CHILD PARTICIPATION AND REPRESENTATION IN LEGAL MATTERS

by

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ABSTRACT

The child’s participation in any legal matter involving him/her is crucial whether received directly or indirectly through a legal representative. The significance of the child’s views in legal matters is accepted internationally and is entrenched in South African law. This is the main feature of the present research.

In Roman law the *paterfamilias* was the complete antithesis of the best interest of the child with his paternal power entirely serving his own interests. The best interests of the child progressively improved his/her participatory rights and the dominance of paternal authority in Roman, Germanic, and Frankish law eventually gave way to parental authority and assistance in Roman-Dutch law. This advanced the child’s participation in legal matters and under Roman-Dutch law, his/her right of participation included legal representation by way of a *curator ad litem*.

The child’s best interests were consistently viewed from an adult’s perspective and resulted in an adult-centred assessment of his/her best interests. Statutory intervention increased the child’s participatory and representation rights, however, the tenor of these items of legislation remained parent-centred.

The Appeal Court later dispelled any uncertainty regarding the paramountcy with respect to the best interests of the child. During the 1970s in South Africa, the emphasis began shifting from a parent-centred to a child-centred approach in litigation between parents in cases involving their children. An open-ended list of factors comprising the best interests of the child accentuated this shift. Courts were encouraged to apply the paramountcy rule in legal matters concerning children and to consider the views of children in determining their best interests.

The new democratic constitutional dispensation in South Africa, followed by the ratification of the Convention on the Rights of the Child and the African Charter, obligated South Africa to align children’s rights with international law and
standards. The South African Law Reform Commission set out to investigate and to formulate a single comprehensive children’s statute.

The resultant Children’s Act 38 of 2005 is the most important item of legislation for children in private law in South Africa. The Children’s Act provides for the widest possible form of child participation in legal matters involving the child. It revolutionises child participation requiring no lower age limit as a determining factor when allowing the child, able to form a view, to express that view.

The child’s right to access a court and to be assisted in doing so further enhances his/her participatory right. Effective legal representation is the key in ensuring that children enjoy the fundamental right of participation equal to that of adults in legal matters involving children.

Comparative research of child laws in Australia, Kenya, New Zealand and United Kingdom confirms that South Africa is well on the way in enhancing children’s participatory and legal representation rights in legal matters concerning them. This illustrates that only the child’s best interests should serve as a requirement for the legal representation of children in legal matters. Continued training is essential to ensure the implementation of the Children’s Act and requires a concerted effort from all role-players.
KEY WORDS

access
age of majority
best interests of the child
birth of the child
capacity to act
capacity to litigate
child
child participation
Children’s Act 38 of 2005
 guardian
guardianship
infans
legal capacity
legal representation
minor
participatory right of the child
representation
rights of the child
views of the child
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