

THE CHILD'S VOICE IN THE HAGUE CONVENTION:

Does ascertaining the child's
view realise the best interests
of the child in legal and related
proceedings in terms of the
Hague Convention on the Civil
Aspects of International Child
Abduction ?

by

Shanaaz Christine Mia

A research paper submitted in
partial fulfilment of the requirements
for the degree of Master of Laws.

UNIVERSITY of the
WESTERN CAPE

Supervisor: Prof. J Sloth-Nielsen

UNIVERSITY OF THE WESTERN
CAPE



UNIVERSITY OF THE
WESTERN CAPE
**THE CHILD'S VOICE IN
THE HAGUE CONVENTION**

by SHANAAZ CHRISTINE MIA

Supervisor:

Professor JULIA SLOTH-NIELSEN

Department of Private Law

This paper seeks to ascertain whether the child's participation in proceedings in terms of the Hague Convention on the Civil Aspects of International Child Abduction realises the best interests of the child.

An exploration of the above necessarily involves a consideration of the term 'the best interests' of the child. The content of the term will be considered and a comparison undertaken of the content ascribed in South Africa, England and Australia.

The paper will consider the mechanisms employed to determine the wishes of the child and to ascertain the weight attached to the child's views. It is also necessary to ascertain whether the input received from the minor child influences the decision made with regard to the minor child.

The paper will consider whether the extent to which the child's views influence the decision made about him/her is a measure of whether the best interests of the child is realised. If accessing the child's view does promote or contribute to realising the best interests of the child generally, the paper will look at how the Hague Convention allows the child's voice to be heard and whether this has resulted in the best interests of the child being realised.

UNIVERSITY OF THE WESTERN CAPE

MASTERS PROGRAMME

**THE CHILD'S VOICE IN THE
HAGUE CONVENTION**

Does ascertaining the child's view realise the best interests of the child in legal and related proceedings in terms of the Hague Convention on the Civil Aspects of International Child Abduction ?



UNIVERSITY *of the*
WESTERN CAPE

NAME OF CANDIDATE : Shanaaz Christine Mia
STUDENT NUMBER : 2035681
PROPOSED DEGREE: LLM
PROGRAMME : Constitutional Law
SUPERVISOR: Prof. J Sloth Nielsen

CONTENTS

1.1	WHAT IS THE HAGUE CONVENTION?	7
1.2	WHOM DOES IT BIND?	8
1.3	WHAT IS THE CONTEXT.....	8
1.4	WHAT IS THE OBJECTIVE OF THE CONVENTION?.....	9
1.5	HOW IS THE OBJECTIVE REALIZED: the procedural remedy	10
1.6	THE CONTENT OF THE 'BEST INTERESTS ' OF THE CHILD 15	
1.6.1	SOUTH AFRICA.....	16
1.6.2	ENGLAND.....	19
1.6.3	AUSTRALIA.....	23
1.7	THE CHILD'S PARTICIPATION IN PROCEEDINGS: ASCERTAINING THE CHILD'S WISHES IN DETERMINING 'THE BEST INTERESTS OF THE CHILD'.....	28
1.7.1	ENGLAND.....	29
1.7.2	SOUTH AFRICA.....	33
1.8	WHAT MECHANISMS ARE USED TO DETERMINE THE WISHES OF THE CHILD.....	35
1.8.1	ENGLAND.....	35
1.8.2	SOUTH AFRICA.....	38
1.9	WHAT REQUIREMENTS MUST A CHILD MEET TO PARTICIPATE IN DETERMINING HIS/HER BEST INTERESTS	44
1.9.1	ENGLAND.....	44
1.9.2	AUSTRALIA.....	46
1.9.3	SOUTH AFRICA.....	47
1.10	ASCERTAINING THE CHILD'S VIEW IN THE CONVENTION 50	
1.10.1	ENGLAND.....	56

1.10.2	SOUTH AFRICA.....	59
1.11	THE COURT'S ATTITUDE TO THE CHILD'S WISHES.....	69
2	CONCLUSION.....	73



UNIVERSITY *of the*
WESTERN CAPE

INTRODUCTION

The "best interests" of the child is a widely accepted principle internationally.¹ In South Africa this principle has been recognised and enjoys Constitutional protection.² The paramountcy of the interests of the child in custody matters is noted in the preamble to the Hague Convention on the Civil Aspects of International Child Abduction.³

The question to be considered is how this is achieved in Hague Convention cases where the procedure does not provide for evaluation/ assessment of evidence placed before the court on the merits of the case.

The purpose of the Hague Convention is laudable and the problem it seeks to address may be seen to be in the 'best interests' of the child.

The paper will consider whether the child's views influence the decision made, and employ this as a measure of whether the best interest of the child is realised.

An exploration of the content of the term the 'best interests' is thus necessary. The content of the term will be considered and a

¹ It is enshrined in the domestic legislation of various countries as well as in the United Nations Convention on the Rights of the Child 1989 (Article 3). e.g. The Constitution of the Republic of South Africa Act 108 of 1996 (s28); The Constitution of the Republic of Namibia 1990 (article 15), Matrimonial Causes Act 1973, (s25 (1)) and The Children Act 1989(s1(1)) in the UK.

² Section 28 of the Constitution of South Africa, Act 108 of 1996

³ The complete text of the Hague Convention is available under www.hcch.net/e/conventions/text28e.html.

comparison undertaken of the content given to the term in South Africa, England and Australia.

It is also necessary to look at the mechanisms employed to determine the wishes of the child and to ascertain the weight attached to the child's views. This is followed by ascertaining whether the input received from the minor child influences the decision made with regard to him/her.

1.1 WHAT IS THE HAGUE CONVENTION?

The Hague Convention on the Civil Aspects of International Child Abduction⁴ (hereafter the Convention) was adopted by the Hague Conference on Private International Law⁵ at its Fourteenth Session on 25 October 1980.

The Convention is described as *"an effort to engender co-operation between states to protect the rights of the child"*.⁶

The preamble to the Hague Convention notes the view of the signatory States' *"that the interests of children are of paramount importance in matters relating to their custody"*.⁷ It is noted further in the preamble that there is an intention or desire *"to protect children from the harmful effects of their wrongful removal or retention and to establish*

⁴ The complete text of the Hague Convention is available under www.hcch.net/e/conventions/text28e.html.

⁵ This is an inter-governmental organization, which seeks to work toward progressive unification of the rules of private international law.

⁶ Nicholson C 'An introduction to the Hague Convention on the Civil Aspects of International Child Abduction' in Davel C.J. (ed.) *Introduction to Child Law in South Africa* (2000) 223 at p240.

⁷ Paragraph 1 of the Preamble of the Convention on Civil Aspects of International Child Abduction

*procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.*⁸

1.2 WHOM DOES IT BIND?

It was first signed by the representatives of Canada, Greece, France and Switzerland. The Hague Convention has been signed by several other states after this date. States, which have not signed the Hague Convention on the date it was adopted, have subsequently acceded to the Convention. For the Convention to be effective vis-à-vis another state, that state must have accepted the first state's accession. Once this acceptance has been lodged, the Convention is in effective operation between the two states. South Africa, England and Australia are bound by the Hague Convention.

1.3 WHAT IS THE CONTEXT

The context for the above Hague Convention is to be found in the modern world where ease of foreign travel and the relaxation of cross border control, as well as the increase in bi-national marriages, have resulted in an environment which enables children to be removed to another country with ease. Such removals may be wrongful where the child is retained by a parent and deprives the other parent of custodial or access rights in terms of a court order. The high incidence of dual nationality today also no doubt contributes to the above occurrence of international parental abduction.⁹

⁸ Paragraph 2 of the Preamble of the Convention on Civil Aspects of International Child Abduction

⁹ See Nicholson C. *op cit* 232

The issues in disputes around custody of and access to children in a divorce or breakdown of a relationship are often complex enough where both parties live in the same state. The factors highlighted above only contribute further to the complexity of the problem. Thus having recognised the seriousness of the problem, the Hague Convention was conceived to enable the international community to prevent parental abduction of children and to secure the return of children who are wrongfully taken across transnational boundaries.

1.4 WHAT IS THE OBJECTIVE OF THE CONVENTION?

The object of the Convention is embodied in Article 1 thereof which states:

"The objects of the present Convention are:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and*
- b) to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States".¹⁰*

In the Explanatory Report, the Rapporteur explains that the Hague Convention seeks to deprive the abducting parent's action from any practical or juridical consequences. In order to achieve this the Hague Convention seeks to restore the status quo by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'¹¹

¹⁰ www.hcch.net/e/conventions/txr28e.html.

¹¹ Perez-Vera E 1982 Explanatory Report, The Acts and Documents of the Fourteenth Session of the Hague Conference On Private International Law, p 428 and 429 [hereafter Perez-Vera Report]. The Report is recognised as the official commentary to the Hague Convention.

The Hague Convention seeks both to prevent abduction, and to restore stability to abducted children by facilitating the speedy return of abducted children to their place of habitual residence. The child is returned to the State of habitual residence because it is assumed that this is the forum that is best situated to make a decision on the merits of the matter and has a most significant interest in the determination of the matter.¹²

Schuz explains that " *the objective of prompt return is based on the premise that the welfare of the children is best promoted by reversing the effect of an abduction as quickly as possible, for three reasons. First, this will negate the harm often caused to children who are suddenly removed from their environment, and secondly the knowledge that the return will be ordered is likely to deter potential abductors. Thirdly, the child's interests can best be protected by litigation in the forum conveniens, which will usually be the place of the child's habitual residence*".¹³ (own emphasis)

UNIVERSITY of the
WESTERN CAPE

1.5 HOW IS THE OBJECTIVE REALIZED: the procedural remedy

In achieving the above objective, the Convention requires that Contracting States follow the procedure prescribed by the Hague

¹² Nicholson C. op cit 234, Anton A E. "The Hague Convention on International Child Abduction" (1981) 30 *ICLQ* 537 at p 543-554

¹³ Schuz R "Habitual residence of children under the Hague Child Abduction Hague Convention- theory and practice" (2001) 13 *Child & Fam LQ*, 2

Convention. Silberman describes the remedy afforded by the Hague Convention as a procedural remedy.¹⁴

The procedure that is prescribed does not provide for a substantive enquiry into the merits of the dispute by the court in a Contracting State seized with an application in terms of the Hague Convention.

The Hague Convention enables a parent to seek assistance from the Central Authority of a country to secure the return of a child who has been abducted. In the context of the Hague Convention an abduction occurs when a child is removed from its place of habitual residence and is wrongfully removed or retained¹⁵ in a country away from the child's place of habitual residence. The habitual residence is the last place where the parent exercising custody rights had formed a permanent intention to live.¹⁶ The abduction is wrongful when it deprives a parent of the custody rights she/he had actually exercised prior to the removal or retention.

UNIVERSITY of the
WESTERN CAPE

The applicant may approach the court in the country of a contracting state directly for the return of the child instead of approaching the Central Authority.¹⁷ Once the application is before a court in terms of the Hague Convention, the court seized of the matter is bound to act in

¹⁴ Silberman L "Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis" (1994) 28 *FLQ* 9 at p10

¹⁵ Article 3 of the Convention states that a removal of a child is wrongful when it is in breach of custody rights attributed to any person, institution or other body.

¹⁶ see Schuz R "Habitual residence of children under the Hague Child Abduction Convention- theory and practice" (2001) 13 *Child & Family LQ* 1 for a comprehensive discussion of the term 'habitual residence'.

¹⁷ See Bruch C "The Central Authority's Role under the Hague Child Abduction Convention: A Friend in Deed" (1994) 28 *FLQ* 35 for a discussion of the assistance provided by the Central Authority.

terms of Article 12 of the Convention. Once it is ascertained that the child has been wrongfully removed or retained as provided in Article 3 and less than a year has elapsed from the date of abduction, the court must order the immediate return of the child in terms of Article 12 of the Convention. The court may order the return of the child even if more than a year has elapsed. This is to deter a parent who has managed to conceal the child for more than a year from benefiting by their concealment of the child.

The procedural remedy requires the return of the child to the State of habitual residence to be effected speedily. The expeditious return of the child to the State of habitual residence is intended to end the instability and disruption in routine occasioned by the abduction, as well as to afford the Court in the State of habitual residence the earliest opportunity to determine the dispute based on a substantive enquiry into the merits of the dispute.

Whilst the court has an obligation to return a child in terms of article 12, there are instances where a court may refuse to order the return of a child forthwith. The court is not obliged to order the return of the child if the person opposing the return establishes that the applicant was not exercising custody rights or had consented or acquiesced in the removal or retention.¹⁸ The court may also refuse to order the return of the child if it is established that the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to

¹⁸ Article 13(a)

take account of the child's views.¹⁹ An exception that is invoked frequently is Article 13 (b) which states that a court is not bound to order the return of a child if it is established that:

'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

A defence in terms of article 13(b) requires that the Respondent establish that there is a considerable or high risk of harm or a grave risk, which will affect the child upon return to the State of habitual residence.²⁰ Alternately, the Respondent must prove that the child would be placed into an intolerable situation if returned. This defence requires a serious consideration of the issue and the person relying on the defence must render a clear and compelling argument. The risk of harm must be serious and weighty.²¹

It is not unusual for an abducting parent to allege that a return would be prejudicial to the child and seek to place before the court evidence that the child would be exposed to physical or psychological harm. This may require a consideration of the merits of a custody dispute between the parents. The Convention seeks to ensure that a custody dispute is

¹⁹ This rule has been criticised as it is felt that it may cause parents to place pressure on vulnerable young children. In this regard see Anton A E "The Hague Convention On International Child Abduction" (1981) 30 *ICLQ* 550.

²⁰ This would require an enquiry into the merits of the matter.

²¹ Nicholson CMA "Can South Africa follow England's example and apply a strict interpretation of article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction" (1999) 32 *De Jure* 250

considered by the court best able to deal with the matter. The court in the place of habitual residence is considered to be the most convenient forum to determine what is in the best interests of the child.

It is therefore important that a Court hearing a Hague Convention application not permit an applicant to attempt to force the court to conduct a substantive enquiry by pleading a defence in terms of article 13(b), where such application may be frivolous. In Re C (Abduction: Grave Risk of Physical or Psychological Harm),²² the Court emphasised that an "*Article 13 (b) defence must be scrutinised rigorously and, I would emphasise, in the round before it is upheld*"²³

The purpose of the immediate return presumes that it is in the best interests of minor children that they are returned to their country of habitual residence. The view of the court is summed up in the dictum of Butler-Sloss LJ as follows:

*"The welfare of the child who has been abducted is generally seen as best served by returning him to the jurisdiction of his habitual residence and leaving the decision of what should happen to him thereafter to the court best equipped to deal with the custodial problems of the family living within its jurisdiction before the child was abducted."*²⁴

²² [1999] 2 FLR 478

²³ *supra* at p487

²⁴ Re P (Abduction: Minor's Views) [1998] 2 FLR 825 at 827

The immediate return is based on the presupposition that the child needs continuity and stability and that this was present in the place of habitual residence.²⁵

1.6 THE CONTENT OF THE 'BEST INTERESTS' OF THE CHILD

Barratt and Burman note that "it has become a legal incantation that 'the best interests of the child' are the overriding consideration in deciding custody cases".²⁶ They also note that many countries have incorporated this standard into their constitutions and domestic legislation. The author's illustration include the following examples, section 28 of the Constitution of the Republic of South Africa Act 108 of 1996; Article 15 of the Constitution of the Republic of Namibia 1990, section 25 (1) of the Matrimonial Causes Act 1973, and section 1(1) of the Children Act in the UK; as well as Article 3 of the Convention on the Rights of the Child adopted in 1989.²⁷

The courts have recognised that a child's interests need to be protected and if necessary by a person other than either of the parents. This is especially so in divorce matters where custody is an issue in dispute. The Courts role in determining what is in the best interests of the child is recognised, as the Court sits as arbiter in custody disputes between parents or third parties.

²⁵ Caldwell J "Child Welfare Defences in child abduction cases - some recent developments" (2001) 13 *Child and Family LQ* 121 at p 123

²⁶ Barratt A and Burman S "Deciding the best interests of the child: an international perspective on custody decision making" (2001) 118 *SALJ* 556

²⁷ Ibid

Anne Palmer notes that *"the best interests of the child is the guiding criterion that underpins all decisions relating to custody of children following the divorce of their parents."* And that the *"law requires the courts to make the best decision possible at the time as to the custody arrangements for the children."*²⁸

In considering the factors determining how a decision is made to provide for the best interests of the minor child Barratt and Burman note that "the substantive content of the best interests standard varies across jurisdictions but typically includes factors as the *child's own wishes*; his or her physical, emotional and educational needs; the desirability (or otherwise) of continuity of present circumstances; the child's age and gender; the capacity of the parent to provide for the child's educational, emotional, psychological, and cultural development; the parent's ability to meet the basic physical needs of the child and the emotional bond which exists between the child and a particular parent."²⁹ (own emphasis)

UNIVERSITY of the

1.6.1 SOUTH AFRICA WESTERN CAPE

The standard of the 'best interests' of the child is considered a paramount consideration in decisions pertaining to the child and is enshrined in national legislation in South Africa.³⁰

²⁸ Palmer A 'The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 – 1995' in Keightley R (ed.), *Children's Rights*, Cape Town 1996 at p98

²⁹ Barrat et al op cit at p556-557

³⁰ Section 28 of the Constitution of South Africa, Act 108 of 1996

South African Courts have always taken into account the best interests of the child when making a decision with regard to children. Hlophe J (as he then was) notes of the common law position, that the interests of children are central to any decision concerning the child in custody matters.³¹ The Judge refers to various decisions, which refers to relevant considerations in the court's determination, the earliest case being Fletcher v Fletcher.³²

The present position in South Africa which influences all decisions regarding children is Section 28(2) of the Constitution of South Africa, Act 108 of 1996, which provides that the best interests of the minor child is a paramount consideration in every matter pertaining to the minor child. Judge Hlophe notes that "*this is in keeping with the universal recognition that the interests of the child must prevail, as stated in other international documents in addition to the Hague Convention on Child Abductions*", whereafter he refers to the United Nations Convention on the Rights of the Child 1989.³³

A guide used by South African courts to determine which parent should be granted custody was listed in the case of McCall v McCall³⁴ where King J (as he then was) explains the factors, which are relevant: "*In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical,*

³¹ The Hon Mr. Justice Hlophe "The Judicial Approach to 'Summary Applications for the Child's Return': A move away from the Best Interests Principles?" (1998) 115 *SALJ* 439 at 440

³² 1948 (1) SA 130 (A) at p145

³³ Hlophe J op cit at p440

³⁴ 1994 (3) SA 201 (C)

moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the criteria listed may differ only as to nuance. The criteria are the following:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child
- (b) the capabilities, character and temperament of the parent and impact thereof on the child's needs and desires
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to maintaining the status quo ;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in particular circumstances the child's preference should be taken into consideration;**
- (l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12... should be placed in

the custody of his father; and any other factor which is relevant to the particular case with which the Court is concerned."³⁵

(own emphasis)

1.6.2 ENGLAND

The term 'the best interests' or the welfare of the child is recognised in the United Kingdom. Bainham and Cretney note that "*English law has a strong commitment to the welfare or 'best interests' of children.*"³⁶

The authors note that much of English law had grown in a piece meal fashion and that the Children Act 1989 (hereafter the Children Act) changed this in one fell swoop.³⁷ It provides:

"When a Court determines any question with respect to:

- (a) the upbringing of a child, or
- (b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration."³⁸

Bloy notes that the Children Act introduced flexibility as to which court hears 'family proceedings' and that the High Court, County Court and Magistrates' Court have concurrent jurisdiction. He notes further importance of the Act as described by Steyn LJ in the case of Oxfordshire County Council v M³⁹ as follows:

³⁵ McCall v McCall 1994 (3) SA 201 (C) at 204] - 205F

³⁶ Bainham A and Cretney S Children The Modern Law, (1994) 77

³⁷ *ibid* p33

³⁸ Children's Act 1989 s1(1)

³⁹ [1994] 1 FLR 175

"... under the Children Act 1989 the child's welfare is the paramount consideration. This objective is spelled out explicitly in section 1(1). The welfare checklist in s1(3) underpins it. And the Act contains a framework designed to achieve that purpose. The 1989 Act was a watershed"⁴⁰

However Bainham and Cretney note that the 'welfare' or 'best interests' of the child is an indeterminate concept and argue that the crucial issue is not the concept but who is asked the question. They suggest that it is inevitable that an individual decision-maker's value judgements intrude on the determination of the best interests' of the child.⁴¹

Thus they indicate that "in an effort to structure judicial discretion, the Children Act broke new ground and incorporated a statutory 'checklist' of factors for the courts applying the welfare principle."⁴² The factors that the court should have regard to are:

- "(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or he is at risk of suffering;

⁴⁰ See discussion in Bloy DJ *Child Law* (1996) 12

⁴¹ Bainham and Cretney *op cit* at p43

⁴² *Ibid* at p43

- (f) *how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;*
- (g) *the range of powers available to the court under this Act in the proceedings in question.*"⁴³

The wishes of the child is a factor which has been regarded by the courts and in the case of Re P (Minors) (Wardship: Care and Control)⁴⁴ Butler-Sloss stated:

*"In all family cases it is the duty of the court to listen to the children, ascertain their wishes and feelings, and then make decisions about their future having regard to but not constricted by those wishes"*⁴⁵

The wishes of the children were also noted in Re M (Contact)(Welfare Test)⁴⁶, where the parties separated and the children lived with their father. Two years later their father entered a new relationship and the children refused to visit their mother. In the following year all contact had ceased. The children were then aged nine and eight years old. The Court Welfare Officer interviewed the child and found the child to be 'mature for his years'. The older child indicated that he did not want contact with the mother and gave reasons for his wishes. The lower court had granted an order refusing contact with the mother. On appeal the Court of Appeal weighed up the second element of the checklist

⁴³ Ibid at p43

⁴⁴ [1992] 3 FLR 681

⁴⁵ Ibid at p689

⁴⁶ [1995] 2 FLR 274

versus the first and attached significant weight to the views of the children.⁴⁷

The physical, emotional and educational needs of the child were the basis of the courts decision in the matter Re W (A Minor) (Residence Order)⁴⁸. A baby aged one month old lived with the father and a nanny. The mother who was not married to the father had signed a 'parental responsibility'⁴⁹ agreement in favour of the father. The mother sought an ex parte 'residence order'⁵⁰ and alleged that she had been pressurised into signing the order. The application was refused. The court held that the status quo should be maintained. The Court of Appeal allowed the residence order as requested, indicating that three to four weeks was not sufficient time to establish a status quo. Further the Court found that the child's best interests were served by being with the mother, who also had another child, aged three years old.⁵¹

Bloy notes that it is important to recognise that the welfare principle in English law only applies to circumstances referred to in section 1(1) and does not apply to ancillary relief applications where the child's welfare is the first but not the paramount consideration, in adoption

⁴⁷ Discussed in Bloy DJ op cit at p24

⁴⁸ [1992] 2 F.L.R 332

⁴⁹ This term refers to the care and control and decision- making power a parent exercises over a child and is the equivalent of the concept of custody in South African law.

⁵⁰ This refers to an order settling the arrangements as to the person with whom a child is to live on a daily basis and does not affect another person's ability to exercise parental responsibility.

⁵¹ Discussed in Bloy DJ op cit at p27

proceedings nor in ouster applications⁵² under section 1 of the Matrimonial Homes Act 1983.⁵³

1.6.3 AUSTRALIA

With regard to the position in Australia, Parker, Parkinson and Behrens, (hereafter Parker et al) note that 'the best interests' principle has been the central concept in the law relating to children for the most of this century.⁵⁴ This concept is the paramount consideration in decision-making about who should have parental responsibility. The 'best interests' principle is applicable also in that Australia ratified the United Nations Convention on the Rights of the Child in December 1990.⁵⁵ This requires that in actions concerning children, the best interests of the child shall be the primary consideration.⁵⁶ This applies to Australian courts, social welfare institutions and administrative authorities.⁵⁷



Section 65 E of the Family Law Act provides that :

"In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as a paramount consideration."

⁵² This is an application to order a person, namely one of the parents to leave the family home.

⁵³ Bloy DJ op cit at p13

⁵⁴ Parker S, Parkinson P, Behrens J, Australian Family Law in Context (1999) 739

⁵⁵ Ibid at p747

⁵⁶ Article 3 (1) of the United Nations Convention on the Rights of the Child 1989

⁵⁷ Parker S, et al op cit at p752

Further the Family Law Act 1975, section 68E provides,

- "(1) This subdivision applies to any proceedings under this Part in which the best interests of a child are the paramount consideration.*
(2) This Subdivision also applies to proceedings, in relation to a child, to which subsection 60G(2), 63F(2) or section 68T applies."

Subsection 60G refers to adoption proceedings⁵⁸, subsection 63F refers to child welfare provisions of registered parenting plans.

In section 68F the Family Law Act prescribes how a court should determine what is in the best interests of a child as follows:

"The court must consider:

- a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks is relevant to the weight it should give to the child's wishes;*
- b) the nature of the relationship of the child with each of the child's parents and with other persons;*
- c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - i. either of his or her parents;*
 - ii. any other child, or other person, whom he or she has been living;**
- d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially*

⁵⁸ In contrast to this position, the position in the UK is that section 1(1) of the Children Act 1989 recognising the paramountcy of children's interests does not apply in adoption proceedings.

affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

- e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;*
- f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;*
- g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - i. being subject or exposed to abuse, ill-treatment, violence or other behaviour; or*
 - ii. being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;**
- h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
- i) any family violence involving the child or a member of the child's family;*
- j) any family violence order that applies to the child or a member of the child's family;*
- k) whether it would be preferable to make the order that would least likely lead to the institution of further proceedings in relation to the child;*

- l) *any other fact or circumstance that the court thinks is relevant.*⁵⁹

The section also provides in subsection 3 that if the court is considering making an order with the consent of all the parties to the proceedings, the court may but is not required to have regard to all or any of the matters set out in subsection 2.⁶⁰

In the case of In the marriage of N and H⁶¹, the Court considered an appeal by the natural father of a child. The trial court had found that it was not in the interest of the minor child to permit access to the natural father who was a transsexual. The child was raised by the mother and stepfather. The Court dismissed the appeal. The Court found that the child was in a stable home environment with stable role models and to add another role model may turn out to be confusing and would introduce an unknown and unnecessary risk. The court accepted the lower court had weighed the facts of the case on the basis that the welfare of the child is a paramount consideration.

One of the factors in section 68F indicates that the child's relationship with each of the parents is a relevant consideration. This factor has found application in the matter of In the marriage of Jurss (1976) 9 ALR 455.

⁵⁹ Section 68F(2) Family Law Act.

⁶⁰ Section 68F(3) Family Law Act.

⁶¹ 45 ALR 419.

In the matter of In the marriage of Raby⁶², the parties were divorced and had each remarried at the time the matter was before the court. After the parties separated the minor child was left in the care of the father, as the mother lived in a hostel. The mother had frequent access to the child and alleged in the divorce proceedings that the father would properly care for and maintain the child who was 6 years old at the time of the divorce. Two years later, shortly after remarrying, the mother sought advice as to how she could regain custody of the child who was now eight years old. The trial court had formed a favourable impression of the mother and found that the stepmother was less aware of the responsibilities of motherhood. The court was of the view that living with the biological mother and step father would offer the child better prospects of care, parental control, a sound education and an opportunity to make a good start in life. The trial court was willing to change the status quo where it would be in the child's best interests. The mother of a child was granted custody of the child who had been living with the father for some time. The father appealed the decision of the primary court. On appeal, the Court held that the welfare of the child including his happiness was paramount. It held further that where the status quo is predictably more detrimental to the welfare of the child than proposed alterations, then a change may not only be desirable, it may be necessary.

It is clear the factors taken into account bear some measure of congruence. The factors take into account the child, adults around the child and the roles they play. The consideration of the factors also

⁶² 12 ALR 669

takes into account the contributions made to the care of the child and which provide for the minor child's development.

The different compilations and order of words generally appear to be aimed at the same goal - to make the best decision possible at the time as to the custody and care arrangements for the child.

The welfare of the child is thus given considerable importance in that it is a primary consideration in determinations of disputes affecting the minor child such as custody and access.

In considering the content of the term 'the best interests of the child', the paper focuses on matters related to custody and access in domestic civil disputes as well as with regard to the Hague Convention. In considering the factors that have been taken into account, either in terms of international treaties, domestic legislation and applied in judicial determinations of the best interests of the child, it is evident that the child's view or wishes is a relevant factor.

WESTERN CAPE

1.7 THE CHILD'S PARTICIPATION IN PROCEEDINGS: ASCERTAINING THE CHILD'S WISHES IN DETERMINING 'THE BEST INTERESTS OF THE CHILD'

Yair Ronen notes that children "*typically play a minor role in decision making processes related to their own protection.*"⁶³ He proposes in response to this problem a conception of advocacy, which emphasises

⁶³ Ronen Y 'Protection for whom and from what? Protection Proceedings and the child at risk' in Douglas G and Seibu L (eds.) *Children's Rights and Traditional Values* (1998) 249

the child's right to be an active participant in determining what is in the child's best interest.⁶⁴

1.7.1 ENGLAND

Bainham and Cretney indicate that *"few can doubt that the decision of one or both parents to divorce, or not divorce, is one which has profound implications for any children of the family. Yet the interests or wishes of those children are deemed in law totally irrelevant in determining whether the basis for granting a decree of divorce is established."*⁶⁵ The authors go further and explain that this is so because *"since divorce is conceived an adult issue, the welfare principle, which makes the best interests of children paramount, has no application."*⁶⁶ This position exists because in a divorce matter adult claims must be considered and this *"falls outside the provisions of the Children Act and continues to be governed by the Matrimonial Causes Act 1973."*⁶⁷ The authors conclude that *"the reality is that the law does not always give precedence to children's interests."*⁶⁸

Whilst recognising the above, later in the same text, the authors observe that *"the increased importance attached to the views of children in the legislation has already been noted."*⁶⁹ The authors note

⁶⁴ *ibid*

⁶⁵ Bainham A and Cretney S *op cit* at p35

⁶⁶ *ibid* at p35

⁶⁷ *ibid* at p36, see also Bloy DJ *op cit* at p13

⁶⁸ Bainham and Cretney *op cit* at p 36

⁶⁹ *ibid* at p139

that "the Children Act, more than any legislation before it gives recognition to the views of children and young people"⁷⁰

This view is diluted somewhat in the observation that "despite the argument (following Gillick)⁷¹ that the courts may be obliged to follow the wishes of the mature children, the Children Act merely requires the courts to ascertain those wishes and to take them into account. Its overriding duty is to do what is best for the child and that may not always coincide with what the child wants."⁷² This view is illustrated by dictum of Butler-Sloss in the case of Re P (Minors) (Wardship: Care and Control)⁷³ that :

"In all family cases it is the duty of the court to listen to the children, ascertain their wishes and feelings, and then make decisions about their future having regard to but not constricted by those wishes"



⁷⁰ *ibid* at p 59

⁷¹ This matter was decided prior to the Children Act 1989 and concerned young person right to consent to medical treatment at the age of 16.

⁷² Bainham and Cretney *op cit* at p139

⁷³ [1992] 3 F.L.R 681

The court nevertheless is bound by the welfare principle and would likely consider the factors in the checklist, which are similar to those taken into account under the old law.⁷⁴

Thus even before the Children Act was enacted in England, whilst it was not a paramount consideration, the court was required to consider the views of an older child. It was not clear how old or how mature a child had to be to consider his or her views. Whilst this aspect was not clear traditionally, the position in modern law in England, is that the capacity of children to express an opinion on matters affecting them must be taken seriously.⁷⁵

In the matter Re P (A Minor) (Education)⁷⁶, the Court was invited to settle a dispute as to whether the parties' teenage son should remain at a fee-paying boarding school, or to move to a local day school after the parties' divorce. The teenager wished to attend the local day school. The Court of Appeal stated in the above matter that:

⁷⁴ Bainham A and Cretney S op cit at p138 These include the following:

- ◆ *The ascertainable wishes and feelings of the child concerned (considered in light of his or her age and understanding)*
- ◆ *The physical, emotional and educational needs of the child*
- ◆ *The likely effect on the child of any changes in his circumstances*
- ◆ *Any harm the child has suffered or is at risk of suffering*
- ◆ *How capable each of the child's parents (and any other person in relation to whom the court considers the question to be relevant) is of meeting the child's needs*

The range of powers available to the court under the Children Act in the proceedings in question

⁷⁵ Bainham A and Cretney S op cit at p139

⁷⁶ [1992] 1 FLR 316

*"It was the duty of the court, when making decisions about their future welfare, to listen and to pay respect to the wishes and views of older children"*⁷⁷

Bainham and Cretney cite the case of M v M(Transfer of Custody: Appeal)⁷⁸, to illustrate the point. In this matter the Court of Appeal held that a failure to accord proper weight to the strongly held views of a 12 year old was a ground of appeal.

In the case of Gillick v West Norfolk and Wisbech Area Health Authority,⁷⁹ Mrs Gillick had five daughters under the age of 16 years old. The Department of Health and Social Security issued a circular which advised medical practitioners that they would not be acting unlawfully if they prescribed contraceptives to girls under the age of 16 years old, provided the doctor acted in good faith and sought to protect the girl from the harmful effects of sexual intercourse. The courts view was that a doctor would not breach the law if she/he failed to inform the parents that their daughter was to be prescribed contraceptives if the following were satisfied:

- *"that the girl, although under 16, will understand his advice;*
- *that she cannot be persuaded to inform her parents or give permission for the doctor to inform them;*
- *that she is likely to begin or continue having sexual intercourse with or without contraceptive treatment;*

⁷⁷ *ibid*

⁷⁸ [1982] 2 FLR 325

⁷⁹ [1985] 3 All ER 402

- *that her physical or mental health will suffer if she does not receive contraceptives; and*
- *that her best interests require her to be given contraceptive advice, treatment or both, without parental consent.*⁸⁰

1.7.2 SOUTH AFRICA

The position with regard to ascertaining the child's view in South African law in determining the best interests of the child is informed by the common law as well as section 28 of the Constitution of the Republic of South Africa⁸¹ and section 6(4) of the Divorce Act.⁸² The court is the upper guardian of all minor children in South Africa. In this capacity the court whilst presiding over matters pertaining to minor children, will ensure that whatever order is made will be in the best interests of the individual child in question. The best interests of the child has been a paramount consideration in disputes regarding custody since the Appellate Division (as it then was) decision in the case of Fletcher v Fletcher.⁸³ Whilst South Africa has no legislated checklist as in Australia or England, the criteria formulated by King J (as he then was) in the case of McCall v McCall⁸⁴ has offered guidance. It must be noted however that different courts have taken different approaches.

⁸⁰ Discussed in Bloy DJ *op cit* at p45

⁸¹ Act 108 of 1996

⁸² Act 70 of 1979

⁸³ 1948(1)SA130(A) discussed in Lubbe v Du Plessis 2001(4) SA 57 (C) at p66

⁸⁴ 1994 (3) SA 201 (C)

In determining the best interest of the child in South Africa, the court may have regard to a list of factors formulated by King J. (as he then was) in the case of McCall v McCall⁸⁵. This includes the "*child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration.*"⁸⁶

In Lubbe v Du Plessis⁸⁷, Van Heerden J notes that the court in the Fitschen⁸⁸ case expressed the view that courts would in future have to give more prominence to the recognition of children's rights. The parents' [and the courts] willingness to recognise such rights would also have to be considered, especially where children are old enough to form informed opinions about their rights [*and well being or best interests.*]⁸⁹ *own emphasis.*

It has also been argued that in terms of section 28(1)(h) a child has a right to be heard.⁹⁰



Section 28(1)(h) provides: *"Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."*⁹¹

⁸⁵ Ibid

⁸⁶ Ibid at p205F

⁸⁷ 2001 (4) SA 57 (C) at p 67 F

⁸⁸ 1997 JOL 1612 (C)

⁸⁹ 2001 (4) SA 57 at p67E - G

⁹⁰ Kassan D The Voice of the Child in Family Law Proceedings, paper presented at a conference titled "The Changing Definition of the Family," Cape Town 25-26 March 2002 p4

⁹¹ Constitution of South Africa Act 108 of 1996

The appointment of a legal practitioner will certainly enable the court to ascertain the views of the child. This could occur in terms of section 6(4) of the Divorce Act or section 28(1)(h) of the Constitution. Kassan notes that the Divorce Act does not realise the child's right to a legal representative as provided for in the Constitution and that there is a discrepancy between the Divorce Act and the Constitution.⁹² Section 28(1)(h) requires that a legal practitioner be appointed at state expense if substantial injustice would occur. However section 6(4) of the Divorce Act only allows for appointment of a legal representative at the discretion of the court. This discretion will be influenced by whether the parties can afford it. Thus protection of the child's interests by his/her own practitioner is only realised if the child's parents are wealthy.

1.8 WHAT MECHANISMS ARE USED TO DETERMINE THE WISHES OF THE CHILD

Domestic as well as international law makes provision for the child's wishes or the child's preference to be considered when making a decision with regard to custody or a decision pertaining to the child. This part of the paper will consider how the decision-maker ascertains the child's wishes. In disputes related to custody, it is necessary to ascertain how the process involves the minor child.

1.8.1 ENGLAND

The authors Bainham and Cretney note that the court is obliged to have regard to a checklist of factors in applying the welfare principle in

⁹² Kassan D op.cit at p8

contested private law proceedings and proceedings involving children. The checklist comprises factors, which were habitually taken into account by the courts under the old law.⁹³ The authors suggest that the factors taken into account will depend on the type of matter before the court i.e. whether it is a custody or residency order or access or contact orders.⁹⁴

In view of the above, how then should the court discover the view of the children involved in the matter before the court? In England, the position is that the child will be represented by a guardian *ad litem*⁹⁵ whose duties include conveying the child's views to the court. In private proceedings, children are usually unrepresented. It is possible that the judge may decide to interview older children in private or may rely on the report from the Welfare Officer.⁹⁶

The child's wishes will indirectly be placed before the court via the Welfare Officer if the Welfare Officer includes the minor child in his /her assessment and reports thereon. It has however occurred that on occasion the minor children were not interviewed as will be discussed below.

Bainham and Cretney note that representation for children in private law matters is the exception rather than the rule, as opposed to public

⁹³ Bainham A and Cretney S op cit 138

⁹⁴ Ibid

⁹⁵ The guardian ad litem is the child's representative in court in England. In South Africa the Family Advocate plays a role in interviewing the child and recommending what is in the best interests of the child.

⁹⁶ Bainham A and Cretney S op cit at p140

law, e.g. the removal of children from the family home, where representation of children is the norm.⁹⁷

In the United Kingdom, it is only recently that independent representation of children has been extended to private law proceedings. The National Youth Advocacy Services (NYAS) was originally founded to provide legal representation for young people in care and have expanded to cover representation in private law proceedings as well.⁹⁸

In Re A (Contact: Separate Representation)⁹⁹, a young boy, C, aged 14 years approached the NYAS as he was extremely worried about his half sister, M, aged 4 years old. He wanted to speak to the judge and to make the judge believe that it was dangerous for his sister to see her father. C had not been interviewed by the court welfare service or social services. The NYAS brought an application for party status for M under r9.5 of the Family Proceedings Rules 1991 (SI 1991/1247). The basis of the application for party status was that M was at risk of harm, which had not been thoroughly investigated. There had been a failure of the two relevant agencies to interview the two siblings and since there was an application for a penal notice on the contact order by the stepfather it was appropriate for a full further investigation. The application was dismissed in the County Court. In the appeal, it was argued that the absence of interviews with the children was disturbing and that the County judge ought not to have dismissed C's persistent

⁹⁷ Ibid

⁹⁸ Henley T and Herschman D 'The Representation of Children in Private Law' 2001 *Family Law* 540

⁹⁹ [2001] 1 F.L.R 715

and detailed views. It was argued further that this constituted a breach of Article 6 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, in that there had been a failure to provide a fair trial. It was also argued that there had been a breach of respect for M's private life. The Court largely accepted the points made on behalf of M and it ordered that the minor M should be represented independently when the matter is reheard on transfer to the High Court.¹⁰⁰

1.8.2 SOUTH AFRICA

In divorce matters in South Africa, the court is required to consider a report filed by the Family Advocate in terms of the Mediation in Certain Divorce Matters Act.¹⁰¹ The purpose of the Act is *"to provide for the mediation in certain divorce proceedings, and in certain applications arising from such proceedings, in which minor or dependant children of the marriage are involved, in order to safeguard the interests of such children; and to amend the Divorce Act 1979, in order for the consideration by a court in certain circumstances of the report and recommendations of a Family Advocate before granting a decree of divorce or other relief and to make the provisions of section 12 (1) and (2) of the said Act applicable to an enquiry instituted in terms of this Act; and to provide for matters connected therewith."*¹⁰² Schafer notes

¹⁰⁰ Henley T and Hershman D op cit at p540

¹⁰¹ Act 24 of 1987

¹⁰² Preamble to Act 24 of 1987

that the Office of the Family Advocate was established "to see to the proper protection of rights of minor and dependent children."¹⁰³

The Family Advocate plays an important role with regard to protecting the interests of minor children in all divorce actions and related applications.

The ambit of the Family Advocate's jurisdiction to institute enquiries is with regard to:

- i) *divorce actions where minor or dependent children are involved and*
- ii) *applications made for variation, rescission or suspension of an order with regard to custody or guardianship of, or access to, a child previously made in terms of the Divorce Act.*¹⁰⁴

The Family Advocate may conduct an enquiry at the request of the court or either of the parties to the proceedings.¹⁰⁵ The Family Advocate may also apply to the court for authorisation to conduct an enquiry where, upon perusal of the summons, it appears that such an enquiry is warranted.¹⁰⁶

¹⁰³ Schafer I "The Family Advocate in South Africa" in: Bainham A and Pearl D (eds.) *Frontiers of Family Law*, London (1993) 36 see also section 4 (1) of the Mediation in Certain Divorce Matters Act, Act 24 of 1987

¹⁰⁴ section 4 (1) of Act 24 of 1987

¹⁰⁵ Ibid

¹⁰⁶ section 4 (2) of Act 24 of 1987, see also *Van Vuuren v Van Vuuren* 1993 (1) SA 1663

The enquiry by the Family Advocate is informal and the Family Advocate may institute the enquiry in a manner which the Family Advocate deems expedient or desirable.¹⁰⁷

This could include a request for affidavits from the parties or persons to whom the parties refer the Family Advocate for collateral information, reports or documents. The Family Advocate must submit a report to court within 15 days of completion of the enquiry.¹⁰⁸

The Family Advocate may request a Family Counsellor to assist the Family Advocate with an enquiry. The author's experience is that social workers, employed in the Department of Social Services, are appointed as Family Counsellors. This enables the legal and social work disciplines to interact in a meaningful and practical way in divorce actions and applications to facilitate the best interests of children.¹⁰⁹

In the author's experience the practice in the various offices of the Family Advocate is that the Family Counsellor will interview the parties as well as the children and any other person deemed to have information relevant to a decision regarding the minor or dependent children e.g. school teachers, relatives etc.

In a divorce or related application the court is required to consider the report of the Family Advocate before making an order or granting

¹⁰⁷ Schafer I op cit at p37

¹⁰⁸ Regulation 5(3) of the Regulations in the Mediation in Certain Divorce Matters Act 24 of 1987

¹⁰⁹ Schafer I op cit at p39

relief.¹¹⁰ The value of the contribution made via the report of the Family Advocate is noted.¹¹¹ This does not mean that the court will make an order which follows the Family Advocate's recommendation in every matter. The Family Advocate's sole interest is the welfare of the minor or dependant children born of the parties' marriage.

The Family Advocate may also, if she or he deems it to be in the interests of the child and if requested by the court, appear at the trial of any divorce action and may adduce evidence relevant to the action or application or cross-examine witnesses giving evidence thereat.¹¹²

As indicated earlier, the court may also appoint a separate legal representative for the child in terms of section 6(4) of the Divorce Act 1979.¹¹³ This section has not been used often. Palmer suggests that the cost implications have possibly resulted in a separate legal representative not being appointed for the child.¹¹⁴ Kassan argues that section 6(4) of the Divorce Act does not meet the constitutional objective that section 28 (1)(h) of the Constitution¹¹⁵ demands with regard to representation of children at state expense in divorce proceedings.¹¹⁶

¹¹⁰ section 12 of the Divorce Act, Act 70 of 1979, see also Whitehead v Whitehead 1993 (3) SA 72

¹¹¹ Hlophe J op cit at p445-446

¹¹² Section 4 (3) of Act 24 of 1987

¹¹³ Act 70 of 1979

¹¹⁴ Palmer A op cit at p112

¹¹⁵ Act 108 of 1996

¹¹⁶ Kassan D op cit at p8

The Constitution requires that children's rights be recognised, and specifically that children be heard in matters affecting them. The application of section 6(4) of the Divorce Act should be applied having regard to section 28 (1) (h) of the Constitution which is the supreme law of the country. Section 6(4), however only provides legal representation subject to the parties covering the costs and is applicable if it is in the court's discretion. Kassan notes that there are no criteria informing the term 'substantial injustice'¹¹⁷ which does not allow it to be applied effectively because of the vagueness of the term.

The methods mentioned above are not exhaustive. Other methods which may be employed to ascertain the child's views, is for the court to consider reports obtained by one of the parties from experts e.g. social workers and or psychologists who have investigated or assessed the circumstances of the child, which are considered to be material, and which reflect the child's view.¹¹⁸ The court may also decide to interview the child in chambers as occurred in the Martens¹¹⁹ matter.

The Family Advocate's appearance at the trial also provides an avenue to convey to the court the child's views, albeit a limited one as the Family Advocate may not agree with the child as to what is in his/her best interests. Kassan notes that the Family Advocate interviews children at his/her discretion and the regulations informing the Family Advocate's consideration do not require the Family Advocate to hear or

¹¹⁷ Kassan D op cit at p4

¹¹⁸ In Ex parte Crichtfield 1999 (3) SA 132, the court had insight into the report of the Family Advocate and two Family Counselors as well as two further psychologists reports.

¹¹⁹ 1991(4) SA 287 (T)

record the child's views¹²⁰. The Family Advocate is thus not aware of the child's views in every summons perused. It follows then that whilst the Family Advocate intends to act in the best interests of the child, this is not per se representation of the child.

The importance of ascertaining the child's view gives effect to the objectives of various international, regional and domestic instruments and legislation.¹²¹ It also recognises the child as a bearer of rights and an active participant securing his /her best interests rather than being a passive recipient which is characteristic of the welfare approach.¹²²

In considering the views of the child, due regard must be had to recognising the stress and ill effects that children suffer as a result of the dispute between adults. The child, if s/he is the subject of the dispute, may feel caught in the middle and feel forced to choose between his/her parents. The child's views should be discovered in such a way as to avoid making children feel that they have to choose. Thus discussion and interviews with the child will be required to be tailored in accordance with the developmental stage of the child. In this regard the report of the Welfare Officer or psychologist assessing the matter with regard to the maturity of the child and reasons given by the child for the views expressed will be valuable. The rationale of social

¹²⁰ Kassan D op cit at p12

¹²¹ United Nations Hague Convention on the Rights of the Child 1989, African Charter on the Rights and Welfare of the Child 1990, and Constitution of the Republic of South Africa Act 108 of 1996.

¹²² Eeklaar J, 'The Importance of Thinking that Children have Rights' in Alston Parker, Seymour (eds.) Children, Rights and the Law (1992) 228

workers and psychologists is generally based on similar theories of child development.

1.9 WHAT REQUIREMENTS MUST A CHILD MEET TO PARTICIPATE IN DETERMINING HIS/HER BEST INTERESTS

Having ascertained that the court is required to consider the child's views in matters concerning him/her it follows that the discussion should proceed to consider what requirements a child is expected to meet before being allowed to express his/her views. In this regard, legislation and case law, which may be related to custody applications and actions, will be examined to determine what is required. The discussion will also consider what prerequisites are required in an application in a Hague Convention matter.

1.9.1 ENGLAND

The position in England is informed by the Children Act 1989 which restates the welfare principle which first appeared in the Guardianship of Infants Act 1925.¹²³ The Children Act requires that the "court shall have regard in particular to -

- a) "the ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding).¹²⁴

The Family Law Act 1996 also provides for the court to have a similar consideration namely: *In making a decision in any proceedings for a*

¹²³ Hogget B, Pearl D, Cooke E and Bates P op cit at p532

¹²⁴ Section 1(4) The Children Act 1989.

*divorce order or a separation order it appears to the court that the circumstances of the case require that the court exercise its powers under the Children Act 1989.*¹²⁵ In deciding the circumstances the court shall treat the welfare of the child as paramount¹²⁶. In making the above decision the court shall consider various factors, and the court shall also have particular regard, on evidence before it to-

- a) *"the wishes and feelings of the child considered in the light of his age and understanding and the circumstances in which those wishes were expressed"*¹²⁷

The Law Commission in England, prior to the enactment of the Children's Act, proposed that the child's wishes and feelings be given due consideration in light of his/her age and understanding at least in contested cases. This proposal found unanimous favour. The consideration of children's wishes in making decisions regarding them is in accordance with a rights-based approach, which sees a child as having rights¹²⁸. Various international and domestic legislation grant children rights.¹²⁹ The recognition of children as bearers of rights requires that they be permitted to participate in processes affecting them, by virtue of holding such rights. The approach which recognises children as bearers of rights seeks to empower children with a voice to pursue their rights. The Law Commission in England noted the

¹²⁵ Section 11(2) The Family Law Act 1996

¹²⁶ Section 11(3)) The Family Law Act 1996

¹²⁷ Section 11(4)(a) The Family Law Act 1996, see Hogget et al op cit at p549

¹²⁸ Eekelaar J op cit at p228

¹²⁹ Examples include the Article 12 of the UN Convention on the Rights of the Child, Article 4 of the African Charter on the Rights and Welfare of the Child and section 28 of the Constitution of the Republic of South Africa.

recognition "*given both in practice and in law to the child's status as a human being in his own right*".¹³⁰

With regard to age considerations it is noted that the court has the power to make custody orders in English Law until the child reaches the age of 18 and that the court will rarely make a custody order which is contrary to the wishes of a child who is 16 years old.¹³¹ The impracticality of imposing a court order on a child aged 16 years is recognised when one takes into account that a child may legally leave school and seeks full time employment at this age.¹³² The approach recognises the unfairness of imposing an order on a child of this age. This view is illustrated by the dictum of Butler-Sloss and the court's approach in the case of Re P (A Minor) (Education)¹³³ discussed above. The view of Butler-Sloss LJ was as follows:

*"I think that the boy's wishes in this case have to carry, for me, such weight as to tilt the balance and make it necessary that what he has asked for in a sensible way should, in fact, be the decision of this court"*¹³⁴

UNIVERSITY of the
WESTERN CAPE

1.9.2 AUSTRALIA

In Australian Courts presiding over family law matters, the wishes of the child is just one of the factors to be considered by the courts. This

¹³⁰ Hogget et al. op cit. at p550, See also the reference to the case of Gillick above

¹³¹ Ibid

¹³² Ibid

¹³³ [1992] 1 FLR 316

¹³⁴ Discussed in Bloy DJ op cit at p24

factor has however had a varied history.¹³⁵ Prior to the Family Law Reform Act 1995, the wishes of the child were to be given such weight which the court considered appropriate in the circumstances. This was followed by S68F(2)(a) of the Family Law Reform Act 1995 where -
"the court must consider:

*any wishes 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 the child's wishes."*

Australian law refers to the child's level of maturity and level of understanding.¹³⁶ This latter approach acknowledges that children develop at different ages depending on various factors. Thus, a child aged between 9-13 years old may be sufficiently mature to express his/her view with a sound basis and logic underpinning such view.

1.9.3 SOUTH AFRICA

In South African law, the common law position has resulted in the formulation of a list of factors. One of the criteria which the court will consider in determining what is in the best interests of the child is to take cognisance of *"the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration."*¹³⁷ Hoffman and Pincus refer to case law in South Africa where the court applied the above criteria, and where the child's preference was taken into account. The authors express the view that the application of this criterion is to determine the maturity of the child

¹³⁵ Parkers S, Parkinson P, Behrens J, *Australian Family Law In Context* (1999) 885

¹³⁶ Ibid

¹³⁷ *McCall v McCall* 1994 (3) SA 201 (C)

having regard to the child's age.¹³⁸ The application of this factor is illustrated in the French case¹³⁹ where the Court took into account the wishes of the child.

The enquiry into the child's wishes seeks to ascertain with which parent the younger child feels more secure. The enquiry with regard to an older child's wishes seeks to determine whether the child's wish or expressed preference is well informed. A factor which influences how an older child's wishes is taken into account is whether the child is emotionally mature. This approach recognises that a teenager or older child is establishing him/herself as a young person. It is noted that young teenagers or children entering puberty are exercising discretion and making judgements. In light of this their opinions regarding where they want to live and why should influence a decision regarding custody.¹⁴⁰

In the period prior to South Africa acceding to the Hague Convention, the Cape Provincial Division of the High Court did have occasion to determine a dispute with regard to custody of minor children alleged to have been abducted by a parent.¹⁴¹ In the case of Martens v Martens, Van Zyl J, sitting as upper guardian of the minor children in the court's jurisdiction, adjudicated a dispute between the parents with regard to custody of the minor children. The judge in attempting to decide what

¹³⁸ Hoffman A and Pincus BK The Law of Custody (1989) 50

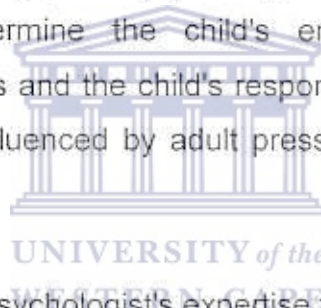
¹³⁹ Ibid at p51, French v French 1971 (4) SA 298 (W)

¹⁴⁰ Ibid at pp50 - 51

¹⁴¹ 1991(4) SA 287 (TPD)

would be in the best interests of the minor children involved took the opportunity to speak to the minor children to ascertain their views.¹⁴²

Upon examining the consideration of the child's wishes in the various jurisdictions referred to in this paper, the legislation in operation at present makes no reference to a particular age at which a child may determine where or with which parent s/he wishes to reside. Perusal of international instruments and domestic legislation, including the Hague Convention, does however make reference to the words 'age' and 'degree of maturity'¹⁴³. This term or factor may be considered vague in that it does not provide a concrete judicial standard. It fits more comfortably into a sociological or psychological framework. The social worker seeks to determine the child's emotional maturity, the motivation for responses and the child's responses whether the child's expressed wishes is influenced by adult pressure or adult views and demands.



The social worker and psychologist's expertise thus makes it necessary for their assistance to be sought by the court making a decision

¹⁴² The minor children were twin sisters aged eleven years old. The Court had difficulty in accepting the suggestion that the children be returned to Germany where the parties should approach a German Court for resolution of the custody issue. The Court considered it necessary to speak to the twins after all the arguments had been concluded and the arguments for and against an award of custody to the parties were made. After consideration of the information available and having ascertained the children's view and related information the court determined that it would be in the best interests of the twins to remain with the Respondent in South Africa.

¹⁴³ Article 13 of the Hague Convention, Article 12 of the UN Convention on the Rights of the Child

regarding the child, when it ascertains the wishes of the child. Resources may however influence whether a social- worker or psychologist's assistance is sought in every matter. Hague Convention matters require the immediate return without considering the substantive merits of the application for return. This approach would preclude a social workers involvement, unless the Respondent raised an article 13 defence. Only in this latter instance could the court request a report from a social worker. It is possible however that where an article 13 (b) defence is raised it is likely that the Respondent may have already sought such a professional's advice and obtained a report, which may be placed before the court.

1.10 ASCERTAINING THE CHILD'S VIEW IN THE CONVENTION

The Hague Convention, on the other hand, purports to protect the interests of minor children in matters pertaining to their custody by requiring that children be returned to the State of habitual residence. The Court of the State of habitual residence shall conduct an enquiry into the merits of the matter where rights of custody have been breached. The Hague Convention thus, provides a procedural remedy and does not envisage a substantive enquiry into the matter.

The procedure followed is that the matter is brought before the court via an originating summons in the UK and on application in the High Court of South Africa. The matter is considered based on *affidavit evidence* (own emphasis) and very seldom is oral evidence permitted. This procedure does not appear to allow for the wishes of the child to be canvassed by the court. This seems to be in conflict with one of the

criterion suggested in the McCall¹⁴⁴ case, that the child's preference be considered.

Hlophe J (as he then was), notes that:

*"It is not impossible to imagine cases where, on the evidence before the court, it would not be in the interests of the child to return to his or her habitual residence. The court, however, has no discretion except in terms of article 13. It seems, therefore, that in cases not involving art 13 defences one can certainly argue that the mandatory- return procedure may not accord with the best interests of the child"*¹⁴⁵

This argument is echoed by Maher who submits that the Hague Convention's requirement of summary return does not promote that interests of the individual child and is potentially inconsistent with an interpretation of section 28 of the Constitution.¹⁴⁶

The Constitutional Court noted in Sonderup v Tondelli¹⁴⁷ that the Convention envisaged two processes, namely the evaluation of the best interests of children in determining custody matters which concern the long term interests and the interplay between the long and short term interests of children in jurisdictional matters. The court was of the view that the Convention recognised and sought to protect the paramountcy of the best interests of children in resolving custody

¹⁴⁴ 1994 (3) SA 201 (C)

¹⁴⁵ Hlophe J op cit at p445-446, Kirsch v Kirsch [1999] 2 All SA 193 at p205a-c

¹⁴⁶ Maher A The Hague Convention on the Civil Aspects of International Child Abduction- "a Departure from the Constitutional Paramountcy of the 'best interests' principle? Unpublished dissertation University of Cape Town, October 2002 p8

¹⁴⁷ 2001 (1) SA 1171(CC)

matters and that the short-term interests of the child may be overridden in the process. The court was required to consider whether the summary return requirement imposed by the Convention was unconstitutional or not.

The Court's view is reflected as follows:

*'One can envisage cases where, notwithstanding that a child's long - term interests will be protected by the custody procedures in the country of that child's habitual residence, the child's short term interests may not be met by immediate return. In such cases, the Convention might require those short- term best interests to be overridden.'*¹⁴⁸

Having assumed that there was an inconsistency, the court proceeded to consider whether the inconsistency is justifiable under section 36 of the Constitution. In the consideration the Court considered the importance of the purpose of the Convention and the relationship between the Convention and the limitation it imposes on realising the short-term best interests of the child.

The Court noted that the purpose of the Convention was that the best interests of the child whose custody is in dispute should be considered by the appropriate court and that a court hearing an application under the Convention should not allow the proceedings to be converted into an application for custody. Recognising the appropriateness of a specific forum, the Convention also sought to prevent the circumvention of an appropriate forum by the unilateral action of one

¹⁴⁸ Ibid at p1184E-F

parent. The Convention also encouraged co-operation between State parties in cases of child abduction. These purposes, the court held, were important, and were consistent with the values of an open and democratic society.¹⁴⁹

The Court found that there was a close relationship between the purpose of the Convention and the means sought to achieve the purpose. It held further that the Convention was carefully tailored and the extent of the limitation was mitigated by the exemptions provided in articles 13 and 20 of the Convention, which catered for those cases where the specific circumstances dictated that a child should not be returned to the State of the child's habitual residence.¹⁵⁰

The Court was of the view that *"the paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the Convention"*.¹⁵¹ The court indicated that an established pattern of domestic violence may result in grave risk of harm to the child as contemplated in article 13.¹⁵² Thus the best interests of the child could in the case of an established pattern of domestic violence require that the exemption be applicable and the court could refuse to order the return of a child to the country of habitual residence where conditions cannot be put in place to ensure the well being of the child.

¹⁴⁹ Ibid at p1185D-F

¹⁵⁰ Ibid

¹⁵¹ Ibid at p1185 G-H

¹⁵² Ibid at p1186 B-C

The Court found that in applying the Convention in South Africa required the court to balance the desirability of the appropriate court retaining its jurisdiction versus the likelihood of undermining the best interests of the child by ordering the return of the child to the jurisdiction of the appropriate court. The Court noted the ameliorative effect of article 13 and the courts ability to impose conditions in the order for the child's return, which are designed to protect the child. Thus the Court was of the view that the limitation was tailored to achieve the important purposes of the Convention and that it went no further than to achieve its objective. The Court found that the means employed by the Convention are proportional to the ends it seeks to attain and is thus manifestly reasonable and justifiable in an open and democratic society. Consequently the Court concluded that the Act incorporating the Convention is consistent with the Constitution.¹⁵³

In light of the Constitutional Court's decision in the Sonderup matter, South African courts will now determine similar applications in accordance with the prescripts of the Hague Convention and the Constitutional Courts indication in the Sonderup case.

Prior to the application in the Sonderup matter, the Family Advocate acting as Central Authority attempted to facilitate the return of the child by 'mediation'.¹⁵⁴ When this proved unsuccessful an application was launched by the Family Advocate in the Eastern Cape Division of the

¹⁵³ Ibid at p1186 C-G

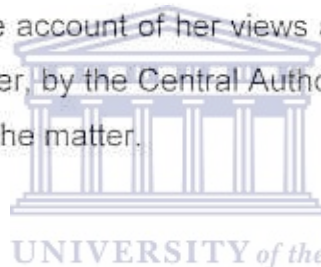
¹⁵⁴ Article 7(c) of the Convention. Discussion with Family Advocate, Port Elizabeth 3 May 2002

High Court for the return of the minor child aged, 3 years old to British Columbia.¹⁵⁵ The court granted the order.

The Family Advocate, acting as the Central Authority in terms of Article 7 of the Convention, was not required to consider the minor's views or assess what was in the best interests of the minor child based on the merits of the matter. In terms of Article 13 of the Convention the court must consider the child's wishes. Article 13, provides:

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

It is arguable however, that in the Sonderup matter, the child lacked sufficient maturity to take account of her views and therefore could not be consulted in this matter, by the Central Authority or any professional addressing the court on the matter.



There is no further indication in the Convention as to what age the court may presume the child to have reached an age of maturity for the purposes of article 13. Caldwell suggests that the court should weigh the soundness and validity of the child's reasons for objecting to return.¹⁵⁶ The Court in Re T (Abduction: Child's objections to Return)¹⁵⁷ identified factors, which were regarded as being relevant to

¹⁵⁵ Article 7(f) and (g) of the Convention

¹⁵⁶ Caldwell J op cit at pt33

¹⁵⁷ [2000] 2 FLR 192

the determination. These included what the child perceived was in his/her interests, whether the child's reasons were realistic or not, the extent to which the child had been influenced by the abducting parent and the extent to which the child's objections would diminish upon return.¹⁵⁸ This consideration will depend on the evidence of the child's wishes. The mechanisms and assessments used in ordinary custody evaluations will be useful in Convention matters to ascertain the wishes of the child.

In view of The Hague Convention being concerned with the ill effects occasioned to children, it is necessary to ascertain what processes if any are envisaged in the Court's interaction with the minor child. If there is no process prescribed in the Hague Convention, does it follow that the processes enlisted by the court to assist in divorce actions are at the court's disposal for Hague Convention matters? If not how then is the child's view ascertained.

1.10.1 ENGLAND

The English Courts approach in Hague Convention cases is gleaned from the case law and the presentation of the Hon. Mr. Justice Peter Singer in his presentation in Pretoria in 1999.¹⁵⁹ In Re P (Abduction: Minor's Views)¹⁶⁰ the court stated the following:

¹⁵⁸ [2000] 2 FLR 192 at p204

¹⁵⁹ Singer P. The Hon Mr. Justice 1999 How the English court handles Hague hearings. The judicial approach to summary applications for a child's return: a move away from the "best interests" principle? Paper presented at the Hague Child Abduction Seminar Justice College Pretoria 21-23 Jan 1999 (on file with author)

¹⁶⁰ [1998] 2 FLR 825

*"[T]he welfare of the child who has been abducted is generally seen as best served by returning him to the jurisdiction of his habitual residence"*¹⁶¹

The English Court will determine at the interlocutory stage how the evidence of the child's objections will be made available where the Respondent relies on this limb of article 13 in a Hague Convention case. Singer LJ indicated that the court is anxious to ensure that the procuring and presentation of the child's view is *"done both sensitively and neutrally, and via some person with insight into children's emotional needs and their cognitive development, able to express an opinion upon their stage of maturity."*¹⁶²

The Court's first recourse would be to call on the officer of the Court Welfare Service. It is the view of the Singer LJ that the Court Welfare Officers are suitably experienced to fulfil this function. The benefit that the court has is that those Welfare Officers attached to the High Court in London have become familiar with the concepts involved in Hague Convention cases and the approach of the court.¹⁶³

The Welfare Officer is thus able to provide a report dealing specifically with the information required by the court to assess the merits of an Article 13 defence. The report will be directed at reporting on the child's objections and to what extent the child has attained an age where it can be said that a sufficient degree of maturity has been reached so

¹⁶¹ Ibid at p827

¹⁶² Singer P LJ op cit at p12

¹⁶³ Ibid.

that his / her views may be taken into account. The child is brought in for an interview with the Welfare Officer who will file a written report, time permitting. Alternatively, the report by the Welfare Officer will be given orally at the final hearing.¹⁶⁴

The Court prefers that this route be followed as it has been found to promote consistency and impartiality. Whilst this latter method is preferred, the court will also permit the release of court documentation and the instruction of medical, psychological and psychiatric experts to advise on the child. This however can only be done with prior leave of the judge and enables the court to control this aspect of evidence and the preparation of the case effectively.¹⁶⁵

Another way in which the child's views may be placed before the court is when application is made at the interlocutory stage for the child to be represented separately and to have party status in the proceedings. This is rarely permitted in the UK whereas in other jurisdictions this is permitted.¹⁶⁶

UNIVERSITY of the
WESTERN CAPE

Singer LJ notes that the English approach has been regarded as being dismissive in not accommodating legal representation of the child or giving more consideration to the child's wishes, but notes a recent change, which is a more liberal trend.¹⁶⁷ This would occur where a

¹⁶⁴ Ibid.

¹⁶⁵ Ibid. In this regard, specific time frames are required to prevent a matter dragging on which results in a child settling into the new environment.

¹⁶⁶ Ibid. In contrast to the position in the UK, the Australian legal system provides for such representation.

¹⁶⁷ Ibid. at p13

child needs to put forward a point of view different to that of the party before the court.

1.10.2 SOUTH AFRICA

South Africa has not had extensive experience with Hague matters as compared to the UK and Australia. The mechanisms for determining the wishes of the child and how this is placed before the court is thus not based on a tried and tested mechanism for Hague Convention cases, but may be based on methods used for divorce actions and custody and access disputes. It is noted that the root problem in Hague Convention matters is that the problems relate to issues characteristic of divorce matters. Thus, the mechanisms employed and methods used to ascertain the child's views could be similar if, not the same model used in the adjudication of domestic custody disputes.

The Chief Family Advocate is appointed as the Central Authority, for the purpose of the Hague Convention, in South Africa.¹⁶⁸ The office of the Chief Family Advocate is based in Pretoria.¹⁶⁹ The Family Advocate thus in fulfilling its role as Central Authority, may take or cause to be taken appropriate measures in order to obtain the voluntary return of a child,¹⁷⁰ alternately, the Family Advocate, acting

¹⁶⁸ section 3 of the Hague Convention On the Civil Aspects of International Child Abduction Act, Act 72 of 1996

¹⁶⁹ The Family Advocate may be contacted at Private Bag X81, Pretoria 0001 or at BAadvpta@justice.gov.za

¹⁷⁰ Article 10 of the Convention incorporated into Act 72 of 1996

as Central Authority may initiate or institute proceedings to secure the return of the child.¹⁷¹

In placing relevant evidence before the court the Family Advocate may request the Family Counsellor to conduct an interview with the minor or dependent children involved in the case. The Family Counsellor's report may then be placed before the court. In view of the impartiality of the Family Counsellor, the child's views, which may not be in favour of returning, will find its way before the court presiding over the matter.¹⁷² The Family Counsellor is able to comment on the maturity of the minor child, its needs and the value to be attributed to the child's objections, after interviewing the child. The feasibility of the above assessment conducted under the auspices of the Office of the Family Advocate must take into account the Central Authorities obligation to secure the summary return required by article 7 of the Convention.

It is possible that the suggestion could be advanced that there is a conflict of interests between the Family Advocate's role in protecting the welfare and interests of the minor child in custody and access disputes and that of Central Authority in terms of the Hague Convention, to facilitate a speedy return of the child. The Family Advocate in his/her role as Central Authority may not conduct a substantive enquiry or an enquiry into the merits of the matter, as it is

¹⁷¹ *Sonderup v Tondelli and the Family Advocate*, 18 October 2000, which was an application brought in the Eastern Cape Provincial Division of the High Court. The case was referred to the Constitutional Court and is reported as *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

¹⁷² Noting the criticism that the Family Counsellor is not legally obliged to consult with the child this proposal assumes that legislation pertaining to the Family Advocate and Family Counsellor must make it mandatory to consult with a young person.

required to facilitate the voluntary return of the child or institute proceedings to secure the return of the child in terms of article 7 of the Convention.

The Central Authority is required to co-operate to achieve the objectives of the Convention. In pursuance of the above the Central Authority may take all appropriate measures to prevent further harm to the child.¹⁷³ The Family Advocate, acting as Central Authority may after consulting with the particular child or liaising with the Central Authority in the child's place of habitual residence, determine that it is in the child's interests to remain in the country to which he or she is removed.¹⁷⁴ The court may in terms of article 13, take into account information relating to the social background of the child provided by the Central Authority or competent authority of the child's place of habitual residence.

The Hague Convention however requires that the Central Authority facilitate the return of the minor child and not conduct a substantive enquiry. The provision of information such as a social work report is required to be provided by the Central Authority in the child's place of habitual residence.¹⁷⁵ It is not clear at this stage whether the court will accept a report provided by a Family Counsellor appointed in terms of the Mediation in Certain Divorce Matters Act.

¹⁷³ Article 7(b)

¹⁷⁴ Article 7

¹⁷⁵ Article 13 of the Hague Convention

The conflict arises between the role of the Family Advocate in ensuring that the short-term best interests of the individual child is realised and the role of the Central Authority in realising the long-term best interests of children generally, by securing their prompt return and not investigating the merits of the case as would ordinarily occur in a custody dispute in a domestic custody dispute. When the Family Advocate acts as Central Authority to facilitate the return of the particular child he/she promotes the best interests of children generally or the long term best interests of children and not necessarily the best interests of that particular child. This facilitation of prompt return being in the interests of children has been acknowledged.¹⁷⁶ But the Constitutional Court has also highlighted that there may be instances where it is not in the interests of the child to order its immediate return.¹⁷⁷ In this latter scenario, in a domestic matter, the role the Family Advocate will play is to conduct a substantive enquiry into the merits of the matter and to make a recommendation to the court. The Convention does not provide for the Family advocate acting as Central Authority to conduct a substantive enquiry into the matter.

The manner in which the court will gain access to the child's views differs in the different jurisdictions. This can range from welfare reports where the Welfare Officer or social worker interviews the child. Another method is to appoint a representative to the child to represent his/her interests in court. The court may also make use of judicial interviews.

¹⁷⁶ Duncan W "Fundamental Principles of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction" unpublished paper delivered at REUNITE seminar on the Hague Child Abduction Hague Convention, Cape Town, January 1998 p 7, see also *Kirsch v Kirsch* [1999] 2 All SA 193 at p205

¹⁷⁷ *Sonderup v Tondelli* (2001) 1 SA 1171 (CC) at p1186 B-C

The South African Law Commission's (hereafter 'the Commission') recommendation proposes to address the conflict it perceives in the Family Advocate's role as Central Authority.¹⁷⁸ The proposal is that the Director General: Social Development be designated the Central Authority for the purposes of the Hague Convention.¹⁷⁹ It proposes further that the Family Advocate act as representative of the child as in the case of Sonderup v Tondelli.¹⁸⁰ It is not clear whether this proposal envisages the Family Advocate placing the views of the child before the Court when the child is of sufficient age of maturity. The role of the Family Advocate in the Sonderup matter was to give effect to the Hague Convention, i.e. summary return of the child. As indicated elsewhere in this paper the Family Advocate did not consult the child or assess the child with a view to representing the child or addressing the court on whether it is in the child's interest to be returned in this specific matter. Thus it is not clear what role is envisaged when the Commission proposes the Family Advocate will play the same role as in the Sonderup matter. It is also not clear at this stage that the Director General: Social Development will be in a position to address matters referred to it as Central Authority where legal knowledge is required.

The Commission recognises the dis-empowered position children operate from in the context of divorce disputes and seeks to make recommendations, which will address the vulnerability which children

¹⁷⁸ Kassan *Op cit* at p13

¹⁷⁹ South African Law Commission Discussion Paper 103 REVIEW OF THE CHILD CARE ACT at 1080

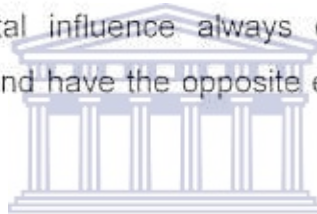
¹⁸⁰ *Ibid*

feel by enabling them to participate or make input to the court before a decision is made which will affect them.¹⁸¹ The Commission recognises the value that section 6(4) of the Divorce Act can make to enable children's views to be placed before the court. The appointment of a legal representative for the child in acrimonious matters will certainly contribute to the best interests of the child being realised. The difficulty with this section is that the cost of appointing a legal representative will only be possible where the parties can afford it. It is perhaps a section which can be used both in the High Court as well as the Southern Divorce Court. However when it is noted that the Southern Divorce court provides a cheaper forum for divorce than the High Court it is likely that many parties proceeding in the Southern Divorce Court will not be in a position to afford a separate legal representative. Often parties have completed a pre-printed summons themselves and do not have the means to appoint attorneys or legal representative for their own interests.

The role of the Family Advocate in protecting the interests of children in both High Court and Southern Divorce Court proceedings in divorce and related proceeding cannot be overlooked. The Commission's Discussion Paper notes however that whilst it is a key function of the Family Advocate to ascertain the child's wishes and to communicate these to the court, the Mediation in Certain Divorce Matters Act does not require the Family Advocate or Family Counsellor to hear the views of the child or to consult with the child in every matter that is referred to the Office of the Family Advocate.

¹⁸¹ Ibid at p654

In addressing the above the Commission recommends an amendment to the regulations to provide for the wishes of children to be recorded in the Annexure A form which is attached to the divorce summons.¹⁸² It is suggested that this will go a long way to solving the problem.¹⁸³ Whilst it is important to record the wishes of children, it must be noted that one of the parties completes the Annexure A form attached to a divorce summons. The possibility exists that the child may be placed in a difficult position where a parent discusses the divorce and a child feels obligated to be loyal to that parent. Where the parent has not discussed the divorce with the other parent such a discussion with the child before the institution of the proceedings has come to the attention of the other parent could also exacerbate acrimony which may exist. The possibility of parental influence always exists but this could contribute to the conflict and have the opposite effect than is intended by the recommendation.



The recording of the child's views it is submitted, is best recorded by an impartial person and preferably a social worker or a legal representative. It is submitted that the Mediation in Certain Divorce Matters Act be amended to direct that the Family Advocate ascertain the child's views in all matters referred to the office. It is suggested further that the roles of the Family Advocate and Family Counsellor be clarified and that the Family Advocate's role be similar to the role of the Child Representative in the Australian Family Court. Thus the

¹⁸² The form is only completed if there are minor or dependant children born of the marriage between the parties and is required to be signed before a commissioner of oaths.

¹⁸³ South African Law Commission Discussion Paper 103 REVIEW OF THE CHILD CARE ACT at p656

involvement of the Family Advocate as the child's representative could be based on similar guidelines to the appointment of the child representative. The guideline for the appointment of a child representative is made in the following cases:

- i. *"Cases involving allegations of child abuse whether physical, sexual or psychological;*
- ii. *where there is an apparently intractable conflict between the parents;*
- iii. *where the child is apparently alienated from one or both parents;*
- iv. *where there are real issues of cultural or religious difference affecting the child;*
- v. *where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare;*
- vi. *where the conduct of either or both of the 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;*
- vii. *where 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;*
- viii. *any case in which, on the material filed by the parents, neither seems a suitable custodian;*
- ix. *any case in which 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;*
- x. *where 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 practicable purposes exclude the other party from the possibility of access to the child;*
 - xi. *cases where it is proposed to separate siblings;*
 - xii. *custody cases where none of the parties are legally represented;*
 - xiii. *applications in the Court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.*"¹⁸⁴

In the matter of Demetriou & Demetriou,¹⁸⁵ Justice Asche expressed the following view on the role of the Child Representative:

*"To my mind the answer is clear that Counsel appointed for the children is there to assist the Court and consequently the child, in assessing the broad interests of the child in respect of which the wishes of the child is only one, albeit often an important factor, in assessing those interests."*¹⁸⁶

¹⁸⁴ Representing the Child's Interests in the Family Court of Australia Report to the Chief Justice of the Family Court of Australia September 1996 at 9 (on file with author)

¹⁸⁵ (1976) FLC at p90-102

¹⁸⁶ Representing the Child's Interests in the Family Court of Australia Report to the Chief Justice of the Family Court of Australia September 1996 at p11

At present the Family Advocate conducts an enquiry and reports to the court. The Family Advocate makes recommendations as to what is in the best interests of the minor or dependant children with regard to custody and access. The Family Advocate is assisted by a Family Counsellor who conducts an assessment if requested to do so. The Family Advocate thus interviews the parties as well as any other person who can assist the Family Advocate in making an informed recommendation.¹⁸⁷ If required to do so, or at the Family Advocate's instance, the Family Advocate may appear at the trial to lead the evidence of witnesses and to cross examine witnesses. This latter appearance does not occur very often and the suggestion is that this be encouraged where it will promote the interests of the minor child.

The submission made above would require the Family Advocate to interview the children in every matter referred to the Family Advocate. The assistance of a social worker or psychologist will still be required where the children are very small so as to provide an expert opinion which lies in the domain of the experts referred to.¹⁸⁸ The purpose of the Family Advocate's involvement would then be to ensure that the view of the minor child is represented by an impartial outsider and to make recommendations or to take such steps as are necessary to insulate the child from the conflict and to ensure that decisions are taken which are in the best interests of the child. This would include

¹⁸⁷ Teachers and family members are a valuable source of information where they are willing to co-operate.

¹⁸⁸ The social worker or psychologist's assistance is required where children are traumatised and cannot express themselves or are too young to articulate their wishes. The tests and evaluation of the aforementioned experts will prove to be useful in this instance.

appearing at the trial to lead evidence of experts or to cross-examine witnesses where necessary.

The role of the Child Representative as described in Lyons & Bosely¹⁸⁹ is as follows:

- (a) *"to interview the child and explain the duty of the Child's Representative in the proceedings;*
- (b) *to present direct evidence to the Court about the child and matters relevant to the child's welfare;*
- (c) *to present evidence of the wishes of the child old enough to state his or her wishes."*¹⁹⁰

The above involvement of the Family Advocate could exist in addition to the more frequent use of section 6(4) of the Divorce Act.

1.11 THE COURT'S ATTITUDE TO THE CHILD'S WISHES

This part of the paper considers the courts' consideration of the child's wishes and how the child's wishes have influenced the outcome of cases with regard to him/her.

In English law, some case law suggests that the courts have, through experience, discovered that it is pointless to ignore the expressed wishes of an older child.¹⁹¹ However it appears the wishes of some

¹⁸⁹ (1978) FLC 90 at p423

¹⁹⁰ Representing the Child's Interests in the Family Court of Australia Report to the Chief Justice of the Family Court of Australia September 1996 p12

¹⁹¹ Hogget et al op cit at p550 where they refer to the case of M v M (transfer of custody: Appeal) [1987] 1 WLR 404, [1987] 2 FLR 146

children may not be taken into account. Bainham and Cretney refer to the dictum of Butler-Sloss LJ¹⁹², that the court was not bound by wishes of children. In the latter case the children were 13 and 11 years respectively. The court felt that it should depart from the wishes of the children when their future welfare required the court to do so.¹⁹³

According to Singer LJ, the English court's approach to a child's objections or expressed wishes in a Hague Convention case is that little or no weight is attached to the child's objections to being returned¹⁹⁴ In the matter of S v S (Child Abduction)(Child's Views)¹⁹⁵ Lord Justice Balcombe indicated that if the court should come to the conclusion that the child's views have been influenced by some other person e.g. the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. The judge indicated further that *"Any other approach would be to drive a coach and horse through the primary scheme of the Hague Convention"*.¹⁹⁶ In the latter case, the minor child an intelligent 9-year-old had psychological problems, which subsided when she was abducted to England. Despite an improvement in her condition upon being moved to England, and the child's wish to remain with the Respondent in England the child was returned, as per the Hague Convention procedure.

¹⁹²Bainham A and Cretney S op cit at p139 (n147)

¹⁹³ibid

¹⁹⁴Singer LJ op cit at p13

¹⁹⁵[1992] 2 FLR 492

¹⁹⁶S v S (Child Abduction)(Child's Views) [1992] 2 FLR 492 at p 501D-E

In the case of Re K (Abduction: Child's Objections)¹⁹⁷ the Court concluded that the child aged 7 who was the subject of the application, lacked the maturity necessary to give weight to her objections. The Court also indicated how the matter would be approached had the Court found that the child was sufficiently mature and the objections had a valid basis, which would unlock the door to the discretion of the court to consider the child's welfare. The Court indicated that it would have to take into account all the facts of the case and would balance the child's objections against the purpose of the Hague Convention that purports that it is in the best interests of the child to be promptly returned to their country of habitual residence for their future to be decided there.

The Court noted that in the exercise of its discretion it would take into account that the nature of the child's objections may be catered for and addressed by the measures which the operation of the Convention puts in place as well as by the laws of the Contracting State and the undertaking of the Applicant. The minor child was afraid of being struck by the father. The Court acknowledged that the US was a developed country and has mechanisms and legislation in place to protect the mother and the minor child from abuse. It appears that reference is also made to conditions the court may impose. The Court also considered the safeguard provided by the undertaking made by the father that he would vacate the premises or seek alternative premises for the mother and child. He also was willing without prejudice or

¹⁹⁷ [1995] 1 FLR 977

admission of abusive acts on his part, to consent to a protection order being put in place to allay fears of abuse.

However in the case of Re T (Abduction: Child's Objections to Return)¹⁹⁸ the court recognised the older child's objections to return and took this into account and did not order return of the younger child. To do so would have produced an intolerable situation as the younger child was emotionally dependent on the older child.¹⁹⁹

The Court also noted that it is necessary to bear in mind the policy of the Convention and in considering applications before it, to note that this could be circumvented by parents who may subject children who are easily suggestible to fears and anxieties which results in a child voicing objections to return. The Court should give effect to the purpose of the Convention to prevent cross-border abduction or retention of children. The objective of prompt return must be given effect to and only in exceptional circumstances would a different course of action be followed.²⁰⁰

UNIVERSITY of the
WESTERN CAPE

In the case of The Ontario Court v M and M (Abduction: Children's Objections),²⁰¹ an application was initially brought by the children's grandmother for access to her grandchildren. Later the relief sought was custody of her grandchildren. The parents of the children left Canada for England after the father of the children received a

¹⁹⁸ [2000] 2 F.L.R. 192

¹⁹⁹ Ibid at p281

²⁰⁰ Singer P.J. op cit. at p14

²⁰¹ [1997] 1 F.L.R. 475

deportation order. The children accompanied their parents to England. The grandmother was unhappy and wanted access to the children and later custody. The children naturally preferred to remain with their parents in England and objected to being returned. The court found that the children would be placed in an intolerable situation if they were returned to the sole custody of their grandmother having taken into account the children's views. The views of the children reflected that they did not like and feared their grandmother.

The Courts have recognised the tension between the anti abduction thrust of the Hague Convention and the respect to be accorded to a child's views which views are affirmed by Article 12 of the Hague Convention on the Rights of the Child.²⁰² Further, the Explanatory Report prepared by Prof. Perez-Vera also indicates that the child's views on return or retention may be conclusive depending on the child's age and degree of maturity.²⁰³ Prof Perez-Vera notes that the Hague Convention applies to all under the age of sixteen but it is *"acknowledged that would be very difficult to accept that a child of for example fifteen years of age, should be returned against its will"*²⁰⁴

2 CONCLUSION

Upon considering the various views, legislation and international instruments, it is noted that the Hague Convention does provide for the

²⁰² Caldwell J op cit p 130 citing the case of *S v S* [1999] NZFLR 625

²⁰³ Ibid

²⁰⁴ Perez-Vera Report at p433 (on file with student)

child's view to be heard. This occurs firstly in terms of Article 13. This is qualified by the requirement that the child must be of a certain age or degree of maturity. There are no directives in this regard and the realisation of the success of this article has depended on the subjective view of the court applying the Hague Convention. It has been noted that the courts adopt a robust approach, which excludes a substantive enquiry into the matter. This approach does not allow for the views of very young minor children to be canvassed. Courts have however been influenced by the views of an older sibling who is able to express his or her views in making a decision with regard to a younger child.²⁰⁵

The approach, which adopts a summary return, may arguably be contrary to a traditional approach to the best interests of the child. Despite the move from a welfare-based approach to a rights based approach both make provision for the canvassing or consideration of the child's views. Both to a lesser or greater degree consult the child and apportion a value to the child's views. Article 4 of the Hague Convention also only allows children of a particular age and maturity to determine their best interests and otherwise adopts a summary return approach. Article 4 states that *'the Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease*

²⁰⁵ *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192

*apply when the child attains the age of 16 years.*²⁰⁶ Thus children age 16 years and upward may refuse to return, whilst children under 16 years old must be able to convince the court as to their maturity and the logic of their reasons for not returning.

Maher observes that the summary approach provided for is a departure from the best interests' principle, as it is understood in South African courts.²⁰⁷

The rationale for the summary approach is in understanding that Hague Convention adopts a generalised approach, which presumes that the immediate return of children to their countries of habitual residence is in their best interests. It may be argued that the purpose of deterring abductions of many children overrides the interests of one individual child. Various courts recognise this general application of the Hague Convention in realising the best interests of the child. It follows therefore that not consulting the child or ascertaining his/her views impacts on how the best interests of the child is realised.

An approach, which realises the best interests of the individual child, has recently increasingly come to the fore. The application of the court's discretion in terms of Article 13(b) creates the opportunity to consult the child and to make a determination in the individual child's best interests. Albeit in a limited scenario, the Hague Convention does realise the interests of the individual child by consulting the child. It is

²⁰⁶ Hague Convention on the civil Aspects of International Child Abduction.

²⁰⁷ Maher A op cit at p8, see also Duncan W op cit. at p 9

necessary to consult the child to ascertain his/her view so that the court may apply its discretion as provided for in Article 13.

The Article 13 defence if successfully made out does provide an instance where the welfare of a specific child is allowed to prevail over the welfare of children in general. Caldwell notes the view of Philp J that the exceptions serve to establish that the underlying spirit of the Hague Convention is that the child's interests are paramount under all circumstances²⁰⁸



²⁰⁸ Caldwell J op cit at p124

REFERENCES

ABBREVIATIONS

FLQ Family Law Quarterly

ICLQ International and Comparative Law Quarterly

ALR Australian Law Reports

FLR Family Law Reports

NZLR New Zealand Law Reports

SA South African Law Reports

All SA All South African Law Reports



UNIVERSITY of the
WESTERN CAPE

Anton A. E. 1981 The Hague Convention on International Child
Abduction 30 *ICLQ* 537

Bainham A. and Cretney S. 1993 Children The Modern Law Dorset
Press Dorchester

Barratt A and Burman S 2001 Deciding the best interests of the child:
an international perspective on custody decision making 118 (3)
SALJ 556

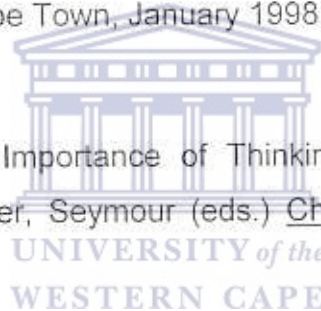
Bruch C. 1994 'The Central Authority's Role under the Hague Child Abduction Convention: A Friend Indeed' 28 *FLQ* 35

Bloy DJ 1996 Child Law Cavendish Publishing London

Caldwell J 2001 *Child Welfare defences in child abduction cases - some recent developments* 13 (2) *Child and Family Law Quarterly* 121

Duncan W "Fundamental Principles of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction" unpublished paper delivered at REUNITE seminar on the Hague Child Abduction Hague Convention, Cape Town, January 1998

Eekelaar J 1992 "The Importance of Thinking that Children have Rights" in Alston Parker, Seymour (eds.) Children, Rights and the Law Oxford London



Franklin B. 1995 The Handbook of Children's Rights and Comparative Policy Routledge London

Hayes M. and Williams C. 1995 Family Law Principles, Policy & Practice Butterworths London

Henley T. and Hershman D 2001 The Representation of Children in Private Law July [2001] *Family Law* 540

Hogget B. Pearl D. Cooke E. and Bates P. 1996 The Family, Law and Society Cases and Materials 4 th Edition Butterworths London

Hoffman A. and Pincus B.K. 1989 The Law of Custody Butterworths Durban

Hlophe The Hon Mr. Justice 1998 "The Judicial Approach to 'Summary Applications the Child's Return': A move away from 'The Best Interests' Principles?" 115 SALJ 439

Nicholson C.M.A. 1999 Can South Africa follow England's example and apply a strict interpretation of article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction 32 *De Jure* 248

Nicholson C.M.A. 2001 Introduction to the Hague Convention on the Civil Aspects of International Child Abduction in Davel (ed) Introduction to Child Law in South Africa Juta Cape Town

Parker S., Parkinson P. and Behrens J. 1999 Australian Family Law in Context Commentary and Materials 2nd Edition Brookers Auckland

Palmer Anne The best interests criterion: An overview of it's application in custody decisions relating to divorce in the period 1985 - 1995 in Keightley R. ed. 1996 Children's Rights Juta Cape Town

Perez Vera E. Explanatory Report on the Hague Convention on the Civil Aspects of International Child Abduction Hague Convention and Recommendation adopted by the Fourteenth Session and Explanatory Report The Hague January 1982

Reddaway J. And Keating H. 1997 Child Abduction: 'Would Protecting Vulnerable Children Drive a Coach and Four through the principles of the Hague Convention?' 5 *International Journal of Children's Rights* 77

Ronen Y. 1998 Protection for Whom and from What? Protection Proceedings and the child at risk in Douglas G. and Seibu L (Eds.) Children's Rights and Traditional Values Ashgate Dartmouth

Schafer I. 1993 The Family Advocate in South Africa in Bainham A. and Pearl D. (Eds) Frontiers of Family Law Chancery Law Publishing Ltd. London

Schuz R. 1995 "The Hague Child Abduction Convention: Family Law and Private International Law" 44 *ICLQ* 771

Schuz R. 2001 "Habitual Residence of children under the Hague Child Abduction Convention- theory and practice" 13 *Child & Family Law Quarterly* 2

Silberman L. 1994 Hague Convention on International Child Abduction: A brief Overview and Case Law Analysis 28 *FLQ* 9

Singer P. The Hon Mr. Justice 1999 How the English court handles Hague hearings. The judicial approach to summary applications for a child's return: a move away from the "best interests" principle? Paper presented at the Hague Child Abduction Seminar Justice College Pretoria 21-23 Jan 1999

SOUTH AFRICAN CASES

Ex parte Critchfield 1999 (3) SA 132 (T)

Fletcher v Fletcher 1948 1 SA 130 (A)

French v French 1971 4 SA 298 (W)

Fitschen v Fitschen 1997] JOL 1612 (C)

Kirsch v Kirsch [1999] 2 All SA 193

Lubbe v Du Plessis 2001 (4) SA

McCall v McCall 1994 3 SA 201 (C)

Martens v Martens 1991 (4) SA 287 (T)

Sonderup v Tondelli 2001 1 SA 1171 (CC)

Van Vuuren V Van Vuuren 1993 (1) SA 163 (T)

Whitehead v Whitehead 1993 (3) SA 72

FOREIGN CASES

Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All
ER 402

In the marriage of JURRS 9 ALR 455

In the marriage of N and H 45 ALR 419

In the marriage of PAILAS 11 ALR 493

In the marriage of RYAN 14 ALR 466

In the marriage of RABY 12 ALR 669

In Re: M (Minors)(Residence Order: Jurisdiction [1993] 1 FLR 495

Re M (Contact) (Welfare Test)[1995] 2 FLR 274

In Re P (Minors) (Wardship: Care and Control)[1992] 3 FLR 681

Re W (A Minor) (Residence Order)[1992] 2 FLR 332

Re P (A Minor) (Education)[1992] 1 FLR 316

OxfordshireCounty Council v M[1994] 1 FLR 175

The Ontario Court v M and M (Abduction: Children's Objections)
[1997] 1 FLR 475

Re C (Abduction: Grave Risk of Physical or Psychological Harm)
[1999] 2 FLR 478

Re A (Contact: Separate Representation) [2001] 1 FLR 715

Re P (Abduction: Minor's Views) [1998] 2 FLR 825

M V M (Transfer of Custody: Appeal) [1987] 2 FLR 146

May v May [1986] 1 FLR 325

Re T (Abduction: Child's objections to Return) [2000] 2 FLR 192

S v S (Child Abduction)(Child's Views [1992] 2 FLR 492

Re K (Abduction: Child's Objections[1995] 1 FLR

S v S [1999] NZFLR 625

LEGISLATION

Hague Convention on the Civil Aspects of International Child Abduction
1980

United Nations Convention on the Rights of the Child 1989

African Charter on the Rights and Welfare of the Child 1990

1950 European Convention for the Protection of Human Rights and
Fundamental Freedoms

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

The Constitution of the Republic of South Africa Act 108 of 1996

The Constitution of the Republic of Namibia 1990

Matrimonial Causes Act 1973(UK)

The Children Act 1989 (UK)

The Family Law Act 1975 (Australia)

Family Law Reform Act 1995 (Australia)

Divorce Act 70 of 1979

Mediation in Certain Divorce Matters Act 24 of 1987

OTHER

South African Law Commission Discussion Paper 103 REVIEW OF
THE CHILD CARE ACT

Representing the Child's Interests in the Family Court of Australia
REPORT TO THE CHIEF JUSTICE OF THE FAMILY COURT OF
AUSTRALIA