

CHILD PARTICIPATION AND REPRESENTATION IN LEGAL MATTERS

by

DAVID WEGELING DE BRUIN

Submitted in partial fulfillment of the degree Doctor Legum
in the Faculty of Law, University of Pretoria

Supervisor
Professor CJ Boezaart

November2010

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

ACKNOWLEDGMENTS

The reality of working with children daily as a magistrate confirmed my resolve to conduct this research. The journey has been long and indeed a catharsis in many ways.

Trynie Boezaart as supervisor has been a pillar of strength throughout this humbling experience. Her inspirational observations and firm, but unobtrusive style of supervision complements her humility and enormous patience. She never doubted my ability and made me believe in myself. At times during my research, her encouragement was a lifeline. Her indulgence with my lack of technical skills helped to smooth away the rough edges.

At a late but important stage during my preparation of this thesis, I had the privilege of having the late Professor Piet de Kock edit all but two chapters of my thesis, the introduction and conclusion. He inspired me with his guidance and suggestions which helped with the final preparation of this thesis. I acknowledge and appreciate his valuable contribution.

To my wife Rieta and son David who have endured my absence from normal family life for so long I extend my most heartfelt gratitude. Only Rieta knows what time and effort really went into the preparation of this thesis. Her patience and silent support carried me through this long journey.

The Lord graced me with the ability to persevere and use the talent He bestowed on me and has been and remains my Shepherd.

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