not follow the Family Advocate's recommendation in that case.
[272] *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC) 606-610. In this matter counsel for applicant (with counsel for the respondent concurring) requested that the family advocate should recues herself on the basis that she had been accused of bias by the respondent in an earlier complaint made in writing to the office of the Family Advocate, and that during the hearing she had to cross-examine the respondent.

will be properly taken care of.[273] However, the court's investigations are frequently superficial and inadequate.[274] This is not necessarily due to lack of skill or knowledge but can be attributed to the fact that the Family Advocate's Office carry high caseloads and are under-resourced.[275]

In addition to resource constraints, the variety of difficulties that are associated with the effective communicating with presiding officers on behalf of children should not be underestimated.[276] Based on the research of Pillay and Zaal, courts should be cautious in assuming that the Family Advocates are best placed to accurately convey the views and concerns of child. Further, they indicate that there is additional research data to the effect that there is no guarantee that Family Advocates will place much emphasis on ensuring that the court has a full understanding of the child's views, even where Family Advocates are correctly apprised of these views and concerns.[277]

Presently, courts rely heavily upon the reports and recommendations of the Family Advocate and family counsellor to place the views and wishes of children before the court in a neutral and accurate manner. As has been shown, there are many difficulties in the functioning of the Family Advocate's office that make such reliance problematic. There is

[273] Skelton (2008) 224.
[274] Carnelley (2010) 641.
[275] See *Brown v Abrahams* (2004) 1 All SA 401 where the court notes 'the severe resource constraints presently impeding the proper functioning of the Office of the Family Advocate…' (424C-D).
[276] Pillay and Zaal (2005) 689.
[277] Pillay and Zaal (2005) 689. In a study conducted by the second author of that article in 2002, it was found 'that only 22.5 per cent of family advocates placed strong emphasis on conveying and asserting the wishes of children to courts , because the majority of them saw their primary responsibility as one of revealing and advocating what they considered to be in the best interests of children or other parties'. See Zaal N (2003) 'Hearing the Voices of Children in Court: A Field Study and Evaluation' in Burman S (ed) *The Fate of the Child – Legal Decisions on Children in the new South Africa* Juta & Co, Ltd: Cape Town. See also Pillay R, 'The custody evaluation process at the Durban office of the Family Advocate: An Analysis of the criteria used by family counsellors in the drafting of assessment reports' (unpublished mini-dissertation: Interdisciplinary Masters Degree in Child Care and Protection, University of Durban – Westville). Pillay L's study conducted in 2003, and it was found that in 44 per cent of reports by family counsellors reviewed there was expressly mentioned that the wishes of the children involved was a factor influencing their recommendation. Further it was found that in the 44 per cent of reports that mentioned children's views, their comments were seldom quoted verbatim but almost always rephrased or interpreted. The findings indicate that family counsellor's reports provided courts 'with only a somewhat muted synthesized impression of the voices of children.'

sufficient empirical data to suggest that the Family Advocates system frequently fails to maintain the participatory rights of children as required by article 12 of the CRC and Article 4(2) of the African Charter.[278]

## 3. OTHER PARTICIPATION PROCEDURES AVAILABLE TO CHILDREN INVOLVED IN OR AFFECTED BY FAMILY LAW MATTERS

### 3.1 Expert Reports

An issue that also demands consideration is whether reports by social workers or psychologists or their evidence in court is indeed an adequate manner to place the child's views before the court for consideration. Undoubtedly the most common way of placing children's views before the court, this indirect method of participation has its advantages for children but is also subject to some criticism.



#### 3.1.1 The Role of the Expert

The court in *Stock v Stock* explained the role of an expert witness as follows:

> An expert in the field of psychology or psychiatry who is asked to testify in a case concerning the custody, or variation of a custody order, or children, a case in which difficult emotional, intellectual and psychological problems arise within the family, must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him.[279]

Section 62 of the Children's Act is the only provision in the Children's Act which makes provision for the appointment of an expert in children's matters. In terms of the

[278] Pillay and Zaal (2005) 690. Pillay and Zaal contend that 'in order to supplement the second-hand and sometimes incomplete evidence relating to the views of children conveyed by family advocates, presiding officers in divorce cases need an additional source of information that will provide them with a direct impression of these views .'

[279] 1981 (3) SA 1280 (A) at 1296E-F. See also Jackson v Jackson 2002 (2) SA 303 (SCA) 311F-G, 323E-324C and 327G-333I) and *Gentiruco v Firestone SA (Pty) Ltd* 1972 1 (SA) 589 (A).

provision, the Children's Court may, for the purposes of deciding any issue before it, order that a designated social worker, family advocate, psychologist, medical practitioner or other suitably qualified person may carry out an investigation to establish the circumstances of the child, the parent or parents, a person who has parental responsibilities and rights in respect of the child etc. A person who is subject to such an investigation may also obtain supplementary evidence or reports from other suitably qualified persons.[280] As the Children's Court is empowered to deal with parental responsibilities and rights disputes, these provisions will find application in those family law matters as well. Although section 62 specifically has application to proceedings in the Children's Court, expert reports are widely used in other courts as well though it is not provided for in legislation.

The Supreme Court of Appeal seems to have indicated its preference for the wishes of the child to be placed before the court indirectly, *via* expert evidence. A case that has confirmed the position with regard to the admissibility of expert evidence and recommendations from the Family Advocate is *P v P* .[281] The Family Advocate at the instance of the Appellant was requested to investigate the best interest of the children in this matter. The Family Advocate in turn appointed a social worker and family counsellor, to conduct an investigation into the best interest of the child and also engaged the services of a clinical psychologist, to undertake a psychological assessment of the children.



The Supreme Court of Appeal noted that the Family Advocate's opinion was based almost exclusively on the recommendations in the reports submitted to her by the experts she appointed. The lack of objectivity was highlighted by Chetty J [282] and the appeal court noted that some of the experts' attitude was indeed unfortunate as the task of an expert is to assist

[280] Section 62(2) of the Children's Act.
[281] 2007 (5) SA 94 (SCA).
[282] The appeal court noted that the family counselor in cross-examination strenuously defended her position and was unwilling to make any concessions in favour of the Respondent, which indicated her lack of objectivity. It should further also be noted that when the children's preferences was put to these expert witnesses under cross-examination, they were still unwilling to reconsider their opinion. (para 21)

the court in an objective manner.[283]Chetty J pointed out that 'it is clear that the expert opinion is not mere conjecture, surmise or speculation of the expert: it is his judgement in a matter of fact. It is equally clear, that whilst in many cases a court needs and benefit from an expert's opinion, the expert witness should not usurp the function of the court.'[284] The appeal court concluded that Chetty J did not question the special knowledge, training or experience of the various expert witnesses, but identified his main problem with such experts as their inability to draw a line between matters of fact and matters of value thereby distorting the judicial process by acting like judges.[285]

This case also highlights the important principle of good faith, which entails that 'each person that participates in litigation to present the court with all relevant facts, negative and positive, so that the court could come to the right conclusion and therefore a decision, based on correct fact.'[286]



### 3.1.2 The Advantages and Disadvantages of Expert Reports as a form Participation

The elements that make expert investigations and reports a meaningful method of participation include:

- **Professional knowledge and special skills:** In various common law jurisdictions, including Australia, this indirect method of informing the court of the child's views is favoured above a judge interviewing a child directly.[287] Social workers and mental health professionals possess the specific knowledge and expertise to enable children to ensure that children's real views are elicited and placed before the court. Experts

[283] Par 11.
[284] Par 16.
[285] Par 17.
[286] de Ru H (2008) 'Family Law: The Value of the Recommendations made by the Family Advocate and Evidence by Expert Witnesses in Determining the best Interests of a Child: *P v P* 2007 (5) SA 94 (SCA)' 48(2) *Codicillus* 71.
[287] Cashmore J & Parkinson P (2007) 'What Responsibility Do Courts Have to Hear Children's Voices?' 15 *International Journal of Children's Rights* 49.

are also required to interpret the child's views and apply his or her professional knowledge to the situation. An expert report can be very helpful to the court and persuasive.[288]

- **Specifically trained to speak to children:** An expert report gives the child the benefit of speaking with someone who is specifically trained to communicate with children in stressful situations.[289]
- **Builds a relationship of trust with the child:** The expert may conduct several interviews with the child over a period of time and will establish a rapport with the child. Interviews are also done in a more relaxed setting away from the court which may reduce stress and pressure on the child. In such a setting the child is more likely to reveal his or her true feelings. It has also been pointed out that by conducting several interviews, the expert can ascertain whether the child's views are consistent or varies depending on the immediate circumstances.[290]
- **Places the child's views in context and can be cross-examined with regard to observations and interpretations made:** As pointed out by Doogue and Blackwell:

> '[The expert can] comment on their observations of the behavioural nuances of stress, anxiety, and so-forth. The advantage for the Court in this being the method [for ascertaining the child's views] is that this person is able to give evidence and can be



[288] In *I v S* 2000 (2) SA 993 (C) the two children expressed their view not to have regular contact with their father to a psychiatrist and the family advocate. The court rejected the family Advocate's recommendation and upheld the wishes of the children as recommended in the psychiatrist's report. See also *Meyer v Gerber* 1999 (3) SA 550 (O), where the court did not speak to the parties' 15-year-old son but took the boys preferences into account which were illustrated in a letter the child wrote to his mother, two affidavits, reports from the Family Advocate and two psychological reports.

[289] Tapp P (2006) 'Judges are Human too: Conversation Between the Judge and a Child as a Means of Giving Effect to Section 6 of the Care of the Children Act 2004' New Zealand Law Review 39.

[290] Bala (2004) 'Assessments for Post-Separation Parenting Dispute in Canada' 42 *Family Court Review* 490 as cited in Tapp P (2006) 'Judges are Human too: Conversation Between the Judge and a Child as a Means of Giving Effect to Section 6 of the Care of the Children Act 2004' *New Zealand Law Review* 39.

subjected to cross-examination on their evidence, thus providing accountability for the views they have expressed on the child's behalf.'[291]

Cross-examination on the reasons for the child's views and the child's demeanour meets the parents' due process rights and makes it more likely that the parents will accept the decision.[292]

Criticisms of placing the views of children before court through a third party expert report include the following:

- **Children's views are filtered and reinterpreted:** There is noteworthy research which indicate that children are unhappy with the filtering or reinterpretation that can occur when their views are conveyed to court indirectly.[293]
- **Interview fatigue:** The Committee on the Rights of the Child point out that the use of expert assessments and reports must be limited where ever possible and emphasizes that in 'hearing' a child 'that a child should not be interviewed more than necessary, in particular when harmful events are explored. The "hearing" of a child is a difficult process that can have a traumatic impact on the child.'[294] In the matter of *J v J*[295] the child had been the subject of a long line of litigation between his parents. In addition, the child had been repeatedly subjected to psychological assessment. The child had complained to the psychologist that he was not a 'lab rat' to be subjected to continuous testing. The judge gave considerable attention to the child's wishes and ordered that the child be allowed to settle down without further litigation, assessment and investigation'.

[291] Doogue and Blackwell (2000) 'How Do We Best Serve Children in Proceedings in the Family Court?' *Butterworths Family Law Journal* 193-203 as cited in Tapp (2006) 39.
[292] Tapp (2006) 72.
[293] Tapp (2006) 39.
[294] General Comment No. 12 (2009) 10.
[295] 2008 (6) SA 30 (C).

- **Conflicting reports:** The evidence of expert witnesses can constitute valuable contributions to disputed family law matters but not always conclusively. Parties often present expert evidence directly opposing the conclusion of the other.[296] Such conflicting reports may lead to protracted court proceedings.
- **Whether children's views are correctly placed before the court depends largely on the quality of the expert report:** In *Hlope v Mahlalela*[297] the court noted the inadequacy of the psychologist's report, but the court did not suggest further investigation. However in *B v P*[298] the court specifically ordered that the child be re-interviewed so that her wishes could be more accurately ascertained.

The recommendations of expert witnesses are meant be of assistance to the court in determining the best interests if the child. The courts are not bound to accept these recommendations. As has been pointed out, this confirms the independence of a presiding officer and, in a broader context the judiciary.[299]



### 3.2 Judicial Interviews

There has been an ongoing debate regarding the wisdom of judges speaking to children in family law proceedings. Only in exceptional cases will the child be heard directly by the judge, or as a witness in court.[300] The choice of a judge to speak to a child directly is entirely

[296] See eg. *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O) 97D-E and *Ex Parte Crichfield* 1999 (3) SA 132 (W) 137I-J.
[297] 1998 (1) SA 449 (T)
[298] 1999(4) SA 113 (T)
[299] de Ru (2008) 71.
[300] However, in *Hlophe v Mahlalela* 1998 (1) SA 449 (T) (custody dispute between father and maternal grandparents) the child of eleven years old was called as a witness and the counsel for applicant only posed one question to her: 'where would you prefer to stay?' to which she replied 'with my grandparents'. Putting the child in such a position was undoubtedly very stressful, traumatic and unfair that she had to make such a choice in the presence of all the parties. What is worse is that Van den Heever J proceeds to state that for reasons apparent from his judgment he will not take any cognisance of the child's expressed preference. It is submitted that there is nothing apparent from this judgment that would justify the way in which this child views was elicited and then dismissed.

a matter of judicial discretion. In the event that a judge does decide to see the child it will usually be in the judge's chambers, without having the child sworn as a witness.[301]

It is submitted that circumstances which may urge a judge to speak directly to a child include, where the children asked to see the judge, where it is suspected that the child has been influenced or systematically alienated,[302] where parents are engaged in an intractable dispute[303] and where there is conflicting expert opinions.

The following are some of the benefits both a judge and the child may derive from this process:

- **Provides a further participation option for the child:** The more participation procedures are available for the child to choose from, the more likely it becomes that the child's real views are placed before the court. The child also has the option to choose the method that is the most comfortable for him or her.
- **Informative for judge:** The court will be able to compare the report of the Family Advocate and other expert reports with its own interview with the minor child in order to reach a well-informed decision with regard to the care and contact rights relating to the minor child
- **Empowering for chid:**. Judges have also indicated that they have gained much insight in meeting children face to face and usually information comes to the fore which had not been disclosed before.[304]
- **Better understanding of the child and intensity of views:** One of the major benefits of judicial interviews that has been indicated is that the judge can get an appreciation

[301] Bala N, Lee K, Lindsay R and Talwar V (2010) 'The Competence of Children to Testify: Psychological Research Informing Canadian Law Reform' 18 *International Journal of Children's Rights* 53 Fn 1.
[302] Raitt F (2007) 'Hearing Children in Family Law Proceedings: Can Judges make a Difference?' 19 *Child and Family Law Quarterly* 206.
[303] Raitt (2007) 208.
[304] Raitt (2007) 217.

of the strength with which the child hold his or her views, more so than just reading a report.[305] The judge can gain a first hand impression of the child's maturity, which is a factor to be taken into consideration when deciding the weight to be attached to the child's views.[306]

- **Confirm previous expressed views:** Evidence presented in court and cross-examination may have cast doubt on whether the child's views remain current. 'A conversation with the child after the evidence has been led may ensure that the judge has the most up-to-date and relevant information.'[307]
- **Different possible solutions come to the fore:** It has also been noted that children can come up with solutions no one else has thought of and which are more workable. For example in *Kleynhans v Kleynhans and Another*[308] the conflicting opinions of the experts lead to the father bringing an application to have the dispute resolved by oral evidence. What is of significance in this case is that a major reason for the dismissal of the application was because the children had on several occasions already suggested an acceptable solution to the impasse that had been reached in their parent's ongoing dispute regarding their father's contact with them.
- **Measure likely impact of decision:** Before the decision is made the judge might have a conversation with the child to estimate the likely impact of going against a child's firmly held wishes. The purpose should not be to persuade the child but to obtain a better sense of whether ordering a parenting arrangement which goes against the wishes of a child is likely to work.[309]



[305] Raitt (2007) 207.
[306] Cashmore & Parkinson (2007) 52. In *McCall v McCall* 1994 (3) SA 201 (CPD). The judge found the boy to be intelligent, articulate, persuasive, sincere and candid who displayed a degree of maturity and intellectual development that satisfied him that the child is capable of forming and expressing an intelligent and informed judgment on what he subjectively perceives to be in his best interest. (208B)
[307] Tapp (2006) 61. Cashmore & Parkinson (2007) 53.
[308] (2009) JOL 24013 (ECP).
[309] Cashmore & Parkinson (2007) 53.

- **Direct access to decision-maker:** Having direct access to the decision maker can be very powerful for children and it has been indicated that the process of *being listened* to could well be as important to children than the actual outcome.[310]
- **Judge can assess the reasonableness of the submissions made by the parties**: Where there are conflicting opinions regarding the child's capacity to express his views or major disputes of fact, interviewing the child would allow the judge to assess the reasonableness of the submissions by made on behalf of the parties.[311]

The following are criticisms of judges conducting judicial interviews and risks and difficulties faced by judges considering using this method of participation:

- **Inadequacy of training of judges to communicate with children:** It has been argued that a 'judge does not have the necessary skill to facilitate a child's communication on sensitive matters, to provide the child with support when the child expresses views that they feel are disloyal to a parent, or to understand the nuances of a child's communication.'[312]
- T**he limitation of a once-off interview: '**A judge does not have the time to establish the relationship of trust that is usually required before a child will reveal their views on matters important to them and their family.'[313]
- **Child is subjected to yet another interview**: It has been held that where a child has been interviewed by various persons and has persisted with the same view, it would 'insensitive' to subject the child to further interviews, well knowing that it is unlikely that the child will change his mind.[314]

[310] Raitt (2007) 209.
[311] See in this regard *Family Advocate v R* (Unreported) case number 2004/2012 Eastern Cape High Court – Port Elizabeth.
[312] Tapp (2006) 62.
[313] Tapp (2006) 62.
[314] *Meyer v Gerber* 1999 (3) SA 550 (O) at (656C).

- **Speaking to a judge may be intimidating to a child:** In *F v F* the court observed that if the child 'found interactions with professionals (who are trained in child psychology and possess the requisite skill and sensitivity to conduct the relevant enquiry) daunting, it is then only logical to expect an encounter with five strange judges, ill-equipped to deal with the situation, to be thoroughly intimidating.'[315] The child may be so intimidated by the judge that he or she becomes withdrawn.
- **Speaking to a judge may impose a burden of responsibility on children:** Children may carry a sense of responsibility in circumstances of family break-up regardless of whether their views are explicitly sought.[316] A child, unaware how much weight was actually attached to his views, may feel responsible for the ultimate decision. It has been argued that most children do not want to determine or be responsible for the outcome.[317]

There are of course many opponents against the direct involvement of children in litigation in this way. De Jong argues that 'it is generally accepted that the adversarial system of litigation is just too hostile, too confrontational, too formal and too intricate and that direct involvement in such a system may have dangerous repercussions for the children.'[318]

Any judge having a conversation with a child must be aware of the risks and difficulties as well as the benefits. It is argued that such conversations are not a substitute for expert interview and evaluation of the family dynamic. Nevertheless these conversations can be a useful complement to the report of an expert.[319] It is argued that the difficulties inherent in this process can be overcome by judges 'but it does take a serious degree of purpose, will and

[315] 2006 (3) SA 42 (SCA) par 25-26.
[316] Raitt (2007) 214.
[317] Cashmore & Parkinson (2007) 53.
[318] De Jong M (2008) 'Giving Children a Voice in Family Separation Issues: A Case for Mediation' 4 *Tydskrif vir Suid- Afrikaanse Reg* 787.
[319] Cashmore & Parkinson (2007) 54.

creativity to tackle them.'[320] It is submitted that judges should not hesitate to apply their discretion to speak directly to children if they are of the opinion that the circumstances call for such intervention and see it in the best interest of the child.

## 4. OBSERVATIONS AND CONCLUSIONS

It has been argued that a 'child's very competence to form and express a view' may depend on the procedural participation opportunities provided.'[321] The available procedures could enhance or inhibit the child's ability to and express a view. A supportive and empowering environment to discuss and consider the available participation options may also have an effect on the child's ability.[322]

It is submitted that children in family law matters need to be informed from the outset of the process, and during it, of the participation options which are available to them. They must be given appropriate information about the process and informed about what to expect.[323]



Each participation method has its advantages and disadvantages. The appointment of a SLR may raise concerns that the child is placed in difficult position because the child may be in direct conflict with the parents or at least one of the parents and the appointment of a legal representative may lead to a further protraction of the litigation and costs.[324] It has been argued, however, that in some cases a SLR for the child could be vital in order to allow the child a "proper opportunity to express and explain [his] views".[325]

With regard to judicial interviews, court room testimony and the appointment of a SLR most argue that these are unsuitable participation methods because these options do not

[320] Raitt (2007) 223.
[321] Barratt A (2003) "The Best Interest of the Child"– Where is the Child's Voice?' in Burman S (ed) *The Fate of the Child: Legal Decisions on Children in the new South Africa* Juta & Co, Ltd: Cape Town 153.
[322] Barrat (2003) 153.
[323] Cashmore & Parkinson (2007) 55.
[324] Van Heerden *Boberg's Law of Persons and the Family* (1999) 542.
[325] Van Heerden (1999) 542.

provide the 'supportive environment best suited to a nuanced treatment of the child's voice or maximising the child's ability to participate.'[326]

Further, with regard to judicial interviews, the South African cultural context must be kept in mind. African culture dictates that a child must have respect for their elders. Kaime notes that:

> '[I]n many African traditional societies, the autonomy of the child is often heavily constrained. Notions of child and childhood are generally premised on the idea that it is only adults that know what is best for children. From an early age, children are taught to defer and revere the elderly'.[327]

A judge speaking directly with a child may then prove to be of very limited benefit because the child could either clamp up due to intimidation or fear or the child may just agree with any observations by the judge, once again in the fear that any dissent will be seen as disrespectful.



For some children being interviewed by trained professionals might be appropriate for them to have a true opportunity to be heard. However, the cost of such practitioners is unaffordable to many parties, and private practitioners may only be available to the wealthy.[328]

The child's development, social, economic and cultural environment will all have an impact on how the child expresses him- or herself.[329] The circumstances of each case should, therefore dictate what participation method or methods should be adopted. However, due

[326] Barrat (2003) 154.
[327] Kaime T (2005) 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' 5 *African Human Right Law Journal* 231.
[328] Barrat (2003) 154.
[329] Barrat (2003) 153.

regard should be given to the age of the child, the nature of the decision being made, the forum, the type and quality of the representation available, and the available state resources.

It is submitted that courts tend to gloss over procedural issues[330]. It has been shown that the quality of the participation methods is of crucial importance. It is further submitted that a combination of the procedures might be the best solution for both the child and the court.[331]

## 5. COMPARATIVE ANALYSIS[332]

It is submitted that looking at the Australian experience and methods of placing children's views before the court could inform the South African participation landscape. Australia's family law structures may be more developed than South Africa's, but the underlying principles of the two systems are very similar. A comparison between these two systems, therefore, seems appropriate.



### 5.1 Legal Landscape and Legislative Framework

The Family Court of Australia was established as a specialist court in 1976. The court is a superior court which deals with more complex matters. The Federal Magistrates Court is a faster, cheaper and simpler forum for the resolution of family law disputes. The Australian

[330] Barrat (2003) 154.
[331] *Family Advocate v B* (2007) 1 All SA 602 (SE) mother (abductor) and child had been subjects of three comprehensive reports which deal intrinsically with the child's well-being. (i) report by family counsellor engaged to conduct "an investigation regarding the social circumstances of mother and child; (ii) a report by a curator ad litem appointed by the court to represent the child in these proceedings, "to report to this Court on the best interest of the child"; (iii) a medico-legal psychological assessment compiled psychologist at the bequest of the curator ad litem.
[332] This section will be based on the findings of a survey undertaken in 2009 under the auspices of Childwatch International Research Network. The study has been identified as the first study to examine children's participation across different international family law contexts. At the time the findings was published South Africa had indicated that did intend to complete the survey. The Child & Youth Research & Training Programme, which is a South African Childwatch International Associated Institution, would complete the survey. At the time of writing, it was unclear whether South Africa has indeed completed the survey. Newell S, Graham A & Fitzgerald R 'Results of an International Survey Regarding Children's Participation in Decision-Making Following Parental Separation', Report to Childwatch International Research Network's Children and the Law Thematic Study Group, (Australia: Centre for Children and Young People, Southern Cross University, November 2009).

family law system is strongly in favour of resolving disputes by private agreement between parents and only 6% of cases require judicial determination.[333]

The Family Law Act 1975 provides for the resolution of disputes concerning children following divorce. Taylor *et al*. point out that this legislation does not specifically mention the child's *right* to have their views heard and taken into account.[334] However, when a court determines what is in the child's best interests, the court must consider 'any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views'.[335]

In determining the best interests of the child the court must take into account the 'primary considerations' in section 60CC, which are (1) the benefit to the child of having a meaningful relationship with both his or her parents; and (2) the need to protect the child from physical and psychological harm and being subjected or exposed to abuse, neglect or family violence.[336] The view expressed by the child is included as an 'additional' consideration. Taylor *et al.* observe that this classification if the child's views as an 'additional consideration' 'overlooks the importance of the children's views and is inconsistent with the intention of the CRC which emphasises participation rights as being foundational to the decision-making process.'[337]



## 5.2 Methods of Participation

[333] Newell *et al.* (2009) 7. In terms of Section 60I of the Family Act 1975, Family Dispute Resolution is compulsory in all matters before parties may proceed to have the matter resolved by the court.
[334] Taylor N, Fitzgerald R, Morag T, Bajpai A and Graham A (2012) 'International Models of Child Participation in Family Law Proceedings following Parental Separation / Divorce' 20 *International Journal of Children's Rights* 654. See *Russell & Russell & Another*(2009) FamCA 28 (22 January 2009) where court held that the child's expressed views on his or her welfare must be considered together with any other factor relevant to the weight to be attached to those views.
[335] Section 60CC(3)(a).
[336] Section 60CC(2A) requires that in applying the primary considerations, the court must give greater weight to this consideration.
[337] Taylor et al. (2012) 655.

Children participate in Australian family law matters in a number of ways. Carnelley points out that like South Africa, Australia has taken a more protected stance, avoiding that children are directly involved in litigation between their parents.[338] Section 60CD of the Act sets out how a child's views are to be expressed. In terms of that section, the court may inform itself of a child's views by having regard to anything contained in a report given to the court under section 62G(2); by making an order under section 68L for the child's interest in proceedings to be independently represented by a lawyer; or subject to applicable Rules of Court, by such other means as the court thinks appropriate. These methods will now be discussed in more detail.

### 5.2.1 Family Reports

Children have their views most commonly heard through the Family Report.[339] The Family Law Act makes it clear that a family consultant who is directed to give the court a report *must* ascertain the views of the child in relation to the matter and must include the views of the child on that matter in the report.[340] A family consultant need not obtain a child's views if doing so would be inappropriate because of the child's age or maturity or some other special circumstance.[341] Family consultants are usually psychologists and/or social workers who specialise in child and family issues after separation and divorce.[342]

### 5.2.2 Judicial Interviews

[338] Carnelley (2010) 656. Although section 65C(b) provides that children can also apply for a parenting order directly.
[339] Section 62G(2).
[340] Section 62G (3A). My emphasis.
[341] Section 62G(3B).
[342] Commission for Children and Young People and Child Guardian – 'The Representation of Children and Young People's Views in Australian Family Law Decision Making: A Discussion Paper' available at http://www.ccypcg.qld.gov.au/resources/publications/archived-papers.html (last accessed 31 October 2013)

On rare occasions, the judge will speak directly to a child in chambers. Judges seem to be reluctant to interview children for reasons similar to those discussed above[343], even though such an interview is only possible with the permission of the child.[344]

A case that has illustrated how well judicial interviews can work in practice is *Painter v Morley*.[345] Four children were given the opportunity to express their views directly to the Court. The interview took place in a courtroom in the presence family consultant, counsel for the Independent Children's Lawyer and the judge. The family consultant posed the questions to the children by asking them to confirm what they said to the family consultant in the last family report. The children were informed that they did not have to be in court if they did not want to; they did not have to express any view and there would be no difficulties if they did not do so; that the decision was made by the Judge and not the children; and that it was simply an opportunity to ascertain their views if they wished to give them. At the conclusion of the interview, the family reporter gave evidence of what had occurred and what was said. The interview was recorded and a transcript of the interview was also available to the Court and the parties.



### 5.2.3 Independent Children's Lawyer

While no right exists to independent representation for children in family law disputes, it is common for children to be appointed a lawyer in complex cases.[346] If is appears to the court that the child's interests in the proceedings ought to be independently represented by a lawyer, the court may order that the *child's interests* in the proceedings are independently represented by a lawyer.[347] The court may order the appointment of an independent

[343] See par 3.2.
[344] Carnelley (2010) 665.
[345] [2007] FamCA 283.
[346] Carnelley (2010) 665.
[347] Section 68L(2). My emphasis.

representative on its own initiative, by application of the child or an organisation concerned with the welfare of children or any other person.[348]

### 5.2.3.1 The circumstances which would require the appointment of a ICL

In the matter of *Re K Appeal,*[349] the court identified the circumstances which would require the appointment of a ICL:

- presence of allegations of child abuse ,whether it be physical, sexual or psychological abuse;
- if a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent;
- intractable conflict between the parents;
- the child is apparently alienated from one or both parents;
- real issues of cultural or religious differences affecting the child;
- the sexual preference of either or both parents or some other person having significant contact with the child are likely to impinge upon the child's welfare;
- the conduct of either or both parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare;
- there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the children;
- on the material filed by the parents, neither seems a suitable custodian;



[348] Section 68L(4).
[349] (1994) FamCA 21.

- one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practical purposes exclude the other party from the possibility of access to the child;
- Cases where it is proposed to separate siblings or;
- Cases where none of the parties are legally represented.

The court may make an order for the purpose of allowing the lawyer who is to represent the child's interests to find out what the child's views are on the matters to which the proceedings relate.[350] Obtaining the child's views is again limited if it would be inappropriate because of the child's age or maturity.[351] The Family Law Act emphasises that a person cannot require a child to express his or her views in relation to any matter.[352] The Guidelines provide for the practical implementation of this provision and states that '[a] child who is unwilling to express a view must not be pressured to do so and must be reassured that it is his or her right not to express a view even where another member of the sibling group does want to express a view.'[353]



**5.2.3.2 The Role of the ICL**

The Family Law Act proceeds to elaborate on the role of the independent children's lawyer (ICL). The Act starts off by discussing the general nature of role of independent children's lawyer. The ICL must form an independent view of what is in the best interests of the child, based on the evidence available to him or her and must act in relation to

[350] Section 68L(5).
[351] Section 68L(6).
[352] Section 60CE.
[353] Guidelines for The Independent Children's Lawyers (6 December 2007) 4 available at http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Children's+Matters/Independent+Childrens+Lawyer/ (hereinafter "Guidelines for the ICLs").

proceedings in what he or she believes to be in the best interests of the child.[354] The Act makes it very clear that the ICL is not the child's legal representative and is not obliged to act on the child's instructions.[355] The Australian system therefore only makes provision for a best interest legal representative.[356]

The Guidelines specifies that although the ICL does not take instructions, he is 'required to ensure the Court is fully informed of the child's views, in an admissible form…'.[357] The Guidelines also requires the ICL to explain his role to the child and specifically provides for the situation 'where a child of sufficient maturity wishes to have a direct representative who will act on the child's instructions, the ICL should inform the child of the possibility of applying to become a party to the proceedings.'[358]

'The ICL must be truly independent of the court and the parties to the proceedings.' The ICL must be '…unfettered by the considerations other than the best interests of the child.'[359] The Guidelines go into detail about how the ICL should handle the situation where the best interests of the child and the child's expressed views does not coincide. If the evidence indicates that the child's best interests will be served by an order that is contrary to the child's views the ICL must follow the following course of action: (1) the ICL must advise the child that he or she intends to make submissions to court contrary to the child's views; (2) he or she must assure the child that his or her views are indeed before the court and arguments will be made to support the adoption of those views; (3) the ICL must make submissions in support of the best interest of the child; (4) The ICL must provide clear reasons why the child's views does not promote the best interests of the child; (5) if there was not an opportunity prior to the

[354] Section 68LA(2).
[355] Section 68LA(4).
[356] See par 2.1.2.1.2 above.
[357] Guidelines for the ICLs 2.
[358] Guidelines for the ICLs 3.
[359] Guidelines for the ICLs 2.

conclusion of the proceedings, explain to the child at conclusion of the proceedings why he or she made submissions that were contrary to the child's views.[360]

The Act goes on to state the specific duties of the ICL, which includes the ICL must:

(a) Act impartially when dealing with the parties to the proceedings;

(b) Ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court;

(c) Identify those matters in reports and other documents that the ICL considers to be the most significant for determining the best interests of the child and ensure that the court's attention is drawn to those matters;

(d) Endeavour to minimise the trauma the child experiences in relation to the proceedings;

(e) Facilitate settlement of the matter to the extent to which doing so is in the best interests of the child.[361]



The ICL has a wide discretion in how the case is managed and the involvement of the child in the case. The Guidelines indicate that the following factors must be considered to establish the appropriate degree of involvement by the child in an individual case:

- 'the extent to which the child wishes to be involved; and
- The extent that is appropriate for the child having regard to the child's age, developmental level, cognitive abilities, emotional state and views.'[362]

[360] Guidelines for the ICLs 5. See in this regard *H v W* (1995) FLC 92-598, where the Full Court of the Family Court discussed determining the best interest of the child and taking children's views into account. Baker J states: 'a child's wishes must not only be considered, but must be shown to have been considered, in the reasons for the judgment of the trial judge. Furthermore, if the trial judge decides to reject the wishes of a child, then clear & cogent reasons for such a rejection must be given particularly if, as in this case, the separate representative submits that the Court should give effect to such wishes.' At 81,961.
[361] Section 68LA (5).
[362] Guidelines for the ICLs 2.

With regard to the confidentiality of disclosures of the child to the ICL, the Act provides that the ICL is not under an obligation to disclose to the court and cannot be required to disclose to the court any information that the child communicates to him or her.[363] The ICL may disclose information communicated to him or her by the child to the court, if the ICL considers that the disclosure to be in the child's best interests.[364] The ICL may make such a disclosure even if it is made against the wishes of the child.[365] The Guidelines for ICL further elaborate on this point and requires that ICL to inform the child that he or she will be making such a disclosure.[366]

The Guidelines indicate that the ICL must endeavour to build a relationship of trust and respect with the child. The Guidelines, however, also caution against the risk of the child becoming over dependent upon the ICL and advises that the ICL should seek peer or professional help in responding to such a situation.[367]

It has been established that the participation of the ICL has been successfully incorporated into the Australian legal process.[368] The ICL is well regulated and approximately a third of all family law cases decided in courts have a ICL involved.[369]

## 6. RECOMMENDATIONS AND CONCLUSION

The comparison between South Africa and Australia points to the complexity of implementing children's participation rights into practice even where there is legislation which provide for such participation. This is supported by the 2009 study[370], 'which

[363] Section 68LA(6).
[364] Section 68LA(7).
[365] Section 68LA(8).
[366] Guidelines for the ICLs 3.
[367] Guidelines for the ICLs 3-4.
[368] Carnelley (2010) 660.
[369] Australian Institute of Family Studies http://www.aifs.gov.au/icl/ (last accessed 31 October 2013).
[370] Newell S, Graham A & Fitzgerald R 'Results of an International Survey Regarding Children's Participation in Decision-Making Following Parental Separation', Report to Childwatch International Research Network's Children and the Law Thematic Study Group, (Australia: Center for Children and Young People, Southern Cross University, November 2009).

highlights the need for jurisdictions internationally to continue to develop processes and procedures for supporting children to participate and to ensure these are appropriately implemented, monitored and evaluated.'[371]

While there is no dedicated family court system in South Africa, what is needed is a regulated family law team approach. It is submitted that the first step in establishing such a team approach is a comprehensive set of guidelines which set out the role of the separate legal representative for the child in relation to the child, the parties and the court.

South Africa's Draft LAB[372] Guidelines are in many respects similar to the Australian Guidelines for ICLs. The Australian Guidelines are very practical and solution focussed while South Africa's Draft LAB Guidelines lack the necessary specificity for proper implementation. The Australian Guidelines is user-friendly and makes the role of the ICL in relation to the child, the parties and the court very clear.



It is not argued that South African should adopt the Australian guidelines verbatim, as some of the aspects of the Australian guidelines for ICLs would not be relevant or applicable to the South African legal landscape. In particular, the Australian legislation only makes provision for the appointment of an ICL by the courts. It has been established in South African that a legal representative can be appointed by Legal Aid SA without a court order and this aspect should be retained.[373]

The following recommendations are made towards a complete and user-friendly guideline for children's separate legal representatives (SLR) in family law matters: (a) the Guidelines must be specific about the skills, qualifications, experience and attributes a SLR must have; (b) there must be provision made for an accredited training course the all SLR

[371] Taylor *et al*. (2012) 669.
[372] Legal Aid Board.
[373] Carnelley (2010) 660.

must undergo before he or she may act for a child; (c) it must include detail regarding the SLR's role in relation to the other parties and the court and also the SLR role in pre-trial negotiations and trial; (d) there must be more detail regarding the relationship that the SLR must endeavour to have with the child; (e) children's views should be ascertained as early in the process as possible, so it must include some clarification regarding the timing of the appointment of a SLR; (f) SLR must be given a wide discretion, in consultation with the presiding officer, around case management and evidence at trial ; (g) there must be clarity that the SLR is a full participant in the proceedings and is entitled to service of all documents; (h) there must be provision made for the SLR to interact with other role players involved in the process, such as social workers and mental health professionals;

It has been argued that those children whose wishes have been given serious weight were aided by high-quality professional intervention.[374] 'Until appropriate mechanisms are put in place to ensure the meaningful participation of children, many children will be excluded from contributing to those decisions which will have a major impact on the rest of their lives.'[375]



[374] Barratt (2003) 154. Fn 25.
[375] Barrat (2003) 156.

# CHAPTER 5 : CONCLUSIONS AND RECOMMENDATIONS

## 1. INTRODUCTION

This chapter will emphasise the most important conclusions reached in the previous chapters. Drawing on those conclusions, this chapter will endeavour to make certain recommendations which may ensure that children are given appropriate and adequate opportunity to have their voices heard in family law matters affecting them.

## 2. CONCLUDING REMARKS

In chapter 2 the aim was to examine the international instruments and regional instruments and the how the right to participation was established in the international field. The chapter establishes that Article 12(2) relates specifically to the to the right of the individual child to participate in judicial and administrative proceedings such as divorces. Article 12(1) refers to the right of the child to express his or her views freely in all matters affecting him or her. It concluded that the CRC applies to children who are able to form a view and the Charter apply to children who are able to communicate their views. The CRC and the Charter both have stronger and weaker features but the Charter can be seen as confirming global standards contained in the CRC.



The object of chapter 3 was to examine the legislative framework of children's right to participate in South Africa and to determine whether South Africa's international obligation to implement the right to be heard into domestic legislation has been fulfilled. The further aim was to establish whether domestic legislation is in fact sufficient to make the right to participate accessible to South African children.

A key distinction that was made in this chapter was the legal representation of children is a form of participation. It was concluded that section 28(1)(h) guided the way for legislature to draft enabling legislation which indeed brings international standards into domestic

legislation but that further procedural provisions would be useful to ensure that all role players know how the legislative provisions should be implemented in practice.

The aim of chapter 4 was to look at how domestic legislation had been implemented in practice and what methods of participation are currently available for children involved in family law disputes in South Africa. The pros and cons of the various available participation methods was examined and compared to similar procedures available in Australia. The chapter stresses that the circumstances of each case should dictate what participation method or methods should be adopted.

It has been argued that a 'child's very competence to form and express a view' may depend on the procedural participation opportunities provided. Further to this point, the available procedures could enhance or inhibit the child's ability to come to and expressing a view.[376]



Chapter 4 concludes that implementation of children's participation rights into practice in South Africa will not improve unless comprehensive guidelines are put in place. It was further concluded that what is needed is a team approach in family law matters and that children should have not only the choice to participate but must have a choice of options of participation methods when they do decide to participate.

It has been shown that children will choose to disclose their views at different stages and to different persons, whether it be the Family Advocate, the independent expert, their legal representative or the judge. A one-size-fits-all approach is therefore not feasible.

## 3. RECOMMENDATIONS

While there is no dedicated family court system in South Africa, what is needed is a regulated team approach. The approach of the Children's Court in relations to parental

[376] Barrat (2003) 153.

responsibilities and rights disputes have taken initial steps in establishing such a team approach, by providing for the appointment of a legal representative for the child in section 55, for the ordering of expert reports in section 62 and specifically emphasising in section 61 the role of the presiding officer plays in ensuring that children are given an opportunity to express their views. It is recommended that this inquisitorial approach of the Children's Court should be expanded to the larger family law system.

In accordance with the recommendations of the Committee on the Rights of Child that States should 'establish specialised legal aid support systems in order to provide children involved in administrative and judicial proceedings with qualified support and assistance.'[377], it is therefore recommended that there should be a support system created in family law matters between the presiding officer, the expert, the family advocate and the SLR. The various role-players will work together to come to solution which is in the best interest of the child. What is essential is much stronger emphasis on the role of the presiding officer with regard to how the matter should be dealt with and children's involvement in the matters. It is has been recognised that 'the extent to which children's voices are heard depends on the role the judge plays in determining how their views are received, weighed and taken into account.'[378]



A family law team approach requires the team to co-operate in order to fulfil two main functions (1) determine the most appropriate procedure to provide this particular child the most appropriate opportunity to have his or her views heard and; (2) provide the judge with the relevant context to enable the judge to understand the reasons behind the child's views and determine the due weight to be attached to the child's view. The team should take an individualistic approach to all cases and decide in each matter what the most appropriate participation method is, which will ensure the child's current views and the context for those

[377] United Nations Committee on the Rights of the Child, 43rd Session , "Speak, Participate and Decide – The Child's Right to be Heard" , Day of General Discussion, 15 September 2006
[378] Cashmore and Parkinson (2007) 44.

views are put before the court. The chosen approach by the family law team should be guided by the wishes and characteristics of the particular child, the stage and type of the dispute (including the personalities of the parents), the personalities, skills and experience of the members of the family law team responsible for the case.[379]

Word count: 35 097



[379] Tapp (2006) 73.

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