

# South African courts' differing approaches to determining children's views in family law matters\*

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## SUMMARY

The United Nations (UN) Convention on the Rights of the Child, 1989 (CRC), the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) and sections 6(5), 10, and 31(1)(a) of the Children's Act 38 of 2005 (Children's Act) place an obligation on South African courts to determine children's views in their parents' family law matters. This article analyses thirteen judgments stretching from 2003 – 2020 and one 2018 psychological study in relation to parenting plans to ascertain how South African courts determine children's views and wishes in practice. The judgments selected relate to divorces and disputes regarding children's primary residence and care and contact (custody and access disputes), disputes where a parent intends emigrating with children, and matters where a parent abducted a child. The judgments indicate courts have diverging approaches to determining children's views and wishes in family law matters. The 2018 psychological study found legal practitioners unfortunately fail to take into account children's inputs for purposes of drafting their parents' parenting plans. In light of courts' diverging approaches to determining a child's voice in their parents' litigious matters, as well as the current complete lack of guidelines in this regard, there is a need to amend the Children's Act to assist courts with particular regulations or guidelines in this regard. If courts are equipped with guidelines to direct their determination of children's views and wishes in family law matters, this will result in a more certain, and more congruent approach and most importantly, it will assist courts to pay heed to their duty to properly hear the voice of the child.

## 1 Introduction

South African legislation<sup>1</sup> and two prominent treaties<sup>2</sup> require South

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1 See ss 6(5), 10, and 31(1)(a) of the Children's Act 38 of 2005 (Children's Act).

2 See art 4 of the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC), and art 12 of the United Nations (UN) Convention on the Rights of the Child, 1989 (CRC).

African courts to allow child<sup>3</sup> participation in legal matters where the outcome may affect a child, provided that the child is of a specific age, level of maturity, and stage of development to participate. Participation occurs when courts allow children to express their views, when adults listen to such views, and when courts give due weight to the children's views, interests, and goals.<sup>4</sup>

Article 4(2) of the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) provides as follows:

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

Article 12 of the United Nations (UN) Convention on the Rights of the Child, 1989 (CRC) provides as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Section 6(5) of the Children's Act 38 of 2005 (Children's Act) stipulates as follows:

A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning a child which significantly affects the child.

Section 10 of the Children's Act stipulates as follows:

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

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3 S 1 of the Children's Act: "child" means "a person under the age of 18 years". Art 2 of the ACRWC: "child" means "every human being below the age of 18 years". Art 1 of the CRC: "child" means "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

4 Krappman "The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child)" 2010 *International Journal on Children's Rights* 502.

Section 31(1)(a) of the Children's Act provides as follows:

Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b)<sup>5</sup> involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

A child's right to voice his/her views in legal proceedings is not novel. In the 1971 case of *French v French*,<sup>6</sup> the court stated a child's views had to be considered in disputes between parents involving parental responsibilities and rights.

According to Mol, child participation in legal proceedings may take the form of (a) expert reports; (b) children litigating on their own behalf; (c) judges hearing children directly; (d) legal representation for a child; and (e) best-interests representation.<sup>7</sup>

The legal representation of a child may entail the appointment of a legal practitioner to represent the child by acting on the child's instructions.<sup>8</sup> It may further entail that an appointed legal representative be client-directed.<sup>9</sup> Best-interests representation is another form of legal representation where the child's legal representative represents the child by advancing the child's best interests.<sup>10</sup> In the South African context, best-interests representation usually entails appointing a curator *ad litem* to represent very young children that are unable to articulate their views in a legal matter.<sup>11</sup>

Where a court finds that the outcome of the proceedings between parties will result in substantial injustice for a child the court will, in terms of section 28(1)(h) of the Constitution of the Republic of South Africa, 1996 (Constitution) and at state expense, appoint a legal representative for the child.<sup>12</sup> Determining if there may be substantial injustice is unrelated to the form of legal representation (which will either be to take instructions directly from the child or to follow a best-interests approach).

5 S 31(1)(b): "A decision referred to in para (a) is any decision — (i) in connection with a matter listed in section 18(3)(c); (ii) affecting contact between the child and a co-holder of parental responsibilities and rights; (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a person or family member or, generally, the child's well-being."

6 1971 4 SA 298 (W) (hereinafter *French*).

7 Mol "Children's Representation in Family Law Proceedings" 2019 *International Journal on Children's Rights* 67.

8 See fn 7 above.

9 See fn 7 above.

10 See fn 7 above.

11 Mol 2019 *International Journal on Children's Rights* 74.

12 Boezaart and De Bruin "Section 14 of the Children's Act and the Child's Capacity to Litigate" 2011 *De Jure* 416.

Besides the considerations contained in the sections of the Children's Act referred to above, no guidelines or factors are available to assist courts in affecting child participation. Seeing that courts determine (and weigh) children's views on a case-by-case basis, an in-depth inquiry into how courts have dealt with this aspect in the past is relevant and important. This article analyses the forms of child participation employed by South African courts in selected cases to determine children's views in certain family law proceedings. Due to length limitations, the analysis is limited to:

- (a) Divorce and care (primary residence and care) disputes;
- (b) Relocation disputes; and
- (c) Child abduction disputes.

Apart from *Soller v G*<sup>13</sup> and *Ex parte van Niekerk: In re van Niekerk v Van Niekerk*,<sup>14</sup> all the judgments selected for analysis were handed down after the Children's Act came into operation.<sup>15</sup> Even though *Soller* and *Van Niekerk* were handed down before the enactment of the Act, they were selected because they were handed down after South Africa became a state party to the CRC and the ACRWC and after the Constitution came into operation, and they deal with and particularly discuss child participation. The 2018 study<sup>16</sup> identified relates to various role-players involved in the drafting of parenting plans and whether or not such role-players considered or took into account children's views and wishes for purposes of their parents' parenting plan.

At the hand of the analysis of these cases and the study by the psychologists,<sup>17</sup> recommendations are made to address the current situation where the Children's Act is devoid of guidelines to assist courts in determining children's views and wishes. The recommendations include various aspects relating to child participation in family law matters, ranging from how the court may become more child-friendly to suggesting an amendment to the Children's Act to add regulations and guidelines thereto courts may utilise to determine children's views and wishes.

## 2 How South African courts determine children's views in family law proceedings

A number of judgments relating to three areas of family law are analysed to ascertain how courts have gone about determining children's views

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13 2003 5 SA 430 (W) (hereinafter *Soller*).

14 2005 JOL 14218 (T) (hereinafter *Van Niekerk*).

15 Some parts of the Children's Act came into force on 11 July 2007 while the rest came into operation on 1 April 2010.

16 Robinson T, Ryke E and Wessels C "Professional views of mental health and legal professionals relating to the divorcing family and parenting plans" 2008 *Child abuse research: A South African journal* 16 – 24.

17 See fn 16 above.

and wishes in family law matters. The 2018 study<sup>18</sup> was selected as it focuses on parenting plans and how various role-players, such as attorneys and advocates go about drafting parenting plans (intended to regulate parental responsibilities and rights such as contact, care, relocation, and so on). The judgments relate to three areas of family law: (a) divorce and care disputes; (b) relocation disputes; and (c) child abduction disputes.

## 2 1 Divorce and care disputes

In *Legal Aid Board: In re Four Children*,<sup>19</sup> a legal representative was appointed for four children in their parents' acrimonious divorce action to act as the children's mouthpiece in such divorce proceedings. The Supreme Court of Appeal (SCA) explained why certain persons are suitable to represent children while others are not.<sup>20</sup> The SCA found that a Legal Aid attorney was suitable to represent children in legal proceedings, either as their legal representative or as curator *ad litem*.<sup>21</sup> The SCA stated as follows:

The appointment of an employee of the Legal Aid Board as curator would have met everything that was avowedly required and might have been done by granting the preliminary order in suitably modified form ... No more was required for the Justice Centre to achieve its avowed aim than to have one of its employee's appointed curator. Where a curator is not able personally to conduct the litigation then no doubt a child is entitled to have a legal practitioner assigned under that section but that was not the present case.<sup>22</sup>

The SCA further stated:

I have pointed out that there is no bar to an employee of the Justice Centre being appointed curator to a minor. Indeed, employees of the Legal Aid Board will generally be admirably suited to such an appointment. They will seldom have a conflict of interest – as private practitioners might have – and yet they have the qualifications and skills to conduct the litigation without further outside assistance.<sup>23</sup>

In addition, the court explained that a curator *ad litem* could be appointed without the child's knowledge if a person had applied for the curator's appointment and can show that the appointment is in the child's benefit and interest.<sup>24</sup>

In the divorce matter of *Van Niekerk*, the children's mother frustrated the parental responsibilities and rights of the children's father by preventing the children from having contact with him.<sup>25</sup> Both parties

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18 See fn 16 above.

19 2011 JOL 27159 (SCA) (hereinafter *Legal Aid Board*).

20 *Legal Aid Board* paras 12-15.

21 *Legal Aid Board* para 22.

22 *Legal Aid Board* paras 18-19.

23 *Legal Aid Board* para 24.

24 *Legal Aid Board* para 12.

25 *Van Niekerk* para 1.

made use of expert reports to advance arguments on why each of them was more suitable to primarily care for the children.<sup>26</sup> The parties' experts' findings were not discussed in the judgment itself.

The SCA in *Van Niekerk* found that the children (aged twelve and fourteen) had an interest<sup>27</sup> in the outcome of their parents' legal dispute. It ordered state-funded legal representation for the children in terms of section 28(1)(h) of the Constitution and briefly discussed the contents and purpose of section 28(1)(h).<sup>28</sup> The court not only ordered legal representation for the children at state expense, but further decided to join the children as parties to their parents' dispute.<sup>29</sup>

In *Soller v G*,<sup>30</sup> a child, K, sought to vary his parents' divorce order in respect of his primary care and residence.<sup>31</sup> At the outset of its judgment, the court stated that K was central to his parents' disputes and was of a mature age of fifteen years and six months.<sup>32</sup>

The judge was acutely aware of K's right to participate in his parents' legal dispute and stated the following:

I can envisage few proceedings of greater importance to a child/young adult of K's age than those which determine the circumstances of his residence and family life, under whose authority he should live and how he should exercise the opportunity to enjoy and continue to develop a relationship with both living parents and his sibling.<sup>33</sup>

The court found that K had tried to express his views to various role-players, including the HC his parents' legal representatives, and the experts mandated by his parents, and that he was deserving of legal representation at state expense (a section 28(1)(h) appointment).<sup>34</sup> Although the court appointed K his own legal representative, it reiterated that K remained a child and was therefore not able to direct the litigation fully.<sup>35</sup> The child's legal representative was expected legally to convey the child's best interests by exercising their discretion on the wishes of the child within the context of the child's age, maturity, and background.<sup>36</sup>

The judge explained that although he was neither a psychologist nor a social worker, he was under the impression that K could articulate his views in his parents' dispute clearly.<sup>37</sup>

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26 *Van Niekerk* para 3.

27 *Van Niekerk* para 8.

28 *Van Niekerk* paras 5-6.

29 *Van Niekerk* para 8.

30 See fn 13.

31 *Soller* para 1.

32 *Soller* para 4.

33 *Soller* para 7.

34 *Soller* paras 9-10.

35 *Soller* para 4.

36 *Soller* paras 48 and 67.

37 *Soller* para 33.

The court referred to K's views in detail:

[44] K has clearly expressed to myself, the Family Advocate, the [section] 28 legal practitioner and through his behaviour that he wishes to live with his father. He claims that he would wish to spend time with and visit his mother.

[45] K has made his choice quite clear. During 2002 he ran away from his mother's home and went to his father. This resulted in yet another application to court and an order ... that K would continue to live with Mr G [his father] until the principal of King David High School has certified that K has completed his school exams whereupon K would return to Mrs G [his mother] in whom custody remains, subject to Mr G's reasonable rights of access ... It was ordered that the Family Advocate should investigate to report on the best interests of K.

[46] Once K had completed his examinations he persisted in his view that he wished to live with Mr G. *Inter alia*, this Court was presented with a letter emanating from K in which is stated the following:

'26 November 2002

Dear Mom,

I am writing this letter to tell you that I will not come home on Thursday after my exam with you. I have decided on my own will not to come home with you. I will still come and visit you and talk to you on the phone. I still want to live with my Dad and I want you to respect that. It is also not necessary to bring urgent applications or even decide to lock Dad in jail. My mind is made up and this is what I want.

From K'

[47] Most recently, K has met with Mr T D Wilke, a registered psychologist appointed a family counsellor in the Office of the Family Advocate. Mr Wilke's report indicates that both Mr and Mrs G know that K has indicated that he 'prefers to live with his father' and 'he has clearly stated that he prefers to live with his father' and 'he has the greatest respect for his mother but is clear in his decision that he cannot live with her'.

[48] K has met with and spoken to Mr Charles Mendelow, the [section] 28 legal practitioner on a number of occasions. Mr Mendelow's report and his address from the Bar are to the following effect:

'The minor child has, in no uncertain terms, informed me that he wishes to have an amicable and bonded relationship, with both his parents. He wishes to live with his father. He would like to see his mother and/or be with his mother every alternate weekend for the entire weekend and, furthermore, see his mother in the evenings (presumably for supper) once a week.'

The court found that K should stay in the primary care of his mother. Dr Carr (a psychologist who consulted all members of K's family)<sup>38</sup> concluded that K's father's influence resulted in him having become alienated from his mother and that this was a blatant form of abuse.<sup>39</sup> Dr Carr, therefore, proposed that K attend psychotherapy and, to this effect, the court ordered that K attend sessions with a counsellor at his school and for the counsellor to report to the family advocate in this regard.<sup>40</sup>

38 *Soller* para 50.

39 *Soller* para 51.

In *Potgieter v Potgieter*,<sup>41</sup> the father of the eleven and fifteen-year-old children appealed the court *a quo*'s decision to award care of the parties' children to their mother.<sup>42</sup> The SCA described the main issue before it to be the care of the two children.<sup>43</sup> Two clinical psychologists and one psychiatrist were asked to assess and provide the court *a quo* with evidence of their findings.<sup>44</sup> The children's mother called a psychologist that administered a psychometric test on both parties.<sup>45</sup> The family advocate also requested a clinical psychologist to focus on the parties' parental capacities.<sup>46</sup> This psychologist did not interview the children as he felt "it would traumatise them to be interviewed again".<sup>47</sup>

The SCA found the various experts knowledgeable in their fields but at the same time found their findings wanting as it seemed that they accepted the father's version and sources without critical evaluation.<sup>48</sup> The court referred to the views of the children only insofar as the daughter had expressed no real preference as to which parent she wanted to live with after the divorce, while the son had expressed a clear desire to live with his mother.<sup>49</sup> The SCA found that based on favourable credibility findings in favour of the mother and adverse findings against the father, the care of the children should remain with the mother, and the father's appeal was accordingly dismissed.<sup>50</sup>

Co-holders of parental responsibilities and rights may address a variety of family law disputes by entering into a parenting plan, including care arrangements for the child.<sup>51</sup> In a 2018 study,<sup>52</sup> three South African psychologists conducted interviews with six social workers, eight psychologists, eight attorneys, and one family advocate involved in drafting parenting plans in divorce matters.<sup>53</sup> The most striking observation one may make from the 2018 study is not so much that the role-players' inconsistency in determining children's views and wishes when drafting parenting plans, but that the role-players mostly refrain from ascertaining children's views altogether. By not taking into account children's views for purposes of parenting plans, the 2018 study reveals that persons involved in drafting parenting plans often do not uphold

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40 *Soller* para 75.

41 2007 5 SA 94 (SCA) (hereinafter *Potgieter*).

42 *Potgieter* para 3.

43 *Potgieter* para 1.

44 *Potgieter* paras 6-9.

45 *Potgieter* para 6.

46 *Potgieter* para 9.

47 As above.

48 *Potgieter* para 21.

49 *Potgieter* para 20.

50 *Potgieter* para 14.

51 S 33(3) Children's Act.

52 Robinson, Ryke and Wessels "Professional Views of Mental Health and Legal Professionals relating to the Divorcing Family and Parenting Plans" 2018 *Child Abuse Research* 14-26.

53 Robinson, Ryke and Wessels 2018 *Child Abuse Research* 15.



their obligations in terms of the treaties and the relevant sections of the Children's Act at all.

All the legal practitioners (including the family advocate) indicate they did not interview children when drafting parenting plans in divorce matters.<sup>54</sup> The psychologists found that legal practitioners involved in family law matters do not interview children for the following reasons:

Attorneys and advocates choose not to consult with the children as they often feel uncomfortable to interview the children. Social workers and psychologists are more experienced and trained in interviewing children and often include children when drafting parenting plans. It is essential that the focus of intervention remains on the child's experience and on how to help the child post-divorce with the multi-faceted emotions they have to deal with. Legal professionals should refer children to mental health professionals for interviews unless the legal professionals have received adequate training for this purpose.<sup>55</sup>

From the above, it is evident that although the authors advise that legal practitioners are better equipped to interview children (if specifically trained to do so), they also caution persons involved in drafting parenting plans against a situation where they do not consult the children at all. A parenting plan should represent a child's needs as this would help assure children that they are heard by the divorcing adults and make children feel more secure, which is conducive to children functioning better after their parents' divorce.<sup>56</sup>

The psychologists further advise that children must be consulted as it is important to draft a child-centred parenting plan and not a parent-centred one.<sup>57</sup> In a subsequent study (by the same authors in 2019),<sup>58</sup> they found that parenting plans should be child-centred<sup>59</sup> and to — at the same time aim — address the needs of the parents.<sup>60</sup>

## 2.2 Relocation disputes

In the unreported judgment of *AC v KC*,<sup>61</sup> the court requested a family advocate to prepare an urgent report in relation to a relocation application concerning a mother who wished to move to Abu Dhabi with her two children (ten and twelve). Based on the urgency of the matter, the family advocate did *not* conduct an in-depth investigation.<sup>62</sup> The

54 Robinson, Ryke and Wessels 2018 *Child Abuse Research* 19.

55 See fn 54 above.

56 Cleophas and Assim "Child Participation in Family Law Matters affecting Children in South Africa" 2015 *European Journal of Law Reform* 250.

57 See fn 54 above.

58 Robinson, Ryke and Wessels "Parenting Plans Attentive to the Needs of the Divorcing Family" 2019 *Obiter* 221-239.

59 Robinson, Ryke and Wessels 2019 *Obiter* 226-233.

60 Robinson, Ryke and Wessels 2019 *Obiter* 233-238.

61 Unreported 389/08 2008 ZAGPHC 369 judgment handed down on 13 June 2008 (hereinafter *AC v KC*) para 1.

62 *AC v KC* para 8.

family advocate reported that the older child expressly indicated that she wished to accompany her mother to Abu Dhabi.<sup>63</sup> The family advocate expressed reservations about whether or not the younger child, a boy, should move with his mother to Abu Dhabi.<sup>64</sup>

The court did not focus on the children's views but instead indicated that the final question a court had to answer in a relocation application was whether the applicant, objectively viewed, acted like a reasonable person in the same circumstances would have.<sup>65</sup> The mother was allowed to relocate with the child to Abu Dhabi as the court found that the mother acted as a reasonable person would have.<sup>66</sup>

In *HG v CG*,<sup>67</sup> the court considered a relocation application where a mother applied to court to relocate with her four children from South Africa to Dubai. The eldest, a boy, was aged eleven and his siblings, triplets, were eight.<sup>68</sup>

The court was cognisant of a child's right to participate in legal proceedings and stated as follows:

The Act has brought about a fundamental shift in the parent/child relationship from that which prevailed in the pre-constitutional era and now not only vests a child with certain rights but moreover gives a child the opportunity to participate in any decision-making affecting him or her. Thus s 10 of the Act explicitly recognises a child's inherent rights in any matter affecting him or her...<sup>69</sup>

The court also referred to section 31(1)(a) of the Children's Act and stated that this section is "widely framed and there is no doubt that the relief sought by the applicant triggers the operation of the aforesaid section."<sup>70</sup>

The father of the children approached an expert to assist him in opposing the mother's relocation application. The father's expert considered ample factors in relation to whether or not the relocation application should be granted, of which the respective children's views were mentioned only briefly:

When [K] was interviewed on the day her father brought her, she had completely different opinions from the first session. At this point she stated clearly that she would 'miss him (her father) too much' if she stayed with her mother full time. She was worried about upsetting her mother by saying this. Subsequently Mrs [G] in interviews with the writer asserted that [K] felt she had not been 'heard', was tearful and upset after the second interview. This was in fact the direct opposite of the case. When [K] was later questioned

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63 See fn 62 above.

64 See fn 62 above.

65 *AC v KC* para 15; Domingo "For the Sake of the Children: South African Family Relocation Disputes" 2011 *PELJ* 155.

66 *AC v KC* paras 15-16.

67 2010 3 SA 352 (ECP) (hereinafter *HG v CG*).

68 *HG v CG* para 1.

69 *HG v CG* para 6.

70 See fn 69 above.

about this she denied ever making such remarks to her mother and seemed mystified by the whole issue.<sup>71</sup>

The expert the father called upon proposed that the primary residence of the children change from their mother to their father based on particular factors the expert deemed relevant to the matter.<sup>72</sup> The court had the benefit of the opinions of various externally appointed experts as well as the family advocate's findings.<sup>73</sup> The court vehemently rejected the findings the experts put before it and stated the following in this respect:<sup>74</sup>

By all accounts the children are of an age and maturity to fully comprehend the situation and their voices cannot be stifled but must be heard. The children's point of view is in direct conflict with their [ie the psychologists'] recommendations and this no doubt actuated them to suggest that they be relieved of the responsibility of deciding with which parent to live.<sup>75</sup>

The court quoted an expert witness to set out what the court had found to be the children's views on their parents' relocation dispute:

When I enquired from the children about the important aspects of possibly moving to the Emirates, they all understood the gravity of the situation and made it abundantly clear that they would prefer the situation to remain as it is at the moment. As stated above [M] took on a responsibility as the eldest and voiced his concern about whether the triplets would be able to cope without the respondent [ie their father]. He stated he doubts they will survive without either parent ... [M] stated that he would prefer it if the situation could remain as it currently stands. He likes school and his friends and he specifically mentioned that he loves bible study and would not be able to do it in Dubai. He stated that if the situation had to change his preference would be to stay in South Africa.<sup>76</sup>

The court rejected all the expert findings but relied on the expert reports insofar as they reported the children to be of an age and level of maturity to make an informed decision — such a decision being that the children wanted to remain in South Africa.<sup>77</sup> The court accordingly dismissed the relocation application.<sup>78</sup>

In the relocation case of *JP v JC*,<sup>79</sup> the unmarried parties had two boys, a six-year-old and a three-year-old.<sup>80</sup> The children were primarily in the

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71 *HG v CG* para 15.

72 See fn 70 above.

73 *HG v CG* paras 11-18.

74 *HG v CG* para 21.

75 *HG v CG* para 17.

76 *HG v CG* para 20.

77 *HG v CG* para 23.

78 *HG v CG* para 24.

79 2016 1 All SA 794 (KZD) (hereinafter *JP v JC*).

80 *JP v JC* para 1.

care of their mother.<sup>81</sup> The mother wished to relocate to the United Kingdom with the two minor children.<sup>82</sup>

The court mentioned the children's wishes only once in its judgment:

'JMC', who is presently five years of age, has expressed his wish to relocate with his maternal grandparents though he wants to maintain contact with his father, the first respondent. However, because of his tender age his wish cannot be said to be an informed one.<sup>83</sup>

The family advocate was requested by the court to provide evidence in respect of the relocation application and the family advocate involved a family counsellor to assist in this regard.<sup>84</sup> The court found the evidence led by the family advocate and family counsellor to be unhelpful and rejected their evidence.<sup>85</sup>

The children's views were not mentioned in either the court's summary of its findings or reasons for its findings.<sup>86</sup>

In *Cunningham v Pretorius*,<sup>87</sup> the parents of a four-year-old boy disagreed about their child's possible relocation to the United States.<sup>88</sup> The child's mother wanted him to reside with her in the United States, while his father wanted him to continue residing in South Africa.<sup>89</sup>

The court found that the child and his father had a good relationship.<sup>90</sup> Despite his young age, the boy spent extended periods with his father.<sup>91</sup> The boy's parents had diverging opinions about their son's views and wishes regarding the possibility of the child's relocation to the United States: The father indicated that his son had informed him that he did not wish to return with his mother to the United States and that he was enthusiastic about being in South Africa for the arrival of his soon-to-be-born sibling.<sup>92</sup> The mother submitted that the father did not interpret the son's views correctly and that the child did not mean that he preferred to be left behind in South Africa while she relocated to the United States.<sup>93</sup>

The court mentioned that no less than six experts had filed reports on the matter.<sup>94</sup> Three reports dealt with the child's language difficulty.<sup>95</sup> A licensed clinical social worker from the United States and a social worker

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81 *JP v JC* para 5.

82 See fn 80 above.

83 *JP v JC* para 46.

84 *JP v JC* paras 33-34.

85 *JP v JC* paras 36-37.

86 *JP v JC* paras 43-48.

87 2008 ZAGPHC 258 (hereinafter *Cunningham*).

88 *Cunningham* para 1.

89 *Cunningham* paras 3-4.

90 *Cunningham* para 22.

91 See fn 90 above.

92 *Cunningham* para 24.

93 See fn 92 above.

94 See fn 92 above.

95 *Cunningham* para 25.

based in South Africa also presented reports to the court.<sup>96</sup> The reports from the social workers and language therapists were for the most part uncontested.<sup>97</sup> The reports by the psychologists were, in contrast, considered to have led to several disputed submissions and contentions in relation to the views and wishes of the child.<sup>98</sup>

The court ordered the boy to accompany his mother to the United States.<sup>99</sup>

### 2 3 Child abduction matters

In *WS v LS*,<sup>100</sup> the father of two young boys applied for the children to be returned to live with him in the United Kingdom. At the time the court delivered its judgment (September 1999), the one boy was two years old and his younger brother had just turned one.<sup>101</sup> No mention was made of the views and wishes of the children, presumably because both children were still very young and therefore unable to express their preferences. The children's ages were considered insofar as an expert relied on the children's ages to find that it would be best if they remained primarily in the care of their mother.

The court concluded that the youngest child was too young to return to England and, because it was best for children not to be separated from each other, both children should remain in South Africa.<sup>102</sup>

In *Central Authority for the Republic of South Africa v LS*,<sup>103</sup> the father of a four-year-old and a six-year-old sought their return to him in Canada where he alleged the children had been abducted by their mother before being brought with her to South Africa.<sup>104</sup>

At the outset of its judgment, the court mentioned the children's right to participate in the child abduction proceedings as set out in article 13 of the Hague Convention. The court quoted the following part of article 13:

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.<sup>105</sup>

The court commented on the children's objections (views) to their return to Canada as follows:

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96 See fn 95 above.

97 See fn 95 above.

98 See fn 95 above.

99 *Cunningham* para 77.

100 2000 4 SA 104 (C) (hereinafter *WS v LS*).

101 *WS v LS* para 118.

102 *WS v LS* para 116.

103 2021 2 SA 471 (GJ) (hereinafter *Central Authority v LS*).

104 *Central Authority v LS* para 1.

105 *Central Authority v LS* para 4.

The children raised an objection to returning to Canada. Both categorically indicated that they do not wish to return to Canada. Their explanations were, according to Mr. Courtenay and Ms. Filmer (social worker), woefully inadequate and based on immature reasoning. They concluded that the children are anxious about moving back to Canada which is due to the continued uncertainty. They hold the view that the refusal to return has, likely, been spurred on by the respondent or another adult who has actively tried to influence them.<sup>106</sup>

The court seems not to have attached any weight to the child's views, as it did not refer thereto in its conclusion or the reasons for its judgment. The court dismissed the father's application for the children to be returned to Canada.<sup>107</sup>

In *Central Authority for the Republic of South Africa v Reynders*,<sup>108</sup> the court referred to the considerations a court should take into account in relocation applications and correctly included a child's views as one of the aspects a court is obliged to consider.<sup>109</sup> In this matter, the child's father alleged that the parties' daughter, who was eight years old,<sup>110</sup> had been abducted by her mother in Belgium whereafter they had returned to South Africa to live with the child's maternal grandmother in Hoedspruit.<sup>111</sup>

In this case, the court acknowledged that it had a duty to consider allowing the child to participate in the proceedings.<sup>112</sup> The court gave detailed reasons for its decision, which included the child's views:

She obviously has an ambivalent attitude towards her father and his way of life, which view is no doubt less objective than it ought to have been, taking into account the nature of the present proceedings and her participation therein.<sup>113</sup>

The court found that the child should remain in Hoedspruit and not return to her father in Belgium.<sup>114</sup>

In *N v Central Authority for the Republic of South Africa*,<sup>115</sup> a girl's mother appealed against the trial court's decision that the child be returned to Northern Ireland to live with her father.<sup>116</sup>

The appeal court summarised the trial court's decision and reasons for its decision as follows:

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106 *Central Authority v LS* para 13.3.

107 *Central Authority v LS* para 113.

108 2011 2 SA 438 (GNP) (hereinafter *Central Authority v Reynders*).

109 *Central Authority v Reynders* paras 26-29.

110 *Central Authority v Reynders* para 4.

111 *Central Authority v Reynders* para 2.

112 Para 26.2 of the judgment expressly refers to s 6(5) of the Children's Act and para 26.4 expressly refers to s 10.

113 *Central Authority v Reynders* para 28.4.

114 *Central Authority v Reynders* para 28.

115 (2016) ZAKZPHC 43 (hereinafter *N v Central Authority*).

116 *N v Central Authority* para 1.

- a We know from the report of Dr Keen [a social worker who provided evidence to the trial court] that [S] misses her siblings, and wishes that she could see them.
- b) We also know that [S] did not wish to discuss her father and step-mother with Dr Keen. This was not explored by Dr Keen, and one should not have to speculate as to why that would be. There is no indication in the record of any animosity to her father, and no allegations are made against him by the appellant regarding his mis-treatment of [S], or of any fears harboured against Mr [R] by [S]. Whatever reasons Dr Keen may have had for not exploring these problems (and we are not told of any), it leaves the court in the dark.<sup>117</sup>

The mother's appeal for the daughter not to be returned to Northern Ireland succeeded.<sup>118</sup>

In *KG v CB*,<sup>119</sup> the father of a five-year-old girl, together with the Central Authority in the United Kingdom (UK) and Wales, applied to a South African court for the return of the child to the UK.<sup>120</sup> In the initial phase of the dispute, the trial court appointed a legal representative for the child and explained such appointment as follows:

[T]he matter was heard on 4 October by Meyer J who *mero motu* raised the issue of legal representation of T, as contemplated in section 279 of the Children's Act ... Meyer J ordered that a curator *ad litem* be appointed to represent T's interests and postponed the matter to 11 October 2011 for the curator to be appointed. Mr Johan van Schalkwyk from Legal Aid South Africa was thereafter appointed. In his report dated 17 October 2011, Mr van Schalkwyk recommended that T not be returned to the United Kingdom until such time as the appeal be finalised and "the cloud surrounding the allegations of molestation [be] cleared."<sup>121</sup>

The child's curator *ad litem* reported to the trial court in relation to his findings as follows:

The curator *ad litem* stated that he had been appointed on 11 October 2011 to report on T's personal circumstances; comment on her level of maturity and her ability to comprehend the proceedings; comment on the effect of relocation on T, and on any other factor that should be taken into account. In his report, he mentioned that, because of time and logistical restraints, he had been unable to investigate and report on CB's [the father's] circumstances. His report deals with his interview with T, the circumstances of KG [the mother] and her immediate family based in Johannesburg, and his conversation with one of T's teachers. In addition, the report covers his 'face value evaluation' of the minor child's views, her immediate circumstances and her day-to-day activities and interactions. From his conversation with T, he concluded that she was not mentally, physically or academically advanced and that she was not yet of an age and maturity that it is appropriate to take account of her views.<sup>122</sup>

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117 *N v Central Authority* para 15.

118 *N v Central Authority* paras 31-32.

119 (2012) JOL 28641 (SCA) (hereinafter *KG v CB*).

120 *KG v CB* para 1.

121 *KG v CB* paras 13-14.

Noteworthy from the above passage is the submission of the child's curator *ad litem* that his evaluation of the child's views was only a "face-value evaluation". This term was not defined or explained but creates the impression that a child's legal representative may ascertain the child's views via a face-value or a more in-depth evaluation.

The court further found the following in relation to the child's views:

T is now five years and 10 months old and has spent more than half of her young life in South Africa. As indicated above, according to the report of the curator *ad litem*, T has not attained an age and maturity at which it is appropriate for the court to take account of her views. She is totally unaware of this litigation, for which credit must be given to KG.<sup>123</sup>

The court dismissed the appeal and maintained the position of the trial court, namely that the parties' daughter must be returned to the United Kingdom.<sup>124</sup>

### 3 Findings

Below is a summary of how the thirteen judgments handed down by South African courts determined children's views and wishes in family law matters:

	Expert reports	Judges directly	Legal representative	Curator <i>ad litem</i>
<b>Divorce and care</b>				
<i>Legal Aid: Four Children</i>	No	No	Yes: Legal Aid	Yes: Legal
<i>Van Niekerk</i>	No	No	Yes: s 28(1)(h) attorney	No
<i>Soller v G</i>	No	Yes	Yes: s 28(1)(h) attorney	No
<i>Potgieter v Potgieter</i>	Yes: Psychologists	No	No	Yes: Family advocate
<b>Relocation</b>				
<i>AC v KC</i>	Yes: Family advocate	No	No	No
<i>HG v CG</i>	Yes: Psychologists	No	No	No
	Yes: Family advocate	No	No	No
<i>JP v JC</i>	No	No	No	No

122 *KG v CB* paras 52-53.

123 *KG v CB* para 60.

124 *KG v CB* para 62.



<i>Cunningham v Pretorius</i>	Yes: Psychologists	No	No	No
	Social workers			
	Language experts			
<b>Child abduction</b>				
<i>WS v LS</i>	Yes: Psychologists	No	No	No
	Yes: Family Advocate			
<i>Central Authority v LS</i>	Yes: Social worker	No	No	Yes: Private advocate
	Yes: Family Advocate			
<i>Central Authority v Reynders</i>	No	No	No	No
<i>N v Central Authority</i>	Yes: Family Advocate	No	No	No
	Yes: Social worker			
	Yes: Family Advocate			
<i>KG v CB</i>	Yes: Social worker	No	No	Yes: Legal Aid

The first observation from the table above is that no two cases show the same approach. South African courts have diverging approaches to child participation.

The second observation is that in eight of the thirteen judgments the assistance of experts was enlisted, making this approach the most popular form of child participation. Although experts are often involved in helping courts determine children's views and wishes in legal proceedings, courts in many instances expressly found against such opinions.

Thirdly, one observes that in only four of the thirteen cases discussed, legal representatives were appointed for children in terms of section 28(1)(h) of the Constitution. Carnelley argues that even where the legal representative appointed for a child is considered client-directed and the client (the child) is mature enough to instruct his/her legal representative, the legal representative is still expected to act in the best interests of the child.<sup>125</sup>

125 Carnelley "The Right to Legal Representative at State Expense for Children in Care and Contact Disputes – a Discussion of the South African Legal Position with Lessons from Australia" 2010 *Obiter* 650-651.

The fourth observation is that in only one of the thirteen cases discussed the judge spoke with the child directly. The child was almost sixteen years of age, which is relatively mature in age compared to children affected by other judgments.

The judgments discussed show that South African courts are inconsistent in how they determine children's views and wishes in family law proceedings.

The fact that in only two of the thirteen judgments a Legal Aid attorney was utilised as curator *ad litem* is concerning. Only in *Legal Aid: In re Four Children* and *KG v CB* did the court appoint Legal Aid attorneys to act as curators *ad litem* for children. As Legal Aid South Africa is state-funded, it would be sensible for courts to more regularly utilise Legal Aid attorneys to act as children's legal representatives or curators *ad litem*.

## 4 Recommendations

An amendment to the Children's Act by adding regulations or guidelines in relation to child participation may address the current inconsistencies in the judicial approach. The amendment could address the following aspects:

### 4 1 Appointing a legal representative in accordance with a child's age

When a child is very young, it may be best for a court to appoint a curator *ad litem* to follow a best-interests representation approach. When a child is older and more mature, a court may appoint the child a legal representative that may take instructions directly from the child.

As seen from the cases discussed in this article, a curator *ad litem* could be a Legal Aid employee, private attorney, or private advocate. It is submitted that courts ought to consider appointing Legal Aid attorneys as curators *ad litem* more often since Legal Aid is a state-funded institution and their appointment makes sense from a cost perspective.

### 4 2 Expert opinions

In most of the cases selected for this article, the parents of a child and not the court itself mandated and funded experts to assess their child and offer an expert opinion to the court. In matters where children are involved courts only called upon family advocates as experts.

The Office of the Family Advocate may be ordered to furnish a court with a report in relation to a matter involving a child. A family advocate is not a child representative but acts neutrally per his/her mandate provided for in terms of the Mediation in Certain Divorce Matters Act.<sup>126</sup>

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126 Mediation Act, see s 4; see *Du Plessis v Strauss* 1988 2 SA 105 (A).

In the case of child abduction cases, the Office of the Family Advocate must be involved as the central authority in South Africa to affect the objectives as set out in the Hague Convention<sup>127</sup> as incorporated into the Children's Act. A family advocate also undertakes an investigation relating to minor or dependent children in court applications where a party seeks to vary, suspend or rescind guardianship or custody (or primary residence and care as referred to in current terminology) of children.<sup>128</sup>

In considering and weighing the evidence of experts involved in assessing children, courts are guided by the ordinary rules of evidence.<sup>129</sup>

### 4 3 Child-friendliness of a court

All courts hearing matters in which children are involved should be made child-friendly, as this obligation is rooted in section 48(2) of the Children's Act.<sup>130</sup> Therefore, the first reason why it should be a priority to make courts more child-friendly is rooted in the legislative obligation contained in the Children's Act. Further to this, a child's right to participate in legal proceedings includes his/her right to freely express his or her views and wishes. By making courts more child-friendly, courts are a step closer to fulfilling their duty to allow children the right to participate in legal proceedings.<sup>131</sup>

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127 The Hague Convention on the Civil Aspects of International Child Abduction.

128 S 4(1) of the Mediation of Certain Divorce Matters Act provides as follows: "1. The Family Advocate shall a) after the institution of a divorce action; or b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979), if so requested by any party to the proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor child or dependent child of the marriage concerned or regarding such matter as is referred to him by the court."

129 See Meintjes-van der Walt "The Proof of the Pudding: The Presentation and Proof of Expert Evidence in South Africa" 2003 *TSAR* 88-106 for a discussion on expert evidence.

130 S 48(2) Children's Act; Moyo "Child Participation under South African Law: Beyond the Convention on the Rights of the Child?" 2015 *SAJHR* 178.

131 Keyser and Ryke suggest five factors which could make courts more child-friendly: (1) Language and cultural barriers between children and court staff should be removed; (2) courts and forums should be adapted to be conducive to child participation; (3) court staff should wear less intimidating clothing; (4) courts should make use of closed-circuit television, separate waiting rooms, one-way screens in court rooms and the video-taping of evidence; and (5) child witnesses should receive special preparation. See Keyser and Ryke "The Perceived Utility Value of two Attachment Measures in Care and Contact Recommendations by Family Counsellors: A Pilot Study" 2020 21(2) *Child Abuse Research: A South African Journal* 61-76.

#### 4 4 Compulsory use of the Parental Bonding Instrument

It is proposed that any person involved in having to report to a court in relation to a child's views and wishes make use of the Parental Bonding Instrument (PBI). The PBI is an attachment measurement tool<sup>132</sup> freely available in the public domain which has reasonable face validity, allows parents to describe the relationship with a child, and enables parents to identify their characteristics within the relationship.<sup>133</sup> This attachment measure is also well-established and has scales that simplify interpretation.<sup>134</sup> The measure's good psychometric properties coupled with the fact that the measures have already been tested numerous times further show their suitability in the court context.<sup>135</sup>

Regardless of whether a curator *ad litem* or legal representative is appointed for a child, or whether experts are involved or family advocates are tasked with investigations, all role-players assessing children should be obligated to utilise the PBI and to report back to the court in relation thereto.

Obligating role-players to make use of the PBI in matters where children have participatory rights will provide some consistency in how children are assessed. Consistency in the method of assessment will inevitably lead to approaching child participation consistently by weighing evidence obtained from the application of a single standardised tool.

### 5 Conclusion

The proposed amendment to the Children's Act or a new Regulation will in all probability not be extensive or labour intensive. A relatively minor amendment to existing legislation, namely the Children's Act, or adding a short new Regulation thereto may provide courts with guidance in

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132 The PBI was developed in the 1970s by Parker, Tupling and Brown ("A Parental Bonding Instrument" 1979 *British Journal of Medical Psychology* 1-10) and is aimed at measuring fundamental parenting styles as perceived by children: Suzuki and Kitamura "The Parental Bonding Instrument: A Four Factor Structure Model in a Japanese College Sample" 2011 *The Open Families Study Journal* 89. The PBI elicits memory-based answers to questions about a child's upbringing in the first sixteen years of life. The PBI contains 25 items that address each parent separately, producing a two-dimensional measure of perceived parental behaviours. These behaviours are plotted with "care" versus "indifference/rejection" on one axis and "overprotection" versus "allowance of autonomy/independence" on the other. Of the 25 items, twelve evaluate the first dimension (care), while thirteen evaluate the second (overprotection): Uji and Kitamura "Factorial Structure of the Parental Bonding Instrument (PBI) in Japan: A Study of Cultural, Developmental, and Gender Influences" 2006 *Child Psychiatry and Human Development* 116.

133 Keyser and Ryke 2020 *Child Abuse Research* 64.

134 See fn 133 above.

135 See fn 133 above.

respect of child participation in civil proceedings (including family law proceedings). It is therefore submitted that such an amendment will address the gap in our current legal dispensation.