

CHAPTER 5

THE CHILD'S RIGHT TO PARTICIPATION AND REPRESENTATION IN LEGAL MATTERS IN THE POST-CONSTITUTIONAL ERA IN SOUTH AFRICA

5 1 Introduction

The post-constitutional era¹ not only ushered in a new political dispensation but more importantly a new legal dispensation, as South Africa heralded in a Constitution in which a Bill of Rights was enshrined.² For the first time the participatory and representation rights of children in legal matters were acknowledged by statute.³

Up until the Interim Constitution coming into effect⁴ the rights of children were governed by the Roman-Dutch law and individual items of legislation.⁵ This fragmentation made it difficult to envisage holistically what route the

¹ Starting with the period after 27 April 1994. Although the Interim Constitution came into operation before 27 April 1994 the Constitution of South Africa with the Children's Act today serve as the pinnacle of children's rights in South Africa.

² Ch 2 of the Constitution. The piecemeal fashion in which legislation pertaining to children was received is indicative of "patching" in order to address the rights of children as they evolved. This all changed with the enactment of the Children's Act 38 of 2005 which will be discussed in more detail in 5 4 *infra*.

³ The child's right to participation in all legal matters affecting the child is echoed in s 1 of the Constitution where it is declared that "[t]he Republic of South Africa ... is founded on the following values: (a) ... the achievement of equality and the advancement of human rights and freedoms". The Bill of Rights in s 7(1) of the Constitution highlights that the rights of "all people [are enshrined] in our country". The words "everyone", "persons" or "no one" in the following sections in the Constitution denote the applicability of fundamental rights in the Bill of Rights to children excluding children from only those sections applicable to adults; s 8 the Bill of Rights applies to *all* law, s 9 equality clause, s 10 human dignity, s 11 right to life, s 12 freedom and security of the person, s 13 slavery prohibited, s 14 right to privacy, s 15 freedom of religion, belief and opinion, s 16 freedom of expression, s 18 freedom of association, s 21 freedom of movement and residence, s 24 environment, s 25 property, s 26 housing, s 27 health care, food, water and social security, s 28 children, s 29 education, s 30 language and culture, s 31 cultural, religious and linguistic communities, s 32 access to information, s 33 just administrative action, s 34 access to courts, s 35 arrested, detained and accused persons, s 38 enforcement of rights. (Emphasis added.)

⁴ Came into operation on 27 April 1994.

⁵ Eg the Age of Majority Act 57 of 1972; Child Care Act 74 of 1983; Children's Status Act 82 of 1987; Guardianship Act 192 of 1993; Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996; Natural Fathers of Children Born out of Wedlock Act 86 of 1997; Maintenance Act 98 of 1999; Domestic Violence Act 106 of 1999.

development of children's rights was following. As constitutional development ensued, more amendments had to be effected to bring legislation affecting children in line with constitutional imperatives.⁶

5 2 Children's rights in legal matters

Children's rights have resulted in a plethora of publications during the past thirty years or so and deservedly so.⁷ From this evolvement and scrutinising of children's rights the need for the consideration of the individuality of children and their entitlement to equal rights and protection during their advance to maturity is indisputably confirmed. Timms⁸ points out that children need three types of rights; the right to representation, the right to participation and the right to protection as well as to have their best interests applied. The aim of this chapter is to determine to what extent South Africa has made provision for these requirements.

⁶ Regarding the Child Care Act, the first amendment came with the Child Care Amendment Act 96 of 1996. The Adoption Matters Amendment Act 56 of 1998 and thereafter the Child Care Amendment Act 13 of 1999 followed. Even before 1994, amendments were being effected to address the inequalities that were prevalent in the Child Care Act. The Special Courts for Blacks Abolition Act 34 of 1986 abolished the Commissioner's court dealing with matters on a segregation basis. The Child Care Amendment Act 86 of 1991 also brought about significant changes; the Abolition of Restrictions on the Jurisdiction on Courts Act 88 of 1996. The Children's Act 38 of 2005 will be dealt with in 5 4 *infra*.

⁷ Freeman *The Moral Status of Children - Essays on the Rights of the Child* (1997) hereafter Freeman *Moral Status of Children* 51 mentions that growth of the child's liberation movement started in the 1970s and was lead by John Holt and Richard Farson. Freeman mentions, *op cit* 51 that in a publication of 1971 by Adams *et al Children's Rights* Robert Ollendorff in his contribution argued for the adolescent's right to self-determination. In addition Freeman, *loc cit*, refers to Farson in his publication (*Birthrights*, 1978) who makes the following resounding comment: "[a]sking what is good for children is beside the point. We will grant children rights for the same reason we grant rights to adults, not because we are sure that children will become better people, but more for ideological reasons, because we believe that expanding freedom as a way of life is worthwhile in itself. And freedom, we have found, is a difficult burden for adults as well as for children".

⁸ *Children's Representation* 42. To what extent South Africa has met this requirement will be discussed in 5 2 3 *infra*.

5 2 1 Origin and development of children's rights in respect of participation and legal representation

According to Freeman⁹ the earliest recognition of children's rights is in the Massachusetts, *Body of Liberties* of 1641.¹⁰ Unfortunately, this recognition took far longer to come to fruition than was expected¹¹ for it was only at the beginning of the twentieth century that a noticeable development in the interests of the child took place.¹² Van Bueren avers that children's rights were not acknowledged at the start of the twentieth century and that in reality children continued to be perceived as objects.¹³ Until 1979 the recognition and advocacy of children's rights in specific terms was still a pipe dream globally.¹⁴

⁹ *Moral Status of Children* 48.

¹⁰ Children in other states had the right to complain to the Authorities for redress (Freeman *Moral Status of Children* 48). Hamilton, "Implementing children's rights in a transitional society" in Davel *Children's Rights in a Transitional Society* (1999) 16, explains that from the beginning of the twentieth century and more particularly from the end of the First World War, the need for the protection of children, became the focal point for regional and international drafting bodies.

¹¹ However, Freeman *Moral Status of Children* 48-49 refers to early proponents of children's rights such as Jean Vallès, Kate Wiggin and Janusz Korczak more than a half century before the importance of a child's autonomy was widely recognised.

¹² The recognition of children with the development of laws focusing on children is illustrated by Van Bueren *International Documents on Children* (1998) hereafter Van Bueren *International Documents* xv in her reference to the historical framework of international documents on children. Hamilton in Davel *Children's Rights in a Transitional Society* 16 also refers to a number of international documents which preceded the CRC. Freeman *Moral Status of Children* 49 informs there were earlier declarations such as the Declaration of Geneva of 1924 declaring in its preamble "mankind owes to the Child the best it has to give" but focussing only on the welfare of the child set out in five principles which included the requisite means for normal development, food and medicine, relief in distress, protection against exploitation and socialisation to serve others. Freeman *op cit* 49 most probably gives the best example of how the international community viewed a child by referring to a comment by a French delegate to the Commission on Human Rights in 1959 who believed that "the child was not in a position to exercise his own rights. Adults exercised them for the child ... A child had special legal status resulting from his *inability to exercise his rights*". Freeman *op cit* 50 comments that the United Nations Declaration of the Rights of the Child of 1959 presented ten principles which again highlighted the protection and welfare of the child, however, giving no indication of recognition of the child's autonomy, the child's views or any appreciation of empowerment of the child. (Emphasis added.)

¹³ *International Documents* xv mentioning that there was an unquestioned assumption that children could and should rely on the exclusive protection of adults to ensure their rights are exercised. This perception remained until 1979 with the proclamation of the International Year of the Child.

¹⁴ Van Bueren *International Documents* xvi professes that although the proclamation of 1979 as the International Year of the Child may, with the benefit of hindsight, appear to have been a catalyst for the international community to begin examining international laws on children from a *child perspective*, there was a cautious approach to this new development.

Some developments were initiated at a regional level,¹⁵ while globally¹⁶ there were indications of acknowledging children's rights with the drafting of the Convention on the Rights of the Child.¹⁷ The Convention on the Rights of the Child has been acclaimed as the single most ratified Convention globally¹⁸ and the most important international document acknowledging the rights of children nationally and internationally.¹⁹

The exceptions as indicated by Freeman *Moral Status of Children* 51-52 being the exponents during the child's liberation movement during the 1970s and notably Farson with the enumeration of nine rights for children, all of which were derived from self-determination; some of the rights worth mentioning are the right to alternative home environment allowing the child to "exercise choice in his own living arrangements", the right to information that was only accessible to adults (eg children should be allowed to inspect records kept about them), the right of children to educate themselves, the right to sexual freedom and the right to experiment with their sexuality without fearing punishment (his extension of this right to the right of children to pornography is not endorsed), the right to economic empowerment including the right to work, to develop a credit record and to achieve financial independence, the right to freedom from physical punishment, the right to justice. Freeman *op cit* 52-53 mentions valid criticisms that were levelled at Farson and others advocating rights for children but he also correctly concedes that the duties of parents and others to protect children must be endorsed. The importance of this movement was to address discrimination and the recognition of the child's autonomy and concludes that it is significant that the philosophical and legal thought on the requirements to exercise autonomy have converged. Furthermore, that the dichotomy between protecting children and protecting their rights to autonomy is false. Failure to protect children and advance their welfare will lead to children not being able to exercise self-determination and, on the other hand failure to recognise the personality of children is likely to result in their protection being undermined and the children being reduced to objects of intervention. See further Timms *Children's Representation* 41 where she argues that the concept of children's rights advanced by the child liberationists are just as fundamentally flawed as the earlier child salvation movement, the first regarding children as objects and the second denying the idea of childhood altogether, presenting a concept of mini-adults. Timms *op cit* 41 concludes that what is required is a pragmatic approach to children's rights attempting to incorporate both the right of the child to protection and the right to seek self-determination and autonomy.

¹⁵ Two prominent such developments at regional level are the European Convention on the Legal Status of Children born out of Wedlock in 1975 and the Declaration on the Rights and Welfare of the African Child in 1979 (Van Bueren *International Documents* xv-xvi).

¹⁶ Van Bueren, *International Documents* xvi, refers to the United Nations Standard Minimum rules for the Administration of Juvenile Justice (the Beijing Rules) in 1985.

¹⁷ The CRC was adopted and opened for signature, ratification and accession by the General Assembly in terms of resolution 44/25 contained in UN doc A/44/25 dated 20 November 1989. The CRC entered into force on 2 September 1990 after twenty countries had ratified it.

¹⁸ All but two of the world's governments have been persuaded to be legally bound by the provisions of the Convention. The two countries are the United States of America and Somalia according to Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in Davel *Introduction to Child Law in South Africa* (2000) 202. Compare also Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Law" in Boezaart *Child Law in South Africa* (2009) 309 n 5.

¹⁹ Every national and international commentator to date has acknowledged the importance of the CRC and there has accumulated a vast number of case law both nationally and

5 2 2 International instruments

There are a number of Conventions that have led to the culmination of children's rights in the Convention on the Rights of the Child.²⁰ The effect of this Convention at a regional level, resulting in the adoption of the African Charter, bears testimony to the importance and influence of the Convention on the Rights of the Child.

5 2 2 1 United Nations Convention on the Rights of the Child²¹

The Convention on the Rights of the Child as the world's first international legal instrument on children's rights was the result of ten years of negotiation between government delegations, intergovernmental organisations and non-governmental organisations.²² The General Assembly of the United Nations adopted the Convention on the Rights of the Child in 1989²³ and it entered into

internationally confirming the importance of the CRC. Furthermore the Conventions on regional bases and domestic legislation that have emerged since the entering into force of the CRC bears testimony to the importance of this Convention. See eg Arts "The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" 1993 *AJICL* 140-141; LeBlanc *The Convention on the Rights of the Child United Nations: Lawmaking on Human Rights* (1995) hereafter LeBlanc *The Convention* vii; Timms *Children's Representation* 43; Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South Africa" 1995 *SAJHR* 402; Freeman *Moral Status of Children* 2; Human in *Bill of Rights Compendium* par 3EA28; Boezaart in *Child Law in South Africa* 1; Van Bueren in *Introduction to Child Law in South Africa* 202; Fottrell *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (2000) hereafter Fottrell *Revisiting Children's Rights* 3-4; Fortin *Children's Rights and the Developing Law* (2003) hereafter Fortin *Children's Rights* 49.

²⁰ Reference to and discussion of regional and global instruments will be found in 5 2 2 1, 5 2 2 1 2 and 5 2 2 1 3 *infra*.

²¹ The UN Doc A44/25 was adopted in terms of resolution A44/25 on 20 November 1989 by the General Assembly of the United Nations and later ratified by South Africa on 16 June 1995. What will be considered and discussed are those articles dealing with the participation of children and their right to be legally represented and the over-arching principle of the best interests of the child.

²² Freeman *Moral Status of Children* 53.

²³ In terms of resolution 44/25, contained in UN doc A/44/25 dated 20 November 1989, the CRC was opened for signature, ratification and accession. Human in *Bill of Rights Compendium* par 3EA28 informs that the Convention was unanimously adopted by the General Assembly on 20 November 1989 and entered into force on 2 September 1990.

force on 2 September 1990 being one of the quickest to do so.²⁴ Today it is one of the most widely ratified human rights instruments in the world.²⁵

The Convention on the Rights of the Child introduced a new era of international instruments affecting children, containing a number of rights previously not accorded to children, notably the child's right to express an opinion and to have that opinion considered in any matter or procedure affecting the child.²⁶ Furthermore, the right of the child to be provided with an opportunity not only to be heard, but assisted by a representative in any judicial or administrative

²⁴ Mower *The Convention on the Rights of the Child – International Law Support for Children* (1997) hereafter Mower *The Convention* vii mentions in his introduction that the CRC was open for signature and ratification on 26 January 1990 and had received 20 ratifications, the threshold for entry into force, by 2 September 1990. See further Arts 1993 *AJICL* 140 where it is pointed out that never before had an international human rights instrument entered into force so quickly. Compare further LeBlanc *The Convention* xi who mentions that by the end of December 1992 it had been ratified by 127 countries and signed by a further 27. Fottrell *Revisiting Children's Rights* xi mentions in her introduction that within eight years the CRC had received universal acceptance by all but two countries, these being Somalia and the United States of America. She further informs that in all 191 countries have already ratified the CRC at the time of writing. The United States of America has signed the CRC but has not yet ratified it. South Africa ratified the CRC on 16 June 1995.

²⁵ Hamilton in *Children's Rights in a Transitional Society* 14. LeBlanc *The Convention* xi regards the rapid and widespread acceptance of the CRC as impressive and remarkable. Mower *The Convention* vii also highlights the rapid ratification and acceptance of the CRC. Fottrell *Revisiting Children's Rights* xi refers to the universal ratification of the CRC and giving the CRC considerable political, legal and moral leverage. As Van Bueren in *Introduction to Child Law in South Africa* 202 phrases it "[i]t is this potency to change and improve which has captured the imagination of civil society and persuaded all but two world governments to be legally bound by the Convention's provisions".

²⁶ Kilkelly *The Child and the European Convention on Human Rights* (1999) hereafter Kilkelly *European Convention on Human Rights* 116 aptly explains that the freedom of expression universally recognised for adults was slow to be recognised for children. CRC recognised the importance of consultation according to the principle of the child's evolving capacity. Toope "The Convention on the Rights of the Child: Implications for Canada" in Freeman *Children's Rights: A Comparative Perspective* (1996) 41 mentions that the European child did not attain judicial personality (presumably what is meant is legal subjectivity) until the nineteenth century and in the USA children were only recognised as fully legal individuals (legal subjects) in 1969. Freeman "The Convention: An English Perspective" in Freeman *Children's Rights: A Comparative Perspective* (1996) 96 observes that it is the first international document explicitly to state that children have a right to have a say in processes affecting their lives. See further Flekkøy and Kaufman *The Participation Rights of the Child Rights and Responsibilities in Family and Society* (1997) hereafter Flekkøy and Kaufman *Participation Rights of the Child* 88; Freeman *Moral Status of Children* 56-57; Fortin *Children's Rights and the Developing Law* (2003) hereafter Fortin *Children's Rights* 40-41; Fottrell *Revisiting Children's Rights* 3-4 5.

proceedings affecting the child, was something completely new.²⁷ Importantly, the best interests of the child were being accepted as an international standard in all matters concerning the child ensuring that the best interests of the child shall be a primary consideration.²⁸

There does not seem to be a general consensus which enshrines the general principles of the Convention on the Rights of the Child.²⁹ Van Bueren³⁰ lists four articles that, according to her, underpin the general principles and they are article 2³¹ dealing with non-discrimination, article 3 dealing with the best

²⁷ See in general authorities referred to in n 26 *supra*. Fortin *Children's Rights* 41 specifically refers to the procedural rights which children are provided with in order to allow them the opportunity to be heard in any judicial and administrative proceedings affecting them.

²⁸ Fottrell *Revisiting Children's Rights* 5 mentions that the principle is widely accepted in the domestic law of countries but with the provision of art 3 it is introduced into international law for the first time. Freeman *Children's Rights: A Comparative Perspective* 94 maintains that art 3 together with art 12 most probably are the most important provisions in the CRC. He observes that the CRC mentions that the best interests of the child are "a primary consideration" and not *the* primary or *the paramount* consideration and it is regrettable that the CRC does not set as high a standard as found in English law with reference to s 1(1) of the *Children Act* of 1989. (Emphasis is that of the author.) Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" in Alston *The Best Interests of the Child Reconciling Culture and Human Rights* (1994) mentions that the most important formulation of the best interests principle is clearly contained in art 3(1) of the CRC and there are three reasons for this. Firstly the other international instruments do not purport to recognise the rights of children. Secondly, it is used in a context where the child is considered more an object than a subject of rights. Lastly, art 3(1) underlines the fact that the principle applies not only in the context of legal work and administrative proceedings, or in other narrowly defined contexts, but "in relation to all actions concerning children". However, Parker "The Best Interests of the Child – Principles and Problems" in Alston *The Best Interests of the Child Reconciling Culture and Human Rights* (1994) 27 warns that if the best interests standard is in truth a hollow concept then it provides no yardstick by which states parties' laws or practices can be judged.

²⁹ It must be added that contemporary writers and commentators endorse the four articles, albeit sometimes indirectly, that enshrine the general principles and can be regarded as representing the value system on which the CRC rests being arts 2 (non-discrimination), 3 (best interests), 6 (survival and development) and 12 (freedom of expression). This is referred to by McGoldrick "The United Nations Convention on the Rights of the Child" 1991 *IJLF* 135-136; Sloth-Nielsen 1995 *SAJHR* 408; Van Bueren *The International Rights on the Rights of the Child* (1995) hereafter Van Bueren *Rights of the Child* 45-51; Van Bueren *Introduction to Child Law in South Africa* 203. See further eg Human in *Bill of Rights Compendium* par 3EA28; Fortin *Children's Rights* 37.

³⁰ In *Introduction to Child Law in South Africa* 203.

³¹ Art 2 reads as follows:

- "1 States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
- 2 States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities,

interests of the child,³² article 6 dealing with the survival and development of the child³³ and article 12³⁴ dealing with the child's opinion. The best interests of the child are pivotal in all actions concerning the child and may be regarded as one of the most important articles contained in the Convention on the Rights of the Child.³⁵

However, some commentators on the Convention on the Rights of the Child have other views.³⁶ What is of prime importance is the acknowledgement of the

expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

³² Art 3 reads as follows:

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

³³ Art 6 reads as follows:

- "1 States Parties recognize that every child has the inherent right to life.
- 2 States Parties shall ensure to the maximum extent possible the survival and development of the child."

³⁴ Art 12 reads 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 natural law."

³⁵ Art 3. See Van Bueren in *Introduction to Child Law in South Africa* 203. Freeman *Children's Rights: A Comparative Perspective* 94 maintains that the article 3 together with article 12 is most probably the most important provision in the CRC.

³⁶ Eg Freeman *Moral Status of Children* 55 refers to the general rights as the right to life (art 6), prohibition against torture (art 37), freedom of expression (art 13), freedom of thought and religion (art 14), right to information (art 17) and the right to privacy (art 16). Flekkøy and Kaufman *The Participation Rights of the Child* (1997) hereafter Flekkøy and Kaufman *Participation Rights of the Child* 30-35 regard the following as important rights, arts 1 (definition of a child), 2 (non-discrimination), 3 (best interests), 5 (parental guidance), 12 (child's opinion), 13 (freedom of expression), 14 (freedom of thought, conscience and religion), 15 (freedom of association) and 16 (privacy). See further Hamilton in Davel *Children's Rights in a Transitional Society* 19. She is of the view that the CRC is fortified by three articles being art 2 focussing on non-discrimination, art 3 highlighting the best interests "concept" in all actions concerning children and art 12 confirming the participation of children in decisions affecting their lives. Fottrell *Revisiting Children's Rights* 5 opines that the CRC is underpinned by five key elements being art 2, art 3, art 5, art 6 and art 12.

articles on which the commentators agree that have given impetus to further regional development of children's rights and which have found significance in municipal legislation.³⁷

Van Bueren explains that an analysis of the Convention on the Rights of the Child reveals that it achieves five goals.³⁸ Primarily the Convention on the Rights of the Child creates new rights under international law for children where such rights previously did not exist.³⁹ Secondly, it protects the rights of children in a global treaty, which until the adoption of the Convention on the Rights of the Child had only been acknowledged or refined in case law under regional human rights treaties.⁴⁰ Thirdly, the Convention on the Rights of the Child also creates binding standards.⁴¹ Furthermore, the Convention on the Rights of the Child imposes new obligations in relation to the provision and protection of children.⁴² Finally, the Convention on the Rights of the Child ensures that there is an additional expressed ground whereby States Parties are duty bound not to discriminate against children in their enjoyment of this Convention's rights.⁴³

According to Van Bueren the Convention on the Rights of the Child is based on four cornerstones referred to as the four P's.⁴⁴ These cornerstones may be summarised as follows: participation of children in all matters or procedures affecting them; protection of children against all forms of discrimination and

³⁷ The effect on South African legislation will be considered in this chapter and some of the other jurisdictions in the chapter dealing with comparative law see ch 5 *infra*.

³⁸ In *Introduction to Child Law in South Africa* 203.

³⁹ Van Bueren in *Introduction to Child Law in South Africa* 203 explains that this includes the child's right to preserve his or her identity and the right of indigenous children to practise their own cultures.

⁴⁰ Van Bueren in *Introduction to Child Law in South Africa* 203 gives as example the child's right to participate either directly or indirectly in any judicial or administrative proceedings affecting that child, and to take account of those views.

⁴¹ Van Bueren *loc cit* says that up until the CRC's entry into force, the standards suggested were only regarded as non-binding recommendations. These non-binding recommendations include safeguards in adoption procedures and the rights of mentally and physically disabled children.

⁴² According to Van Bueren *loc cit* the new obligations on states to ensure that effective measures are taken to abolish traditional practices prejudicial to the health of children (such as female genital circumcision) and to provide for rehabilitative measures for child victims of neglect, abuse and exploitation.

⁴³ Van Bueren *loc cit*.

⁴⁴ Van Bueren *Rights of the Child* 15; Van Bueren in *Introduction to Child Law in South Africa* 203; Human in *Bill of Rights Compendium* par 3EA28.

abuse; prevention of harm to children, the development of preventative health care and the prevention of child abduction and the provision of assistance for children's basic needs, including rehabilitation for child victims.⁴⁵

The child's participatory rights become evident when analysing the Convention on the Rights of the Child. Starting with the preamble to the Convention on the Rights of the Child where it is agreed and declared unequivocally "that everyone is entitled to all the rights and freedoms ... without distinction of any kind, such as ... birth or other status" and further that "childhood is entitled to special care and assistance" and that particularly children should be afforded the "necessary protection and assistance" so that children can fully assume their responsibilities within the community. The preamble of the Convention on the Rights of the Child further considers that children should be fully prepared to live individual lives in society in the spirit of the ideals proclaimed in the Charter of the United Nations and in particular in the spirit of "peace, dignity, tolerance, freedom, equality and solidarity". It must be borne in mind that children because of their physical and mental immaturity need special safeguards and care "including appropriate legal protection, *before as well as after birth*".⁴⁶

Guiding principles have been identified by the commentators as being of such general importance to be considered as forming the basis of the Convention on the Rights of the Child.⁴⁷ In the first instance there is article 3 requiring the best interests of the child to be a primary consideration in all matters affecting the child and is pivotal in all actions affecting the child.⁴⁸ The second is probably

⁴⁵ See generally Van Bueren in *Introduction to Child Law in South Africa* 203; De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289 *et seq*; Human in *Bill of Rights Compendium* par 3EA28.

⁴⁶ Emphasis added. Before birth the interests of the unborn child require protection. See 4 2 2 1 *supra*.

⁴⁷ Hamilton in *Children's Rights in a Transitional Society* 20 arranges the guiding principles and rights under three headings, namely protection, provision and participation.

⁴⁸ The phrasing of art 3 is clear and requires that in all procedures concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a *primary* consideration. (Emphasis added.)

just as important a principle⁴⁹ affecting the rights of children, being the right of the child to voice his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.⁵⁰ Added to these two is the right of the child to be legally represented.⁵¹ The child's participation in legal matters is, as any new development in law, time consuming and progresses at its own pace.⁵²

⁴⁹ The importance of the best interests of the child principle cannot be gainsaid and is rightly regarded by commentators like Van Bueren in *Introduction to Child Law in South Africa* 203 as one of the four articles enshrining the general principles of the CRC. The other three being art 2 dealing with non-discrimination, art 6 dealing with survival and development and art 12 dealing with freedom of expression. The decision by the Committee on the Rights of the Child to focus on the mentioned four articles as the "soul" of the CRC has ensured a value system of the CRC that enhances the entitlement of children's rights. See also Sloth-Nielsen 1995 *SAJHR* 408; Fortin *Children's Rights* 40-41.

⁵⁰ The child's right to participation is not only contained in art 12 of the CRC but in a number of other arts underpinning the child's participatory rights: eg art 9 focussing on the child's right to maintain contact with both parents if separated from one or both of them; art 13 directing the child's right to express his or her views, obtain information, make ideas or information known either orally or in writing; art 14 securing the child's right to freedom of thought, conscience and religion; art 15 highlighting the child's right to freedom of association; art 16 focusing on the child's right to protection of privacy; art 17 directing the child's right to access appropriate information; art 19 securing the child's right to protection against all forms of abuse; art 20 securing the child's right to protection where the child is without a family; art 21 confirming that with adoption the best interests of the child shall be paramount; art 22 securing the protection of refugee children; art 23 determining the disabled child's right to special care and education; art 24 securing the child's right to health and health services; art 25 determining the periodic review of authorised placement of children in alternative care; art 28 confirming the child's right to education; art 40 securing the child's right to participation in the administration of justice. Van Bueren in *Introduction to Child Law in South Africa* 204-205 refers to two new principles of interpretation in international law which reinforces the CRC, namely the best interest and the evolving capacities of the child. It is the evolving capacities of the child coupled with the changes in the culture of listening that may be regarded as the driving force which creates the potential to achieve an evolutionary revolution in South Africa. Van Bueren *op cit* 205 makes a valid statement when she says that adults will have to be willing to relinquish some of their own power before a new culture of listening seriously to children can develop. Van Bueren *op cit* 206 does caution that internationally decision-making institutions, from courts to children's homes and educational institutions are on the whole unaccustomed to the new type of listening.

⁵¹ The importance of art 12(2) of the CRC becomes more evident in South Africa with the enforcing of constitutional imperatives.

⁵² It must be added that in South Africa the momentum has increased with the signing into law of the Children's Act 38 of 2005 on 8 June 2006 and the complete Children's Act in operation from 1 April 2010. For a detailed discussion on the Children's Act see 5 4 *infra*.

5 2 2 2 The African Charter on the Rights and Welfare of the Child

Lesser known but closer to home the African Charter⁵³ was adopted by the Organisation of African Unity (OAU), now the African Union (AU), in 1990⁵⁴ but only entered into force on 29 November 1999.⁵⁵ As Viljoen indicates, the value of the African Charter has to be viewed against the reality of the child's position in Africa.⁵⁶ The African Charter is not as well-known an international instrument as the Convention on the Rights of the Child, but it is bound to have an effect on the participatory and representation rights of the child in South Africa.⁵⁷ The

⁵³ The acronym used throughout the present discussion and further references thereto in this chapter.

⁵⁴ OAU Doc CAB/LEG/24.9/49 of 11 July 1990. Compare in general Viljoen "The African Charter on the Rights and Welfare of the Child" in Boezaart *Child Law in South Africa* (2009) 331-350; Chirwa "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child" 2002 *IJCR* 157-177; Lloyd "Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: *Raising the gauntlet*" 2002 *IJCR* 179-198.

⁵⁵ South Africa's notice of ratification of the OAU Charter on Children dated 21 January 2000 (<http://www.polity.org.za/govdocs/pr/2000/pr0121b.html> accessed 19 February 2010). South Africa signed the ACRWR on 10/10/1997 and Minister Nkosazana Dlamini-Zuma ratified the ACRWC on 7 January 2000 in Pretoria. See generally Thompson "Africa's Charter on Children's Rights: Normative Break with Cultural Traditionalism" 1992 *ICLQ* 432-444; Human *Bill of Rights Compendium* par 3EA41 2; Viljoen in *Child Law in South Africa* 331; Chirwa 2002 *IJCR* 157-177; Lloyd 2002 *IJCR* 179-198; Davel "The African Charter on the rights and welfare of the child, family law and children's rights" 2002 *De Jure* 281-296.

⁵⁶ *Child Law in South Africa* 332 who further elaborates on this by saying that due to the unique situation in Africa, children are more likely to be victims of human rights violations than adults. Viljoen *op cit* 335 mentions that due to the fact that regional specificities were disregarded because of numerous compromises the need, from a legal stance, was identified for a regional children's rights instrument. In drafting the ACRWC specific issues omitted from the CRC were identified and included in the ACRWC. See also Viljoen "Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" 1998 *CILSA* 205-206; Human in *Bill of Rights Compendium* par 3EA41.2; Olowu "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child" 2002 *IJCR* 128 reaffirms that the ACRWC is not opposed to the CRC. The two international instruments are complementary and both provide a framework through which children and their welfare are increasingly discussed in Africa. Also compare Sloth-Nielsen and Mezmer "Surveying the research landscape to promote children's legal rights in an African context" 2007 *AHRLJ* 331. See Ehlers and Frank "Child Participation in Africa" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 113 who mentions that the ACRWC does not differ greatly from the spirit of the CRC. Its intention is to afford African children *additional* protection in the light of their particular vulnerability. (Emphasis is that of the authors.) This view is shared by Davel "Intercountry Adoption from an African Perspective" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 259 who mentions that the ACRWC was drafted because of the need to deal with issues pertinent to children in Africa – specific issues omitted from the CRC.

⁵⁷ Viljoen in *Child Law in South Africa* 331 explains that the ACRWC is not well known either in South Africa or the rest of Africa. One of the reasons for this is its protracted entering

cultural context of the African Charter's preamble resonates the cultural diversity of South Africa.⁵⁸

The African Charter is divided into two parts. The first part contains thirty one articles which create substantive and procedural rights, freedoms and responsibilities of the child, together with corresponding duties imposed on the parents and state organs.⁵⁹ The second part comprises the establishment and organisation of the eleven-member African Committee of Experts on the Rights and Welfare of the Child which is mandated to promote and protect the rights guaranteed by the African Charter.⁶⁰

The preamble of the African Charter highlights the concern of the delegates that the situation of most African children remains critical due to unique factors like the socio-economic, cultural and traditional and developmental circumstances together with natural disasters, armed conflicts, exploitation and hunger that impact on the children's physical and mental immaturity and therefore children

into force. The ACRWC was adopted by the twenty-sixth Ordinary Session of the Assembly of the Heads of State and Government of the OAU, Addis Ababa, Ethiopia on 11 July 1990. S 47(3) of the ACRWC required the ratification by fifteen member states of the OAU before the charter could enter into force. This requirement was achieved and the ACRWC entered into force on 29 November 1999.

⁵⁸ Thompson 1992 *ICLQ* 434 refers to the "familiar African regional conventional language" of the preamble: "Taking into consideration the virtues of their cultural heritage, historical background and the values of African civilisation which should inspire and characterise their reflection on the concept of the rights and welfare of the child."

⁵⁹ Olowu 2002 *IJCR* 129 opines that the ACRWC, just as the CRC, is predicated on four important principles being non-discrimination (art 3), best interests of the child (art 4(1)), the right to life, survival and development (art 5) and the views of the child (art 4(2)). See further Arts "The international protection of children's rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" 1993 *AJICL* 144-155; Viljoen, in *Child Law in South Africa* 336-337 regards the best interests of the child (art 4(1)), non-discrimination (art 3) and the primacy of the ACRWC over culture and custom (he specifically refers to the outlawing of child marriages and setting of a minimum age of eighteen years as marriageable age) as the main features of the ACRWC. Lloyd "The African Regional System for the Protection of Children's Rights" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 36 regards the following articles as "underpinning principles" in the ACRWC: non-discrimination (arts 3 and 26), the best interests of the child (art 4), life, survival and development (art 5) and respect for the views of the child (art 7).

⁶⁰ For a summary of the ACRWC see Thompson 1992 *ICLQ* 434-438 442-443; Arts 1993 *AJICL* 144-157. Viljoen in *Child Law in South Africa* 336-340 sets out the substantive provisions of the ACRWC. Compare further Chirwa 2002 *ILCR* 157-177; Lloyd 2002 *IJCR* 179-198; Davel 2002 *De Jure* 281-296.

need special safeguards and care.⁶¹ Against this background it is recognised that children occupy a unique and privileged position in the African society and for children to fully and harmoniously develop their personalities, they must be given the opportunity to grow up in a family environment in an atmosphere of happiness, love and understanding.⁶² The legacy of tyranny⁶³ and apartheid⁶⁴ which has been part and parcel of Africa can be eliminated if the execution of the rights of children set out in the African Charter is adhered to.

The contents of the African Charter bears testimony to what children have had to endure in Africa and therefore it is no surprise that certain rights are emphasised more than the equivalent rights in the Convention on the Rights of the Child.⁶⁵ There are certain articles in the African Charter than need to be examined closer in order to determine to what extent the child's participatory rights and the right to legal representation have been enshrined in this Charter. The provision contained in article 1(2) of the African Charter⁶⁶ is significant because it highlights the importance of international instruments.

⁶¹ Thompson 1992 *ICLQ* 433 mentions that it is significant to note that the member states of the OAU have explicitly acknowledged, in the ACRWC, as one key source of inspiration for their collective recognition of the rights and welfare of African children and the protection of such rights, the efforts of the United Nations in the field of children's rights. The CRC has been a major catalyst for Africa's new Children's Charter. Davel 2002 *De Jure* adds by saying that the motivation for the ACRWC is emphasised in the first three consecutive paragraphs of the preamble to the ACRWC: in the first place the critical condition of most children is acknowledged and warrants special safeguards. In the second place focus is placed on the unique position of children in African societies. Lastly, the prerequisites for children's physical and mental development are acknowledged as requiring particular care.

⁶² The preamble to the ACRWC as a whole creates a picture of caring, protecting, developing and cherishing children and for this to be done legal protection under conditions of freedom, dignity and security is required.

⁶³ Ongoing conflict in Africa has unfortunately become part of the heritage of Africa; eg the atrocities and massacres in Uganda, Somalia, Sudan and Rwanda to name but a few.

⁶⁴ The legacy of apartheid needs no further explanation.

⁶⁵ A comparison will follow later in the present discussion, refer 5 2 2 4 *infra*.

⁶⁶ Notably art 1(2) specifies that "[n]othing in this Charter shall effect any provisions that are *more conducive* to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in the State". (Emphasis added.) Thompson 1992 *ICLQ* 433 refers to the ACRWC as a major human rights document with a radical departure from African cultural traditionalism and summarises the contents of the ACRWC *op cit* 434-438 442-443; Viljoen in *Child Law in South Africa* 332 emphasises that international children's law does not replace, but rather supplements, protection at a national level. He aptly refers to international law as a safety net when viewed from national level. Davel 2002 *De Jure* 282 mentions that the ACRWC can be viewed from many perspectives. She mentions further that the contents should be carefully studied.

The key articles in the African Charter for the purpose of this thesis are those that enhance the rights of children and in particular the participatory and representation rights of the child. Starting with the definition of a child, the African Charter allows for a wider group of persons to be included due to the fact that there is no proviso.⁶⁷ The African Charter accords the right to life⁶⁸ to every child and endorses the principle of non-discrimination.⁶⁹ Fundamental principles governing disputes affecting children are reiterated by the African Charter and in some instances show an improvement to the corresponding article found in the Convention on the Rights of the Child.⁷⁰ The two fundamental principles that govern disputes affecting children in Western law, being the best interests of the child and the right of every child who is capable

⁶⁷ Art 2 states that for the purpose of this Charter “a child means every human being below the age of 18 years”. Arts 1993 *AJICL* 145 refers to the strict definition without exceptions. Compare further Viljoen 1998 *CILSA* 209, *Child Law in South Africa* 337; Chirwa 2002 *ICLR* 158 comments that it is debatable whether this definition includes a foetus but the end of childhood is clearly determined with a uniform age of eighteen years. Lloyd 2002 *IJCR* 184 comments that the definition of a “child” is in vague terms mindful of the cultural implications and that the definition of childhood and of a child is culture-specific. Lloyd elaborates on this in *Children’s Rights in Africa: A Legal Perspective* 35 mentioning that the definition may yet come under scrutiny in Africa, because it is linked to effective birth registrations, physical capacity, initiation ceremonies and other cultural concepts of childhood in Africa.

⁶⁸ Art 5(1) provides that “[e]very child has an inherent right to life”. The right to life must be protected by states parties as determined in art 5(1) “[t]his right shall be protected by law”. This leads Viljoen in *Child Law in South Africa* 337-338 to pose the following two questions, whether this means that states parties are obliged to protect the life of the unborn foetus and whether the state cannot impose the death penalty in respect of children? Viljoen *op cit* 337 correctly indicates that abortion is not provided for in the ACRWC. Added to that legal subjectivity commences at birth and there is no indication that the definition of a child as a human being was intended to include a foetus. Art 5(3) of the ACRWC answers the second question of Viljoen *op cit* 338, by confirming that the “[d]eath sentence shall not be pronounced for crimes committed by children”. Olowu 2002 *IJCR* 131 regards the failure of the ACRWC to address the question of unborn children as anomalous and bemoans the failure of the ACRWC to address controversial aspects like abortion.

⁶⁹ Art 3 reads that “[e]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, relation, political or other opinion, national and social origin, fortune, birth or other status”. The principle of non-discrimination is one of the core articles of the CRC and may equally be regarded as such in the ACRWC. Compare Arts 1993 *AJICL* 145; Viljoen in *Child Law in South Africa* 336; Davel 2002 *De Jure* 285. Chirwa 2002 *ICLR* 158 comments that discrimination lies at the centre of the ACRWC and draws attention to the ACRWC being the second global and first regional human rights instrument that extends the list of grounds on which discrimination is prohibited.

⁷⁰ A comparison between the CRC and the ACRWC regarding aspects concerning children will follow in 5.2.2.4 *infra*.

of communicating his or her view to do so either directly or through an impartial representative, are specifically included in the African Charter.⁷¹

The remainder of the rights highlight the identity, protection and *autonomy*⁷² of the child with rights such as the right to a name and nationality;⁷³ freedom of expression and association, thought, conscience and religion;⁷⁴ the right to education;⁷⁵ the right to health and health services;⁷⁶ the right to protection against all forms of child abuse;⁷⁷ administration of child justice;⁷⁸ and the right to parental care and protection.⁷⁹

⁷¹ Art 4(1) reads that “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be *the* primary consideration”. (Emphasis added.) Art 4(2) confirms the participatory and representation rights of the child where it determines that “[i]n 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”. Compare Thompson 1992 *ICLQ* 435; Arts 1993 *AJICL* 158; Chirwa 2002 *IJCR* 160-161; Lloyd 2002 *IJCR* 183; Olowu 2002 *IJCR* 129; Davel 2002 *De Jure* 283.

⁷² Emphasis added.

⁷³ Art 6(1) determines that every child shall have the right to a name from birth.

⁷⁴ Art 7 is complementary to art 4(2) where it reads that “[e]very child who is capable of communicating his or her own views shall be assured the right[s] to express his [or her] opinion[s] freely in all matters and to disseminate his [or her] opinions[s] subject to such restrictions as are prescribed by laws”. Art 8 accords the right to free association and peaceful assembly and art 9 accords the right to freedom of thought, conscience and religion. Art 9(2) places a duty on parents to provide guidance and direction in the exercise of these rights having regard to the evolving capacities and the best interests of the child.

⁷⁵ Art 11 accords to every child the right to an education.

⁷⁶ Art 14 grants every child the right to enjoy the best attainable state of physical, mental and spiritual health. Art 14(2) requires states parties to undertake the pursuance of full implementation of this right and take special measures to reduce infant and child mortality rates (the article refers to morality rate but this is an obvious typographical error).

⁷⁷ Art 16 requires states parties to ensure that specific legislative, administrative, social and educational measures are taken to protect children from all forms of child abuse.

⁷⁸ Art 17(2)(c)(iii) provides that every child in a criminal trial be afforded “legal and other appropriate assistance in the preparation and presentation of his [or her] defence”. Art 17(2) requires states parties in particular to (a) ensure that detained, imprisoned or otherwise detained children are not subjected to any form of inhuman or degrading treatment or punishment (b) are kept separate from adults whilst in detention (c) ensure that the child is informed of the charge against him or her, is presumed innocent until found guilty, shall have his or her matter determined as speedily as possible, shall be entitled to an appeal upon conviction, have his or her matter disposed of *in camera*. (Emphasis added.)

⁷⁹ Art 19 accord children the right to residence with their parents and not to be separated unless it is in their best interest.

The African Charter defines a child as any person under the age of eighteen years. The importance of the definition cannot be denied as it circumscribes those who fall within its ambit.⁸⁰ However, it has been argued that the definition is too compact and vague.⁸¹ The “best interests of the child” principle reaffirms the commitment of the African Charter to ensure the rights of children.⁸² The right of children to express their views and to have their opinions taken into account in legal and administrative proceedings is confirmed in the African Charter.⁸³

The African Charter contains a provision ensuring legal representation for children in civil or family-law matters as well as criminal proceedings.⁸⁴ In this regard the provisions of article 1(2) should be considered. Where a state has ratified the Convention on the Rights of the Child and African Charter the

⁸⁰ See Lloyd 2002 *IJCR* 184 and in *Children’s Rights in Africa: A Legal Perspective* 35 she mentions that the definition as clear and concise as it is may yet come under scrutiny because of its linkage to birth registration, physical capacity, initiation ceremonies and other cultural and traditional notions of childhood in Africa. See further Arts 1993 *AJICL* 145; Viljoen 1998 *CILSA* 209; Chirwa 2002 *ICLR* 158.

⁸¹ Lloyd 2002 *IJCR* 184 who adds that the definition does offer wider protection of young people than the CRC, but it has been defined in vague terms and only one sentence has been used to define “child”. Arts 1993 *AJICL* 145 conversely regards the definition as a great step forward allowing protection of and provision to probably the widest possible group of young people. Chirwa 2002 *IJCR* 158 finds the definition clear and precise and welcomes the fact that it does not append a condition “unless, under the law applicable to the child, majority is attained earlier”.

⁸² Art 4(1) specifies that “[i]n all actions concerning the child undertaken by *any person* or authority the best interests of the child shall be *the* primary consideration”. (Emphasis added.) Commentators are all agreed that the level of the child’s protection is enhanced and this is indeed a more powerful statement than the equivalent in the CRC. See in this regard Viljoen 1998 *CILSA* 208; Viljoen in *Child Law in South Africa* 341-342; Chirwa 2002 *IJCR* 160; Lloyd 2002 *IJCR* 183; Davel 2002 *De Jure* 283.

⁸³ Art 4(2) grants this right with the proviso that a “child who is capable of communicating his/her own views” shall be provided an opportunity to express those views in all judicial and administrative proceedings; art 7 further confirms this right under the heading freedom of expression which specifies that “[e]very child who is capable of communicating his or her own views shall be assured the rights to express his [or her] opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by law”.

⁸⁴ Art 4(2) provides that “[i]n all judicial or administrative proceedings affecting a child who is capable of communicating his/her views ... the views of the child to be heard [may] ... 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”. Art 17 addresses the administration of child justice and allows legal representation in criminal matters as specified in art 17(2)(c)(iii) that states parties shall ensure that every child accused of infringing the penal law “shall be afforded legal and other appropriate assistance in the preparation and presentation of his [or her] defence”.

provisions of the Convention on the Rights of the Child,⁸⁵ which allow legal representation, may come to the assistance of a child who is not legally represented in a civil or family-law matter.⁸⁶

The African Charter provides a number of associated participatory rights to which the child is entitled.⁸⁷ Besides the rights set forth in the African Charter it also places responsibilities on children.⁸⁸ Human,⁸⁹ in her discussion finds that the contents of the document cannot be separated from the status of the child in society. The realism of the African Charter questioned by Human⁹⁰ and the tension and polarisations which Viljoen⁹¹ refers to have until now been positively addressed by South Africa. It remains clear that the role of the African Charter in South Africa will continually be scrutinised by other countries on the African continent and it remains for South Africa to set the pace regarding the applicability of the African Charter.⁹²

⁸⁵ Art 12(2) of the CRC.

⁸⁶ Viljoen in *Child Law in South Africa* 342 questions which level of protection should the state adhere to when both Conventions have been ratified and concludes that both instruments provide that their provisions do not affect “any provisions that are more conducive to the realisation” of children’s rights; see art 41 of the CRC which provides for the application of a higher standard in appropriate national law and international law relevant to the rights of children that are higher than those standards in the CRC.

⁸⁷ See in this regard arts 3 (right of non-discrimination), 5 (the right to life), 6 (the right to a name and nationality from birth), 8 (the right of freedom of association), 9 (the right to freedom of thought, conscience and religion), 10 (the right to privacy), 11 (the right to education), 12 (the right to participate in leisure, recreation and cultural activities), 13 (the right of disabled children to special protection), 14 (the right to health and applicable services), 15 (the right to be protected from economical exploitation), 16 (the right to be protected against all forms of abuse), 17 (the right to due process of law and a minimum age for criminal accountability), 18 (the right to be maintained irrespective of parents’ marital status), 19 (the right to parental care and protection), 21 (the right to be protected against harmful social and cultural practices), 22 (the right not to participate in armed conflicts), 23 (the right to refugee status), 24 (the right to ensure that adoptions conform to applicable legislation), 25 (the right to assistance when separated from parents), 27 (the right to be protected against sexual exploitation), 28 (the right to be protected against drug abuse), 29 (the right against sale, trafficking and abduction of children).

⁸⁸ Art 31 of the ACRWC.

⁸⁹ In *Bill of Rights Compendium* par 3EA41 2(d) mentions that children in traditional societies in Africa are to a large degree considered the property of their parents and raises the question whether the philosophy of the ACRWR is realistic and/or viable.

⁹⁰ *Loc cit.*

⁹¹ In *Child Law in South Africa* 342 refers to the tensions and polarisation which may be created by the ACRWC.

⁹² An example is the non-compliance to which Viljoen *op cit* 349 refers, to wit customary marriages of children under eighteen years and failure of children “born out of wedlock” to inherit intestate under customary law with reference to *Mthembu v Letsela* 1997 (2) SA 936 (T). The Recognition of Customary Marriages Act 120 of 1998 came into operation on 15

The implementation of international instruments in South Africa occurs mainly through legislation and policy.⁹³ The Constitution prescribes the procedure to be followed when the enforcement of an international instrument is to become obligatory in South Africa.⁹⁴ Section 39 of the Constitution further assists in the interpretation of the Bill of Rights⁹⁵ and requires a court, tribunal or forum not only to promote the values that underlie an open and democratic society based on human dignity,⁹⁶ equality⁹⁷ and freedom,⁹⁸ but also to consider international law.⁹⁹

5 2 2 3 Other international and regional instruments in which child participation and legal representation in legal matters are acknowledged

There are very few international and regional instruments which acknowledged the child's right to participation and legal representation before the advent of the Convention on the Rights of the Child.¹⁰⁰ The first international human rights

November 2000 which specifically addresses the concern raised in art 21(1) of the ACRWC concerning child marriages. S 3(1)(a)(i) of the Recognition of Customary Marriages Act requires both prospective spouses to be above the age of eighteen years in order to enter into a valid customary marriage. The other question regarding the inability of a child born out of wedlock to inherit intestate in terms of the customary law was finally considered in *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) par 100 624B where the finding in *Mthembu v Letsela* was set aside.

⁹³ Olivier "The Status of International Children's Rights Instruments in South Africa" in Davel *Introduction to Child Law in South Africa* (2000) 200 explains that the 1996 Constitution is relevant for the implementation of international children's rights in that it regulates the relationship between international law and the South African law. Added to this is the Bill of Rights which contains provisions concerning children's rights.

⁹⁴ S 231(4) requires enactment by national legislation for it to become law in South Africa.

⁹⁵ S 39(1)(b) of the Constitution.

⁹⁶ This is found in the preamble where it is recognised that the child requires legal protection in conditions of freedom, dignity and security.

⁹⁷ This right is included in art 2 of the ACRWC confirming non-discrimination.

⁹⁸ The right to freedom echoes throughout the ACRWC, notably the preamble and in arts 3, 4, 7, 8, 9, 10, 12 and 19.

⁹⁹ S 39(1) of the Constitution. See also Olivier in *Introduction to Child Law in South Africa* 200-201.

¹⁰⁰ In the early twentieth century the focus was on the physical needs of children rather than their rights or freedom according to Timms *Children's Representation* 43. See further Van Bueren *Rights of the Child* 6-7; Fottrell *Revisiting Children's Rights* 2 who mentions that the Declaration is basically paternalistic and welfare orientated; Human in *Bill of Rights Compendium* par 3EA26 mentions that it was the first step in the development at setting standards aimed at the international protection of children.

instrument aimed at children's rights was adopted in 1924.¹⁰¹ There were attempts at participation, but these resulted in addressing children's protection and service.¹⁰² One such example is the Declaration of Rights of the Child in 1924 which in the preamble established a moral obligation to ensure that the child is provided with the best opportunity and the certainty that it will be safeguarded.¹⁰³ The Declaration consists of five principles which may be summarised as the child's right to economic, psychological and social needs.¹⁰⁴

A similar Declaration followed in 1959.¹⁰⁵ The Declaration of the Rights of the Child in 1959 comprised ten principles which were broadly framed and did not contain any reference to child participation or representation in legal matters. However, the needs and more importantly the interests of children were for the first time being addressed in a much wider social and welfare context.¹⁰⁶ It made reference to the best interests of the child¹⁰⁷ and highlighted other rights

¹⁰¹ The Declaration of the Rights of the Child adopted by the League of Nations. See also Human *loc cit*; De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289 293; Hodgson "The Historical Development and 'Internationalisation' of the Children's Rights Movement" 1992 *AJFL* 252 260-261.

¹⁰² Fottrell *Revisiting Children's Rights 2* refers to these early international efforts as welfare orientated, paternalistic, and aspirational and to some extent symbolic. Notably the child's rights were framed in broad terms. See further Van Bueren *International Documents* 1-6; Van Bueren *Rights of the Child* 6-12; Timms *Children's Representation* 43-44; Freeman *Moral Status of Children* 47-53; Hamilton in *Children's Rights in a Transitional Society* 14-19; Flekkøy and Kaufman *Participation Rights of the Child* 26-27.

¹⁰³ The preamble of the Declaration determines that "mankind owes to the child the best that it has to give" and concludes that the Declaration forms what may be called a "kind of children's charter" and that the Assembly's approval of the Declaration makes it "the children's charter of the league". This Declaration, formulated after the end of the First World War, and the rights of the child bears testimony of the concerns regarding children at that time.

¹⁰⁴ Human *loc cit* rightly mentions that the importance of this Declaration must not be underestimated. In the first place the concept of children's rights was established internationally. Secondly, for the first time international acknowledgement was given to the rights of children linking those rights with the welfare of the child. The attention of states was drawn to the importance and necessity of protecting the rights of children especially when acting on their behalf when their interests were at stake. See further Van Bueren *Rights of the Child* 8.

¹⁰⁵ Declaration of the Rights of the Child, UN Doc A/4354 (20 November 1959). It is notable that one of the two countries that abstained was South Africa.

¹⁰⁶ Human in *Bill of Rights Compendium* par 3EA27.

¹⁰⁷ Principle 2 which holds that the "child shall enjoy special protection, and shall be given ... means, to develop ... in a normal manner ... in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration".

to which the child was entitled such as equality,¹⁰⁸ nutrition,¹⁰⁹ name and nationality from birth,¹¹⁰ social security,¹¹¹ love¹¹² and non-discrimination.¹¹³ These rights may be regarded as one of the precursors which culminated in the eventual Convention on the Rights of the Child as it set the pace for further development in the formulation and acceptance of children's rights.¹¹⁴

The Universal Declaration of Human Rights of 1948 provides that childhood together with motherhood is entitled to special care and assistance and all children, whether born in or out of wedlock shall enjoy the same social position.¹¹⁵

The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993¹¹⁶ requires that a child, having regard to the age and degree of maturity of the child and after the child has been counselled and duly informed of the effects of the adoption, consents to the adoption where such consent is required.¹¹⁷ It is further required that consideration is given to the child's wishes and opinions having regard to the

¹⁰⁸ Principle 1.

¹⁰⁹ Principle 2.

¹¹⁰ Principle 3.

¹¹¹ Principle 4.

¹¹² Principle 6.

¹¹³ Principle 9.

¹¹⁴ According to Human in *Bill of Rights Compendium* par 3EA27 it was the growing interest in children's issues and the adoption of the Universal Declaration of Human Rights in 1948, which paved the way for the Declaration. She adds that children and their needs rose on national and international agendas due to the 1959 Declaration formulated in a language of entitlement. She bases her opinion on the following words of Van Bueren *Rights of the Child* 12 that "by 1959 ... children are beginning to emerge no longer as passive recipients but as subjects of international law recognised as being able to 'enjoy the benefits of' specific rights and 'freedoms'". Some commentators hold a more neutral approach to the effect of the 1959 Declaration; see Timms *Children's Representation* 43-44; Freeman *Moral Status of Children* 50; Fottrell *Revisiting Children's Rights* 2.

¹¹⁵ Art 25(2) of the Universal Declaration.

¹¹⁶ Art 21 of the CRC deals with the child's consent to adoption. Art 21(a) refers to "persons concerned" which may be interpreted to include a "child". However, art 24 of the ACRWC does not refer to the child's consent *per se*. As is the case with the CRC, "child" may be included in reference to "appropriate persons" in art 24(a) of the ACRWC. With the Children's Act fully entering into force with effect from 1 April 2010 inter-country adoptions are dealt with in terms of ch 16 of the Children's Act. As Human in *Child Law in South Africa* 389 indicates, the Convention has been adopted into South African domestic law with the Children's Act. Adoption in general is discussed in 5 4 5 3 *supra*.

¹¹⁷ Art 4(d)(1).

age and maturity of the child.¹¹⁸ Where the child's consent to an adoption is required, his/her consent must be given freely,¹¹⁹ in the required legal form and expressed or evidenced in writing. The consent of the child must not have been induced by payment or compensation of any kind.¹²⁰ An adoption within the scope of the Convention shall take place only if the competent authorities of the state of origin have determined, after possibilities for placement of the child within the state of origin have been given due consideration, that an inter-country adoption is in the child's best interests.¹²¹

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) of 1985 require that child justice shall be perceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles and at the same time contributing to the protection of the young and the maintenance of a peaceful order in society.¹²² The age of criminal accountability is specifically referred to in the Beijing Rules and states are required not to fix the beginning of the age at too low an age level, mindful of the traits of emotional, mental and intellectual maturity.¹²³ Rights of children to participation and legal representation in

¹¹⁸ Art 4(d)(2).

¹¹⁹ Art 4(d)(3).

¹²⁰ Art 4(d)(4).

¹²¹ Art 4(b). Art 21 of the CRC provides that those states parties who recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. Art 24 of the ACRWC provides that states parties who recognise the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. All three Conventions address the subsidiarity principle, but art 4(b) is more stringent.

¹²² Rule 1.4 of the Beijing Rules. "Juvenile" is not defined age-wise in the Beijing Rules but rule 2.2(a) provides that a "juvenile" is "a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult". Van Bueren *International Documents* 270-271 mentions that age limits will depend on, and are explicitly made dependent on, each respective legal system and respecting fully and allowing, among others, for the culture the member states. The result is a wide variety of ages resorting under the definition of "juvenile", ranging from seven to eighteen years.

¹²³ Rule 4.1 of the Beijing Rules. Van Bueren *International Documents* 271-272 cautions against the fixing of too low an age level or no age level which would create the impression that accountability would become meaningless.

criminal matters form part of procedural safeguards and the essential elements of a fair and just trial.¹²⁴

5 2 2 4 Comparison of international and regional instruments regarding the participatory rights and legal representation of children in legal matters

It appears that the African Charter was by no means accepted as quickly into the fold as the Convention on the Rights of the Child had been.¹²⁵ The Convention on the Rights of the Child as international instrument and the African Charter as regional instrument¹²⁶ may be compared, as those two instruments are regarded as instrumental to the children's rights development in

¹²⁴ Rules 7 1, 14 and 15 of the Beijing Rules which provide that procedural safeguards such as the presumption of innocence prevails, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings. The proceedings shall be conducive to the best interests of a child and conducted in an atmosphere of understanding and shall allow the child to participate therein and express him or herself freely. Rule 15 1 specifically provides that a child has the right to legal representation throughout the proceedings and to apply for legal aid where there is provision for such aid in the country.

¹²⁵ According to Lloyd 2002 *IJCR* 181 one of the reasons for the slow uptake of the ACRWC by the majority of the AU member states (it took almost ten years to enter into force) is the more stringent provisions contained the ACRWC. Another is the lack of knowledge and the need to popularise the ACRWC and sensitise the member states about it. The author mentions further *op cit* 182 that the CRC is drafted in ambiguous terms whilst the ACRWC is "Africa sensitive" thereby according higher standard and deeper obligations on the AU member states and making it difficult to evade obligations. Viljoen in *Child Law in South Africa* 331 mentions that during the drafting of the CRC specific issues were omitted and were specifically identified by those involved with the drafting process of the ACRWC such as children living under apartheid; disadvantages influencing the female child were not sufficiently addressed; practices prevalent in African society such as female genital mutilation and circumcision were not mentioned explicitly; the prevalent socio-economic conditions, such as illiteracy and low levels of sanitary conditions with the accompanying threats to survival in Africa; the community's inability to engage in meaningful participation in the planning and management of basic programmes for children was not taken into account; the African concept of a community's responsibilities and duties had been neglected; the use of children as soldiers and the compulsory minimum age for military service are issues of great importance; the position of children in prison and expectant mothers was not regulated; the CRC negates the role of the family (including the extended family) in the rearing of the child and in matters of adoption and fostering. Sloth-Nielsen and Mezmur 2007 *AHRLJ* 331 report that 41 countries have ratified the ACRWC as at 28 July 2007.

¹²⁶ Viljoen "Supra-national Human Rights Instruments for the Protection of Children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" 1998 *CILSA* 199-21 and Davel 2002 *De Jure* 282 mention that the CRC was a source of inspiration to the ACRWC as well as the OAU Charter itself, the African Charter on Human and People's Rights (1981), and the Declaration of the Rights and Welfare of the African Child (1979). See also Thompson 1992 *ICLQ* 433.

South Africa.¹²⁷ The focus here will be on the participatory and representation rights of children as well the best interests of the child. Viljoen¹²⁸ informs that there are three anchoring principles which assist in understanding the African Charter better: the best interests of the child, the principle of non-discrimination and primacy of the African Charter over harmful cultural practices and customs.¹²⁹ The core of the participatory and representative rights is contained in the four “general principles” to which Lloyd refers.¹³⁰

A comparison between the two children’s rights instruments reveals that the level of protection for children is increased in the African Charter in a number of aspects.¹³¹ The instances where the Convention on the Rights of the Child and the African Charter refer to similar protection, principles and rights are the following:

- (i) The “best interests of the child” principle is referred to in both the Convention on the Rights of the Child and the African Charter.¹³² Yet there can be no doubt that the African Charter provides a higher

¹²⁷ The SALC Project 110 *Review of the Child Care Act* Executive Summary p1 mentions that the Project Committee had from the onset seen its mandate as going beyond the confines of the Child Care Act and formulated as its vision a single comprehensive children’s statute for South Africa’s children. This was based, *inter alia*, on South Africa’s international obligations in terms of the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. See also SALC Discussion Paper par 1 2 p 1 where mention is made of the need to Africanise child care and protection mechanisms; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 265 where they comment on Mohammed’s DP remark in *Fraser v Children’s court, Pretoria North* 1997 (2) BCLR 153 (CC) that new legislation should take account of the reality of the conditions that prevail for women and children in South Africa and that placed the “africanisation” of new legislation firmly on the agenda.

¹²⁸ In *Child Law in South Africa* 336.

¹²⁹ Viljoen *loc cit* adds that if taken together these three principles may be said to create a normative break with the traditional African view of the child and the child’s role in society. Lloyd in *Children’s Rights in Africa: A Legal Perspective* 36 refers to four “general principles” which form the heart of the ACRWC.

¹³⁰ *Loc cit* where she refers to the rights that are set out in arts 3 (non-discrimination), 4 (the best interests of the child and communication of the child’s views), 5 (life, survival and development) and 7 (respect for the views of the child).

¹³¹ Viljoen 1998 *CILSA* 207-212, *Child Law in South Africa* 341-342; Davel 2002 *De Jure* 282-283 mentions that the ACRWC codifies a comprehensive set of children’s rights and increases the level of protection for children in a number of important instances; Chirwa 2002 *IJCR* 157-177 in his discussion of the ACRWC also draws attention to a number of instances where the ACRWC improves on the protection afforded to children in the CRC.

¹³² Art 3(1) of the CRC and art 4(1) of the ACRWC. Chirwa 2002 *IJCR* 160 says that it has been argued that the best interests principle has by reason of its inclusion in the ACRWC exceeded the traditional concepts of protection and that it is therefore open to new development and legal explanation as well as interpretation.

standard¹³³ than the equivalent provision in the Convention on the Rights of the Child by providing that the best interests of the child shall be *the* primary consideration compared with the Convention on the Rights of the Child requiring that the best interests of the child shall be a primary consideration.¹³⁴ The importance of the best interests principle of the child as determined in the African Charter is that the best interests of the child is regarded not only as a primary consideration when cultural aspects are considered but as the primary consideration as it should take precedence over culture every time when it is not in the child's best interests.¹³⁵

- (ii) Both the Convention on the Rights of the Child and the African Charter refer to child soldiers. The Convention on the Rights of the Child allows the recruitment of child soldiers¹³⁶ and the utilisation of these soldiers in hostilities.¹³⁷ The African Charter outlaws the use of child soldiers.¹³⁸

¹³³ Both Viljoen in *Child Law in South Africa* 342 and Davel 2002 *De Jure* 283 refer to the standard of the best interests of the child in the ACRWC as being *the* primary consideration as a powerful statement. (Emphasis added.) Lloyd in *Children's Rights in Africa: A Legal Perspective* 36 adds that the best interests of the child principle is paramount over the other three underpinning principles to which she refers. Compare further Olowu 2002 *IJCR* 129; Chirwa 2002 *IJCR* 160.

¹³⁴ See Viljoen in *Child Law in South Africa* 342; Sloth-Nielsen 1995 *SAJHR* 408; Chirwa 2002 *IJCR* 160; Lloyd 2002 *IJCR* 183; Davel 2002 *De Jure* 283.

¹³⁵ Kaime "The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections" 2005 *AHRLJ* 232 discusses the CRC but the approach in his discourse can be applied even more so as far as the ACRWC is concerned. He asserts that cultural practices threaten or harm the growth and development of a child and cannot be said to be in conformity with the best interests principle. Nyaundi "Circumcision and the rights of the Kenyan boy-child" 2005 *AHRLJ* 179 is more circumspect when he comments that the standard to be applied are the provisions of arts 3(1) of the CRC and 4(1) of the ACRWC and the "*discouragement* of any act" that would seek to undermine the rights of the child. (Emphasis added.) Lloyd in *Children's Rights in Africa: A Legal Perspective* 37 agrees when she says that the supremacy of the best principle of the ACRWC, although amplifying the influence of this overriding principle over other considerations, tends to reflect Western culture rather than embracing the genuine African spirit. Sloth-Nielsen "Domestication of Children's Rights in National Legal Systems in African Context: Progress and Prospects" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 55 affirms that in African context, the problem of compatibility of children's legal rights with customary and religious laws poses particularly acute problems when law reform, harmonisation and domestication are concerned.

¹³⁶ Art 38(3) of the CRC enjoins states parties to refrain from recruiting any child who has not attained the age of fifteen years into their armed forces. When recruiting between the ages of fifteen and eighteen years, states parties must endeavour to give priority to those who are the oldest.

¹³⁷ Art 38(2) of the CRC directs states parties to take "all feasible measures" to ensure that children who have not attained the age of fifteen should not partake directly in hostilities.

- (iii) The scope of protection for refugee children is more extensive in the African Charter as it allows children who are “internally displaced” to qualify for refugee protection.¹³⁹ The scope of protection in the Convention on the Rights of the Child is not as wide as that found in the African Charter.¹⁴⁰
- (iv) The definition of a child is treated differently in the Convention on the Rights of the Child differs from that of the African Charter. The Convention on the Rights of the Child¹⁴¹ defines a child as “every human being below the age of 18 years unless, *under the laws applicable to the child, majority is attained earlier*”. The African Charter¹⁴² in comparison defines a child as “every human being below the age of 18 years”.¹⁴³ It is argued that the limiting language in article 1 of the Convention on the Rights of the Child circumscribes the universal rights of the child.¹⁴⁴
- (v) Flowing from the confirmation of the best interests of the child standard the Convention on the Rights of the Child and the African Charter regard

¹³⁸ Art 22(2) of the ACRWC. Compare Viljoen in *Child Law in South Africa* 339; Davel 2002 *De Jure* 283 refers to art 1 of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict; Olivier “Protocol on Children in Armed Conflict: An International Analysis” in Davel *Introduction to Child Law in South Africa* (2000) 260-263; Chirwa 2002 *IJCR* 168; Lloyd 2002 *IJCR* 184 who puts it succinctly “[t]he message is loud and clear – it is not in the best interests of the child to fight”; Grover “On Recognizing Children’s Universal Rights: What Needs to Change in the Convention on the Rights of the Child” 2004 *IJCR* 265-266.

¹³⁹ Art 23(4) of the ACRWC which provides that children who are “internally displaced ... whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social disaster” and unaccompanied or accompanied by parents, legal guardians or close relatives and who seek refugee status or considered to be refugees in accordance with applicable international or domestic law shall receive appropriate protection. See also Arts 1992 *AJICL* 152-153 157-158; Viljoen in *Child Law in South Africa* 341; Davel 2002 *De Jure* 283; Chirwa 2002 *IJCR* 168; Lloyd 2002 *IJCR* 184-185. Compare *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) regarding the treatment of refugee children in South Africa, discussed in more detail in 5 2 3 1 4 *infra*.

¹⁴⁰ Compare Art 22 of the CRC.

¹⁴¹ Art 1 of the CRC. (Emphasis that of the last-named author in n 139.) This definition has been criticised because of the possibility to operate to the detriment of children by denying them rights under the CRC where majority is attained earlier than eighteen years. See Chirwa 2002 *IJCR* 158; Lloyd 2002 *IJCR* 184; Grover 2004 *IJCR* 259-271.

¹⁴² Art 2 of the ACRWC.

¹⁴³ Lloyd 2002 *IJCR* 184 correctly observes that the ACRWC offers wider protection of young people than the universal standard of the CRC.

¹⁴⁴ Grover 2004 *IJCR* 259-271 discusses in detail the limiting language used in art 1 of the CRC and compares the definition of art 1 with the Universal Declaration of Human Rights (1948) concluding and suggesting that the wording in art 1 be amended to delete the reference to the section “unless, under the law applicable to the child, majority is attained earlier”.

the participation and representation of children in legal matters as very important.¹⁴⁵ The African Charter restricts the participation of children¹⁴⁶ only to judicial and administrative proceedings¹⁴⁷ as a party to the proceedings¹⁴⁸ and within the confines and provisions of appropriate law.¹⁴⁹ The Convention on the Rights of the Child on the other hand is to be favoured because it merely requires the child to be able to form an opinion.¹⁵⁰ Furthermore the Convention on the Rights of the Child allows the child's views to be given due weight in accordance with the age and maturity¹⁵¹ of the child in all matters affecting him/her.¹⁵²

¹⁴⁵ Van Bueren in *Introduction to Child Law in South Africa* 203. Also Compare De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289-299; Sloth-Nielsen 1995 *SAJHR* 408 mentions that the Committee on the Rights of the Child identified four articles as the "soul" of CRC and further *op cit* 410 the right of the child's participation in matters affecting him or her as one of the four articles identified as being central to the interpretation of the CRC. Children as bearers of rights have a say in what are to be regarded as the best interests of the child.

¹⁴⁶ According to Chirwa *loc cit* art 4(2) denies a child, who is not able to communicate, the right to be heard. The CRC with art 12, so he argues, is preferable in that it only requires a child to be able to form an opinion to qualify for a participatory right. Lloyd 2002 *IJCR* 179 *et seq* does not address this problem. Davel in *Gedenkbundel vir JMT Labuschagne 20* mentions that the child's capability may relate to the child's age or level of education and the extent to which the child may be able to articulate his or her view. The wording of the article is structured in such a way that it creates the impression of a right to communicate and not participate.

¹⁴⁷ Chirwa 2002 *IJCR* 161 submits that art 4(2) is very narrowly defined allowing only the child who is capable of communicating his or her views to be heard. Chirwa *loc cit* rightly suggests that this restriction disallows the child to be heard in many informal proceedings. Compare also Davel in *Gedenkbundel JMT Labuschagne 20* who agrees that the opportunity of hearing the child is much more restricted in its scope.

¹⁴⁸ Chirwa *loc cit* mentions that the child must be a party to the proceedings in order to be heard. See further Davel in *Gedenkbundel JMT Labuschagne 20*.

¹⁴⁹ Chirwa *loc cit*. Thompson "The Africa's Charter on Children's Rights: A Normative Break with Cultural Tradition" 1992 *ICLQ* holds the view that art 4(2) entrenches the right of the child to be heard directly or through a representative 435. Davel in *Gedenkbundel JMT Labuschagne 20* correctly cautions that the child's right to be heard which is provided for in the ACRWC is more restricted than the similar right endorsed in the CRC.

¹⁵⁰ Chirwa 2002 *IJCR* 161. If arts 4(2) and 7 of the ACRWC are read in conjunction then the scope of participation becomes broader although the application remains narrow because art 7 has the proviso that the dissemination of the child's opinions are "subject to such restrictions as are prescribed by law". Although the participatory right of the child in terms of the CRC is worded stronger, the ACRWC is more specific in that it provides how the child will be heard. See Davel in *Commentary on the Children's Act 2-14*.

¹⁵¹ Chirwa *loc cit*.

¹⁵² *Ibid*.

The African Charter recognises issues which are of greater importance for Africa than it might be globally. Davel¹⁵³ recognises three issues which are in line with the underlying principles of the African Charter, yet encompass more than the Convention on the Rights of the Child. They are the following:

- (i) Duties are placed on children¹⁵⁴ in accordance with a general concept, which is one of the main features of the Banjul Charter,¹⁵⁵ of the community's responsibilities.¹⁵⁶
- (ii) The acknowledgment of the integral role of the family as basis of the society in which the child is reared.¹⁵⁷
- (iii) The realisation that harmful cultural and social practices have to be eliminated by states parties. Those practices in particular which are harmful to the health or life of the child and those discriminating on the grounds of gender or other aspects of status need to be eliminated by states parties.¹⁵⁸

¹⁵³ 2002 *De Jure* 283.

¹⁵⁴ Art 31(a) of the ACRWC.

¹⁵⁵ The African Charter on Human and People's Rights 1986 was adopted by the then OAU on 26 June 1986 and came into operation in October 1986. According to Human in *Bill of Rights Compendium* 3EA41 1 the underlying philosophy is culturally and ideologically unique to Africa. Art 18 accords rights and duties to the family which are consistent with the traditional view of the family in Africa where emphasis is on the family as a unit.

¹⁵⁶ Viljoen in *Child Law in South Africa* 339-340 explains that this duty must be seen and interpreted in the light of the ACRWC as a whole. The duties are qualified according to the age and ability of the child. See further Arts 1992 *AJICL* 144-145 153-154; Viljoen 1998 *CILSA* 206; Chirwa 2002 *IJCR* 169; Davel 2002 *De Jure* 283.

¹⁵⁷ Thompson 1992 *ICLQ* 438 explains that in Africa it has always been the supreme policy of the law to protect and preserve the family unit irrespective of type; Chirwa 2002 *IJCR* 167 acknowledges the importance of the family as an institution in Africa and mentions that it forms the basis of the community within which rights are supposed to be enjoyed. See further Davel 2002 *De Jure* 283.

¹⁵⁸ Art 21(1) of the ACRWC. Davel 2002 *De Jure* 284 refers to a number of such recognised practices in traditional African society, eg female genital mutilation, killing of baby twins, child betrothals, male primogeniture and child marriages. See further Thompson 1992 *ICLQ* 439-440 who holds that as far as child marriages are concerned the ACRWC, although it may be regarded as a progressive regional instrument, may be on a collision course with African cultural heritage and traditions in so far as they relate to the status of children; Viljoen 1998 *CILSA* 207-208; *Child Law in South Africa* 337; Chirwa 2002 *IJCR* 167; Lloyd 2002 *IJCR* 183. Sloth-Nielsen and Mezmur 2007 *AHRLJ* 348 draw attention to the reality of cultural relativism in Africa and highlight that cultural relativism cannot be separated from the problem of harmful cultural practices such as female "circumcision": an estimated 80 million women and girls in more than 25 countries have been circumcised. This emphasises the plight of girls in Africa. Harmful traditional practices are gender based and affect the girl twice-over because she is female and a child.

There are also distinctive features of the African Charter dealing with matters which are traditionally found in Africa and not specifically addressed in the Convention on the Rights of the Child.¹⁵⁹ Matters such as discrimination against children from unmarried parents,¹⁶⁰ child marriages,¹⁶¹ and parental responsibilities¹⁶² are issues that require special attention as happened in the African Charter.

Discrimination between children born from married and unmarried parents is apparent in several legal systems in Africa.¹⁶³ Although article 3¹⁶⁴ of the African Charter explicitly provides for non-discrimination in the enjoyment of the rights and freedoms contained in the African Charter, this is not the factual position in several countries in Africa. The social stigma children suffer because they are born of unmarried parents is exacerbated by the fact that they also suffer legal disabilities especially in the context of inheritance.¹⁶⁵

¹⁵⁹ Thompson 1992 *ICLQ* 438-440 in his discussion of the ACRWC's influence on African family law expands on the revolutionary impact the ACRWC will have on family law. Olowu 2002 *IJCR* 130 mentions only the proscription of child marriages as does Lloyd 2002 *IJCR* 185. Chirwa 2002 *IJCR* 170 makes a general statement that the ACRWC has several provisions that have not been mentioned in any human rights instrument before, apart from the fact that it makes several improvements on the CRC. Davel 2002 *De Jure* 284 agrees with Thompson *op cit* that the ACRWC may be described as revolutionary keeping in mind that some provisions deviate significantly from the existing standards in many African countries including South Africa.

¹⁶⁰ See n 92 *supra*.

¹⁶¹ See note 93 *supra*. This concern has not been adequately addressed in s 12(2)(a) of the Children's Act.

¹⁶² The discrimination has not been removed completely with the provision of s 21 of the Children's Act.

¹⁶³ Thompson 1992 *ICLQ* 441-442 gives a brief exposition on customary law governing the concept of legitimacy in several countries in Africa. The concept is not that different to the customary law in South Africa. Thompson further explains that in several African countries the concept of "illegitimacy" is also found in the general law of that country and there is a continued discrimination between children born of married and unmarried parents. He mentions Sierra Leone where under customary law there is a presumption of legitimacy of children born from an adulterous association. Sloth-Nielsen and Mezmur 2007 *AHRLJ* mention that religious law also sometimes causes problems. Eg in African countries applying Shari'a law discrimination against children born of unmarried parents remains problematic. See further Arts 1992 *AJICL* 158; Viljoen in *Child Law in South Africa* 336-337; Lloyd 2002 *IJCR* 185; Davel 2002 *De Jure* 285.

¹⁶⁴ Art 3 provides that "[e]very child shall be entitled to ... the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' ... birth or other status".

¹⁶⁵ Thompson 1992 *ICLQ* 441-442 explains that two rules apply to the inheritance of property. The first is the rule of statutory construction allowing only children born in wedlock to be regarded in terms of the relationship to be included in the terms "children", "issue" or "heirs" in wills. The second rule is that only those children born of "legitimate connection" will

Child marriages are common to Africa¹⁶⁶ and have been so for centuries. Thompson gives a very concise and insightful account of the potential conflict between customary law as practised by tribal African communities¹⁶⁷ and the aim of the African Charter to pronounce children's rights in Africa.¹⁶⁸ From the wording of the African Charter it is clear that it is the intention of the African Charter to ban child marriages in Africa.¹⁶⁹

inherit property on intestate succession. See further Arts 1992 *AJICL* 158. Bennett *Customary Law* 318 comments that both the CRC and the ACRWC have provided for the entitlement of children's rights in the treaties without distinction as to birth or other status and suggests that states parties are obliged to remove the stigma of illegitimacy. South Africa has taken remedial steps and under South African law there is no distinction between children born of married or unmarried parents as far as succession is concerned. The present Intestate Succession Act 81 of 1987, s 1(2) provides that birth out of wedlock does not affect the capacity of one relation to inherit from another when the rules of intestacy apply. The Wills Act 7 of 1953, as amended in 1992, provides in s 2D(1)(b) that when interpreting a will, the fact that the person is born out of wedlock must be ignored when determining the potential heirs' relationship for the purposes of the will. This allows for both an unmarried mother and father to benefit their offspring in terms of the rules of testate succession.

¹⁶⁶ Thompson 1992 *ICLQ* 440.

¹⁶⁷ 1992 *ICLQ* 439-440 where he focuses the attention on the main purpose of a heterosexual relationship in Africa as being procreation and marriage is deemed the only appropriate framework in which to accomplish this aim. In tribal communities parents often give their daughters in marriage to suitable men at an age as early as nine or ten years. Young girls are therefore regarded as suitable sexual partners at this age.

¹⁶⁸ Art 21(2) prohibits child betrothals and marriages of both boys and girls and imposes an obligation on states parties to ensure that effective action be taken including legislation to specify that "the minimum age of marriage ... [is] 18 years and make registration of all marriages in an official registry compulsory". The ACRWC views child marriages and the betrothal of young boys and girls as harmful social and cultural practices. In prohibiting child marriages it aims to ensure that children are protected from all forms of sexual exploitation as stipulated in art 27 of the ACRWC.

¹⁶⁹ Thompson 1992 *ICLQ* 440 emphasises that evidently child marriage is consistent with the logic of the ACRWC. This article must be read with the definition of a child in art 2 of the ACRWC. This leads Thompson to conclude that the ACRWC as a progressive regional instrument may be on a collision course with African cultural heritage and traditions in so far as they relate to the status of children. Sloth-Nielsen and Mezmur 2007 *AHRLJ* refer to harmful traditional practices that beset the girl child in Africa and call for comparative research that examines different legal frameworks to indicate effective strategies to prohibit and ultimately eliminate the harmful effect of such practices on children. See further Arts 1992 *AJICL* 158. Davel 2002 *De Jure* 284-285 appropriately includes South Africa in the African countries that have allowed child marriages because procreation is deemed the main purpose of heterosexual marriage, wherefore puberty is regarded as a marriageable age. Before ratifying the ACRWC South Africa adopted the Recognition of Customary Marriages Act 120 of 1998 which requires, in s 3(1) of the Act, those prospective spouses to be above the age of eighteen years before they can enter into a customary marriage. However, s 4 provides that the Minister or delegated officials may grant written permission to children to marry if it is considered to be in the interests of the children concerned. Time will tell to what extent the exercise of this discretion will undermine the general prohibition in s 3(1) of the Act and art 21(2) of the ACRWC.

Parental rights and responsibilities is another issue that is clearly articulated in the African Charter.¹⁷⁰ It appears that in this instance that the aims of the African Charter and customary law in Africa are at odds.¹⁷¹ One of the reasons for the perceived problem areas is the principle of parental authority which has a strong presence in African customary law.¹⁷²

5 2 3 The influence of international instruments on the child's participatory rights and legal representation in South Africa

The Convention on the Rights of the Child¹⁷³ was one of the first international human rights instruments to be signed by South Africa.¹⁷⁴ The more important international instruments regarding children's rights which are legally binding in South Africa to be discussed are the Convention on the Rights of the Child, the African Charter,¹⁷⁵ the Hague Convention on Civil Aspects of International Child Abduction¹⁷⁶ and the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption.¹⁷⁷ In addition reference will be made to the Beijing Rules for the Administration of Juvenile Justice of 1985.¹⁷⁸ For the purpose of the ensuing discussion the focus will be on the influence of

¹⁷⁰ Arts 18, 19 and 20 of the ACRWC.

¹⁷¹ Thompson 1992 *ICLQ* 440 expresses his doubts whether the customary justice systems awards of child custody and visiting rights are based on the best interests of the child. Sloth-Nielsen and Mezmur 2007 *AHRLJ* 333 on the other hand are more positive regarding the domestication of the ACRWC and the CRC referring, inter alia, to Ghana, Kenya, Madagascar, Nigeria and Uganda where more comprehensive dedicated children's statutes have been passed. South Africa has also passed a comprehensive children's statute, the Children's Act, of which some sections became effective on 1 July 2007, and is now fully operational. For a detailed discussion on the participatory rights and legal representation on the child as reflected in the Children's Act, see 5 4 5 and 5 4 6 *infra*.

¹⁷² Thompson 1992 *ICLQ* 439 remarks that in tribal communities where, inevitably, customary law governs, children are regarded as the property of their parents. He poses the question, how realistic is the ACRWC's philosophy? Olowu 2002 *IJCR* 127 then again asks to what extent the ACRWC is capable of protecting the rights of children within the African context? The answers to these questions are not that apparent.

¹⁷³ The General Assembly of the United Nations adopted the CRC on 20 November 1989.

¹⁷⁴ The government committed itself to negotiations in the early 1990s and signed the agreement on 29 January 1993. However, ratification, according to art 47 of the CRC, was still required for a state to become party and therefore legally bound. Ratification came about on 16 June 1995.

¹⁷⁵ South Africa ratified the ACRWC on 7 January 2000.

¹⁷⁶ South Africa acceded to this Convention on 8 July 1997.

¹⁷⁷ The Convention was approved at the 17th session of the Hague Conference on Private International Law. South Africa ratified the Convention on 21 August 2003.

¹⁷⁸ Adopted by the UN in Res 40/33 on 29 November 1985.

the Convention on the Rights of the Child and the African Charter in the development of child law jurisprudence in South Africa.

With the most important participatory rights of the child and the right to legal representation in place it may be asked to what extent did the Convention on the Rights of the Child and the African Charter influence the securing of the mentioned children's rights as fundamental rights in South Africa?¹⁷⁹ There can be no doubt regarding the influence which the Convention on the Rights of the Child and the African Charter have played in the culmination of children's rights in Children's Act. The Convention on the Rights of the Child¹⁸⁰ and the African Charter¹⁸¹ have already been referred to in a number of judgments in South African courts.

¹⁷⁹ As Davel in *Gedenkbundel JMT Labuschagne* 16 mentions the CRC obliges states parties to ensure that a child has the right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child. See further De Villiers 1993 *Stell LR* 306-310; Sloth-Nielsen 1995 *SAJHR* 410-411; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 276-278 after a brief expose of the development in Africa since 1994 and the influence of CRC in Africa, conclude that "[o]nly by being acutely aware of and sensitive to the needs of most vulnerable children in society, will new legislation stand a chance of empowering and protecting South African children and families well into the new millennium". Boezaart in *Child Law in South Africa* 3 summarises it when she says that "[t]he constitutional dispensation brought about in South Africa and the ratification of the United Nations Convention on the Rights of the Child paved the way for acknowledging that children are bearers of rights which they can enforce not only against their parents, but also against the state". South Africa is one of seven African countries with a "child's rights" Constitution according to Tobin "Increasingly seen and heard: The constitutional recognition of children's rights" 2005 *SAJHR* 110 who further mentions that there is an emerging trend within newly adopted or amended constitutions to adopt an approach whereby the treatment of children's rights is focused on under national constitutions as opposed to mere concerns about ensuring children's care and protection. The influence and applicability of the CRC and the ACRWC is specifically recognised in the preamble to the Children's Act 38 of 2005. See further Skelton and Proudlock in *Commentary on the Children's Act* 1-22.

¹⁸⁰ Eg *K v K* 1999 (4) SA 691 (C); *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C); *S v Howells* 1999 (1) SACR 675 (C); *Jooste v Botha* 2000 (4) SA 199 (T); *S v J* 2000 (2) SACR 310 (C); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *Lubbe v Du Plessis* 2001 (4) SA 57(C); *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005(1) SA 580 (CC); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T); *S v B* 2006 (1) SACR 311 (SCA); *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SACR 515 (SCA); *Burger v Burger* 2006 (4) SA 414 (D); *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

¹⁸¹ Eg *Lubbe v Du Plessis* 2001 (4) SA 57 (C); *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (3) SA 198 (CC); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 389 (W); *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights*

5 2 3 1 The influence of the Convention on the Rights of the Child and African Charter after the inception of the new constitutional dispensation

The best interests of the child principle as founded in the common law received recognition in family law disputes in South Africa in the early twentieth century.¹⁸² It was however the ratification of the Convention on the Rights of the Child and later the African Charter that brought children's rights to the forefront. The influence of the Convention on the Rights of the Child and the African Charter, as measured against the constitutional recognition of children's rights, may serve as an indicator of the advance of these rights since the signing of the Constitution of South Africa.¹⁸³ Both the Convention on the Rights of the Child and the African Charter have had an impact on judicial decisions since their respective ratifications. The impact of both these international instruments is evident in the recognition of children's rights and the best interests of the child principle as applied by the high courts.¹⁸⁴

An important question is what the status of the Convention on the Rights of the Child and the African Charter is in South African law. The first requirement of ratification has been complied with and the legislature has introduced national legislation with the acceptance of the Children's Act to further comply with the

Commission v President of the Republic of South Africa 2005(1) SA 580 (CC); *R v H* 2005 (6) SA 535 (C); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T).

¹⁸² Decisions like *Fletcher v Fletcher* 1948 (1) SA 130 (A) 134 144-145; *Tromp v Tromp* 1956 (4) 738 (N) 746B-C; *Shawzin v Laufer* 1968 (4) SA 657 (A) 662G-H 666D; *Segal v Segal* 1971 (4) SA 317 (C) 323-324; ensured that the best interests of the child were recognised as the main consideration and received due attention in custody matters following the divorce of the parents. For further discussion on the best interests of the child, see 5 5 *infra*.

¹⁸³ The Constitution was signed into law on 7 February 1997 after the amended text of the Constitution was confirmed by the constitutional court in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification judgment)* 1997 (2) SA 97 (CC). Skelton and Proudlock in *Commentary on the Children's Act* 1-9 observe that the influence of the CRC can be seen throughout the text of s 28 of the Constitution.

¹⁸⁴ Sloth-Nielsen "Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child" 2002 *IJCR* 137-156 discusses the first five years after the ratification of the CRC and the impact of the CRC on judicial decision-making during that period. For judicial decisions with reference to the CRC since its ratification and the ratification of the ACRWC, see notes 181 and 182 *supra*.

provisions of the Constitution.¹⁸⁵ The provisions of the Convention on the Rights of the Child and the African Charter thus apply to South African law in general and include the private law and public law spheres.¹⁸⁶ The guiding principle in the application of the Convention on the Rights of the Child and the African Charter is the best interests of the child.¹⁸⁷ When the provisions of sections 28(1)¹⁸⁸ and (2) of the Constitution are compared with those of the Convention on the Rights of the Child and African Charter the importance of the two international instruments becomes apparent.

¹⁸⁵ S 231(4) of the Constitution provides that any international instrument becomes law in the Republic when it is enacted into law by national legislation. Although only certain sections of the Children's Act, notably those sections dealing with general principles incorporating the best interests of the child standard, have entered into force there has been compliance with the requirements of s 231(4) of the Constitution. See further Olivier in *Introduction to Child Law in South Africa* 200-201. Sloth-Nielsen 2002 *IJCR* argues that the CRC enjoys heightened status in South Africa because the major provisions of the CRC have been constitutionalised in s 28 of the Constitution and the provisions of s 39(1)(b) and s 39(2) of the Constitution read with s 233 of the Constitution. That would mean that the CRC has application irrespective of the partial operation of the Children's Act.

¹⁸⁶ Boezaart in *Child Law in South Africa* 3 cautions against attempting to classify legal rules pertaining to children in the traditional way. Compare also Keightley "Children and the legal system: An overview of issues raised by contributors" in Keightley *Children's Rights* (1996) 1; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 275.

¹⁸⁷ S 28(2) of the Constitution achieves this with the provision that "[a] child's best interests are of paramount importance in every matter concerning the child". S 28 (3) provides that "[i]n this section 'child' means a person under the age of 18 years".

¹⁸⁸ Which provides that every child has the right-

- (a) to a name and nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that-
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

5 2 3 1 1 Section 28(2) of the Constitution

Children's rights have been considered in a number of decisions in which the Convention on the Rights of the Child and the African Charter have been referred to and compared with the provisions set out in section 28 of the Constitution.¹⁸⁹ In a series of cases, the Constitutional Court held in the first *Fraser* decision¹⁹⁰ that the provisions of the Child Care Act excluding the unmarried father from the decision process in an application for the adoption of his child, were unconstitutional and the offending section was struck down.¹⁹¹ The Constitutional Court held in the second *Fraser* case¹⁹² that the best interests of the child had to be paramount and refused the application to appeal to the Constitutional Court. With this refusal the Constitutional Court clearly regarded the best interests of the child as paramount when compared with other considerations for such an appeal.¹⁹³

Following on the acknowledgment of the paramountcy of the best interest of the child standard the Constitutional Court confirmed the best interest standard in *Minister of Welfare and Population Development v Fitzpatrick and Others*.¹⁹⁴ The rights of children as entrenched in section 28(1) of the Constitution are not

¹⁸⁹ See nn 180 and 181 for some of the decisions.

¹⁹⁰ *Fraser v Children's court, Pretoria North* 1997 (2) SA 261 (CC). The Constitutional Court considered an array of equality issues based on religion, race, gender and marital status. Although no children's right aspect was covered directly in the first Constitutional Court decision and the best interests of the child were not changed. For discussion of the first Constitutional Court decision see Jordaan and Davel "Die Fraser Trilogie *Fraser v Naudé* 1997 (2) SA 82 (W), *Fraser v Children's court, Pretoria-North* 1997 (2) SA 218 (T), *Fraser v Children's court, Pretoria-North* 1997 (2) SA 261 (CC)" 1998 *De Jure* 394-406; Louw "Consent to Adoption: Some Perspectives" 1999 *De Jure* 125-126; Sloth-Nielsen 2002 *IJCR* 140-141; Bekink and Bekink "Defining the standard of the best interest of the child: Modern South African Perspectives" 2004 *De Jure* 35.

¹⁹¹ S 18(4)(d) of the Child Care Act.

¹⁹² *Fraser v Naudé* 1999 (1) SA (CC).

¹⁹³ Pars [7], [9] and [10] of the second *Fraser* judgment where the Constitutional Court denied an application for special leave to appeal to the Constitutional Court.

¹⁹⁴ 2000 (7) BCLR 713 (CC) par [18], 2000 (3) SA 422 (CC). Sloth-Nielsen 2002 *IJCR* 141 explains that the Constitutional Court centred on the best interests of the child. Reference to the CRC was with regard to the principle of subsidiarity as set out in art 21(b) of the CRC which recognise that inter-country adoption may be considered as an alternative means of a child's care, if the child cannot be placed in foster care or with an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. The principle of subsidiarity is also found in art 24(b) of the ACRWC.

exhaustive and section 28(2) has been interpreted to extend beyond the reach of section 28(1) of the Constitution.¹⁹⁵ This view of the Constitutional Court has echoed in subsequent constitutional decisions¹⁹⁶ and numerous other decisions.¹⁹⁷

In a number of instances the children's rights entrenched in section 28(1) of the Constitution, with reference to the Convention on the Rights of the Child and African Charter, have been considered and confirmed in South African case law over the last decade.¹⁹⁸ A few examples serve as illustration.

¹⁹⁵ *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (C) par [17] 428C-D where Judge Goldstone indicated that the "plain meaning of the words cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It [s 28(2)] creates a *right* that is independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this Court in *Fraser v Naude and Others*". (Emphasis added.) Regarding the best interests standard see pars [17]-[21] 428F-429H.

¹⁹⁶ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) pars [40] 780E/F-H and [41] 781A-B with *inter alia* reference to the CRC; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par [75]; *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par [29] 1184F; *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par [20] 207; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) pars [54]-[55]; *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) pars [52]-[55] 609-610; *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) par [12] 187; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) pars [21] to [26] 247-250; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) par [130] 270D-E.

¹⁹⁷ *Eg K v K* 1999 (4) SA 691 (C) 706B-C/D; *Jooste v Botha* 2000 (2) SA 199 (T) 210C-D; *Lubbe v Du Plessis* 2001 (4) SA 57 (C) 66B/C-C 66E-E/F; *T v C* 2003 (2) SA 298 (W) par [18] 307; *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 178C-D; *Soller v G* 2003 (5) SA 430 (W) par [54]; *Kotze v Kotze* 2003 (3) SA 628 (T); *Krugel v Krugel* 2003 (6) SA 220 (T); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) par [7] 3; *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) pars [16]-[17] 56B-57D; *R v H* 2005 (6) SA 535 (C) pars [9]-[10] 540-541; *F v F* 2006 (3) SA 42 (SCA) par [10] 48; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA) par [13] 522H-523B and par [18] 524G-525A; *De Gree v Webb (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 (6) SA 51 (W); *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T); *J v J* 2008 (6) SA 30 (C) par [36] 431-44C; *Legal Aid Board v R* 2009 (2) SA 262 (D) pars [18]-[19] 269C-F.

¹⁹⁸ Sloth-Nielsen 2002 *IJCR* 142 refers to *V v V* 1998 (4) SA 169 (C) as one instance where the court citing the CRC and linking it to s 28(1)(b) of the Constitution underlined the importance of alternative care where the child is removed from the family environment. Bekink and Bekink 2004 *De Jure* 32 referring to *V v V* 189B-E draws attention to the court's comment that the child's rights are paramount and in order to accommodate the child's rights may require that action be taken for the benefit of the child which effectively cuts across the parent's rights. In this case joint custody was awarded notwithstanding the

5 2 3 1 2 Section 28(1)(b) of the Constitution¹⁹⁹

*Jooste v Botha*²⁰⁰ addressed the child's right to parental care as provided for in section 28(1)(b) of the Constitution. Judge Van Dijkhorst observed that the provisions of section 28 should be evaluated in the light of the pre-existing international law on the subject and that the Convention on the Rights of the Child and African Charter are both precursors which embrace special protection for children. Given the guidance it had from the Convention on the Rights of the Child²⁰¹ and the African Charter²⁰² the court elected to interpret the word "parent" restrictively thereby excluding the non-custodial parent from the provisions of section 28(1)(b) of the Constitution.²⁰³

mother's sexual orientation. In *Lubbe v Du Plessis* 2001 (4) SA 57 (C) where the care of the three children was awarded to the father whose parents were willing and able to assist with supporting and caring for their grandchildren. Court finding that although the mother was competent to care for her children, the relationship between the children and her husband was negatively influenced by his authoritarian and aggressive behaviour. *Soller v G* 2003 (5) SA 430 (W) dealt with a fifteen-year old boy's application for the variation of a custody order awarded to his mother. The court (par [8] 434H/I-435A) alluded to the fact that the significance of s 28(1)(h) of the Constitution lay in the recognition, also found in the CRC (art 12(2)), that the child's interests and the adult's interests may not always coincide and that a need exists for separate representation of the child's views. In *R v H* 2005 (6) SA 535 (C) pars [6] and [9] 539G-I and 540G-541B/C the court linked s 28(1)(h) of the Constitution with art 12 of the CRC and arts 4(1) and 19(2) of the ACRWC and concluded that implicit in the best interests of the child is the child's well-being, education, physical and mental health, spiritual, moral and social development. For this reason the father's contact with his daughter was suspended pending compliance with certain conditions. *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) highlighted the plight of unaccompanied foreign children in South Africa.

¹⁹⁹ S 28(1)(b) provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. (Emphasis added.)

²⁰⁰ 2000 (2) SA 199 (T). For discussions of the judgment see Van Zyl and Bekker "Jooste v Botha: Unmarried fathers should not have their cake and eat it" 2000 *De Jure* 152-153; Pieterse "*In loco parentis*: Third party parenting rights in South Africa" 2000 *Stell LR* 327-328; Van der Linde and Labuschagne "Die omgangsreg van die ongehude vader en sy buite-egtelike kind en die vraagstuk van Deliktuele aanspreeklikheid binne konteks van 'n interaksierereg" 2001 *THRHR* 308-315; Van Marle and Brand "Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in Jooste v Botha" 2001 *Stell LR* 409-420; Sloth-Nielsen 2002 *IJCR* 142-144.

²⁰¹ Art 18 read with art 3(1) of the CRC.

²⁰² Art 19 read with art 4(1) of the ACRWC.

²⁰³ The court follows an adult-centred approach and not a child-centred approach. If paternity is not disputed which apparently was not in issue, then in terms of s 28(1)(b) of the Constitution and the extensive interpretation of "family member" s 1 of the Children's Act, which became operative on 1 July 2007, the interpretation of the father not falling within the meaning of the words "parental care" is not agreed with. The court held that the father was not a parent within the meaning of the words "parental care" as "parental care" was intended to refer to custodial care or parental care within the context of s 28(1)(b). This

This restricted view as regards parental care held in *Jooste v Botha* is not supported. Subsequent judgments have leaned towards an extended interpretation of parental care.²⁰⁴

5 2 3 1 3 Section 28(1)(c) of the Constitution²⁰⁵

In *Government of the Republic of South Africa v Grootboom and Others*²⁰⁶ the Constitutional Court had the opportunity to consider the provisions of section 28(1)(c) of the Constitution. The court *a quo*²⁰⁷ held that the state had an obligation towards children in terms of section 28(1)(c) where parents were

primary application in the “vertical plane” alluded to by Judge Van Dijkhorst (207H-J) resulted in s 28(1)(b) being regarded as aimed at “the preservation of a healthy parent-child relationship in the family environment against unwarranted, administrative and legislative acts” and should be viewed against a history of disintegrated family structures caused by governmental policies. The Constitutional Court expressed a contrary view in the *Grootboom* case pars [76] and [77] where the Constitutional Court held that the rights contained in s 28 are primarily of horizontal application since the obligation for fulfilment of the rights lies primarily with the parents. See also *Bannatyne* case par [24] and *R v H* 2005 (6) SA 535 (C) par [9] 540I/J where the court specifically referred to art 9(3) of the CRC providing that states parties “shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”. In par [9] 541B-B/C the court referred to art 19(2) of the ACRWC which provides that “[e]very child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis”.

²⁰⁴ See *Heystek v Heystek* 2002 (2) SA 754 757C-D where the court mentions that parental care is not confined to natural parents but extends to stepparents, adoptive parents and foster parents (who are all regarded as care-givers within the definition of “care-giver” contained in s 1 of the Children’s Act). Also compare *Allsop v McCann* 2001 (2) SA 706 (C); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) par [18] 206 F/G-H/I where the court held that family care includes care by the extended family of a child, which is an important feature of South African family life. Further (par [22] 208B/C-C/D) that the impugned provisions of the Child Care Act (s 17(a) and (c)) (the whole Child Care Act has since been repealed with effect from 1 April 2010) deprived children of the possibility of a loving and stable family life as required by s 28(1)(b) of the Constitution. See further Bekink and Brand “constitutional Protection of Children” in Davel *Introduction to Child Law in South Africa* (2000) 183-184; Heaton in *Bill of Rights Compendium* par 3C36 compares the court’s interpretation with a non-custodial married father and concludes that there is nothing in the wording of s 28(1)(b) to suggest the limitation Judge Van Dijkhorst advocates. The latter view is also conveyed in Cronjé and Heaton *Family Law* 260. Skelton “Constitutional Protection of Children’s Rights” in Boezaart *Child Law in South Africa* 285-286 highlights the fact that children need to be adequately cared for in terms of s 28(1)(b) of the Constitution. The parental duty to pay maintenance as an aspect of “care” was not considered in *Jooste v Botha*.

²⁰⁵ S 28(1)(c) determines that every child has the right to basic nutrition, shelter, basic health care services and social services.

²⁰⁶ 2001 (1) SA 46 (CC).

²⁰⁷ 2000 (3) BCLR 277 (C).

unable to do so.²⁰⁸ Although the Court referred to the Convention on the Rights of the Child, the influence of the Convention on the Rights of the Child is not apparent in the final decision of the Constitutional Court.²⁰⁹

5 2 3 1 4 Section 28(1)(h) of the Constitution²¹⁰

In *Fitschen v Fitschen*²¹¹ the court declined an application for legal representation in terms of section 28(1)(h) of two boys aged fourteen and twelve years because the court was satisfied that substantial injustice would not result as the views of the children were adequately addressed in the reports by the psychologist and Family Advocate.²¹² The court justified its decision for declining the application amongst others stating that the necessary steps had not been taken to give recognition to and incorporate article 12(2) of the Convention on the Rights of the Child into domestic legislation.²¹³

²⁰⁸ 288.

²⁰⁹ Sloth-Nielsen 2002 *IJCR* 149 observes that the concern of the lower court that the best interests of the child should be paramount was replaced by a warning (par [71]) that “the carefully constructed constitutional scheme for the progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand”. Skelton in *Child Law in South Africa* 286 draws attention to *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) par [79] and argues that the indigeneness of a child affected by HIV/Aids could be viewed as amounting to the lacking of parental or family care which generates the state’s duty to ensure that the children’s rights are protected.

²¹⁰ There is no great volume of case law in South Africa but it is slowly being established as indicated in the ensuing discussion. See in general Zaal “When children should be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution 1997 *SALJ* 334 *et seq*; Sloth-Nielsen “Realising children’s rights to legal representation and to be heard in judicial proceedings: an update” 2008 *SAJHR* 495 *et seq*; Du Toit “Legal Representation of Children” in Boezaart *Child Law in South Africa* 96-111.

²¹¹ [1997] JOL 1612 (C).

²¹² Judge Van Reenen (63-64) referring to a similar provision contained in s 25(3)(e) of the Interim Constitution regarding legal representation in criminal matters, decided that the proviso “if substantial injustice would otherwise result” if a legal practitioner is not assigned to the child must be determined by the court. The court was satisfied that the preferences of the children and their reasons were adequately addressed.

²¹³ At 63, the judge mentioned that “nog nie enige van die vereiste stappe geneem [is] om erkenning aan die bepalings van subartikel 2 van artikel 12 van die Konvensie ... te gee nie”.

*Soller v G*²¹⁴ is the first reported case that deals fully with the application and interpretation of section 28(1)(h).²¹⁵ The court granted a child the right to express his views²¹⁶ and in doing so to obtain legal representation in terms of section 28(1)(h) of the Constitution.²¹⁷ This matter concerned the care of a boy of fifteen years who sought a variation of his custody²¹⁸ order from the care of his mother to the care of his father. The initial application for legal representation was brought in terms of section 28(1)(h) of the Constitution. After the court ascertained that the attorney who brought the application had been struck off the roll of attorneys, the court decided that the matter warranted the assignment of a legal representative in terms of section 28(1)(h)²¹⁹ and assigned an attorney on a *pro bono* basis.

The court referring to the Convention on the Rights of the Child observed that the significance of section 28(1)(h)²²⁰ lies in the recognition found in the

²¹⁴ 2003 (5) SA 430 (W). Legal representation was considered in two previous decisions. In *Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) the court granted an application in terms of s 28(1)(h) mentioning that it is a persuasive consideration to hold that in order to give proper effect to the provisions of s 28(1)(h) a court is entitled to join minor parties to proceedings affecting the children's best interests. Unless the children are joined as parties they will not be able to appeal against an adverse order.

²¹⁵ Par [3] 434B/C-D; Davel in *Commentary on the Children's Act* 2-20; Du Toit "Children" 2009 (1) *JQR* 2 1; Du Toit in *Child Law in South Africa* 103-104 107. In the now reported matters of *Fitschen v Fitschen* [1997] JOL 1612 (C) and *Ex parte Van Niekerk; In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) reference was made to s 28(1)(h), in *Fitschen's* case an application brought in terms of s 28(1)(h) failed and in *Van Niekerk's* case the court granted an application without discussing the application in detail, but in *Soller's* case s 28(1)(h) as well as the aim of the section was discussed in greater depth.

²¹⁶ Par [7] 434G-H where Judge Satchwell mentions that "few proceedings [are] of greater import 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". See also pars [44] to [48] 443A/B-444B/C.

²¹⁷ Par [26] 438A/B-D/E referring to s 28(1)(h) the court held that what is envisaged is "a 'legal practitioner' who would be an individual with knowledge of and experience of the law but also the ability to ascertain the views of a client [the child], present them with logic eloquence and argue the standpoint of the client in the face of doubt or opposition from an opposing party or a Court. Section 28(1)(h) ... [requires that] a child in civil proceedings may ... where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner".

²¹⁸ Terminology used before the change brought about by the Children's Act. For a detailed discussion of the Children's Act, see 5 4 *infra*.

²¹⁹ Pars [1]-[7].

²²⁰ Par [8]. S 28(1)(h) of the Constitution provides that the views of the child be placed before the court. The provision of "substantial injustice" is not mentioned in the corresponding art 12 in the CRC.

Convention on the Rights of the Child²²¹ that the child's interests and the adult's interests will not always coincide and therefore a need exists for separate representation of the child's views.²²² The boy in this case wished to reside with his father and was adamant about his decision. Normally the expressed wishes of the child would only be a persuasive factor in determining the best interests of the child.²²³ Of further importance in the *Soller* case is the distinction drawn between the respective roles of the Family Advocate and the legal representative assigned to the child in terms of section 28(1)(h) of the Constitution.²²⁴

In *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*²²⁵ the court allowed two children aged fourteen and twelve years to intervene and be joined as parties to the proceedings of the father and mother where the father

²²¹ Art 12(2) of the CRC provides that the child be provided the opportunity to be heard in any judicial and/or administrative proceedings affecting the child, either directly or through a representative or an appropriate body.

²²² Par [8]-[10] 434-435 where Judge Satchwell discusses the significance of s 28(1)(h) with reference to substantial injustice and refers to Sloth-Nielsen and Van Heerden 1996 SAJHR 250 who voiced their concern over the lack of accommodating the child's views when a conflict of interests arise between parents and children in matters affecting children. This question has to a large degree been resolved with the provisions of ss 10 and 14 of the Children's Act which became operational on 1 July 2007. Child participation and legal representation will be discussed in detail in 5 4 5 and 5 4 6 *infra*.

²²³ Par [54] where the court observed that it is trite in family law that the best interests of each child is paramount in the determining custody and access (now "care" and "contact" in terms of the Children's Act, s 1(1) definition of "care" and "contact" and subs (2). This section became operative from 1 July 2007) arrangements to such child. Par [56] the wishes of the child, in the particular circumstances of the family had become the determinant factor. See in general *McCall v McCall* 1994 (3) SA 201 (C) regarding the suggested list of factors to determine the best interests of the child. S 7 of the Children's Act (in operation since 1 July 2007) has introduced a best interests of the child standard which is applicable in all matters covered by the Children's Act. A discussion of this and other relevant sections of the Children's Act to follow at 5 4 *infra*.

²²⁴ Par [20] 437B-C. From pars [20] to [29] 437B-438I/J the court distinguishes between the functions of the Family Advocate and the s 28(1)(h) legal practitioner to represent the child. Davel in *Commentary on the Children's Act* 2-21 n 7 gives a brief reference to a number of articles that have been written on the role of the office of the Family Advocate since its establishment in 1990 in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 and sets about succinctly explaining the functions of the Family Advocate (2-21/2-22). See De Ru "The value of recommendations made by the Family Advocate and expert witnesses in determining the best interests of the child: P v P 2007 5 SA 94 (SCA)" 2008 *THRHR* 698-705. De Ru concludes (705) that the importance of the decision is to be found in alerting the courts to the dangers of allowing Family Advocates and expert witnesses to take over the function of the court and the duty of the presiding officer. It may be added that the task of the court would be that much easier when the child is also legally represented and the court be allowed to receive the views of the child objectively.

²²⁵ [2005] JOL 14218 (T).

applied to have his rights to access (now contact) to the children defined. The mother refused the children's father contact with his daughters because of his alleged violent behaviour. The court ordered the parents and children to submit themselves to therapy to try and normalise the family situation. The two children refused to submit to treatment.

At the request of the mother and through the intervention of the Centre for Child Law an application was lodged for the appointment of curator *ad litem* for the children. Subsequently a legal practitioner was appointed in terms of section 28(1)(h) of the Constitution.²²⁶ The court voiced its concern regarding the failure of children in general to be granted the opportunity to communicate their views or to have their interests independently placed before the court.²²⁷ The Constitution enjoins the court to protect the best interests of children and only if the children or somebody on their behalf presents the views of the children to the court, will the court have a balanced presentation of the situation.²²⁸

The court had no doubt that the two children had an interest in the outcome of proceedings and considered it to be in the interests of the children for them to be joined as parties because, unless the children were joined as parties, they would not be able to appeal against an adverse order.²²⁹

²²⁶ Par [5] Judge De Villiers indicated that he was of the view that it would be better for the State Attorney to appoint a legal practitioner in terms of s 28(1)(h) of the Constitution.

²²⁷ Par [6].

²²⁸ Par [7] and [8] where the court remarked that the appointed legal practitioner will be best equipped to present the case for the children if he can do so independently from both parents. See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [53] 787H-788A/B where Judge Sachs remarked that the court has not had the assistance of a curator *ad litem* to present the interests of the children. In the High Court it was accepted that the State would represent the interests of the child which the court found "unfortunate". The children, many of whom would have been in their late teens and capable of expressing their views, were not given that opportunity. The court made the very important remark that "[a]lthough both the State and the parents were in a position to speak on their [the children's] behalf, neither was able to speak in their name". This view was reaffirmed in *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) par [3] 201E/F-202A-B where Acting Judge Skweyiya commented "[w]here there is a risk of injustice, [less than substantial injustice] a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of s 28(1)(h) of the Constitution".

²²⁹ Par [8] noting the *Canadian case of Re Children's Aid Society of Winnipeg and AM and LC Re RAM*, 7 CRR where Judge of Appeal Matas pointed out that unless a child is a party to

The appointment of a legal representative for the child concerned was raised *mero motu* by the court in *R v H and Another*.²³⁰ The mother brought an application for variation of her custody order so as to award her sole custody and guardianship of her child. Judge Moosa appointed a legal representative, who was subsequently joined as second defendant, for the child after referring to the application of section 28(1)(h) of the Constitution and article 12 of the Convention on the Rights of the Child.²³¹

In addressing the best interests of the child the court referred to the Convention on the Rights of the Child²³² and the African Charter²³³ and held that implicit in the best interests of the child is the child's well-being, education, physical and mental health, spiritual, moral and social development. Although both parents may have certain interests and obligations towards the child, such interests and obligations yield to the child's best interest.²³⁴

The plight of unaccompanied foreign children was highlighted in *Centre for Child Law and Another v Minister of Home Affairs and Others*.²³⁵ The matter concerned the placement of unaccompanied foreign children with adults in Lindela Repatriation Centre and the failure to ensure that the children be

proceedings it will be impossible for him to appeal against an order which adversely affects the child.

²³⁰ 2005 (6) SA 535 (C) par [6] 539G/H the court came to this decision after reading and considering the pleadings. Also cited as *Rosen v Havenga* [2006] 4 All SA 199 (C).

²³¹ Par [6] 539I/J-540A/B citing a number of reasons for considering such an appointment for the child. In the first place the applicant was seeking drastic relief in the existing access arrangement, which could have serious implications for the child and her father. Secondly, the interests of the child may not be compatible with those of the custodian parent. Thirdly, there may be the need to articulate the views of the child in the proceeding in the interests of justice. Finally, separate legal representation may be in the best interests of the child.

²³² Which has been ratified by South Africa, see 5 2 3 *supra*. The court specifically referred to arts 3(1) and 9(3) providing that states parties shall respect the right of the child, who is separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis, except when it is contrary to the child's best interests.

²³³ Has also been ratified by South Africa, see 5 2 3 *supra*. The court referred to arts 4(1) and 19(2) which provide that "[e]very child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis".

²³⁴ Par [10] 541B/C-D/E.

²³⁵ 2005 (6) SA 50 (T). See further Swart "Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law" 2009 *AHRLJ* 103-128 for insight into the practical treatment of unaccompanied minor refugees in Ghana and South Africa.

brought before a children's court as required in terms of the Child Care Act. The court was concerned about the imminent and unlawful deportation of such children. It appeared that the children who were deported from Lindela back to their countries of origin were loaded into trucks and taken to the train station. There they were transferred onto a train, transported to their country's border, loaded back onto a truck, and taken to the nearest police station within that country.²³⁶

The court held that the way the children were treated by being placed with adults in the repatriation centre resulted in serious infringements of the children's fundamental rights protected in terms of sections 12, 28(1)(c), 28(1)(g), 28(2), 33, 34 and 35 of the Constitution. Furthermore placement of unaccompanied refugee children in Lindela Repatriation Centre also infringed the children's statutory rights in terms of sections 12 and 14 of the Child Care Act.²³⁷

The court emphasised South Africa's commitment regarding the Convention on the Rights of the Child and the African Charter, both which South Africa had ratified. Added to this is the obligation to ensure that the rights of the child, as set out in the Bill of Rights and more specifically section 28(1) and (2) of the Constitution, are complied with.²³⁸

²³⁶ Par [5] 54B-C.

²³⁷ Par [22] 58B/C. The circumstances in respect of the child and steps to be taken to safeguard the child were previously prescribed in the Child Care Act. The procedure is now governed by the provisions of the Children's Act which prescribes in s 152(1) that a child may be removed by a social worker or a police official if there are reasonable grounds for believing that (a)(i) the child is in need of care and protection and (ii) needs immediate emergency protection; (b) that the delay in obtaining a court order for the removal of the child and placing of the child in temporary safe care may jeopardise the child's safety and well-being and (c) that the removal of the child from his or her present environment is the best way to secure that child's safety and well-being. S 150(1) prescribes when a child may be identified as a child in need of care and protection, among others, such as when it appears "that the child has been abandoned or orphaned and is without visible means of support, lives or works on the streets or begs for a living, lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being". S 155 of the Children's Act provides for a court process to determine whether the child is a child in need of care and protection.

²³⁸ Par [27] 58H/I-59B the court granted an application by the curator *ad litem* to be appointed as legal representative in terms of s 28(1)(h) with reference to *Soller v G* 2003 (5) SA 430 (W) 438A/B-D/E to present and argue the wishes and desires of children. Sloth-Nielsen

Recently, in *Legal Aid Board and Another v R*,²³⁹ the court dealt with the role and authority of the Legal Aid Board to appoint a separate legal representative for the time being.²⁴⁰ Although no reference was made directly to the Convention on the Rights of the Child or the African Charter, the indirect application of both the Convention on the Rights of the Child and African Charter cannot be ignored, especially with regards to the poignant words of Chief Justice Langa that there are occasions when in the course of litigation it is necessary “for the child’s voice to be heard”.²⁴¹ This case serves to illustrate the continual development in the South African case law concerning the application of the Convention on the Rights of the Child and the African Charter in acknowledging the child’s voice and allowing the child’s voice to be heard in matters affecting him/her.

The matter concerned a twelve-year old girl who had been caught up in an acrimonious battle between her parents since she was five years old. Previous directions by the court for legal representation for her which was found to be impractical could not, for several reasons, be complied with. The child thereafter contacted Childline requesting help because her views and wishes were not being respected by her parents. With the assistance of Childline and the Centre for Child Law a legal representative was appointed by the Legal Aid Board in Durban.

The child’s mother contested the Legal Aid Board’s appointment of a legal representative for the child arguing that as the child’s guardian she should have

2008 SAJHR 500-501 expresses the view that the court in appointing the curator *ad litem* distinguished between the role of the curator *ad litem* and a legal representative appointed in terms of s 28(1)(h) who would “present and argue the wishes and desires of the child”. Du Toit in *Child Law in South Africa* 97 argues that “legal practitioner” should be interpreted widely to include the appointment of a curator *ad litem* and the assignment of a separate legal representative to present and argue the views of the child.

²³⁹ 2009 (2) SA 262 (D).

²⁴⁰ In this case the role and authority of the Legal Aid Board to appoint a legal representative when approached by a child for such assistance and not as a result of an order by a competent court that was dealt with for the first time. See also Du Toit 2009 (1) JQR 2 1.

²⁴¹ Par [1] of the judgment starts off with this apposite reference to *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) par [56].

been approached in the first instance.²⁴² The Legal Aid Board launched its application because of the mother's insistence that she would not allow consultation between the child and her appointed legal representative. In its application the Legal Aid Board sought a declarator that the State is deemed to have discharged its constitutional obligation in terms of section 28(1)(h) when the Legal Aid Board assigned a legal practitioner to a child at state expense in the matter concerning the child. Further that the assigned attorney was duly assigned as legal practitioner to the child in terms of section 28(1)(h) of the Constitution.

In considering the child's constitutional right to legal representation the court took cognisance of the child's wishes to express her opinions together with the important questions where the child shall live and the principal responsibility for day-to-day care, concluding that substantial injustice would result if the child is not afforded the assistance of a legal practitioner to have her voice heard.²⁴³ This conclusion is in line with the aim of section 10 of the Children's Act and establishes the child's right to participation as set out in the Convention on the Rights of the Child and the African Charter.²⁴⁴

5 2 3 2 The influence of the Convention on the Rights of the Child and the African Charter in the Children's Act

It is in the Children's Act that the influence of the Convention on the Rights of the Child and the African Charter is most noticeable. The advent of the new constitutional dispensation in South Africa brought with it a democracy and the

²⁴² Par [17] 268I-269A. The mother maintained that such an appointment could only be made by herself as lawful guardian or a person exercising parental responsibilities and rights in relation to the child or by a court on application.

²⁴³ Par [20] 269G-H observing that if "the voice of the child has been drowned out by the warring voices of her ... parents" then it is a necessary conclusion that substantial injustice would result if she is not afforded the assistance of a legal practitioner.

²⁴⁴ S 10 provides that every child who is of such age, maturity and stage of development as to be able to participate in any matter concerning the child has the right to participate in an appropriate way and the views expressed by the child must be given due consideration.

inception of the Constitution of the Republic of South Africa.²⁴⁵ This momentous event in South African history, together with the ratification of the United Nations Convention on the Rights of the Child paved the way for a new culture in children's rights.²⁴⁶

The constitutional requirement for the views of the child did not receive the same general recognition in our case law.²⁴⁷ It was only after the decision in *McCall v McCall*²⁴⁸ that the views of the child were considered by the courts as one of the factors to be taken into account in determining the best interests of the child in custody matters.²⁴⁹

Van Bueren²⁵⁰ makes a valid statement when she points out that underpinning the Convention on the Rights of the Child are two new principles of interpretation in international law, the best interests of the child and the evolving capacities of the child.²⁵¹ The change is from a culture of the best interests of the child seen from the viewpoint of the adult²⁵² to what is contained in article 3 of the Convention on the Rights of the Child²⁵³ and article 4(1) of the African

²⁴⁵ 1996. The Constitution was signed into law on by President Nelson Mandela at Sharpeville on 4 February 1997 after the second certification of the Constitution by the Constitutional Court in *Certification of the Amended Text of the Constitution of South Africa, 1996 (Second Certification judgment)* 1997 (2) SA 97 (CC).

²⁴⁶ Moving away from parent-centred children's rights to child-centred rights.

²⁴⁷ A notable exception is *French v French* 1971 (4) SA 298 (W) 299G-H emphasising that the "wishes of the child will be taken into account – with young children as a constituent element in the inquiry where they will attain a sense of security, and with more mature children a well informed judgment, albeit a very subjective judgment, of what the best interests of the child really demand".

²⁴⁸ 1994 (3) SA 201 (C).

²⁴⁹ *McCall v McCall* 1994 (3) SA 201 (C) 204J-205G.

²⁵⁰ In *Introduction to Child Law in South Africa* 204.

²⁵¹ The evolving capacities that Van Bueren *loc cit* refers to are the capacities of participation previously restricted in the South African case law and general framework.

²⁵² Van Bueren's comment, *loc cit*, is that best interests of the child began essentially as a principle of compassion and was regarded as a self-imposed limitation of adult power. The argument was that only an adult could take a decision on behalf of a child due to the child's lack of experience and judgment. More frequently, it has been mentioned that although a question is viewed from the child's best interests, the answer is more often than not given from an adult perspective.

²⁵³ The wording of art 3(1) could not be more encompassing by stating that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The only improvement on this broad principle is found in the best interests principle contained in art 4(1) of the ACRWC which reads that "[i]n all

Charter. Previously the views and wishes of children were either not heard or not considered.²⁵⁴ The first step towards the statutory recognition of the best interests of the child as a general principle is found in the Interim Constitution.²⁵⁵ The ratification of the Convention on the Rights of the Child brought the second new principle²⁵⁶ to which Van Bueren²⁵⁷ refers into the South African legal arena. The courts now not only had the so-called “checklist” enumerated in *McCall's case*,²⁵⁸ but international guidance²⁵⁹ and foreign law with reference to the participatory rights of the child in England and Australia as well.²⁶⁰

actions concerning the child undertaken by any person or authority the best interests of the child shall be *the* primary consideration”. (Emphasis added.)

²⁵⁴ In general the comment that “children should be seen and not heard” was not that uncommon a remark. There are a number of reported cases where, although children were prima facie old enough to express their view, they were either not given the opportunity to do so or the judgment does not reflect that their views were taken into account. Eg *Germani v Herf* 1975 (4) SA 887 (A) 899E the court held that a boy almost fourteen years old was “still young, immature in mind, impressionable and, notwithstanding his stubbornness, unable to decide for himself what is in his best interests”. In *Greenshields v Wyllie* 1989 (4) SA 898 (W) the court did not take much notice of the views of two children aged twelve and fourteen. Ironically the court (at 899B-F) starts off by saying that “children, being human beings and having personalities of their own, having emotional preferences of their own ... would certainly have some interest in knowing why things happen” but then concludes with “a Court is not inclined to give much weight to the preferences of children of 12 and 14. It is not because what they say is not important, but because the Courts know that there is more to it than the way they respond emotionally at this stage”. Barratt 2002 *THRHR* 556 *et seq* discusses the child’s right to be heard in custody and access determinations and concludes that procedural mechanisms ought to be put into place to ensure that children are given a meaningful opportunity to express their views. It appears that the office of the Family Advocate is not the answer due to work pressure, time constraints and heavy caseloads. There are also financial constraints. However, the importance of decisions made about custody disputes is that not only they do impact on the rest of the lives of the children concerned but may also “cast a long shadow beyond their generation”.

²⁵⁵ S 30(3), which came into operation on 27 April 1994, provides that “[f]or the purposes of this section ... and in all matters concerning such child his or her best interests shall be paramount”.

²⁵⁶ That of the child’s evolving participatory capacity in matters affecting the child.

²⁵⁷ In *Introduction to Child Law in South Africa* 204.

²⁵⁸ 1994 (3) SA 201 (C).

²⁵⁹ Ratification of international instruments such as the CRC and ACWRC not only places emphasis on the principle of the best interests of the child but also on the participatory rights and representation rights of the child in matters affecting the child.

²⁶⁰ The *Children Act* of 1989 of England, s 1(3)(a) which refers to the “[a]scertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)” and the *Australian Family Law Reform Act* of 1995 which in s 68F(2)(a) provides that “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 to the child’s wishes”. A comparative analysis of selected English and Australian children’s legislation follows in 6 4 1 and 6 4 3 *infra*.

The Interim Constitution²⁶¹ did not contain any provision regarding child participation or legal representation. Yet it may be regarded as the precursor of the later provisions contained in the Children's Act which clearly enumerates these rights for the children.

Section 39(1)(b) of the Constitution requires that a South African court must consider international law when interpreting the Bill of Rights.²⁶² The Constitution further instructs every court to prefer "any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".²⁶³

Children's rights may rightly be regarded as an aphorism²⁶⁴ which grew into a reality in South Africa.²⁶⁵ The Roman-Dutch law viewed the child through the eyes of the parent as part and parcel of parental authority, this however changed with coming into force of the Children's Act.²⁶⁶ From the dawning of the international recognition of children's rights²⁶⁷ it would only be a matter of

²⁶¹ Act 200 of 1993 which came into force on 27 April 1994.

²⁶² S 39(2) of the Constitution determines that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". Davel in *Gedenkbundel vir JTM Labuschagne* 17 comments that the CRC enjoys a heightened status in the South African legal framework due to the specific provisions of the Constitution itself in ss 39(1)(b) and 39(2).

²⁶³ S 233.

²⁶⁴ Freeman *Moral Status of Children* 47 refers to Hillary Rodman's aphorism that children's rights are "a slogan in search of a definition".

²⁶⁵ This new and exciting journey of the discovery of children's rights did not happen overnight as Hamilton in *Children's Rights in a Transitional Society* 16 mentions, there were a number of international instruments which preceded the CRC such as among others the ILO Conventions Fixing the Minimum Age for Admission of Children to Industrial Employment of 1919, the International Convention for the Suppression of Traffic in Women and Children of 1921 (which is one of two international instruments South Africa signed before 1994), the Children's Charter of the International Convention of Women of 1922, the Bill of Rights for the Handicapped Child, the Children's Charter in Wartime, the Children's Charter for the Post-war World of 1942, the Declaration of the Opportunities for Children of 1942 and the Declaration on the Rights of the Child of 1959. Olivier in *Introduction to Child Law in South Africa* 199 mentions that more than eighty international instruments dealing with the situation of children can be identified.

²⁶⁶ See 4 5 *supra* for a discussion of impact of parental responsibilities and rights on the participatory rights of the child in terms of the Children's Act of which a number of sections came into operation on 1 July 2007, but is now fully operational with effect from 1 April 2010. For a critical discussion of the Children's Act, see 5 4 *infra*.

²⁶⁷ Hamilton in *Children's Rights in Transitional Society* 13-36; Van Bueren in *Introduction to Child Law in South Africa* 202; Viljoen in *Child Law in South Africa* 332-333.

time for the concept to be incorporated into the South African legal system.²⁶⁸ Children's rights entail a merger of interests²⁶⁹ and entitlements, and rights of the child reaching beyond the traditional boundaries of private and public law.²⁷⁰

The shift in emphasis from parental rights to children's rights came gradually, as South Africa settled in into the international arena with the impending dawn of a new democracy, and with it a constitutional dispensation looming on the horizon.²⁷¹ This shift in emphasis is due to a number of reasons. The new constitutional dispensation²⁷² played a predominant role in this movement but South Africa's ratification of the Convention on the Rights of the Child²⁷³ probably played the most important part.²⁷⁴

During the period leading to the democratisation of South Africa, a number of international conventions were being established whereby the rights of children

²⁶⁸ Olivier in *Introduction to Child Law in South Africa* 197.

²⁶⁹ The culmination of which is entrenched in s 28(2) of the Constitution that "[a] child's best interests are of paramount importance in every matter concerning the child". See also Palmer "The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 -1995" in Keightley *Children's Rights* (1996) 98.

²⁷⁰ Keightley in *Children's Rights* 1. Boezaart in *Child Law in South Africa* 3 emphasises that children's rights are not suitable for classification in the traditional way and Human "The Theory of Children's Rights" in Boezaart *Child Law in South Africa* (2009) 243 draws attention to the fact that children's rights cannot be studied in isolation. See also Davel and Jordaan *Law of Persons* 55; Heaton *Law of Persons* 86.

²⁷¹ Eg *B v S* 1995 (3) SA 571 (A) 582A where Judge of Appeal Howe drew attention to the move away from the parental right to a child-centred approach with the following words "[i]t is thus the child's right to have access, or be spared access that determines whether contact to the non-custodian parent will be granted". See also *V v V* 1998 (4) SA 169 (C) 176; *Krugel v Krugel* 2003 (6) SA 220 (T) par [22] 228. Sinclair explains this shift in her article "From parents' rights to children's rights" in Davel *Children's Rights in a Transitional Society* 62-78.

²⁷² Etched in history on 27 April 1994 with the inception of the Interim Constitution, Act 200 of 1993.

²⁷³ On 16 June 1995.

²⁷⁴ There is general consensus that the CRC is the most important international instrument defining and consolidating human rights standards for children. See in this regard Olivier in *Introduction to Child Law in South Africa* 199; Van Bueren in *Introduction to Child Law in South Africa* 202 opines that the CRC has the potential to transform South Africa. Keightley in *Children's Rights* 3 adopts a more holistic view by referring to the Constitution and the CRC working in tandem to extend the influence of international norms over many areas of our domestic law dealing with children. Davel and Jordaan *Law of Persons* 55 regard the ratification of the CRC as the most important reason for the change in emphasis resulting in children's rights gaining more prominence in South Africa. Ratification of The African Charter on the Rights and Welfare of the Child on 7 January 2000 aligned South Africa with the rest of Africa in its plight to foster and Africanise a children's rights culture.

were improved.²⁷⁵ Very few of the international instruments were ratified by South Africa during the apartheid rule.²⁷⁶ The international isolation experienced by South Africa led to the stagnation in the evolving legal and human capacities of children as experienced in South Africa.²⁷⁷

With the advent of a new democratic dispensation in South Africa, a new approach emerged.²⁷⁸ The comparative study, which was embarked upon by the Department of Foreign Affairs and the South African Law Commission, identified certain conventions dealing with children's rights as one of the group of conventions that required minor statutory amendments in order to comply with international human rights standards.²⁷⁹

²⁷⁵ The most important international instruments regarding the rights of children are the following: Convention for the Suppression of Traffic in Woman and Children; Protocol to Amend the Convention for the Suppression of Traffic in Woman and Children of 1947; United Nations Declaration on the Rights of the Child (1959); International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966); Hague Convention on Civil Aspects of International Child Abduction (1980); Convention African Charter on Human and People's Rights (1981); Beijing Rules for the Administration of Juvenile Justice (1985); United Nations Convention on the Rights of the Child (1989); African Charter on the Rights and Welfare of the Child (1990); Convention on the Protection of Children and Co-operation in respect of Inter-country Adoptions (1993); European Convention on the Exercise of Children's Rights (1995).

²⁷⁶ Olivier in *Introduction to Child Law in South Africa* 197 n1 sums it up by saying that "[d]uring the apartheid years the South African government's denial of human rights in its domestic policy was reflected in its foreign policy on international human rights". Olivier *op cit* 197 n 2 adds that South Africa was party only to the following international human rights instruments: The Slavery Convention (1926); The Protocol Amending the Slavery Convention (1953); the Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others (1950).

²⁷⁷ During the period 1910-1994 South Africa introduced legislation in which the child's protection was evident, such as the Adoption Act 25 of 1923, the Children's Act 31 of 1931, the Children's Act 33 of 1960 and the Child Care Act 74 of 1983. Further individual pieces of legislation followed, each addressing a particular need of the child that arose and ostensibly in the best interests of the child, but more often than not it was parent and adult-centred and not child-centred. For child related legislation during the pre-constitutional era, see 3 1 4 *supra*.

²⁷⁸ According to Olivier in *Introduction to Child Law in South Africa* 197, the process started in 1989 when the Department of Foreign Affairs in conjunction with the South African Law Commission (now the South African Law Reform Commission) assessed the compatibility of the existing South African law and the most important international human rights instruments. These international human rights instruments included amongst others the United Nations Convention on the Rights of the Child.

²⁷⁹ These so-called target conventions could be incorporated by signature or accession after minor statutory amendments were made according to Olivier *Introduction to Child law in South Africa* 198.

South Africa has since its re-entry into the domain of international human rights affirmed its position regarding human rights treaties with special reference to children.²⁸⁰ The implementation of the obligations in terms of international law occurs through legislation and policy. In South Africa, the National Programme of Action and the Constitution of the Republic of South Africa, 1996, have been singled out as the two policy and legislative instruments through which South Africa has complied with its commitments in terms of international law.²⁸¹

The National Programme of Action is tasked with the implementation of South Africa's commitments in terms of the Convention²⁸² and the Constitution is the instrument used for the implementation of international children's rights.²⁸³ The Constitution prescribes the process which has to be complied with in order to ratify or assent to an international agreement.²⁸⁴

After the ratification of the Convention on the Rights of the Child, the legislature in South Africa commenced amending legislation dealing directly with children

²⁸⁰ Olivier in *Introduction to Child Law in South Africa* 199 mentions the following human rights treaties and South Africa's position regarding them: International Covenant on Economic, Social and Cultural Rights which South Africa signed on 3 October 1994; International Covenant on Civil and Political Rights which South Africa ratified on 10 December 1998; the African Charter on Human and People's Rights to which South Africa acceded on 9 July 1996; the Convention for the Suppression of Traffic in Women and Children which South Africa signed (definitively) on 28 June 1922 and the Protocol to Amend the Convention for the Suppression of Traffic in Women and Children of 1947 which South Africa signed (definitively) on 12 November 1947.

²⁸¹ Olivier in *Introduction to Child Law in South Africa* 200.

²⁸² According to Olivier *loc cit*, the Cabinet approved the National Programme of Action (also referred to as the NPA) framework in April 1996. The NPA deals with all the policies, plans to promote and implement the CRC, and identifies the different government departments and non-governmental organisations involved in achieving this.

²⁸³ It is through the Constitution that the relationship between international law and South African law is regulated. Furthermore, the Bill of Rights contains a number of provisions concerning children's rights. Olivier *loc cit* also informs that ss 231 and 232 of the Constitution govern the relationship between international law in the form of treaties and custom and the South African law. She adds that s 231(5) provides for the continuation of international agreements, which bound South Africa before the present Constitution came into operation.

²⁸⁴ S 231(2) requires Parliament to approve the international agreement by way of resolution both in the National Assembly and the National Council of Provinces in order to be bound to the international agreement. However, s 231(3) stipulates that if it is an agreement of technical, administrative or executive nature or an agreement that does not require ratification or accession, and is entered into by the national executive, this binds the Republic without approval by the National Assembly and the National Council of Provinces. It must still be tabled in the Assembly within a reasonable time. See further Olivier *loc cit*.

and began with the investigation for a new children's rights dispensation, which culminated in the Children's Act.²⁸⁵

The complexity of children's rights is accepted internationally²⁸⁶ and the acknowledgement of children's rights has become more and more evident in South African case law.²⁸⁷

²⁸⁵ 38 of 2005.

²⁸⁶ Human in *Child Law in South Africa* 243 who refers to an array of foreign authors of children's rights explains the complexity of the theory of children's rights and refers first to the identification of children's rights, the pursuit of balancing the conflicting rights and how to mediate the apparent tension between children's rights and the rights of adults. Human's view is confirmed by Keightley in *Children's Rights* 1 who mentions that children's rights span the whole legal spectrum and is no longer confined to the sphere of traditional private law. She highlights the growing emphasis on the child as bearer of rights and as claimant against not only his or her parents for the realisation of certain duties owed to the child but also compliance of the state's obligations towards the child. Boezaart in *Child Law in South Africa* 3 agrees with Keightley's assessment of the new role the child as bearer of rights has in South Africa today as well as the enforcement of those rights.

²⁸⁷ This is evidenced in reported judgments of the last decade in which the rights of the child as expressed in the Bill of Rights and especially ss 28(1) and 28(2) have been highlighted and endorsed. Eg *K v K* 1999 (4) SA 691 (C) 706B-C/D; *Jooste v Botha* 2000 (2) SA 199 (T) 210C-D; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) pars [40] 780E/F-H and [41] 781A-B with *inter alia* reference to the CRC; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par [75]; *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par [29] 1184F; *Lubbe v Du Plessis* 2001 (4) SA 57 (C) 66B/C-C 66E-E/F; *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par [20] 207; *T v C* 2003 (2) SA 298 (W) par [18] 307; *Kotze v Kotze* 2003 (3) SA 628 (T); *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 178C-D; *Soller v G* 2003 (5) SA 430 (W) par [54]; *Krugel v Krugel* 2003 (6) SA 220 (T); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) pars [54]-[55]; *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) pars [52]-[55] 609-610; *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) par [7] 3; *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) pars [16]-[17] 56B-57D; *R v H* 2005 (6) SA 535 (C) pars [9]-[10] 540-541; *F v F* 2006 (3) SA 42 (SCA) par [10] 48; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA) par [13] 522H-523B and par [18] 524G-525A; *De Gree v Webb (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 (6) SA 51 (W); *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T); *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) par [12] 187; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) pars [21] to [26] 247-250; *J v J* 2008 (6) SA 30 (C) par [36] 431-44C; *Legal Aid Board v R* 2009 (2) SA 262 (D) pars [18]-[19] 269C-F; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) par [130] 270D-E.

5 3 South African Law Reform Commission²⁸⁸

5 3 1 Introduction

The South African Law Commission²⁸⁹ acted on the widespread and divergent responses received in connection with the Child Care Amendment Act.²⁹⁰ Added to this was the need for a comprehensive reconstruction of the Child Care Act, as well as the need to “africanise” child care and to install protection mechanisms for children, as mandated by the ratification of the Convention on the Rights of the Child.²⁹¹

The need for the drafting of a children’s statute received further momentum with the Constitutional Court’s judgment in *Fraser v Children’s court, Pretoria North*.²⁹² In May 1998 the South African Law Commission published an Issue Paper²⁹³ for general information. Following on this the Commission published

²⁸⁸ Hereafter referred to as the SALRC. The SALRC was formerly called the SALC. Documents published before 17 January 2003 (when the name change became effective, s 5 of the Judicial Amendment Act 55 of 2002) are cited as SALC. See in this regard Skelton and Proudlock in *Commentary on the Children’s Act* 1-12.

²⁸⁹ Hereafter referred to as the SALC.

²⁹⁰ See Sloth-Nielsen and Van Heerden “Proposed amendments to the Child Care Act and Regulations in the context of constitutional and international law developments in South Africa” 1996 *SAJHR* 247 *et seq*; Sloth-Nielsen and van Heerden “The Child Care Amendment Act of 1996: Does it improve children’s rights in South Africa?” 1996 *SAJHR* 649 *et seq*; Sloth-Nielsen and Van Heerden “New child care and protection legislation for South Africa? Lessons from Africa” 1997 *Stell LR* 261 *et seq*. See also SALC Discussion Paper 103 par 1 2 p 1; par 6 3 1 p 96.

²⁹¹ SALC Discussion Paper 103 par 1 2 p 1.

²⁹² 1997 (2) SA 261 (CC). Compare Sloth-Nielsen and Van Heerden 1997 *Stell LR* 265 who maintain that the *Fraser* case placed the “africanisation” of the intended children’s legislation firmly on the agenda. During the commission’s consultations, discussion paper and preparation of its final report on the review of the Child Care Act it benefitted from the Constitutional Court’s interpretations of s 28 of the Constitution. Judgments handed down during this process include *SW v F* 1997 (1) SA 796 (O); *V v V* 1998 (1) SA 169 (C); *Naude v Fraser* 1998 (4) SA 539 (SCA); *Jooste v Botha* 2000 (2) SA 199 (T); *Mthembu v Letsela and another* 2000 (3) SA 867 (SCA); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

²⁹³ Project 110 *Review of the Child Care Act* Issue Paper (1998).

several research papers as mentioned by Skelton and Proudlock.²⁹⁴ Then came a Discussion Paper²⁹⁵ followed by the Report²⁹⁶ and a Draft Bill.²⁹⁷

The Commission recommended in its Discussion Paper²⁹⁸ that legal representation, at state expense, be granted automatically for a child in any proceedings under the new children's statute in certain circumstances,²⁹⁹ with the proviso "if substantial injustice would otherwise result". The discussion included recommendations in which provisions were made how to determine the child's best interests which included the direct participation of the child.³⁰⁰ The significance of this recommendation emphasised the importance of the child-participation process during the consultative process.³⁰¹

²⁹⁴ In *Commentary of the Children's Act* 1-12.

²⁹⁵ SALC Project 110 *Review of the Child Care Act* Discussion Paper 103 (December 2001).

²⁹⁶ SALC Project 110 Report on the *Review of the Child Care Act* (December 2002).

²⁹⁷ SALC Project 110 Draft Children's Bill Annexure to the Report on the *Review of the Child Care Act* (2002).

²⁹⁸ SALC Discussion Paper 103 par 6 3 1 pp 98-100.

²⁹⁹ The circumstances are the following:

- (a) where it is requested by the child;
- (b) where it is recommended in a report by a social worker or an accredited social worker;
- (c) where it appears or is alleged that the child has been sexually, physically or emotionally abused;
- (d) where the child, a parent or guardian, a parent-surrogate or would-be adoptive or foster parent contests the placement recommendation of a social worker who has investigated the current circumstances of the child;
- (e) where two or more adults are contesting in separate applications for placement of the child with them;
- (f) where any other party besides the child will be legally represented at the hearing;
- (g) where it is proposed that a child be trans-racially placed with adoptive parents who differ noticeably from the child in ethnic appearance;
- (h) in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child.

Added to the above recommendations, the Commission also recommended in Discussion Paper 103 par 6 3 1 p 100 that a court that has denied a child's request for legal representation has to enter in the minutes of the court proceedings its reasons for such denial. At first glance this recommendation seems superfluous because the children's court functions as a court of law and a court of record (ss 42(1) and 43 of the Children's Act).

³⁰⁰ SALC Discussion Paper 103 par 5 3 p 86 requiring the courts, public or private social welfare institutions, administrative authorities and legislative bodies to consider "any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that are relevant to the weight it should give to the child's wishes".

³⁰¹ This aim is clearly set out in the SALC Discussion Paper 103 par 1 5 p 8 and the success thereof is reflected in the same document par 3 3 pp 3-5 where the Commission found that the right most emphasised by the respondents was the right to be heard.

The recommendation of the Commission to legal representation for children in civil proceedings³⁰² was endorsed.³⁰³ The Commission also recommended that a child may appoint a legal representative of own choice and at own expense.³⁰⁴ Further recommendations included that a duty be imposed on the court to inform the child or the person exercising parental rights and responsibilities in respect of the child of the child's right to legal representation; the court must order legal representation at state expense be provided for the child if it is requested by the child; recommended by a social worker; where it appears that a child has been abused or deliberately neglected; where placement recommendations are contested; where other parties are to be legally represented; or if substantial injustice would otherwise result.³⁰⁵ The Commission's recommendation for legal representation to be provided to children in trans-racial adoptions as presented in Discussion Paper 103 was withdrawn.³⁰⁶

The intention of the Commission to comply with and adhere to the children's rights enumerated in article 12 of the Convention on the Rights of the Child and section 28 of the Constitution, is reflected in the recommendations set out in the final report of the Commission.³⁰⁷ With this in mind the Children's Bill was expected to echo the intention of the Commission and translate it into the Children's Act. It was generally welcomed by civil society. The shift from a parent-centred approach, where a child had very limited statutory participatory

³⁰² The Commission recommended in Discussion Paper 103 par 6 3 1 p 98 that s 8A of the Child Care Act incorporating the grounds provided in regulation 4A(1) of the Child Care Act be put into operation and again in SALC Report par 5 3 2 p 34 expressed its concern that s 8A of the Child Care Act had not yet come into operation.

³⁰³ SALC Report par 5 3 2 p 35 mentioned that a child involved in a matter before the child and family court is entitled to legal representation. This recommendation was inserted in clause 78(1) of the Children's Bill.

³⁰⁴ SALC Report par 5 3 2 p 35 added that if such legal representation did not serve the interests of the child the court must terminate the appointment, see clause 78(2)(b) of the Children's Bill.

³⁰⁵ SALC Report par 5 3 2 p 36 which was also included in clause 78(5) of the Children's Bill. An interesting addition to what was recommended in the SALC Discussion Paper 103 is a child who must be represented at state expense must be represented by a Family Advocate, a child and family law practitioner whose name appears on the family law roster, or the child and family court registrar, in urgent matters.

³⁰⁶ SALC Report par 5 3 2 p 37.

³⁰⁷ SALC Discussion Paper 103 pars 6 3 1, 6 3 3 pp 100, 104 and Report dated December 2002 par 5 3 2 pp 34-37.

rights and no representation rights at state expense,³⁰⁸ to a child-centred approach where the rights of the child were enhanced and where the principle of participation and representation of the child, was confirmed.

5 3 2 Aim of the South African Law Commission

The aim was to determine the development of the South African law with the intention to ensure that a holistic all-embracing children's statute, in which the plight of those most vulnerable, children, who are the voiceless members of society, was formulated.³⁰⁹ In the preceding discussions it was pointed out that the Constitution entrenched the best interests of the child principle and thereby ensured that, in all matters affecting the child, the interests of the child would be paramount.

The further development aligning the rights of the child with that which is set out in the Convention on the Rights of the Child and the African Charter will be investigated.³¹⁰ The Child Care Amendment Act of 1996³¹¹ intended, amongst others, to bring about dramatic changes regarding the participatory and accompanying representation rights of the child.³¹² Some of the proposed amendments contained in the Child Care Amendment Act were met with valid criticisms. For purposes of the present discussion attention will focus on the

³⁰⁸ S 8A and reg 4A of the Child Care Act never came into operation.

³⁰⁹ The process in South Africa gained momentum from as early as 1993 with commentators focussing attention on the plight of children in South Africa; eg De Villiers "The United Nations Convention on the Rights of the Child: Guidelines for South Africa" 1993 *Stell LR* 306-310; Sloth-Nielsen 1995 *SAJHR* 401; SALC Discussion Paper 103 par 1 1 p 1.

³¹⁰ Art 12(1) of the CRC prescribes that states parties shall assure the participatory rights of children who are capable of forming their own views in all matters affecting them. Art 4(2) of the ACRWC is a bit more restricted in the application of children's rights, confining them to judicial and administrative proceedings. Both international instruments prescribe legal representation where required when children are expressing their views. The CRC art 12(2) mentions a representative or appropriate body and art 4(2) of the ACRWC refers to an impartial representative as a party to the proceedings.

³¹¹ 96 of 1996 became operative (with the exclusion of s 8A and reg 4A) on 1 April 1998.

³¹² S 8A dealing with legal representation of children in children's court enquiries. Reg 4A was only inserted by the 1998 Amendments. For a detailed discussion of the amendments intended in s 8A and reg 4A, see Sloth-Nielsen and Van Heerden 1996 *SAJHR* 247. See also Sloth-Nielsen and Van Heerden 1996 *SAJHR* 649; Zaal 1997 *SALJ* 336.

introduction of the new section that was intended to deal with legal representation.³¹³

Section 8A(1) of the Child Care Act provided that “[a] child may have legal representation at any stage of a proceeding under this Act”.³¹⁴ The court was obliged to inform a child who is “capable of understanding” at the commencement of any proceeding of his or her right to request legal representation at any stage of the proceeding.³¹⁵ The children’s court was also entitled to approve the appointment of a child’s legal representative by the child’s parent “should the children’s court consider it to be in the best interests of such child”.³¹⁶ Legal representation for the child at state expense could be ordered by the children’s court if the court considered this to be in the child’s best interests.³¹⁷ Regulations were included as a guide for the determination of whether the children’s court was obliged to order legal representation at state expense.³¹⁸

³¹³ S 8A was inserted by s 2 of the Amendment Act.

³¹⁴ This included any proceeding from consideration of the confirmation of a detention order in terms of reg 9(2)(d) of the Child Care Act to an appeal in terms of s 16A of the Child Care Act as well as an application for an order in terms of s 10 of the Child Care Act or an adoption inquiry which will include an application for a rescission where an adoption order was granted.

³¹⁵ S 8A(2) of the Child Care Act.

³¹⁶ S 8A(3) of the Child Care Act.

³¹⁷ S 8A(5) of the Child Care Act.

³¹⁸ Reg 4A(1) which reads as follows: “Legal representation at expense of the state shall be provided for a child who is involved in any proceedings under the Act, in terms of section 8A(5) of the Act, in the following circumstances:

- (a) where it is requested by the child who is capable of understanding;
- (b) where it is recommended by a social worker or an accredited social worker;
- (c) where any other party besides the child will be legally represented in the proceedings;
- (d) where it appears or is alleged that the child has been physically, emotionally or sexually assaulted, ill-treated or abused;
- (e) where the child, parent or guardian, a person in whose custody the child was immediately before the commencement of the proceedings, a foster parent or proposed foster parent, or an adoptive or proposed adoptive parent contests the placement recommendation of a social worker or of an accredited social worker who has furnished a report contemplated in section 14(2) of the Act of [sic] regulation 8(2), as the case may be;
- (f) where two or more persons are each contesting in separate proceedings for the placement of the child in their custody;
- (g) where the child is capable of understanding the nature and content of the proceedings, but differences in languages used by the court and the child, a legal representative who speaks both the languages must, subject to paragraph (h), be provided;

The criticisms levelled at the Child Care Amendment Act although quite valid, must be viewed against the background of the Child Care Amendment Act which was an interim measure.³¹⁹ Nevertheless, the criticisms were cogent and highlighted the importance of framing a new children's statute for South Africa.³²⁰ Sloth-Nielsen and Van Heerden³²¹ drew attention to three aspects regarding the importance of legal representation for children in children's court proceedings. Firstly, where there have been conflicts of interests between the parents' and the child's legal interests and the parents have been represented while there was no mechanism to assist the child in obtaining legal representation.³²² Secondly, the failure in general in children's court proceedings to comply with the provision of article 12³²³ of the Convention on the Rights of the Child which is regarded as one of the four cornerstones of the

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- (h) where a legal representative contemplated in paragraph (g) cannot be provided, an alternative arrangement should be made, including the provision of an interpreter for the child;
 - (i) where there is reason to believe that any party to the proceedings or any witness intends to give false evidence or to withhold the truth from the court; and
 - (j) in any other situation where it appears that the child will benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcome for the child."

³¹⁹ Sloth-Nielsen and Van Heerden 1996 *SAJHR* 649; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 262.

³²⁰ Van Heerden in *Boberg's Law of Persons and the Family* 618-621 and the authority cited in the accompanying nn 405 to 414. Sloth-Nielsen and Van Heerden 1996 *SAJHR* 250-252; 1996 *SAJHR* 649-651; 1997 *Stell LR* 262-263; Zaai 1997 *SALJ* 335-336.

³²¹ 1996 *SAJHR* 250.

³²² Examples which come to mind are a disputed foster parent placement or a contested step-parent adoption of a child. This concern is shared by a number of commentators; eg Sloth-Nielsen and Van Heerden 1996 *SAJHR* 251; 1996 *SAJHR* 650; 1997 *Stell LR* 263; Van Heerden in *Boberg's Law of Persons and the Family* 619. With the Children's Act fully operational legal representation of the child in the children's court is addressed in s 55 of the said Act, see discussion 5 4 6 *infra*.

³²³ The right of the child, who is capable of forming his or her own view, to freely express those views in all matters affecting the child and furthermore, to express those views directly or through a representative. Sloth-Nielsen and Van Heerden 1997 *Stell LR* 262 points out that s 8A falls short of introducing an unequivocal right to participate on the part of the child. See further Van Heerden in *Boberg's Law of Persons and the Family* 618 n 407 remarks that legal representation for a child is still not obligatory in all cases and mentions further that the phrase "who is capable of understanding" is unnecessary vague mainly because many of the children who are subject to children's court proceedings will, due to their tender years, not be capable of understanding any explanation of their right to representation. This questions the adequacy of protection aimed at in s 8A and reg 4A thus leaving the constitutional entrenchment of the right to legal representation for children wanting in reality.

Convention on the Rights of the Child.³²⁴ Lastly, the failure to comply with one of the children's rights clauses in the Constitution, ensuring that 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".³²⁵ One of the main criticisms directed at the attempt to comply with the requirements of the Convention on the Rights of the Child³²⁶ was the lack of commitment on the part of legislature to make legal representation obligatory.³²⁷ Although there had been partial compliance with

³²⁴ Or, as Sloth-Nielsen 1995 *SAJHR* 410-411 puts it, one of the four core articles providing the CRC with a "soul". What was intended did not become a reality especially against the background of the parent-centred approach prior to the inception of the Constitution. The Child Care Amendment Act only focused on children's court proceedings and not on all matters such as panel discussions for the review in terms of s 16(2) or of orders issued in terms of s 15(1)(b) of the Child Care Act. A new dimension brought about by the Children's Act will be discussed in 5.4 *infra*.

³²⁵ S 28(1)(h) of the Constitution. S 8A(3) of the Child Care Act provided that a children's court may approve that a parent may appoint a legal practitioner for his or her child for any proceeding under the Child Care Act "should the children's court consider it to be in the best interests of such child". In practice such an approval would be highly unlikely due to the underlying possibility of conflict of legal interests. Viewing this subsection from a parent-centred approach it appeared reasonable but from a child-centred approach which is what was initially intended it was quite the opposite.

³²⁶ South Africa had already signed the CRC on 29 January 1993 which was one of the first international instruments signed by the then De Klerk government according to Olivier in *Introduction to Child Law in South Africa* 198. South Africa had also ratified the CRC on 16 June 1995. It was therefore to be expected that the drafters of the Child Care Amendment Act would have taken cognisance of the content of the CRC and especially art 12. There were a number of positive developments in the Child Care Amendment Act, notably the move towards child-centred criteria for the removal of children as the primary ground for the new criteria in s 14(4) aligning the principle of "a child in need of care" with the "best interests of the child" principle in s 28(2) of the Constitution. See in this regard Sloth-Nielsen and Van Heerden 1997 *Stell LR* 264.

³²⁷ Sloth-Nielsen and Van Heerden 1996 *SAJHR* 251 argue that the creation of a new duty giving a discretionary power to the presiding officer in the children's court to consider whether legal representation is in the best interests of the child did not go far enough. They contend that the presiding officer should be compelled to consider the issue of legal representation at least at the onset of the proceedings. See further Sloth-Nielsen and Van Heerden 1996 *SAJHR* 650 reaffirming that the obligation to inform a child "capable of understanding" at the beginning of the proceedings in the children's court is not enough. Zaal 1997 *SALJ* 336 maintains that the attempt to draft an appropriate provision in s 8A was not successful because it is too disjointed and uses too broad a phrasing to offer sufficient guidance on this important issue whether children should have an enforceable right to representation in child care proceedings. Zaal *op cit* 342-343 concludes that many of the 42 commissioner-respondents interviewed in his survey drew attention to the importance of the quality of legal representation that children are likely to receive (this aspect will be canvassed further in this discussion below). To counter the cost implication for legal representation in all children's court proceedings, Zaal proposed an eight point guideline which focuses on a children's-rights approach more aligned with the provision of art 12 of the CRC and ensured that the appointment of a representative is mandatory

the constitutional requirement of representation for children in civil matters,³²⁸ this would have come about if the section and regulation had been operative. The stage was set for drafting a completely new children statute.³²⁹

5 3 3 Best interests principle investigated

The South African Law Commission wanted to determine what principles should underpin the new children's standard.³³⁰ There were serious concerns regarding the piecemeal fashion in which the Child Care Act was being amended in order to comply with South Africa's international commitments.³³¹ It was agreed that section 28 of the Constitution provided an important benchmark in the protection of children in South Africa because principles derived from international law³³² on children's rights were enshrined in the Constitution of South Africa.³³³ The setting of a best interests standard was regarded as one of

where the child is in disagreement with anyone else involved in the proceedings or where the other party has a representative.

³²⁸ S 28(1)(h), which provides that 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", Zaal 1997 SALJ 335 correctly says that the phrase "civil proceedings affecting the child" is wide enough to include care proceedings in the children's court. Zaal *op cit* 335 points to the critical importance of decisions taken in the children's court.

³²⁹ Sloth-Nielsen and Van Heerden 1997 *Stell LR* 264-265 mention that there was a firm agreement amongst all the stakeholders that "it was necessary (as a matter of some urgency) to begin the process of rewriting the Child Care Act in its entirety". SALC Discussion Paper 103 par 1 2 p 1 indicates that the concept of a Children's Code was raised at the Gordon's Bay Conference, "Towards Redrafting the Child Care Act", held on 26 to 28 September 1996.

³³⁰ SALC Discussion Paper 103 par 5 1 p 72. In the SALC Issue Paper par 3 2 pp 33-34 the four general principles underpinning the CRC were specifically referred to, which in brief consists of the best interest principle, the consideration of the expressed views of the child, the survival and development of the child and the principle of non-discrimination. In the SALC Issue Paper par 3 3 pp 36-37 reference was made to the ACRWC and although at that stage (the First Issue Paper was dated 18 April 1998) the ACRWC had not yet entered into force, it was noted that the ACRWC was nevertheless a useful document for determining the framework of South Africa's child legislation. In the SALC Issue Paper par 6 3 3 p 78 question 27 asked whether guidelines should be provided to direct decision-makers in the implementation of the constitutional injunction that the best interests of the child is the paramount consideration in all matters affecting children, or whether the incorporation of key principles were sufficient.

³³¹ SALC Discussion Paper 103 par 3 1 p 32.

³³² Art 3(1) of the CRC and art 4(1) of the ACRWC both enshrine the best interests principle as primary consideration. The CRC regards it as "a" primary consideration whilst the ACRWC regards it as "the" primary consideration. For a discussion see 5 2 2 4 *supra*.

³³³ SALC Discussion Paper 103 par 3 2 p 32 and par 5 3 pp 78-87. See generally Heaton "Some general remarks on the concept 'Best interests of the child'" 1990 *THRHR* 95-99;

the key principles that ought to play a central role in legislative reform.³³⁴ It was also the contemporary tendency in recent child law legislation to include general principles highlighting how decisions regarding children should be made in domestic legislation.³³⁵

The best interests principle is not without problems and this was acknowledged by the South African Law Commission.³³⁶ Various arguments have been put forward regarding problems pertaining to the best interests principle such as its “indeterminacy”;³³⁷ differing perspectives by different professionals,³³⁸ and more important for South Africa, the influence of the historical background to and the cultural, social, political and economic conditions of the country concerned including the value system of the relevant decision-maker.³³⁹ The parental

Clark “‘A Golden Thread?’ Some Aspects of the Application of the Standard of the Best Interests of the Child in South African Law” 2000 *Stell LR* 3-20; Haupt and Robinson “Oorsig oor die ontwikkeling van kinderregte met verwysing na die benadering van die sogenaamde *kiddie libbers* en die *kiddie savers*” 2001 *THRHR* 23-31; Davel “In ‘n kind se beste belang” 2001 *De Jure* 274 275; Bekink and Brand in *Introduction to Child Law in South Africa* 194-195; Skelton “Constitutional Protection of Children’s Rights” in *Child Law in South Africa* 280-284.

³³⁴ SALC Discussion Paper 103 par 5 2 p 73. See also Sloth-Nielsen and Van Heerden 1996 *SAJHR* 247; Sloth-Nielsen 1996 *SAJHR* 649.

³³⁵ De Villiers 1993 *Stell LR* 306-309 sounded a warning and formulated suggestions which included a review of all current and proposed legislation regarding the protection of children. See further Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266-278 who referred to contemporary developments in Namibia, Kenya, Ghana and Uganda from which they suggested new forward-looking children’s legislation.

³³⁶ SALC Discussion Paper 103 par 5 3 pp 78-79.

³³⁷ Heaton 1990 *THRHR* 95-99; Clark “Custody: The best interests of the child” 1992 *SALJ* 391; Goldberg “The right of access of the father of an illegitimate child: Further reflections” 1996 *THRHR* 282; Clark 2000 *Stell LR* 3-20; Davel 2001 *De Jure* 272-291.

³³⁸ SALC Discussion Paper 103 par 5 3 p 79 highlights varying viewpoints expounded by Lambraise and Cumes “Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?” 1987 *SALJ* 704; Heilbrun “Child custody evaluation: Critically assessing mental health experts and psychological tests” 1995 *FLQ* 63; Roseby “Uses of psychological testing in a child-focused approach to child custody evaluations” 1995 *FLQ* 97; Bonthuys “Epistemological envy: Legal and psychological discourses in child custody evaluations” 2001 *SALJ* 329.

³³⁹ Alston “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” in Alston *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 3-5; Rwezaura “The Concept of the Child’s Best Interests in the Changing Economic and Social Context of the Sub-Saharan Africa” in Alston *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 82-116; Bennett “The Best Interests of the Child in an African Context” 1999 *Obiter* 145-157.

acceptance of a court's decision is a factor which must be borne in mind when evaluating the best interests of the child.³⁴⁰

The role of the judiciary, starting as early as 1948³⁴¹ with the recognition of the best interest principle and the acknowledgment in *French v French*³⁴² and especially *McCall v McCall*³⁴³ should not be underestimated³⁴⁴ in the eventual formation of the best interest of the child standard found in the Children's Act.³⁴⁵ It was especially the so-called "checklist" which Judge King compiled in *McCall v McCall*³⁴⁶ and other guidelines which the court relied on that assisted the court

³⁴⁰ Clark 1992 SALJ 395 cautions against ignoring the impact which the best interests test as she refers to it may have on a parent who had been the primary care-taker. Furthermore the unpredictability of the best interests test may to some extent be exacerbated by the subjective opinions of a judge. This concern of Clark is also addressed by Parker "The Best Interests of the Child – Principles and Problems" in Alston *The Best Interests of the Child: Reconciling Culture and Human Rights* 26-41.

³⁴¹ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

³⁴² 1971 (4) SA 298 (W).

³⁴³ 1994 (3) SA 201(C).

³⁴⁴ See Palmer in *Children's Rights* 98-113; Barratt *The Fate of the Child: Legal Decisions on Children in the New South Africa* 145-157; Davel in *Commentary on the Children's Act* 2-5 to 2-8.

³⁴⁵ S 7 of the Children's Act which came into operation on 1 July 2007. For a brief overview of the most significant judicial interpretations of children's rights principles see SALC Discussion Paper 103 par 3 4 pp 39-51 and par 5 2 pp 73-75. Eg judicial pronouncements referred to where the best interests of the child are predominant are *Fraser v Children's Court, Pretoria North* 1997 (2) SA 218 (T); *Naude v Fraser* 1998 (4) SA 539 (SCA); *V v V* 1998 (1) SA 169 (C); *SW v F* 1997 (1) SA 796 (O) referring to s 30 of the Interim Constitution (the precursor of s 28(2) of the Constitution); *Jooste v Botha* 2000 (2) SA 199 (T); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *Sonderup v Tondelli* 2001 (1) SA 1171 (CC). See further Sloth-Nielsen 2002 *IJCR* 137-156; Bekink and Bekink 2004 *De Jure* 21-40.

³⁴⁶ 1994 (3) SA 201 (C) 204J-205F where the court held that in determining what is in the best interests of the child, the court has to decide which one of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors of which "[t]he 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 the 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 which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, 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;

when determining the best interests of the child in matters concerning children.³⁴⁷

The South African Law Commission acknowledged that the application of the best interest principle created problems in practice. It posed the question whether the determination should be left to the courts to develop the best interest principle on a case-by-case basis, or whether legislative guidance was required as had already been suggested or done in other jurisdictions.³⁴⁸ One

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- (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 the desirability of maintaining the status quo;
 - (j) the desirability or otherwise of keeping the siblings together;
 - (k) the child's preference, if the Court is satisfied that in the 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 should ... be placed in the custody of his father; and
 - (m) any other factor ... relevant to the particular case with which the Court is concerned".

³⁴⁷ Such as in *French v French* 1971 (4) SA 298 (W) 292H-293A referring to the following:

- (a) the sense of security of the children, involving examination of the extent to which a parent makes the child feel wanted and loved;
- (b) the suitability of the custodian parent, involving an examination of the character of the custodial parent, with particular reference to the ability of the parent to guide the moral, cultural and religious development of the children;
- (c) material considerations relating to the well-being of the children; and
- (d) the wishes of children.

³⁴⁸ Discussion Paper 103 par 5 2 pp 73-75 refers to the report by the Canadian Special Joint Committee on Child Custody and Access wherein it was recommended that decision makers, which included parents and judges, should consider a list of criteria in determining the best interests of the child. This list was to include the following:

- (a) the relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;
- (b) the relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;
- (c) the views of the child, where such views can reasonably be ascertained;
- (d) the ability and willingness of each applicant to provide the child with guidance and education, the necessities of life and any special needs of the child;
- (e) the child's cultural ties and religious affiliation;
- (f) the importance and benefit to the child of shared parenting, ensuring both parents' active involvement in his or her life after separation;
- (g) the importance of maintaining fostering relationships between the child and the child's siblings, grandparents and other extended family members;
- (h) the parenting plans proposed by the parents;
- (i) the willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;
- (j) any proven history of family violence perpetrated by any party applying for a parenting order;

such jurisdiction is Australia where section 68F of the *Australian Family Law Act* 1975 (Cth) was part of the legislative provisions which attempted to give guidance to a court in determining the child's best interests.³⁴⁹

Section 4 of the *Uganda Children Statute* of 1996 refers to the welfare principles contained in the First Schedule to the Statute and provides that the welfare

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- (k) there shall be no preference in favour of either parent solely on the basis of that parent's gender;
 - (l) except in an emergency, the unilateral removal of a child from the family home without suitable arrangements for contact between the child and the other parent is contrary to the best interests of the child; and
 - (m) any other factor considered by the court to be relevant to a particular shared parenting dispute.

³⁴⁹ S 68F prescribed how a court was to determine what is in a child's best interests:

“(2) 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 are 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 to the child's separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with 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 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 harm caused, or that may be caused, by:
 - (i) being subjected 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 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 be least likely to lead to the institution of further proceedings in relation to the child;
- (l) any other fact or circumstances that the court thinks is relevant.”

S 68F of the *Australian Family Law Act* 1975 (Cth) was amended in 2006, see discussion 6 4 3 3 *infra*. Although not mentioned in SALC Discussion Paper 103, the *United Kingdom Children Act* of 1989 has a similar guide for the court when deciding the best interests of the child.

principles shall be the guiding principles in reaching any decision based on the provisions of the Statute.³⁵⁰

The South African Law Commission recommended that as general principle the best interests of the child must be determined with consideration of all relevant facts and circumstances affecting the child.³⁵¹ It did not doubt the need to include guidance to the courts and other users of the new children's statute to indicate what is meant when stating that a particular decision or action must be in the best interests of a particular child.³⁵² The South African Law Commission therefore recommended that guidelines be incorporated in the body of the statute. It was the ideal to follow on the confirmation that in all matters concerning children, the best interests of the child shall be paramount.³⁵³

³⁵⁰ The relevant part of the First Schedule reads as follows:

- “(1) Whenever the state, a court, a local authority or any person 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 paramount consideration.
- (2) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.
- (3) In determining any question relating to circumstances set out in paragraphs (a) and (b) of paragraph (1), the court or any other person shall have regard in particular to –
- (a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;
 - (b) the child's physical, emotional and educational needs;
 - (c) the likely effects of any changes in the child's circumstances;
 - (d) the child's age, sex, background and any other circumstances relevant in the matter;
 - (e) any harm that the child has suffered or is at risk of suffering;
 - (f) where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.”

³⁵¹ SALC Discussion Paper 103 par 5 2 pp 75-76.

³⁵² SALC Discussion Paper 103 par 5 3 p 85, which recommendation was endorsed in the SALC Report on Project 110 par 3 3 p 16 confirming that such a list should be included in the new Children's Bill.

³⁵³ SALC Discussion Paper 103 par 5 3 pp 85-87. The recommended provisions in the new children's statute under the heading “best interests of the child” was that in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the paramount consideration. In determining what is in the best interests of the child the following must be taken into consideration:

- (1) Subject to subsection (3), in determining what is in the child's best interests by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the matters set in subsection (2) must be considered.
- (2) Public or private social institutions, the courts, administrative authorities and legislative bodies must consider:

5 3 4 The child's participatory and representation rights in legal matters

The Child Care Act did not specifically grant children the right to express themselves with regard to section 8 ("Procedure in children's court") and section 14 ("Holding of Inquiries"). In the first Issue Paper of the South African Law Commission it was recognised that this void had to be addressed.³⁵⁴

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- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that are 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; or
 - (ii) any other child, or other person, with 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 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 extended family, tribe, culture or tradition) and any other characteristics of the child that are relevant;
 - (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected 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; or
 - (iii) inappropriate or harmful relationships;
 - (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) that there should be no preference in favour of any parent or person solely on the basis of that parent or person's gender (recommendation 16 of the Canadian Special Joint Committee on Child Custody and Access for the Sake of the Children, December 1998);
 - (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
 - (l) any other fact or circumstance that is relevant.
- (3) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, is likely to be prejudicial to the welfare of the child (s 4(2) of the Uganda Children Statute, 1996).
- (4) If the court is considering whether to make 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)."

With minor differences the recommendations contained in subsections (1) and (2)(a) to (j) are those set out in s 68F(2) of the *Australian Family Law Act 1975* (Cth).

³⁵⁴ SALC Issue Paper 13 par 7 2 3 p 70 highlighted the fact that the child is the central party who often has most at stake. It is difficult to think of an instance in the children's court

The child's right to participate in decision-making in matters that affected him/her was another important principle that had to play a key role in legislative reforms. The direction which the modern children's rights approach was moving was noticeable in the Convention on the Rights of the Child and the African Charter. This included the child's right to legal representation in legal matters affecting him/her.³⁵⁵

The concern was to determine who should represent the child and when a child should be represented. The introduction of section 8A with the Child Care Amendment Act 96 of 1996 was aimed at ensuring legal representation for children at state expense if the child was capable of understanding his or her rights. The Commissioner³⁵⁶ was also empowered to order legal representation for the child if such representation would be in the best interests of the child.³⁵⁷

The South African Law Commission posed certain questions encompassing the range of the intended representation and the responses were concertedly in favour of child participation.³⁵⁸ In order to determine what would be the best

where the child is not the central party, be it care proceedings or adoptions. The only exception may be a contribution inquiry where the order of the court does not affect the child directly.

³⁵⁵ The concern of the SALC in Issue Paper 13 par 7 2 4 pp 90-91 was the acknowledgment of the child's most important role and the inability of the child to speak out in matters affecting the child (eg the child may be too young, disabled or afflicted to speak). The "children's court assistant" did not function properly in reality with only a few offices in South Africa having qualified children's court assistants. This task was eventually taken over by the clerk of the children's court who was administratively inclined and not of any assistance in disputed matters. In some instances prosecutors were used to assist the court, but their adversarial approach did not make them suitable alternatives in an inquisitorial process. Sometimes the investigative social worker who prepared the report was used but again this created procedural problems with witnesses leading evidence and cross-examining. Private lawyers are used to represent children, resulting more often than not in the child's views being suppressed by the parents who mandated the lawyer.

³⁵⁶ The presiding officer in the children's court, in terms of s 42(2) the Children's Act, was referred to as a commissioner of child welfare in terms of s 7(1) of the repealed Child Care Act.

³⁵⁷ Prior to the commencement of the entire Children's Act on 1 April 2010 the perennial problems experienced with "patching" the Child Care Act to align it with the requirements of the Constitution and international instruments became more evident. Reg 4A inserted by the Adoption Matters Amendment Act 56 of 1998 which was aimed at dealing with the provision of legal representation at state expense when certain circumstances prevailed never became operative. See n 318 *supra*.

³⁵⁸ Question 54 in the SALC Issue Paper 13 par 7 2 4 p 74 asked whether the new provisions (set out in reg 4A) adequately covered the circumstances in which legal representation

format if child participation was to be included in the new children's statute, a comparison of international instruments was considered.³⁵⁹

The South African Law Commission recommended that any wishes expressed by the child, subject to the level of the child's understanding, must be considered by public or private welfare institutions, the courts, administrative authorities and legislative bodies.³⁶⁰ The child's representation as part of empowering the child was also investigated by the South African Law Commission.³⁶¹

should be provided at state expense to a child in children's court proceedings and the grounds (as contained in reg 4A), or any other, be incorporated in a new children's statute. SALC Discussion Paper 103 par 3 3 p 36 found that the children themselves responded positively to questions pertaining to their rights and the majority of the respondents emphasised they wanted to be heard. In the SALC Discussion Paper 103 par 3 3 p 38 Davel recommended that the right of the child to express an opinion, to be listened to, and to participate in a manner commensurate with the child's understanding in decisions which affects his or her well-being equivalent to the Ghanaian provision should be included in a new children's statute.

³⁵⁹ The SALC Issue Paper 13 par 3 2 p 10 referred to the importance of any new legislation to ensure that ample opportunity is given for children to participate meaningfully in decisions affecting them. This requirement was echoed in the SALC Discussion Paper 103 par 5 2 p 77 resorting under general principles and guidelines in point 2(4). It was mentioned that whenever a child is in a position to participate meaningfully, in any decision-making affecting him or her, the child must be given the opportunity to participate and proper consideration must be given to the child's opinion, views and preferences, bearing in mind the child's age and maturity. Cognisance was taken of the fact that participation is one of the four general principles of the CRC resonating in art 12(1) of the CRC. SALC Discussion Paper 103 par 5 3 pp 82-85 referred to the recommendation of the Canadian Special Joint Committee on Custody and Access in its report "For the sake of the Children" which mentions that the views of the child should be considered by decision-makers when considering the best interests of the child. S 68F(2)(a) of the *Australian Family Law Act 1975* (Cth) obliges the court to consider any wishes expressed by the child and factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes. S 68G(2) of the *Australian Family Law Act 1975* (Cth) gives guidance on how the child's wishes referred to in s 68F(2)(a) are to be expressed. S 4 of the *Ugandan Children Statute* provides that the welfare principles set out in the First Schedule to the *Statute* shall be the guiding principles in making any decision regarding a child. The First Schedule provides that when the state, a court, a local authority or any person determines any question with respect to the upbringing of a child or the child's property or income arising from the property, regard shall be had in particular to the ascertainable wishes and feelings of the child concerned and be considered in the light of the child's age and understanding. See comparative analysis of selected foreign jurisdictions in ch 6 *infra*.

³⁶⁰ The SALC Discussion Paper 103 par 5 3 p 86 kept the proviso mentioned in s 68F(2)(a) of the *Australian Family Law Act 1975* (Cth) being that the wishes of the child and factors (such as the child's maturity or level of understanding) that are relevant to the weight it (as well as any other factors) should give to the child's wishes.

³⁶¹ SALC Discussion Paper 103 par 6 3 1 p 96 alluded to legal representation for children in children's court proceedings.

5 4 The Children's Act 38 of 2005³⁶²

5 4 1 Introduction

In this section the objectives and the purpose of the Act will be examined in order to determine to what extent the participatory and representation rights have been incorporated in the Act. The focus therefore will mainly be on those sections dealing with the child's right to participation as well as the sanctioning of the child's participation. This will also of necessity include the child's right to legal representation in matters affecting the child.

The redrafting of the Child Care Act culminated in the present Children's Act. A number of versions of the Children's Bill preceded the Children's Act and further extended the process and delayed the submission of the Children's Bill for parliamentary confirmation.³⁶³ Those sections which directly and indirectly sanction children's participation in legal matters and the corresponding right to legal representation in such participation of children in children's court proceedings will be examined.

A Draft Children's Bill issued as annexure with the final report of the Commission contained similar provisions regarding the participation³⁶⁴ and legal

³⁶² The Act was assented to and signed into law by President Mbeki on 8 June 2006 and was published in the GG 28944 of 19 June 2006. The following sections came into operation on 1 July 2007: 1 to 11, 13 to 21, 27, 30, 31, 35 to 40, 130 to 134, 305(1)(b), 305(1)(c), 305(3), 305(4), 305(6), 305(7), 307 to 311, 313, 314, 315 and the second, third, fifth, seventh and ninth items of schedule 4. Reference throughout this discussion will be to the Act unless specified otherwise. An incremental approach was utilised with putting into operation the Children's Act and the entire Children's Act became operative on 1 April 2010 (by Proc R12 of 2010 in GG 33076 of 1 April 2010).

³⁶³ There were three versions of the Children's Bill.

³⁶⁴ The draft Children's Bill was published on 17 October 2002. Clause 9 dealing with general principles provided in sub(6) "[i]f a child is in a position to participate meaningfully in any decision-making process in any matter concerning the child-

- (a) the child must be given that opportunity; and
- (b) proper consideration must be given to the child's views and preferences, bearing in mind the child's age, maturity and stage of development."

Clause 81(1) allows the child as a party to the proceedings to adduce evidence, question witnesses and produce argument.

representation³⁶⁵ as was set out in the final report of the South African Law Commission. After negotiations between the Department of Social Development

³⁶⁵ Clause 77 dealing with legal representation in general provided in subsection (1) that “[a] person who is a party in a matter before a child and family court is entitled to appoint a legal representative of own choice and at own expense”. Subsection (2) provides that “[i]f a person who is a party in a matter does not appoint a legal representative in terms of subsection (1) that person may apply to the appropriate authority to be represented by-

- (a) a family advocate; or
- (b) a child and family law practitioner whose name appears on the Family Law Roster and instructed by the Legal Aid Board in accordance with the Legal Aid Act, 1969 (Act 22 of 1969)”.

Clause 78 specifically deals with legal representation of children and provides as follows:

“(1) A child involved in matter before a child and family court is entitled to legal representation, despite section 77.

- (2) (a) A child may appoint a legal representative of own choice and at own expense to represent the child in such matter.
(b) If a legal representative appointed in terms of paragraph (a), does not serve the interests of the child in the matter or serves the interests of any other party in the matter, the court must terminate the appointment.
- (3) If no legal representative is appointed in terms of subsection (2)(a), the court must inform the parent or care-giver of the child or person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and the child, if the child is capable of understanding, of the child’s right to legal representation.
- (4) If no legal representative is appointed in terms of subsection (2)(a) after the court has complied with subsection (3), or if the court has terminated the appointment of a legal representative in terms of subsection (2)(b), the court may, subject to subsection (5), order that legal representation be provided for the child at the expense of the state.
- (5) The court must order that legal representation be provided for the child at the expense of the state if-
 - (a) it is requested by the child;
 - (b) it is recommended in a report by a social worker or an adoption social worker;
 - (c) it appears or is alleged that the child has been abused or deliberately neglected;
 - (d) any recommendations of a social worker who has investigated the circumstances of the child that the child be placed in alternative care, is contested by –
 - (i) the child;
 - (ii) a parent or care-giver of the child;
 - (iii) a person who has parental responsibilities and rights in respect of the child; or
 - (iv) a would-be adoptive parent, foster parent or kinship care-giver of the child;
 - (e) two or more adults are contesting in separate applications for the placement of the child with them;
 - (f) any other party besides the child is or is to be legally represented at the hearing;
 - (g) the court has terminated the appointment of a legal representative in terms of subsection (2)(b);
 - (h) in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child; or
 - (i) substantial injustice would otherwise result.
- (6) The court must record its reason if it declines to issue an order in terms of subsections (4) or (5).
- (7) A child who must be represented at state expense must be represented by –
 - (a) a family advocate;
 - (b) a child and family law practitioner whose name appears on the Family Law Roster and instructed by the senior family advocate of the area; or
 - (c) the child and family court registrar, if it is an urgent matter which does not allow for the appointment of a person referred to in paragraph (a) or (b).

and other affected Departments during 2003 a new version of the Draft Bill³⁶⁶ was produced by the Department of Social Development. This second version of the Draft Bill differed significantly from the original South African Law Commission draft.³⁶⁷ The clauses dealing with participation and representation in general were not affected that much, although there were some important changes.³⁶⁸ However, the clause dealing with the participation of the child in adoption matters remained the same with only changes in the clauses.³⁶⁹

(8) If the court makes an order in terms of subsection (4), the clerk of the court must, subject to subsection (7)(c), request the senior family advocate of the area to instruct a family advocate or a legal practitioner on the Family Law Roster, to represent the child.”

³⁶⁶ Working Draft Children’s Bill (Minister of Social Development) [B-2003] accessed on 17 June 2003 at <http://www.org.za/docs/2003/appendices/030528childbil.htm>.

³⁶⁷ Skelton and Proudlock in *Commentary on the Children’s Act* 1-13.

³⁶⁸ Clause 10 dealing with the best interests of the child standard had the word “care-giver” inserted subs (1)(a)(ii), (1)(c), (1)(d)(ii) and in (1)(i) the word caring was inserted before family environment. Clause 14(1) reads as follows after inclusion of reference to clause 10 “[a]n organ of state, an official, employee or representative of an organ of state, or any other person in authority who has official control over a child, must, when acting in any matter concerning the child, apply the standard referred to in section 28(2) of the Constitution and section 10 of this Act that the child’s best interest is of paramount importance”.

Clause 14(2) provided that “[e]very child capable of participating meaningfully in any judicial or administrative proceedings in a matter concerning a child has the right to participate in an appropriate way in those proceedings. Views expressed by the child must be given due consideration”.

Clause 71 (previously 77) which dealt with legal representation in general was changed with the deletion of family advocate and child and family law practitioner sub (2) reading thus after the changes “[i]f a person who is a party in a matter does not appoint a legal representative in terms of subsection (1) that person may apply to the appropriate authority to be represented by a legal practitioner whose name appears on the Family Law Roster and instructed by the Legal Aid Board in accordance with the Legal Aid Act, 1969 (Act No. 22 of 1969)”.

Clause 72 (previously 78) dealing with legal representation of children had a few changes deleting previous references to the family advocate. Sub (2) reads as follows after the changes:

“(a) A child may appoint a legal representative of own choice and at own expense to represent him or her in such matter.

(b) If a legal representative appointed in terms of paragraph (a), does not serve the interests of the child in the matter, the court must terminate the appointment.”

Subclause (5) only changed by placing the word “designated” before social worker where the word appears in subclause (5). The word “would-be” adoptive parent was changed to “prospective” adoptive parent.

Subclause (7) was changed to read as follows:

“A child who must be represented at state expense must be represented by –

(a) a legal practitioner whose name appears on the Family Law Roster and who is instructed by the senior family advocate of the area; or

(b) the children’s court assistant, if it is an urgent matter which does not allow for the appointment of a person referred to in paragraph (a).

Subclause (8) was changed by deleting reference to the family advocate reading thus after the changes “[i]f the court makes an order in terms of subsection (4), the children’s court

5 4 2 The objectives of the Children's Act³⁷⁰

The wording of the long title in the draft Children's Bill was changed when compared with the Children's Act, but the gist has remained the same throughout and expresses the objective of the Children's Bill (now Children's Act) namely to care for and protect children and to give effect to the rights of children.³⁷¹ When the preamble to the Children's Act is analysed, the four "cornerstones" of the Convention on the Rights of the Child become evident. Participation, protection, prevention and provision are confirmed with reference to section 28 of the Constitution.³⁷² The Children's Act confers more extensive and encompassing rights than those referred to in section 28 of the Constitution.³⁷³ Therefore, where the preamble mentions that every child has the rights as set out in section 28 of the Constitution, this must not be

assistant must, subject to subsection (7)(a), request the senior family advocate of the area to instruct a legal practitioner on the Family Law Roster, to represent the child".

³⁶⁹ In the SALC Draft Bill the consent of the child is dealt with in clause 259(1)(c) requiring the child to give consent to his or her adoption if "the child is of an age, maturity and stage of development to understand the implications of (i) being adopted and (ii) the consent [is] given".

³⁷⁰ A comparison between the draft Children's Bill annexed to the SALC Report (2002), Bill 70 of 2003, Bill 70B and Bill 70D, which eventually became the Children's Act, will be made where sections dealing with participation and representation are discussed.

³⁷¹ The long title in the draft Children's Bill reads as follows: "To define the rights and responsibilities of children; to define parental responsibilities and rights; to determine principles and guidelines for the protection of children and the promotion of their well-being; to regulate matters concerning the protection and well-being of children; especially those that are the most vulnerable; to consolidate the laws relating to the welfare and protection of children; and to provide for incidental matters." The long title of the Children's Act is more comprehensive and reads as follows: "To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; to provide for the issuing of contribution orders; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on inter-country adoption; to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; to create new offences relating to children; and to provide for matters connected therewith."

³⁷² Skelton and Proudlock in *Commentary on the Children's Act* 1-21 point out that the preamble is transformative in character and aims to improve the situation of children through ensuring state responsibility for their protection, promotion and fulfilment of their rights enshrined in the Bill of Rights through s 28 of the Constitution within the milieu of their families and ubuntu "a person is a person through other people". See further Heaton *Law of Persons* 87.

³⁷³ All the rights contained in the Bill of Rights with the exclusion of those rights where the child's limited legal capacity prevents him or her from exercising the right.

interpreted restrictively, but rather extensively as additional to the rights contained in the Bill of Rights.³⁷⁴

Section 2 of the various Children's Bills sets out the objectives of the Bill. These changed as one Bill replaced another. If the different versions of section 2 are compared with the Children's Act there is only one similarity that stands out.³⁷⁵ The objectives contained in section 2³⁷⁶ set out the details of which rights are aimed at in the long title of the Children's Act.³⁷⁷ The objectives are:

- (a) to promote the preservation and strengthening of families;³⁷⁸
- (b) to give effect to the following constitutional rights of children, namely –
 - (i) family care or parental care or appropriate alternative care when removed from the family environment;³⁷⁹
 - (ii) social services;³⁸⁰
 - (iii) protection from maltreatment, neglect, abuse or degradation;³⁸¹
and
 - (iv) the best interests of a child are of paramount importance in every matter concerning the child;³⁸²
- (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;³⁸³

³⁷⁴ The long title of the Children's Act begins with highlighting one of the main objectives of the Children's Act "[t]o give effect to certain rights of children as contained in the Constitution". Skelton and Proudlock in *Commentary on the Children's Act 1-21* share the view when they maintain that children, as people, are bearers of a range of rights in the Constitution, the only exceptions being where their legal capacities restrict them to exercise any rights, such as the right to vote. See further Mosikatsana "Children" in De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 456.

³⁷⁵ In clause 2 the Draft Children's Bill no reference is made to the best interests of the child or giving effect to the constitutional rights of children. The only similarity to be found is in clause 2(e) "to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic".

³⁷⁶ Of the Children's Act which came into operation on 1 July 2007.

³⁷⁷ Skelton and Proudlock in *Commentary on the Children's Act 1-31* compare the references in the long title with the various subsections in s 28 of the Constitution.

³⁷⁸ Relates to s 28(1)(b) of the Constitution.

³⁷⁹ Relates to s 28(1)(b) of the Constitution.

³⁸⁰ Relates to s 28(1)(c) of the Constitution.

³⁸¹ Relates to s 28(1)(d) of the Constitution.

³⁸² Relates to s 28(2) of the Constitution.

³⁸³ Relates to ss 39(1) and (2) of the Constitution as well as South Africa's obligation in terms of the CRC and ACRWC.

- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;³⁸⁴
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection;
- (h) to recognise the special needs that children with disabilities may have;³⁸⁵ and
- (i) generally, to promote the protection, development and well-being of children.³⁸⁶

The possibility of conflict with other legislation is dealt with in section 3³⁸⁷ of the Act and prescribes what steps to take where such conflict should result.³⁸⁸

³⁸⁴ Chapter 13 of the Children's Act provides for placement of children in alternative care, child and youth care centres and drop-in centres. Chapters 11, 12, 13 and 14 were inserted by the Children's Amendment Act 41 of 2007 of 18 March 2008 (GG 30884 of 18 March 2008). These chapters together with the remainder of the Children's Act became fully operative on 1 April 2010 (GG 33076 of 1 April 2010).

³⁸⁵ Relates to s 10 of the Constitution.

³⁸⁶ Skelton and Proudlock in *Commentary on the Children's Act* 1-31 refer to ss 28(1)(c), (e), (f) and (h) of the Constitution and submit that the three constitutional rights, although not mentioned directly in the clauses of s 2 of the Children's Act, fall under the umbrella of the Children's Act because of the related sections in the Act and Amendment Act. S 28(1)(c) of the Constitution grants children the right to basic nutrition, shelter, basic health services and social services which are dealt with in chapters 11, 12, 13 and 14 of the Children's Act. Ss 28(1)(e) and (f) of the Constitution grant the right to be protected against exploitative labour practices. Ss 140 and 150(2) require investigation into children who are victims of child labour and prohibit the worst forms of child labour notably exploitative labour in whatever form. S 28(1)(h) of the Constitution deals with the right to legal representation in civil matters if substantial injustice would otherwise result.

³⁸⁷ Of the Children's Act which came into operation on 1 July 2007.

³⁸⁸ S 3 of the Children's Act provides that:

- "(1) In the event of a conflict between a section the Act and –
- (a) provincial legislation relating to the protection and well-being of children, the conflict must be resolved in terms of section 146 of the Constitution; and
 - (b) a municipal by-law relating to the protection and well-being of children, the conflict must be resolved in terms of section 156 of the Constitution.
- (2) In the event of conflict between a regulation made in terms of this Act and –
- (a) an Act of Parliament, the Act of Parliament prevails;
 - (b) provincial legislation, the conflict must be resolved in terms of section 146 of the Constitution; and

5 4 3 General comments

Section 1 of the Children's Act contains a number of definitions of new words occurring in the Act. The interpretation of certain words contained in section 1(1) of the Act is important in the application of the sections throughout the Act. Not all the definitions³⁸⁹ found in the Children's Act will be discussed, only those that apply to the participatory rights of the child.

A child is defined as a person under the age of eighteen years.³⁹⁰ A party in relation to a matter before a children's court, means –

- (a) child involved in the matter;
- (b) a parent;
- (c) a person who has parental responsibilities and rights in respect of the child;
- (d) a prospective adoptive or foster parent of the child;
- (e) the department or the designated child protection organisation managing the case of the child; or
- (f) any other person admitted or recognised by the court as a party.³⁹¹

The jurisdiction of the children's court has also been extended and there is a clear indication in the Children's Act of which matters cannot be heard in the

(c) a municipal by-law, the conflict must be resolved in terms of section 156 of the Constitution.

(3) For the proper application of subsection (2)(b) the Minister must in terms of section 146(6) of the Constitution submit all regulations made in terms of this Act and which affect a province, to the National Council of Provinces for approval.

(4) In this section 'regulation' means –

(a) a regulation made in terms of this Act; and

(b) a rule regulating the proceedings of [a] children's court in terms of section 52".

Skelton and Proudlock in *Commentary on the Children's Act* 1-32 draw attention to the fact that where there is a conflict between a section of the Children's Act and a municipal by-law, the normal rule of invalidity of the by-law is subject to section 151(4) of the Constitution which prescribes that national and provincial governments may not compromise or impede a municipality's ability or right to exercise its own powers or perform its functions.

³⁸⁹ Contained in s 1(1) of the Act.

³⁹⁰ S 1(1) of the Children's Act.

³⁹¹ The inclusion of the child as a party in matters before the children's court is of importance because of the extended jurisdiction of the children's court.

children's court. Section 1(4) of the Children's Act relates to jurisdiction³⁹² where it provides that "[a]ny proceedings arising out of the application of the Administration Amendment Act, 1929 (Act 9 of 1929), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court".³⁹³

Children's courts are used exclusively for children-related matters, which among others are care and protection proceedings and adoptions including inter-country adoptions.³⁹⁴ The Child Care Act granted very limited jurisdiction to the children's court regarding the adjudication of matters affecting children.³⁹⁵ Matters on which the children's court may now be able to adjudicate involve protection of children as set out in the Children's Act.³⁹⁶

³⁹² Skelton and Proudlock in *Commentary on the Children's Act 1-30* correctly mention that subsection (4) addresses issues of jurisdiction rather than interpretation.

³⁹³ The appropriate *fora* are divorce courts, maintenance courts and courts for family matters. See also Gallinetti and Skelton "Overview of the international and constitutional mandates in relation to children and related South African legislation" in Gallinetti, Kassan, Mbambo, Sloth-Nielsen and Skelton *Draft Training Materials on the Children's Act; Children's Amendment Act and Regulations 33* who comment that there are specialised courts to adjudicate in maintenance matters and domestic violence matters, and s 1(4) of the Act makes it clear that those specialised courts will continue to hear those cases. The authors justifiably concede that where the child is a victim in a domestic violence matter, this could also be seen as child abuse, and therefore could be dealt with in the children's court.

³⁹⁴ Ss 45(1) and (2) specifically determine which matters may be adjudicated in the children's court. Children's Act 38 of 2005 in s 42(1) confirms that every magistrate court as defined in the Magistrates' Courts Act 32 of 1944 shall be a children's court and every magistrate shall be a presiding officer in such children's court.

³⁹⁵ Gallinetti "The Children's Court" in Davel and Skelton *Commentary on the Children's Act (2007)* 4-11 correctly comments that the jurisdiction of the children's court was extremely limited under the Child Care Act.

³⁹⁶ S 45(1) of the Children's Act sets out a list of matters which a children's court may adjudicate in involving the following:

- (a) protection and well-being of a child;
- (b) the care of, or contact with, a child;
- (c) paternity of a child (one of the new provisions, although the Maintenance Act 99 of 1998 does provide for an inquiry into the paternity of a child);
- (d) support of a child;
- (e) the provision of –
 - (i) early childhood development services; or
 - (ii) prevention or early intervention services;
- (f) maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard;
- (g) the temporary safe care of a child;
- (h) alternative care for a child;
- (i) the adoption of a child, including an inter-country adoption;

The Children's Act also allows for the conviction of a person for the non-compliance with an order of a children's court or contempt of such a court.³⁹⁷

The children's court may not try or convict a person in respect of a criminal charge other than for non-compliance with an order of a children's court or contempt of such court.³⁹⁸ The children's court is bound by the law applicable to magistrate's courts when exercising criminal jurisdiction in terms of non-compliance with an order of a children's court or contempt of such a court.³⁹⁹

Until such time as when family courts are established, the High Courts and the divorce courts have exclusive jurisdiction in matters referred to in section 45(3) of the Children's Act.⁴⁰⁰ There is nothing in the Children's Act preventing the High Court from or limiting the inherent jurisdiction of the High Court as upper guardian of all children.⁴⁰¹

-
- (j) a child and youth care centre, a partial care facility or a shelter or a drop-in centre, or any other facility purporting to be a care facility for children; or
 - (k) any other matter relating to the care, protection or well-being of a child provided for in this Act.

³⁹⁷ S 45(2)(a) of the Act.

³⁹⁸ S 45(2)(b) of the Act.

³⁹⁹ S 45(2)(c) of the Act.

⁴⁰⁰ The issues that remain in the exclusive jurisdiction of the High Court and divorce court are:

- (a) guardianship of a child;
- (b) the assignment, exercise, restriction, suspension or termination of guardianship in respect of a child;
- (c) artificial fertilisation;
- (d) the departure, removal or abduction of a child from the Republic;
- (e) applications requiring the return of a child to the Republic from abroad;
- (f) the age of majority or the contractual capacity of a child;
- (g) the safeguarding of a child's interests in property; and
- (h) surrogate motherhood.

⁴⁰¹ S 45(4) of the Act. Gallinetti in *Commentary on the Children's Act* 4-11 refers to the inaccessibility of the courts prior to the enactment of the Children's Act. She makes a valid comment when she says that where parents are ordinarily the vehicle through which children's matters are brought to court or application for legal aid is made, they are more often than not the reason why the child needs protection and assistance and do not act on behalf of the child in accessing legal representation or access to courts. This disempowerment of children in accessing courts for judicial pronouncements will to a large degree be addressed by the Children's Act.

5 4 4 General principles

The general principles of the Children’s Act are set out in chapter 2 and may be regarded as the core principles of the Act.⁴⁰² Section 6,⁴⁰³ entitled “General Principles” underpins the importance of guiding domestic legislation in relation to the implementation, proceedings, actions and decisions regarding children.⁴⁰⁴

⁴⁰² Ch 2 sets the tone for the interpretation and application of the remainder of the Act. Davel in *Commentary on the Children’s Act 2-2* draws a parallel between the violation of children’s human rights in the past and the children being vulnerable voiceless members of society. It is this suppression of children’s rights that have been addressed in the Act. The guiding light of the CRC and the ACRWC has been usurped in the general principles of the Act allowing for an application of the Act in compliance with the Bill of Rights and the CRC and the ACRWC. See Hamilton in *Children’s Rights in a Transitional Society* 35-36. In her conclusion she is concerned about the obstacles that a country faces, some of which South Africa has already experienced, in implementing the CRC in domestic legislation. See also Boezaart in *Child Law in South Africa* 3.

⁴⁰³ Section 6 prescribes as follows:

- “(1) The general principles set out in this section guide –
- (a) the implementation of *all legislation* applicable to children, including this Act; and
 - (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.
- (2) All proceedings, actions or decisions in a matter concerning a child must –
- (a) respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
 - (b) respect the child’s inherent dignity;
 - (c) treat the child fairly and equitably;
 - (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or any family member of the child;
 - (e) recognise a child’s needs for development and to engage in play and other recreational activities appropriate to the child’s age; and
 - (f) recognise a child’s disability and create an enabling environment to respond to the special needs that the child has.
- (3) If it is in the best interests of the child, the family must be given the opportunity to express their views in any matter concerning the child.
- (4) In *any matter* concerning the child –
- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
 - (b) a delay in any action or decision to be taken must be avoided as far as possible.
- (5) 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 the child which significantly affects the child.” (Emphasis added.)

The avoidance of *any delay* in any matter concerning the child emphasises the best interests of the child standard which is the focal point of the Children’s Act. The emphasis is added to highlight the general application of the section. The section came into operation on 1 July 2007.

⁴⁰⁴ Davel in *Commentary on the Children’s Act 2-3* comments that s 6 is in line with modern child legislation. Eg The *Children Act 1997* of Uganda provides in s 3 that the “[w]elfare principles and the children’s rights set out in the First Schedule to this Act shall be the guiding principles in making any decision based on this Act” (accessed 9 May 2009 at http://www.ulii.org/ug/legis/consol_act/ca199786); the *Children, Young Persons, and Their*

The section is a clear indication of a movement away from a piecemeal and sometimes disjointed method of legislation dealing with children's matters in the past.⁴⁰⁵ The first principle mentioned in section 6 is confirmation of the consistent and all-embracing approach which is to be followed in all matters of concern to children.⁴⁰⁶

In section 6(2) the applicability of the Bill of Rights⁴⁰⁷ in which all fundamental rights are enshrined is reiterated as well as the best interests of the child standard⁴⁰⁸ and the rights and principles contained in the Act.⁴⁰⁹ The reference

Families Act 24 of 1989 of New Zealand prescribes in s 5 under the heading general principles "[s]ubject to section 5 of the Act, any Court which, or person, exercises any power by or under this Act shall be guided by the following principles" thereafter setting out six principles which includes more than one principle similar to s 6 of the Children's Act (http://legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=118878&hitsperh accessed 13 October 2007). For a comparative analysis of New Zealand legislation on child participation, see 6 4 2 *infra*. See further Sloth-Nielsen and Van Heerden 1997 *Stell LR* 269; Heaton *Law of Persons* 89.

⁴⁰⁵ Although there were a number of attempts at formulating children's legislation addressing the plight of children, there had been a lack of cohesion in the various pieces of legislation affecting children. Eg the three previous acts dealing with children's matters; the Children's Act 31 of 1937, Children's Act 33 of 1960 and the Child Care Act 74 of 1983. A non-exhaustive list of other pieces of legislation that impacted directly on children (some still do impact on children on a daily basis, the applicable section indicated in brackets) are the Wills Act 7 of 1953 (s 2D(1)(b)), the Marriage Act 25 of 1961 (ss 24, 24A, 25 and 26), the Age of Majority Act 57 of 1972 (repealed by s 313 read with sch 4 of the Children's Act on 1 July 2007), the Divorce Act 70 of 1979 (s 6(1)(a)), the Human Tissue Act 65 of 1983 (s 18), the Child Care Act 74 of 1983 (as amended from time to time to comply with constitutional requirements), the Mediation in Certain Divorce Matters Act 24 of 1987 (s 4(1)), the Children's Status Act 82 of 1987 (repealed by s 313 read with sch 4 of the Children's Act on 1 July 2007), the Domicile Act 3 of 1992 (s 2(1)), the Births and Deaths Registration Act 51 of 1992 (ss 11 and 12), the Guardianship Act 192 of 1993 (repealed by s 313 read with sch 4 of the Children's Act on 1 July 2007), the Choice on Termination of Pregnancy Act 29 of 1996 (s 5(2)), the South African Schools Act 84 of 1996, the Natural Father of Children Born out of Wedlock Act 86 of 1997 (repealed by s 313 read with sch 4 of the Children's Act on 1 July 2007), the Maintenance Act 99 of 1998, the Domestic Violence Act 116 of 1998. See further Davel in *Commentary on the Children's Act 2-3*.

⁴⁰⁶ This was the view of the SALC as reflected in the Issue Paper 13 par 1 1 p 1 and again confirmed in the SALC Discussion Paper 103 par 2 5 p 19 that all children's issues should be included (child and family; child and State; child and community; child and education; child and child; child and religion, and so forth). See further Davel in *Commentary on the Children's Act 2-3* confirms her earlier view. See also Boezaart in *Child Law in South Africa* 4 who mentions the multi-disciplinary nature of child law which requires a holistic approach in the determination of legal rules relating to children.

⁴⁰⁷ Ch 2 of the Constitution of the Republic of South Africa, 1996.

⁴⁰⁸ As depicted in s 7 of the Act and enumerated in the SALC Discussion Paper 103 par 3 2-3 4 pp 32-51.

⁴⁰⁹ The child's participatory rights echo throughout the Act and the accompanying principles; for example the best interests of the child standard and the confidentiality principle, serve to enhance the child's rights.

to the respect of the child's dignity, fair and equitable treatment reaffirms the individuality of the child.⁴¹⁰ The child's right to the involvement of his/her parents in matters concerning him/her, should it be in his/her best interests, endorses the "africanisation" envisaged in the Children's Bill.⁴¹¹

The move away from a confrontational approach to one of conciliation and problem-solving is to be welcomed. The Act supports conciliation and mediation as method in achieving this and should be encouraged.⁴¹² This underlines the sensitivity of children's matters and the fact that cognisance must be taken of the developmental stage of a child. Also encouraging is the emphasis that is placed on avoiding delays in finalising children's matters.⁴¹³ There has also been a conscious move to create a child friendly atmosphere at the children's court to make the child feel at ease and to accommodate and encourage child participation.⁴¹⁴ Children's court proceedings are closed proceedings and only specified persons are allowed during the proceedings.⁴¹⁵

⁴¹⁰ Contained in ss 1, 7, 9 and 10 of the Constitution. Davel in *Commentary on the Children's Act* 2-4 summarises it when she says this encapsulates the basic principles of equity and non-discrimination that go to the root of our Constitution and international law as reflected in the preambles to and arts 2 and 3 of the CRC and the ACRWC respectively.

⁴¹¹ The family referred to here must be viewed in the light of the definition of "family member" in s 1 of the Children's Act, namely a parent of the child, any other person who has parental responsibilities and rights in respect of the child, a grandparent, brother, sister, uncle, aunt or cousin of the child or any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship. The essence of *ubuntu* is underlined with this stipulation.

⁴¹² S 72 provides for out of court settlements if it is in the best interests of the child which in turn can only benefit the child. The inclusion of mediation as a conciliatory process is supported by s 69 (pre-hearing conferences) which specifically caters for mediation and allows the participation of the child in such conferences. Ss 70 and 71 deal with family group conferences and other lay-forums which allow mediation as a method of resolving a matter relating to the child the only exception being where the child, has allegedly been abused or sexually abused. These three forums have the potential to reduce the present volume of children's court proceedings if properly supervised. See in general pre-hearing conferences, family group conferences and lay-forums Gallinetti in *Commentary on the Children's Act* 4-16/4-17 and 4-33/4-35. See further De Jongh "Giving children a voice in family separation issues: a case for mediation" 2008 *TSAR* 785 *et seq*.

⁴¹³ S 6(4)(b) of the Act.

⁴¹⁴ The Children's Act makes specific provision for this in ss 42(8), 52(2) and 60(3). S 42(8) provides that children's court hearings must, as far as possible, be held in a room which –
“(a) is furnished and designed in a manner aimed at putting children at ease;
(b) is conducive to the informalities of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court;
(c) is not ordinarily used for the adjudication of criminal trials; and
(d) is accessible to disabled persons and persons with special needs.”

For the purpose of the present discussion section 6(5) is very important. The transparency of matters involving children is of the utmost importance as is the participation of the child who is of such age, maturity and stage of development to enable him/her to participate in any matter affecting that child. However, this does not mean that children have to become involved directly in all legal matters affecting them.⁴¹⁶

S 52(2) of the Act provides that rules made in terms of subs (1) must be designed to avoid adversarial procedures and include rules concerning –

“(a) appropriate questioning techniques for-

- (i) children in general; and
- (ii) children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication;
- (iii) traumatised children; and
- (iv) very young children; and

(b) the use of suitably qualified or trained interpreters.”

S 60(1) provides how the proceedings are to be conducted in the children’s court. The presiding officer in matters before a children’s court control the conduct of the proceedings, and may –

“(a) call any person to give evidence or produce a book, document or other written instrument;

(b) question or cross-examine that person; or

(c) to the extent necessary to resolve any factual dispute which is directly relevant in the matter, allow that person to be questioned or cross-examined by-

- (i) the child involved in the matter;
- (ii) the parent of the child;
- (iii) a person who has parental responsibilities and rights in respect of the child;
- (iv) a care-giver of the child;
- (v) a person whose rights may be affected by an order that may be made by the court in those proceedings; or
- (vi) the legal representative of a person who is entitled to a legal representative in those proceedings.

(2) If a child is present in the at the proceedings, the court may order any person present in the room where the proceedings take place to leave the room if such order would be in the best interests of that child.

(3) Children’s court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.”

As Gallinetti “The children’s court” in Davel and Skelton *Commentary on the Children’s Act* 4-25 mentions, the principle of informality is well established in South African law referring to *Napolitano v Commissioner of Child Welfare, Johannesburg* 1965 (1) SA 742 (A) where the then appeal court held that children’s court proceedings are informal proceedings.

⁴¹⁵ S 56 of the Children’s Act provides that the proceedings of the children’s court are closed and only the persons referred to subsections (a) to (f) are allowed to be present.

⁴¹⁶ S 10 of the Act for example mentions participation in an “appropriate” way. For more in depth discussion of the participatory rights of the child, see 5 4 5 1 and 5 4 5 2 *infra*. See also Robinson and Ferreira 2000 *De Jure* 58 who suggest that children should not testify in litigation proceedings. The evidence of the child could be placed before court by way of expert testimony. De Jongh 2008 *TSAR* 787 agrees with the two authors. Compare also De Jongh “Opportunities for mediation in the new Children’s Act 38 of 2005” 2008 *THRHR* 632 *et seq* where she explains the utility of mediation in complying with s 6(4)(a) of the Act. In a recent decision, *J v J* 2008 (6) SA 30 (C), a full bench considered the application of s 6(5) regarding a person who has parental responsibility. At issue was the failure of the non-

The second part dealing with general principles is section 7.⁴¹⁷ It is probably the most important section in the Act.⁴¹⁸ The best interests principle of the common law was confirmed in *Fletcher v Fletcher*⁴¹⁹ and entrenched in section 28(2)⁴²⁰ of the Constitution.

The influence of statutory lists available in other countries such as section 68F of the *Family Law Act Reform Act 1995*⁴²¹ and section 3 read with the First Schedule of the Ugandan *Children Act 1997* (Ch 59) is noticeable in section 7 of the Act.⁴²² However, section 7 is more comprehensive, but then it is not an open-ended list. As will be indicated below, a comparison between the list set out in section 7 and the list of factors enumerated in the *McCall* case identifies certain limitations.

custodian parent to comply with the provisions of an agreement between the parties relating to the schooling of their child. With the regard to the provisions of ss 6(5) and 30(2) of the Act (both sections came into operation on 1 July 2007) the court held that the non-custodian parent through his non-compliance with the agreement forfeited his right of choice conferred on him in terms of the agreement. The court appointed a curator *ad litem* to represent the interests of the child (par [4] 33A/B-B). The child concerned was twelve years old. It appears from the respondents answering affidavit that J, their son, had been consulted in their decision to enrol J in an Afrikaans-medium high school and that he was satisfied with the arrangements to enrol him in Afrikaans-medium primary school the previous two years (par [11] 34D-F/G). In dealing with the best interests of the child reference was made to the views expressed by the child (par [40] 45C/D-D/E). Davel in *Commentary on the Children's Act 2-4* draws attention to the wording of s 6(5) referring to "a person who has parental responsibilities" and poses the question whether "a person" should be read as referring to any *one* person or all the persons. She concludes that a literal meaning favours the first interpretation, any *one* person. This appears to be a logical conclusion. (Emphasis is that of the author).

⁴¹⁷ Amplifying the best interests of the child standard. This section came into operation on 1 July 2007. S 7 of the Act enumerates the best interests of the child standard and prescribes a number of new provisions or factors which is to be considered for the first time what would be in the child's best interests. A detailed discussion of the complete s 7 is found in 5 5 2 *infra*.

⁴¹⁸ The best interests of the child has been termed the "golden thread" that runs through the law relating to children, see *Kaiser v Chambers* 1969 (4) SA 224 (C) 228F-G. Compare Clark *Stell LR* 2000 3; Davel in *Commentary on the Children's Act 2-6*. For a discussion of the best interests of the child, see 5 5 *infra*.

⁴¹⁹ 1948 (1) SA 130 (A).

⁴²⁰ This section provides that "[a] child's best interests are of paramount importance in every matter concerning a child".

⁴²¹ Which amended the *Family Law Act 1975* (Cth) and is discussed in 6 4 3 2 *infra*.

⁴²² Davel in *Commentary on the Children's Act 2-8* mentions that s 7 of the Act has fourteen factors that must be taken into consideration; by comparison s 68F(2) of the *Family Reform Act 167* of 1995 had twelve factors, the First Schedule of the *Children Act 1997* (Ch 59) has six factors and s 1(3) of the *Children's Act 1989* of the United Kingdom has seven factors.

The best interests of the child standard as enumerated in section 7 of the Act reflects South Africa's commitment to comply with the guidelines found in international law.⁴²³ For the first time South Africa has a statutory list to serve as a guide when applying the best interests of the child standard.⁴²⁴ However, section 7 of the Act is not a model of simplicity in construction.⁴²⁵ Previously the only guidance was derived from the list of factors enumerated in *McCall v McCall*.⁴²⁶ The *McCall* case initiated an open-ended list of factors which could be used in custody issues and it appears from the list of factors that this is what Judge King had in mind.⁴²⁷ When comparing the list provided in the *McCall* decision with the standard enumerated in section 7, there are apparent

⁴²³ Such as found in art 3(1) of the CRC and art 4(1) of the ACRWC.

⁴²⁴ S 8 of the Act which came into operation on 1 July 2007 deals with the application of the best interests standard and provides as follows:

- “ (1) The rights which a child has in terms of this Act supplements the rights which a child has in terms of the Bill of Rights.
- (2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.
- (3) A provision of this Act binds both natural and juristic persons, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

In s 8(2) the Act confers a positive duty on the state to respect, protect and promote the rights of children in the Act. S 8(3) extends this application to natural and juristic persons, mindful of the nature of the right and duty imposed by the right.

⁴²⁵ As will be discussed *infra*.

⁴²⁶ 1994 (3) SA 201 (C). The list enumerated in the *McCall* decision has been followed in quite a few subsequent decisions, eg *Bethell v Bland* 1996 (2) 194 (W) 208H-209D; *Krasin v Ogle* [1997] 1 All SA 557 (W) 567i-569e; *Fitschen v Fitschen* [1997] JOL 1612 (C); *K v K* 1999 (4) SA 691 (C) 709A/B-H; *Soller v G* 2003 (5) SA 430 (W) pars [55] 445I/J-446A/B. Because the child's best interest is a question of fact and has to be determined according to the circumstances of each case, individual guidelines used in a specific case as determined by the prevailing circumstances will be found, eg *Van Deijl v Van Deijl* 1966 (4) SA 260 (R) 261H concerning custody and guardianship; *French v French* 1971 (4) SA 298 (W) 298H concerning the custody of a child during a divorce; *Van Oudenhove v Gruber* 1981 (4) SA 857 (A) 868C; *Godbeer v Godbeer* 2000 (3) SA 976 (W) 98I.

⁴²⁷ 204I/J-205A where Judge King mentions that in order to determine what is in the best interests of a the child the court must decide “which of the parents is better able to [have the custody of the child so as to] promote and ensure his [the child's] physical, moral, emotional and spiritual welfare”. In *Fitschen v Fitschen* at 6-7 Judge Van Reenen opined that in addition to the factors listed in the *McCall* case, South African courts would in future have to give more prominence to the recognition of the rights of the child and therefore a parent's willingness to recognise such rights would also have to be considered, especially in respect of children old enough to form an informed opinion in this regard. See further *V v V* 1998 (4) SA 169 (C) 187E-F where Judge Foxcroft cautioned that “checklists” such as the one formulated by Judge King in *McCall* serve only as guides and each case must be determined on its own facts.

differences.⁴²⁸ Section 7 in the Act adheres to constitutional values of non-discrimination,⁴²⁹ but the list is not open-ended as the list in *McCall*.⁴³⁰ Furthermore there is no mention in the Act of the ability of the parent to communicate effectively with the child as included in *McCall*.⁴³¹ The Act does not mention the child's preference in section 7, which is specifically referred to in *McCall* in par (k) as being "the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration".⁴³²

⁴²⁸ The list contained in s 7 appears to be clinical and has to reflect the diversity of the South African society as well as established problem areas. Bekink and Bekink 2004 *De Jure* 28 refer to the inclusion of the consideration of family violence (or domestic violence as it is referred to in South Africa). They refer (28) to the *French* and *McCall* decisions and comment that it is notable that domestic violence is excluded. Compare Bonthuys "Spoiling the Child: Domestic Violence and the Interests of Children" 1999 *SAJHR* 317. Bekink and Bekink *loc cit* mention that in general the courts seem to distinguish between violence against the wife or co-habitant and violence against children and find such a distinction unfortunate as cases of domestic violence definitely impact on the well-being of children (one might add that the emotional trauma suffered by children due to indirect family violence directed at one or both the parents is just as devastating as violence directed at children). With reference to *Katzenellenbogen v Katzenellenbogen* 1947 (2) SA 528 (W) and *B v S* 1995 (3) SA 571 (A) they conclude that it appears that this viewpoint has been overlooked in South African jurisprudence.

⁴²⁹ See Davel in *Commentary on the Children's Act 2-8* who refers to aspects such as same sex matching in divorce cases and whether a parent can provide "creature comforts" which fell away in the list contained in s 7 of the Act.

⁴³⁰ 205F/G where reference is made in par (m) to "any other factor which is relevant to the particular case with which the Court is concerned". One has to agree with Davel *loc cit* that this is remarkable especially as the list of factors enumerated in *McCall*, the list contained in the report "For the Sake of the Children" of the Canadian Special Joint Committee on Child Custody and Access and s 68F of the *Family Reform Act* of 1995 are open-ended lists and referred to extensively by the SALC Discussion Paper 103 par 5 3 pp 78-84 and its recommendation was reaffirmed in the SALC *Review of the Child Care Act* Report (2002) par 3 3 p 16.

⁴³¹ 205B/C referring in par (c) to the ability of the parent to communicate with the child and the "parent's insight into, understanding of and sensitivity of the child's feelings". Davel in *Commentary on the Children's Act 2-8* expresses the view that effective communication may be regarded as a prerequisite to be able to address a child's emotional and intellectual needs referred to in s 7(1)(c) of the Act. This inference is reasonable but capacity may be interpreted as financial ability rather than a communicative ability that *McCall* refers to.

⁴³² 205E/F referring in par (k) to "the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration". Davel *loc cit* argues that the child's participation is catered for in s 10 of the Act. The wide application of s 10 warrants such an inference as it would serve no purpose if the child was allowed to participate in any matter concerning the child but not where the child's best interests are at stake.

The universal application of the best interests of the child standard is emphasised in section 9 of the Act.⁴³³ The paramountcy principle is firmly established in international law and is entrenched in section 28(2)⁴³⁴ of the Constitution creating an independent right and extending beyond the rights created in section 28(1).⁴³⁵

The paramountcy of children's rights poses the question whether in practice the best interests of the child are to be regarded as a standard or a right or both. The Constitutional Court has unequivocally held that all children have the right to have their best interests considered of paramount importance in every matter concerning them.⁴³⁶ Children therefore clearly have a right which guarantees the paramountcy of their best interests. Like all other fundamental rights contained in the Bill of Rights it has horizontal⁴³⁷ and vertical⁴³⁸ application and is not an absolute right.⁴³⁹

⁴³³ S 9 provides that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied".

⁴³⁴ S 28(2) provides that "[a] child's best interests are of paramount importance in every matter concerning the child". See *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par [17] 428C-D referring to *Fraser v Naude and Others* 1999 (1) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par 20 207A/B-F. See further Davel in *Commentary on the Children's Act 2-9*.

⁴³⁵ S 28(1) of the Constitution sets out a number of child-specific rights. See discussion in 5 2 3 1 1 to 5 2 3 1 4 *supra*.

⁴³⁶ Judge Goldstone in *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par [17] 428C-D held that "[s]ection 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1)". This indication that s 28(2) of the Constitution creates a right is emphasised in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [22] 247 where Judge Sachs mentions "[i]t will be noted that he [Goldstone J] spoke about a right and not just a guiding principle. It was with this in mind that this Court in *Sonderup [v Tondelli]* 2001 (1) SA 1171 (CC) par 17] referred to s 28(2) as 'an expansive guarantee' that a child's best interests will be paramount in every matter concerning the child".

⁴³⁷ *Motala v University of Natal* [1995] 3 BCLR 374 (D).

⁴³⁸ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [12].

⁴³⁹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [26] "the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited". S 36(1) provides the requirements for limiting fundamental rights in the Constitution:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic

The interests of children have been promoted due to the Constitutional Court's underpinning of the best interests of the child and confirmation of the paramountcy principle. This in turn has led to High Courts incorporating an expansive approach in their review jurisdiction when applying the best interests standard of the child. The result has been the application of the paramountcy principle of section 28(2) of the Constitution in the review of a protection order in terms of the Domestic Violence Act,⁴⁴⁰ the consideration of a child's urgent removal to temporary safe care in terms of the Children's Act,⁴⁴¹ of maintenance matters,⁴⁴² in decisions on the medical treatment of a child despite the parents' refusal for such medical treatment,⁴⁴³ the child's participation in religious activities of a particular church denomination,⁴⁴⁴ regarding the rights of

society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and the extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose."

See further Woolman and Botha "Limitations" in Woolman, Roux, Klaaren, Stein and Chaskalson in *Constitutional Law of South Africa* 2 ch 34; Davel in *Commentary on the Children's Act* 2-10 and authority cited n 8.

⁴⁴⁰ 116 of 1998. See in this regard *Narodien v Andrews* 2002 (3) SA 500 (C) 506F-507; *B v B* 2008 (4) SA 535 (W) where an interim protection order was set aside and custody of the two children was granted to the mother *pendente lite*.

⁴⁴¹ 38 of 2005. See *Swarts v Swarts* 2002 (3) SA 451 (T) 462D-H where the court considered whether the removal of a child in terms of s 12(1) of the Child Care Act would be better in view of the best interests of the child. The provision of s 12(1) of the Child Care Act was the equivalent of s 152(1) of the Children's Act.

⁴⁴² See *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) par [24] 375B/C-376A/B regarding the enforcement of maintenance obligations; *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C) par [26] 67C-E/F where the duty of support to a child born out of wedlock was extended to the paternal grandparents. In *Soller v Maintenance Magistrate, Wynberg* 2006 (2) SA 66 (C) the court ordered the payment of a child's future maintenance from parent's annuity until the child had become self-supporting. In *Burger v Burger* 2006 (4) SA 414 (D) the court ordered the securing of the father's portion of proceeds from the sale of immovable property until the children had become self-supporting.

⁴⁴³ *Hay v B* 2003 (3) SA 492 (W) 494I-495A holding that the best interests of the child were paramount and was the single most important factor when weighing competing rights and interests concerning children. Further (495D-E) that the parent's private beliefs could not override their child's right to life. The provisions of s 129 of the Children's Act are now applicable in medical treatment and surgical operations regarding children. The child's participatory right in medical treatment and surgical operations are discussed in 5 4 5 2 *infra*.

⁴⁴⁴ *Kotze v Kotze* 2003 (3) SA 628 (T) 632G/H-H/I holding that the child's best interests were paramount and that the clause in the divorce settlement agreement that the child "will fully participate in all religious activities of the ... Church" violated the child's right to freedom of religion in terms of s 15 of the Constitution.

unaccompanied foreign children,⁴⁴⁵ the constitutionality of minimum sentences applicable to sixteen and seventeen-year olds in the criminal sentencing regime,⁴⁴⁶ and regarding the law of succession.⁴⁴⁷

Davel⁴⁴⁸ refers to the best interests of the child standard as ensuring that access is denied to required information in order to prepare for trial on a charge of indecent assault and possession of child pornography.⁴⁴⁹ The paramountcy of the best interest of the child standard is also acknowledged in the sentencing of child offenders⁴⁵⁰ and of the parents of children.⁴⁵¹ Because this right may impinge on the rights of other interested parties and groups, there is a need to delineate and balance this right of children with the rights of others.⁴⁵²

Where the best interests of the child is involved there will often be a diversity of interconnecting constitutional values and interests, some of which may overlap

⁴⁴⁵ *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) par [17] 57B/C-D the court holding that the state is under direct duty to ensure basic socio-economic provision for children who lack family care as unaccompanied foreign children do. The state has an active duty to provide unaccompanied foreign children with the rights and protection set out in s 28 of the Constitution.

⁴⁴⁶ *Centre for Child Law v Minister for Justice and Constitutional Development (NICRO as amicus curiae)* [2009] JOL 23881 (CC) where the Constitutional Court with a seven to four majority held that the applicability on sixteen and seventeen-year old children of the minimum sentencing regime created by the Criminal Law Amendment Act 105 of 1997 in the form it took after the amendment by s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007 limited the rights of children in 28 of the Constitution and such limitation was not justifiable.

⁴⁴⁷ *Bhe v Magistrate, Khayelitsha, Shibi v Sithole, South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC).

⁴⁴⁸ In *Commentary on the Children's Act* 2-10.

⁴⁴⁹ *Prinsloo v Bramley Children's Home* 2005 (5) SA 119 (T) where the applicants, who faced criminal charges, applied for access to certain information infringing the children's rights to privacy and dignity failed to discharge the onus on them to prove the limitation on the children's rights was justified. The paramountcy of the children's best interests moved the onus to the applicants.

⁴⁵⁰ *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (1) SACR 243 (SCA) par [18].

⁴⁵¹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) pars [15]-[18] 244E-246C when sentencing a primary care-giver of minor children the sentence must reflect the paramountcy of the best interests of children appropriately considered and applied.

⁴⁵² See eg *V v V* 1998 (4) SA 169 (C) 189B/C-C/D where Judge Foxcroft refers to the balancing of children's rights with those of the parents "[t]he child's rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights. Although access rights are often spoken of as the rights of the child, it is artificial to treat them as being exclusive of parents' rights".

and some compete with other interests.⁴⁵³ The importance is that demarcation of rights and limitation of rights are not necessarily different processes. Davel⁴⁵⁴ mentions that demarcation unavoidably involves limitation and limitation itself requires a “balancing exercise” in order to arrive at a judgement on proportionality.⁴⁵⁵ Practically, a balancing of rights is unavoidable when dealing with the best interests of the child and the rights of others contained in the Bill of Rights. The guidance given by the Constitutional Court in *Christian Education South Africa v Minister of Education*⁴⁵⁶ has resulted in the test that is applied confirming the paramountcy of the children’s best interests outweighing their parents’ right to religious freedom.⁴⁵⁷

Examples of the influence of the best interests of children are found when the court decided in not setting aside the decision of the Head of the Education Department to declare a previously single-medium school a dual-medium one, although the conduct was administratively unfair.⁴⁵⁸ It was found that

⁴⁵³ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [15] 768B/C-C where Judge Sachs referred to the multiplicity of interconnecting constitutional values and interests and how the overlapping and tension between the different rights are reflected and implicated by the opposing assessments of constitutional values. Judge Sachs further explained (par [30] 776B) that “[o]ur Bill of Rights, through its limitation clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing”.

⁴⁵⁴ In *Commentary on the Children’s Act 2-11*.

⁴⁵⁵ Davel in *Commentary on the Children’s Act 2-11* cautions that the promotion of children’s rights should not be seen as a negative pursuit contrasting the rights of parents, educators or anybody else. Children’s rights should not be seen as challenging, undermining or conflicting with the rights of others or their authority and is found in other spheres of the law, for example neighbour law and labour law.

⁴⁵⁶ 2000 (4) SA 757 (CC) par [31] 777C Judge Sachs holding that “the standard to be applied is the nuanced and contextual one required by s 36 and not the rigid one of strict scrutiny”.

⁴⁵⁷ *Christian Education South Africa v Minister of Education supra* par [41] 780H/I-781A/B where Judge Sachs held that “throughout the world [courts] have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of the parents’ religious practices. It is now widely accepted that in every matter concerning the child, the child’s best interests must be of paramount importance”.

⁴⁵⁸ See *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) where Judge Bertelsmann posed three questions regarding the unfair administrative action of the respondent, whether the court could disregard the unfair declaration of converting the school into a dual-medium school in terms of s 28(2) of the Constitution, what would be the implications of such disregarding of the unfair declaration and how the rights of children were to be affected. Holding (176F-G/H) that “[a]rtikel 28(2) van die Grondwet (Wet 108 van 1996) lees as volg: ‘n Kind se beste belang is van deurslaggewende belang in elke aangeleentheid wat die kind raak.’ Ons Howe het in die jongste tyd by herhaling beklemtoon dat daar praktiese inhoud aan hierdie fundamentele reg verleen moet word”. Continuing (176H/I) that “[d]it spreek vanself dat die bepalings van

regulations providing for the obligatory suspension of female students at education colleges who fall pregnant, were considered to be discriminating unfairly on the basis of gender and to be in violation of the equality principle. This resulted in a pregnant learner to be allowed to complete her education.⁴⁵⁹

In *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*⁴⁶⁰ Judge Bertelsmann did not agree with the argument that section 28(2) of the Constitution did not create a fundamental right, but merely conveyed a preference to a child when there were competing interests.⁴⁶¹ However, Davel⁴⁶² correctly points out that it cannot necessarily be assumed that the best interests of children will *always* outweigh the constitutional rights of parents, educators and other role-players.⁴⁶³

art 28(2) van die Grondwet direk van toepassing is op die onderwys en elke situasie waarin 'n leerder hom mag bevind”.

⁴⁵⁹ *Mfolo v Minister of Education, Bophuthatswana* 1992 (3) SA 181 (BG).

⁴⁶⁰ 2003 (4) SA 160 (T).

⁴⁶¹ 178B/C-C/D where Judge Bertelsmann clearly affirmed his view by saying “ek [is] die mening toegedaan dat art 28(2) inderdaad die fundamentele reg vestig om in die opweging van strydende partye se botsende – en dus ook die strydende partye se aansprake op fundamentele regte en die handhawing daarvan – in die eerste gelid te staan”. In the context of the case at hand that meant that the interests of the applicants “moet ... terugstaan voor dié van die minderjariges”. *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) par [54] 432A-G however, sounded a warning that s 28(2) of the Constitution does not counter other provisions of the Bill of Rights. See also *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par [29] 1184E-F where the court assumed, without deciding, that the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 may in the short term limit the individual child’s best interests. The court (par [29] 1184E/F-G) however reiterated that s 28(2) of the Constitution provided for “an expansive guarantee that a child’s best interests are paramount in every matter concerning the child”. See also *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA) par [27] 135A-B. Compare further Sloth-Nielsen “Children” in Cheadle, Davis and Haysom *Constitutional Law: The Bill of Rights* (2002) 23-1 23-31; Davel in *Commentary on the Children’s Act* 2-12.

⁴⁶² *Commentary on the Children’s Act*.

⁴⁶³ *Op cit* 2-12. Emphasis is that of the author. See also *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) par [55] 429B-C. In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [26] the court specifically mentioned that the paramountcy of the best interests of the child is not absolute.

5 4 5 Participatory rights of children⁴⁶⁴

One of the core functions of the Children's Act is to provide the child with the opportunity to participate in matters affecting him or her.⁴⁶⁵ South Africa has in the new constitutional dispensation been striving for an encompassing and enabling children's statute and perseverance has paid off.⁴⁶⁶

The right of children to express their views freely flows from the right contained in article 12 of the Convention on the Rights of the Child. Davel⁴⁶⁷ rightly explains that the way in which children can "express their views freely" are twofold, by way of participation, directly without an intermediary, and representation where the child can instruct an attorney or have other adult representation in legal proceedings.⁴⁶⁸ Both these formats of presenting

⁴⁶⁴ Ss 7, 8 and 9 of the Act referring to the content, application and the paramountcy of the best interests of the child will be discussed in depth in 5 5 *infra*.

⁴⁶⁵ Davel in *Commentary on the Children's Act 2-2* in the introduction to chapter 2 makes a compelling statement when she says that children have always been vulnerable yet voiceless members of society.

⁴⁶⁶ Davel in *Commentary on the Children's Act 2-2* comments that chapter 2 of the Act (and indeed all sections confirming the child's participation) goes a long way in dealing with the inequalities and discrimination children suffer. She adds that chapter 2 of the Act comprehensively acknowledges the rights of children and their responsibilities in line with the Constitution and international instruments. The challenges to which Hamilton in *Children's Rights in a Transitional Society* 35-36 refers have been met in the Children's Act and have since 1 July 2007 been realising in practice. However, the full implementation of the Act will be the ultimate challenge. See also Boezaart in *Child Law in South Africa* 3 for a very true and sobering thought "[n]o matter how comprehensive a new Children's Statute might be, it should always be borne in mind that it is virtually impossible to deal exhaustively with child law ... [which] cuts across all traditional divisions in our law and its sources will also remain diverse".

⁴⁶⁷ In *Commentary on the Children's Act 2-13*.

⁴⁶⁸ In *Commentary on the Children's Act 2-13*. Kassan *How can the Voice of the Child be Adequately Heard in Family Law Proceedings?* (LLM dissertation 2004 UWC) 12 discusses the different forms of participation found in art 12(2) of the CRC. Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 152 regards art 12 of the CRC essentially as a procedural right, adding that the true importance of art 12 is to be found in the respect with which the child's wishes will be treated. Art 12 demands that when a child is affected by a decision, the child is given the opportunity to express a view and the child's view is given serious consideration. On this basis art 12 is then best understood as a right of participation. Barratt *loc cit* draws attention to the procedural aspects which raise questions regarding the manner in which the child's view is to be expressed. She adds that the child's age and maturity may dictate whether he or she is heard directly or through a representative. Barratt *op cit* 154-155 further refers to procedural pitfalls in the South African legal system regarding procedural opportunities for the participation of children and concludes that the present procedural opportunities for child participation regarding divorce matters are inadequate. See also Edwards "Hearing the voice of the child: notes from

children's views freely are contained in the Children's Act the one confirming the participatory right of the child⁴⁶⁹ and the other enhancing the child's right to have access to the court.⁴⁷⁰

In order to determine to what extent sections 10⁴⁷¹ and 14⁴⁷² comply with the standard of the Convention on the Rights of the Child, a closer look must be had at article 12 of the Convention on the Rights of the Child. Davel⁴⁷³ refers to a number of interesting issues on which article 12 of the Convention on the Rights of the Child is clear.⁴⁷⁴ Each of the issues referred to above will be

Scottish experience" in Davel *Children's Rights in a Transitional Society* (1999) 39 who refers to participation as one way in which children may express their views, and representation as the other way that allows "children and young persons to instruct solicitors, seek advice or have other kinds of adult representation in various types of legal or quasi-legal proceedings". See Robinson and Ferreira 2000 *De Jure* 58 who suggest that children should preferably not testify in litigation but rather have their views submitted to court through an expert witness who could easily convey the views and preferences of the child to court; Kassan 12 expresses the view that it does not appear that the drafters of the CRC required a representative to be a legal representative. According to her art 12(2) implies that such a representative can be a person working in any profession, such as a social worker or even a lay person appointed by the court as a curator or guardian to be the child's spokesperson.

⁴⁶⁹ S 10 of the Children's Act.

⁴⁷⁰ S 14 of the Children's Act. The two sections will, however, be discussed separately.

⁴⁷¹ S 10 of the Act provides that "[e]very child that is of such 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".

⁴⁷² S 14 of the Act provides that "[e]very child has the right to bring, and to be assisted in bringing a matter to court, provided that matter falls within the jurisdiction of that court".

⁴⁷³ *Commentary on the Children's Act* 2-13.

⁴⁷⁴ She refers to the following issues:

- (a) It concerns a child who is "capable of forming his or her own views". No lower age limit is set on children's right to express their views freely.
- (b) That the child has the right to express these views, freely implies that there are no boundaries or areas in which children's views have no place.
- (c) The right to be assured in relation to "all matters affecting the child" and should thus apply even in those matters that may not be specifically covered by the Convention, whenever those matters have a particular interest for the child or may affect his or her life.
- (d) The views of the child must be given "due weight in accordance with the age and maturity of the child", which means that there is a positive obligation to listen to and take the views of children seriously. In deciding how much weight should be given to a child's view in any particular matter, the twin criteria of age and maturity must be considered. Once again the Convention rejects specific age barriers because age *per se* is not the criterion.
- (e) Children should be heard in a very broad scope of decisions: "Any judicial and administrative proceedings affecting the child." There is an increasingly recognised need to adapt courts and other formal decision-making bodies to enable children to participate. This could include innovations such as more informality in the physical

considered individually to determine to what extent the Children’s Act aligns with article 12 on the aspects raised. Where necessary the Convention on the Rights of the Child will be compared with the African Charter.

Article 12(1) refers to children who are “capable of forming their own views” and sets no lower age limit on children’s right to express their own views freely.⁴⁷⁵ By implication the right of children to express their views *freely*⁴⁷⁶ does not allow boundaries or areas where children’s rights have no place. The right of the children’s participation in matters affecting them directly or indirectly is assured, but there is no compulsion to express their views.⁴⁷⁷

The coverage of the rights contained in the wording of article 12 “all matters affecting the child” is wide enough to include even those matters that may not specifically be referred to by the Convention on the Rights of the Child. The only

design of courtrooms, the clothing of the judges and lawyers, separate waiting rooms, the video-taping of testimony and the special preparation of child witnesses.

(f) States are left with the discretion as to how the child’s views should be heard, but where procedural rules suggest that this be done through a representative or an appropriate body, the obligation is to transmit the views of the child.

⁴⁷⁵ The ACRWC has the same provision in art 4(2) read with art 7. S 10 of the Children’s Act has no lower age limit and a child who is of such age, maturity and stage of development has the right to participate and the child’s views must be given due consideration. Art 7 of the ACRWC provides that “[e]very child who is capable of communicating his or her own views shall be assured the right to express his [or her] opinions freely in all matters and to disseminate his [or her] opinions subject to such restrictions as are prescribed by laws”. Although there is no reference in s 10 of the Act to children “freely” expressing their views there is nothing in the wording of the section to suggest that children may not express their views “freely”. The ACRWC’s wording in arts 4(2) and 7 seems more restricted than that of art 12 of the CRC and by comparison s 10 of the Act appears to be on equal terms with art 12 of the CRC. Davel in *Commentary on the Children’s Act 2-12/2-13* refers to the importance of art 12 in acknowledging children as legal subjects, and as such bearers of fundamental human rights with their own views and feelings. She highlights the fact that the free expression of children’s views in matters that affect them come by way of participation and representation. Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 149-150 agrees that the importance of art 12 lies in the development in children’s rights law because the child is regarded as a “full human being”, with integrity and personality and with the ability to participate fully in society. She adds that children as “subjects of protection” are perceived as autonomous human beings who can express their own ideas and preferences about how they want to live their lives.

⁴⁷⁶ Emphasis added.

⁴⁷⁷ S 10 of the Act prescribes participation in “any matter” and therefore suggesting that there are also “no boundaries” as implied in art 12 of the CRC. See also Kassan 7 who points out that children are assured the right of participation and she says (at 10) that the child’s expression is voluntary. See also Davel in *Commentary on the Children’s Act 2-13*.

requirement being that those matters must be of particular interest to children or that it may affect their lives.⁴⁷⁸

The views of children must be given due weight in accordance with their age and maturity. This ensures an obligation to listen to and seriously consider the views of children. When deciding what consideration must be given the children's views in a particular matter, the dual criteria of age and maturity must be considered. The Convention on the Rights of the Child places no age restriction on participation because age *per se* is no criterion.⁴⁷⁹ This would imply that a young child below the age of seven years, previously referred to as an *infans*,⁴⁸⁰ who is able to form a view or opinion, would be able to participate and the child's view would be given due consideration in accordance with the child's age, maturity and stage of development.⁴⁸¹

The views of children should be heard in an as wide as possible spectrum of matters and/or decisions affecting them.⁴⁸² This requires the adjustment of

⁴⁷⁸ Art 7 of the ACRWC is "open-ended" and applies to all matters and art 4(2) includes all judicial and administrative proceedings affecting the child. S 10 of the Act is just as "open-ended" in that it applies to any matter concerning the child. Barratt and Burman "Deciding the best interests of the child: An international perspective on custody decision-making" 2001 *SALJ* 557 mention that it is almost generally regarded that child custody decision-making procedures are inadequate, mostly due to the adversarial framework within which custody decisions are made. Compare Kassan 9; Davel in *Commentary on the Children's Act* 2-13. See also ss 31(1)(a) and (b) of the Act dealing with major decisions involving a child.

⁴⁷⁹ See Robinson and Ferreira *De Jure* 2000 57-58 who opine that children do not derive this right *ipso iure* but that it is acquired by children who may be regarded as "sufficiently mature" to express an opinion. The ability to "form an opinion" may therefore be regarded as an entry level for the right to be heard or to express an opinion. Compare further Van Bueren *Rights of the Child* 139; Kassan 14-16; Davel in *Commentary on the Children's Act* 2-13.

⁴⁸⁰ Literally those who are "unable to speak" in terms of Roman law.

⁴⁸¹ Art 12(1) of the CRC refers to "age and maturity" of the child. Lücker-Babel 1995 *IJCR* 397 explains that a specialist who is trained to assist with the interpretation of the child's views may ensure the participation of such a young child and the child's views would be given due weight according to his or her age or maturity. The testimony of child witnesses in sexual abuse cases have been received in South African law over a long period subject to the application of the cautionary rule. See *R v Manda* 1951 (3) 158 (AD) 162E-163E; *Viveiros v S* [2000] 2 All SA 86 (SCA) par 2 and more recently *Leve v S* [2009] JOL 24390 (ECG) where a full bench found on appeal that the evidence of a five year old boy was credible and satisfactory to substantiate a conviction of rape.

⁴⁸² This is also the view of Lücker-Babel 1995 *IJCR* 401 and Van Bueren *Rights of the Child* 137. However, expression of an opinion or view according to s 10 is subject to the child being of such age, maturity and stage of development so as to be able to participate in an

courts and other formal decision-making bodies to enable the participation of children in a child-friendly and accommodating atmosphere.⁴⁸³

It is left to the discretion of states parties how the children's views should be heard. Where procedural rules suggest that this should be done through a representative party or an appropriate body, the obligation remains to convey the children's views.⁴⁸⁴ A comparison of section 10 of the Act with the provisions in article 12⁴⁸⁵ of the Convention on the Rights of the Child and article 4(2)⁴⁸⁶ of the African Charter may justify the conclusion that section 10 should be read with section 14 of the Children's Act to encapsulate the right of the child's voice to be heard in matters affecting the child.⁴⁸⁷

appropriate way and the views expressed by the child must be given due consideration. Van Bueren *Rights of the Child* 139 argues that art 12(2) provides children with the procedural capacity to be heard either directly or through a representative. She adds that art 12(1) applies to children who are capable of "forming" views and not only children who are capable of expressing views. See further Kassan 8; Davel *Commentary on the Children's Act* 2-13.

⁴⁸³ Compare Pillay and Zaal "Child-interactive video recordings: A proposal for hearing the voices of children in divorce matters" 2004 *SALJ* 684 *et seq.* Compare also s 60(3) of the Children's Act where this aspect is specifically referred to.

⁴⁸⁴ Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 152-157 expresses her concern about the inadequacy of procedures and cautions about the possible procedural pitfalls. She concludes that until appropriate mechanisms are put in place to ensure meaningful participation of children, many children may be excluded from contributing to those decisions which will have a major impact on the rest of their lives. The cost implication will play a major role in implementing the participatory rights of children eventually. One such cost-factor is ensuring the availability of adequately trained interpreters, which is provided for in s 52(2)(b) of the Children's Act. Another is securing the availability of intermediaries, which is provided for in s 61(2) of the Children's Act.

⁴⁸⁵ Art 12(1) of the CRC provides that states parties are obliged to ensure that children who are capable of forming their own views be given the opportunity to express those views in all matters affecting them. Furthermore, the views of children must be considered in accordance with the age and maturity of those children. Art 12(2) of the CRC enable states parties to enact procedural rules obliging the participation of children in any matter affecting them but not to restrict the participation of children. Compare Van Bueren *Rights of the Child* 139; Lückner-Babel 1995 *IJCR* 397-398.

⁴⁸⁶ Art 4(2) of the ACRWC provides that children who are capable of forming their own views have the right to express those views freely in all judicial or administrative proceedings affecting them. Davel in *Commentary on the Children's Act* 2-14 comments that the right of the child to be heard as provided in art 4(2) of the ACRWC may at first glance appear to be more restricted than the scope of art 12 equivalent found in the CRC, the ACRWC is specific with its provision that the child may be heard as a party to the proceedings either directly or through an impartial representative. The importance of this provision is found in the determination of how the child is to be heard. See further Davel in *Gedenkbundel vir JMT Labuschagne* 20-21.

⁴⁸⁷ S 14 of the Act ensures that a child has access to any court in South Africa and aligns with s 34 of the Constitution which ensures that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court

The participation of children as depicted in the Children's Act reveals a myriad of facets where children are given the right to express their views and to have their views considered in matters affecting them.⁴⁸⁸ In the discussion to follow reference will be made to related sections and where applicable the regulations thereby illustrating the importance of the child's participation.⁴⁸⁹

5 4 5 1 Section 10 confirming the participatory rights of children

The general provision in the Children's Act ensuring the child's participatory right is found in section 10.⁴⁹⁰ The open-ended format of the wording contained in the section is an indication that legislation intended the child's participation in any matter affecting the child. Even before the negotiations regarding the development of a children's statute were initiated, it was realised that the participation of children in matters concerning them was imperative.⁴⁹¹ Requirements for a child's participation in terms of section 10 are the ability to

or, where appropriate, another independent and impartial tribunal or forum". S 28(1)(h) of the Constitution does not refer directly to the child's right of participation but implies such a right in civil proceedings. The same argument prevails for the child's right of access to the court. It may be argued that s 28(1)(h) of the Constitution implies such right of access for the child. Therefore, it is submitted that both sections 10 and 14 align with s 28(1)(h) of the Constitution. See Davel in *Commentary on the Children's Act* 2-23 who points out that the limitation of "substantial injustice" in s 28(1)(h) of the Constitution is not found in s 14 of the Children's Act. The word "assist" further enhances the participatory right of the child. Compare Heaton's argument in *Law of Persons* 89 n 44 which seems to endorse the extended interpretation of the child's participatory right. Bosman-Sadie and Corrie A *Practical Approach* 30 explain that children who are too young or afraid may be assisted in bringing a matter to court.

⁴⁸⁸ S 10 does not set an age but focuses on the *ability* of the child to form an opinion or view and to express that view. (Emphasis added.)

⁴⁸⁹ Davel in *Commentary on the Children's Act* 2-24 makes a valid comment when she says, with reference to s 14, that the application of the section calls for enormous efforts in education and advocacy of the right of the child to participate in legal proceedings and having access to courts. The same can be said of s 10 and related sections relating to the voice of the child.

⁴⁹⁰ S 10 stipulates that "[e]very child that is of such 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". This section came into operation on 1 July 2007.

⁴⁹¹ This becomes clear from the views articulated by De Villiers 1993 *Stell LR* 306-307; Sloth-Nielsen 1995 *SAJHR* 417; Sloth-Nielsen and Van Heerden in 1996 *SAJHR* 249-252 and Sloth-Nielsen and Van Heerden 1996 *SAJHR* 649-651. The views of the commentators were endorsed in SALC's Discussion Paper 103 par 5 3 p 73 where participation was regarded as one of the three key principles to be considered in the legislative reforms.

participate;⁴⁹² the subject of the participation must concern the child either directly or indirectly;⁴⁹³ the child may participate in any appropriate way;⁴⁹⁴ and the child's expressed views must be considered.⁴⁹⁵

⁴⁹² The phrase "age, maturity and stage of development" is not interpreted in the Act and does not imply a specific or minimum age but it is to be expected that the child must be capable of forming a viewpoint and must be able to communicate that viewpoint. This requirement will vary from child to child and there are a number of factors that may determine the child's ability. Some factors are contained in the wording of the section. Eg the child's age; the younger the child is the less likely the child will be able to form a viewpoint and communicate this viewpoint. The maturity of the child may be a deciding factor as is the stage of development of the child. All three indicators must be considered by the court to determine whether the views of the child may be considered. There is no presumption to assist the court and the only requirement is that the court must make a factual finding on the available information and evidence to justify a judicial finding. In the working draft of the Children's Bill of May 2003 reference to child participation in clause 9(6) is phrased that "if a child ... in a position to participate meaningfully in any decision-making process in any matter concerning the child (a) the child must be given that opportunity and (b) proper consideration must be given to the child's views and preferences, bearing in mind the child's age, maturity and stage of development". In Children's Bill 70 of 2003 the child's right to participation was referred to in clause 10 as "[e]very child capable of participating meaningfully in any matter". In the Children's Bill 70 of 2003 (Reintroduced) the wording of clause 10 remained the same. In Children's Bill 70B the wording in clause 10 had changed to "age, maturity and stage of development". Compare Robinson and Ferreira 2000 *De Jure* 57-58 who express the view that only children who can form a meaningful opinion or view should be allowed the right to voice that opinion or view. The ability to form an opinion ought then to serve as "entry level" for the right to participate. De Jongh 2008 *TSAR* 789 suggests that the legislator could have determined seven years as an age where children should be able to formulate meaningful opinions about issues affecting their lives. However, this would not be in line with the provisions of art 12 of the CRC or art 4(2) of the ACRWC which should serve as guidelines when considering child participation.

⁴⁹³ In some matters where children are involved, their involvement or concern may be obscure resulting in the children easily being sidelined, eg domestic violence where the children are young or maintenance matters where the parents of the child are unmarried.

⁴⁹⁴ Davel in *Commentary on the Children's Act* 2-13 mentions that participation would refer to all rules that require children to be heard directly, without an intermediary including the requirement that children be consulted about their opinion and enable children to become parties to legal actions so as to participate and/or demand a certain remedy.

⁴⁹⁵ A sterling example is found in *De Groot v De Groot* (Eastern Cape case 1408/2009, judgment handed down 10 September 2009) now reported as *HG v CG* 2010 (3) SA 352 (ECP) where the children concerned were a fourteen-year old boy and a set of eleven-year old triplets. In par [17] the court referred to the express provisions of ss 10 and 31 of the Act and the reports of an accredited social worker and clinical psychologist wherein it was stated that their views should not be heard. The court mentioned that the children were of an age and maturity to fully comprehend the situation and their voices cannot be stifled, but must be heard. In par [19] the family counsellor, who consulted with the children and ascertained their views and found that their viewpoint both to relocating to Dubai and to a change in the custody regime was unequivocal. The court recorded the views of the children *verbatim* to represent what needed to be heard, namely their voices. In par [21] the court found that the attitude of the children to the proposed relocation to Dubai articulated in the reports was neither properly considered nor accorded due weight by the applicant's experts. Finally in par [23] the court concluded that due consideration is to be given to the views of the children and that they were of an age of maturity to make an informed decision. The court did not consider it in the best interests of the children to order a change in the present parenting plan and the application was dismissed.

Although the views and wishes of children have been mentioned in judgments over the past thirty odd years, the courts have not accorded much weight to it.⁴⁹⁶ In the recent past this approach has changed markedly as is reflected in reported judgments.⁴⁹⁷ It is with the institution of section 14⁴⁹⁸ of the Act that the

⁴⁹⁶ Eg *French v French* 1971 (4) SA 298 (W) 299E where the court expressed the view that the wishes of an eleven-year old girl will be taken into account to ascertain what the best interests of the child really demand; *Manning v Manning* 1975 (4) SA 659 (T) the change in the custody of a boy of nine years and eight months was granted without according the child an opportunity to express his view; *Märtens v Märtens* 1991 (4) SA 287 (T) where the court awarded custody of eleven-year old twins to their father in contrast with the recommendation of the Family Advocate; *McCall v McCall* 1994 (3) SA 201 (C) 207H-I the judge personally interviewed the children (*in casu* twin girls aged eleven years and a boy of twelve years) and gave serious consideration to their expressed preferences concerning their custody, commenting that where the court was satisfied that the child has the necessary intellectual and emotional maturity to give a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to “make an informed and intelligent judgment”, weight should be given to his expressed preference. In *Meyer v Gerber* 1999 (3) SA 650 (O) 655B-B/C and 655C/D the court accepted the letter and two affidavits of a fifteen-year old boy. The court, at 655I-J, had to decide whether it was satisfied that the boy was endowed with the necessary intellectual and emotional maturity to make a considered and intelligent decision regarding his choice. The court accepted the boy’s choice and custody (care) was varied as requested. In *Lubbe v Du Plessis* 2001 (4) SA 57 (C) 73H-73H/J the court considered the views of the three boys aged between six and ten years and held that the oldest boy “is sufficiently mature to form and express ‘an intelligent and informed judgment on what he subjectively perceives to be in his best interests’ and that he has a strong desire to live with his father”.

⁴⁹⁷ In *I v S* 2000 (2) SA 993 (C) 997D-H/I the court was satisfied that the children’s (*in casu* thirteen, sixteen and nineteen-year olds) wishes were sufficient to counter their father’s right to access based on the child psychiatrist’s report that the children were “sufficiently mature and old enough to give an independent opinion of their refusal to have any contact with their father”. A good example is to be found in *Soller v G* 2003 (5) SA 430 (W) of how the court viewed the participation of a fifteen-year old boy who brought his own application for the variation of a custody order. In par [1] the court goes to the root of a child’s right to participate, commenting that “[a]t the heart of the application is the extent to which the views and desires of a young adult should be decisive of custodial and access issues”. The court, in par [26] 438B-D, says that “a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner” and pars [44] to [48] 443C-444B expounds the child’s views and wishes and concludes in par [73] 448H-I that “K is nearly a man [sic] and has made his choice” and par [74] 449C-D “[i]t may seem burdensome but K is required to meet with and be counselled by someone other than his mother or father. I enquired of K his views in this regard and he told me that he would welcome such an arrangement”. In *R v H* 2005 (6) SA 535 (C) the court considered the views of a ten-year old boy. In par [30] 547D-F Judge Moosa explains his interview with J because of the court’s refusal to let J testify and be placed under tremendous strain and untold distress. J was found to be a bright, impressive and sensitive young boy and he was acutely aware of the conflict between his parents. J indicated that “he is not yet ready to have access to the first defendant at this point in time”. The Supreme Court of Appeal endorsed the importance of the child’s views in *F v F* 2006 (3) SA 42 (SCA) par [18] 52E/F holding that a child’s views could not be ignored. However, the court held in pars [25] and [26] 54F/G, 54I and 55C that it would not be proper that the child be allowed to be interviewed by the Judges of Appeal and that it would be the proper route for the child to be interviewed by professionals and have that evidence placed before the court. The court held in *Legal Aid Board v R* 2009 (2) SA 262 (D) that the appointment of a legal practitioner by the Legal Aid Board at the instance of the child (*in casu* a twelve-year

participation of children in legal matters was taken to a new level ensuring that not only does the child have a right to bring a matter to a court,⁴⁹⁹ but also to be assisted in doing so.⁵⁰⁰ The aim of this discussion is to indicate to what extent the Children's Act has achieved one its objectives namely "[t]o give effect to certain rights of children as contained in the Constitution".⁵⁰¹

5 4 5 2 Participatory rights of children in general

The anticipation of the public regarding children's rights has been fuelled by the media in the recent past. Expectations, sometimes unrealistic, have brought the participatory rights of children to the forefront. This in itself is indicative of the involvement of parents, grandparents and more importantly, children themselves in matters affecting children.

Section 10⁵⁰² does not limit the participation of children only to the children's court. Children are involved in litigation every day, for example, concerning care and contact,⁵⁰³ divorce matters involving custody,⁵⁰⁴ maintenance,⁵⁰⁵ which

old girl) was in compliance with s 28(1)(h) of the Constitution read with s 3 of the Legal Aid Act 22 of 1969. In *Kleynhans v Kleynhans* [2009] JOL 24013 (ECP) pp 8, 16 and 19 the court referred to the views of the children aged sixteen and thirteen years as placed before court by five experts, two of whom were clinical psychologists and two were social workers. The court (at 19) commented that the children are not babies, both of them can and do clearly think for themselves and they would be justified "in feeling insulted if forced into a situation in which they are treated in a way prescribed by the recommended regime".

⁴⁹⁸ See n 472 *supra*. This section is also discussed in 5 4 5 *supra*.

⁴⁹⁹ The only requirement is jurisdiction of the court. The jurisdictional aspect of the children's court is dealt with in s 45 of the Act, see 5 4 3 *supra*.

⁵⁰⁰ Davel in *Commentary on the Children's Act* 2-19 says that s 14 takes the issue of access to a court one step further with the provision that children have the right to be assisted in bringing a specific matter to a court. Heaton *Law of Persons* 89 takes this argument further (89 n 44) and comments that assistance is not the equivalent of legal representation and therefore it cannot be said that s 14 of the Act links up with s 28(1)(h) of the Constitution. For further comments, see 5 4 5 2 *infra*.

⁵⁰¹ The introductory part of the long title of the Children's Act.

⁵⁰² This is clear from the wording of s 10 which indicates that every child of such 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 the views expressed by the child must be given due consideration.

⁵⁰³ Eg *Soller v G* 2003 (5) SA 430 (W); *R v H* 2005 (6) 535 (C); *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁵⁰⁴ Eg *P v P* 2007 (5) 94 (SCA).

⁵⁰⁵ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC); *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C); *Soller v Maintenance Magistrate, Wynberg*

includes disputed paternity⁵⁰⁶ and domestic violence.⁵⁰⁷ Furthermore, child abduction⁵⁰⁸ and the status of foreign children in South Africa⁵⁰⁹ require the close scrutiny of the involvement of children in litigation affecting their rights.

The other sections in the Act which indicate child participation are where children find themselves in special and/or difficult circumstances. The South African Law Commission was tasked to ensure that a new children's statute mentions such situations in which children with disabilities or suffering from chronic illnesses⁵¹⁰ are included and that those children are not sidelined and refused the opportunity to participate in legal matters affecting them. Section 11(1)(b) allows children with disabilities to participate in matters affecting them.⁵¹¹ This provision is important as, more often than not, they are the ones

2006 (2) SA 66 (C). In South African context the child has a common-law right of support and every parent of a child is clothed with the duty to support his or her child who cannot support him or herself. This duty of the parent has been recast in s 18(2)(b) of the Act as part of parental responsibilities and rights. S 10 of the South African Children's Act provides the child with a right of participation and s 14 of the same Act ensures that every child has the right of access to court. A child in the South African would normally be assisted by his parent or person who has parental responsibilities and rights in bringing a matter to court, in this instance the maintenance court. A child would be able with the assistance of a legal practitioner assigned in terms of s 28(1)(h) of the South African Constitution to bring such application if there has been compliance with common-law requirements of no parent or person with parental responsibilities and rights, where the parent or person with parental responsibilities and rights cannot be traced, there is a conflict or potential conflict of interests between the parent and child or the parent or person with parental responsibilities and rights refuses to assist the child. See regarding maintenance in general Van Schalkwyk in *Child Law in South Africa* 38-61.

⁵⁰⁶ The Children's Act provides in s 36 that there is a presumption of paternity in respect of a child born out of wedlock. This provision should be read with s 37 of the Act. Recently the high court in *LB v YD* 2009 (5) SA 463 (T) handed down a judgment in which the court held that it would be in the interests of the child that paternity be scientifically determined and resolved.

⁵⁰⁷ *Eg Narodien v Andrews* 2002 (3) SA 500 (C).

⁵⁰⁸ *Eg Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

⁵⁰⁹ *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T).

⁵¹⁰ SALC Issue Paper 13 (April 1998) par 2 6 p 10, par 4 2 6 pp 26-27 and par 4 2 7 pp 27-28.

⁵¹¹ S 11(1) provides that "[i]n any matter concerning a child with a disability due consideration must be given to-

- (a) providing the child with parental care, family care or special care as and when appropriate;
- (b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;
- (c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and
- (d) providing the child and the child's care-giver with the necessary support services".

who require additional protection and support as they lack the ability to bring their situation to the court's attention.⁵¹²

Section 12 deals with social, cultural and religious practices. Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to their health.⁵¹³ The protection contained in section 12 prescribes that a child below the age set by law for a valid marriage may not be given out in marriage or engagement.⁵¹⁴ Genital mutilation or the circumcision of female children is prohibited.⁵¹⁵ Virginity testing of a girl under the age of sixteen years is prohibited.⁵¹⁶ A girl over the age of sixteen may only be subjected to virginity testing on certain prescribed conditions.⁵¹⁷ The results of the testing may only

⁵¹² This was mentioned in SALC Discussion Paper 103 par 13 4 1 pp 568-570 where the close link between poverty and disability was highlighted. Various international instruments such as CRC and ACRWC recognise the rights of children with disabilities; see art 2 of the CRC; also art 6 obliging governments to ensure that such children are developed to the maximum extent and art 23 highlighting that a disabled child has the right to special care, education and training to help him or her enjoy a full and decent life in dignity and achieve the greatest degree of self-reliance and social integration possible.

⁵¹³ S 12(1) of the Act.

⁵¹⁴ S 12(2)(a) of the Act. S 12 (2)(b) requires the consent of the child who is above the minimum age for marriage or engagement. The common law determines puberty as the minimum age for marriage. The customary law has the same requirement in South Africa. The Recognition of Customary Marriages Act 120 of 1998 prescribes that the prospective spouses of a customary marriage to be older than eighteen years. S 4 of the said Act allows the Minister or delegated official the discretion to grant written permission to children to marry if the Minister or the official considers the marriage desirable and in the interests of the parties concerned. Davel in *Commentary on the Children's Act* 2-18 refers to the proscription of the ACRWC in art 21(2) regarding the marriage of children under the age of eighteen years. One has to agree with her conclusion that South Africa has not met its obligation in terms of the ACRWC in the Children's Act, see discussion 5 2 2 2 *supra*.

⁵¹⁵ S 12(3) of the Act. The ACRWC does not specifically mention genital mutilation, but art 16(1) clearly requires states parties to take specific legislative, administrative, social and educational measures to protect children from all forms of inhuman or degrading treatment. Art 21(1) of the ACRWC furthermore requires states parties to take all appropriate measures to eliminate social and cultural practices affecting the welfare, dignity, normal growth and development of a child and in particular (a) those customs and practices prejudicial to health or life of the child and (b) those customs and practices discriminatory to the child on the grounds of gender or other status.

⁵¹⁶ S 12(4) of the Act.

⁵¹⁷ S 12(5) of the Act provides that virginity testing of children older than 16 may only be performed-

“(a) if the child has given consent to the testing in the prescribed manner;
(b) after proper counselling of the child; and
(c) in the manner prescribed.”

be disclosed with the consent of the child.⁵¹⁸ The body of the child who has undergone virginity testing may not be marked.⁵¹⁹

The circumcision of boys under the age of sixteen is prohibited with the exception of circumcision for religious purposes within the prescripts relating to the practices of religion⁵²⁰ or for medical reasons on recommendation of a medical practitioner.⁵²¹ Circumcision may only be performed on boys older than sixteen with the consent of that child,⁵²² after proper counselling⁵²³ and in the prescribed manner.⁵²⁴ With regard to the age, maturity and their stage of development boys have the right to refuse circumcision.⁵²⁵

The participation of children in social, cultural and religious practices is not symbolic, but has important significance. The child's right to refuse partaking in any social, cultural and religious practice which may violate the physical integrity of the child is confirmed with the provisions of section 10. If the child is of such age, maturity and stage of development, then the consent of the child remains a prerequisite and the child's view must be taken into consideration.⁵²⁶

Section 13⁵²⁷ prescribes that every child has the right to have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction,⁵²⁸ as well as his or her health status,⁵²⁹ causes and treatment of his or her health status.⁵³⁰ The child has a right to confidentiality regarding his or her health status and the health status of

⁵¹⁸ S 12(6) of the Act.

⁵¹⁹ S 12(7) of the Act.

⁵²⁰ S 12(8)(a) of the Act.

⁵²¹ S 12(8)(b) of the Act.

⁵²² S 12(9)(a) of the Act.

⁵²³ S 12(9)(b) of the Act.

⁵²⁴ S 12(9)(c) of the Act.

⁵²⁵ S 12(10) of the Act.

⁵²⁶ Compare Davel in *Commentary on the Children's Act 2-18*. Where a child challenges the cultural practice of circumcision and is of such age, maturity and stage of development, his refusal must be respected and the circumcision cannot be performed. Whether this will realise in practice remains to be seen.

⁵²⁷ Came into operation on 1 July 2007.

⁵²⁸ S 13(a) of the Act.

⁵²⁹ S 13(b) of the Act.

⁵³⁰ S 13(c) of the Act.

a parent, care-giver or family member.⁵³¹ The only exception is when maintaining confidentiality is not in the best interests of the child.⁵³² The information which is provided to children must be relevant and accessible to children considering the needs of disabled children.⁵³³

The child's participatory right in medical matters involving him/her has been extended considerably in the Children's Act⁵³⁴ and the child's right to consent to

⁵³¹ S 13(d) of the Act.

⁵³² *Ibid.*

⁵³³ S 13(2) of the Act. This section is in line with the general provision of access to information contained in s 32 of the Bill of Rights and the provisions of the Promotion of Access to Information Act 2 of 2000. One can only agree with Davel in *Commentary on the Children's Act* 2-19 that the provision s 13(1)(d) is to be welcomed. The breaching of confidentiality frequently occurs in health care and institutional settings and this subsection acknowledges the right of the child subjecting it only to the best interests of the child.

⁵³⁴ S 129 addresses the consent to medical treatment and surgical operation and provides –

“(1) Subject to section 5(2) of the Choice on termination of Pregnancy Act 92 of 1996, a child may be subjected to medical treatment or surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4), (5), (6) or (7).

(2) A child may consent to his or her own medical treatment or to the medical treatment of his or her child if –

(a) the child is over the age of twelve years; and

(b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.

(3) A child may consent to the performance of a surgical operation on him or her or his or her child if-

(a) the child is over the age of twelve years; and

(b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and

(c) the child is duly assisted by his or her parent or guardian.

(4) The parent, guardian or care-giver of a child may, subject to section 31, consent to the medical treatment of the child or if the child is –

(a) under the age of twelve years; or

(b) over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the treatment.

(5) The parent or guardian of a child may, subject to section 31, consent to a surgical operation on the child if the child is –

(a) under the age of twelve years; or

(b) over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the operation.

(6) The superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent may consent to the medical treatment of a surgical operation on a child if –

(a) the treatment or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability; and

(b) the need for the treatment or operation is so urgent that it cannot be deferred for the purpose of obtaining consent that would otherwise have been required.

(7) The Minister may consent to the medical treatment of or surgical operation on a child if the parent or guardian of the child –

(a) unreasonably refuses to give consent or to assist the child in giving consent;

his or her medical treatment illustrates the measure of participation.⁵³⁵ This innovation of children’s participation in their health care issues found in the Children’s Act links up with the guidelines propounded in the Convention on the Rights of the Child.⁵³⁶ Section 129⁵³⁷ of the Act provides, amongst others, that a child over the age of twelve years and who is of *sufficient maturity and mental capacity*⁵³⁸ to understand the benefits, risks, social and other implications of the treatment may actively participate in the decision involving his or her care.⁵³⁹

-
- (b) is incapable of giving consent or of assisting the child in giving consent;
 - (c) cannot readily be traced; or
 - (d) is deceased.

- (8) The Minister may consent to the medical treatment of or surgical operation on a child if the child unreasonably refuses to give consent.
- (9) A High Court or children’s court may consent to the medical treatment of or a surgical operation on a child in all instances where another person that may give consent in terms of this section refuses or is unable to give such consent.
- (10) No parent, guardian or care-giver of a child may refuse to assist a child in terms of subsection (3) or withhold consent in terms of subsections (4) and (5) by reason only of religious or other beliefs, unless that parent or guardian can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned.

⁵³⁵ S 39(4)(b) of the Child Care Act granted children of fourteen years limited participation regarding their involvement in medical treatment. The lowering of the age of consent to medical treatment from fourteen to twelve years is indicative of this new innovation to enhance the child’s participation in matters affecting the child. Compare Mahery *Children’s Health Service Rights and the Issue of Consent* (LLM dissertation 2007 UWC) 60 who mentions that safeguards to protect children are created with the requirement that the child has sufficient maturity and mental capacity to understand the benefits, risks and social implications of the treatment. She refers to this safeguard as the maturity test.

⁵³⁶ Arts 12(1), (2) and 13. Compare Mahery 61.

⁵³⁷ Subs (1) renders the provisions of s 129 of the Act subject to the provisions of s 5(2) of the Choice on Termination of Pregnancy Act 92 of 1996 as far as a girl child’s choice of terminating her pregnancy without parental consent is concerned.

⁵³⁸ Emphasis added.

⁵³⁹ Subss (2)(a) and (b) of the Act. The child acts independently without the assistance of his or her parent or guardian. See Mahery 77 where she opines that s 129 implies protection of an immature child, but if there is no way of controlling or testing the child in order to determine the child’s maturity then the Children’s Act may fail the child if there is no standardised test. At 108 Mahery views s 129 through the lens of age-based discrimination. Kruger “The philosophical underpinnings of children’s rights theory” 2006 *THRHR* 451-452 in her discussion endorses the “*Gillick*-competency test” which recognised the maturity factor or “maturation factor” that it is the most appropriate answer to what the acceptable limits of self-determination are. She further explains that the “self-determination” approach should become more important when the child approaches mid-adolescence. In this respect she supports Freeman’s dual approach which in essence requires that children’s rights are taken seriously as regards nurturance and self-determination and that policies, practices and laws are incorporated to protect children and their rights. Compare Sloth-Nielsen “Protection of Children” in Davel and Skelton *Commentary on the Children’s Act* 7-34/7-35; Kassan and Mahery “Special Child Protective Measures in the Children’s Act” in Boezaart *Child Law in South Africa* 207-209.

If the child is older than twelve years and is of sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of a surgical operation the child may consent to the performance of a surgical operation on him or her.⁵⁴⁰ In addition to the first two requirements the parent or guardian of the child must *duly assist* the child with his or her consent for the performance of the surgical operation.⁵⁴¹

The assistance referred to in section 129(3)(c) of the Act ought to be interpreted differently from the assistance referred to in section 14.⁵⁴² If a child does not have sufficient maturity and mental capacity to comprehend the benefits, risks and social implications of a surgical operation, then the parent or guardian may consent.⁵⁴³ Section 129(3) of the Act is not subject to section 31 of the Act as is the case with section 129(4) of the Act.⁵⁴⁴ The intention of the legislator may be

⁵⁴⁰ Subss (3)(a) and (b) of the Act.

⁵⁴¹ Emphasis added. Subs (3)(c) of the Act. It is not understood what is meant by *duly assist*. Assistance is not defined in the Act and therefore the common law interpretation of assistance is to be considered. Slabbert “Parental Access to Minors’ Health Records in the South African Health Care Context: Concerns and Recommendations” 2004 *PER* 171 mentions that the requirement for assistance of a child twelve years and older with sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of the surgical operation, is difficult to understand. She poses the questions what would be the implication if the parent does not assist the child or refuses to assist the child? The answer to these questions appears to be in ss 129(7)(a) to (d) and 129(9) of the Act. Mahery 78-79 comments that failure in the Act to explain what is meant by “*duly assist*” is problematic and creates confusion because it is not clear whether parental assistance refers to parental advice, supplementary support or parental approval. Mahery submits that “*duly assists*” should not include “a power” enabling parents to veto a competent child from accessing required surgery. Sloth-Nielsen in *Commentary on the Children’s Act* 7-35 suggests that “*duly assist*” seems to presuppose concurring parental acquiescence or agreement if not actual “consent” in the legal sense, that is to say where the parent signs the relevant authorisation form, which place may now be taken by the signature of the child. This suggestion is supported with the best interests of the child the overarching criterion.

⁵⁴² S 14 refers to “assist”, although “assist” in s 14 of the Act deals with the child’s right of access to court, the principle remains the same. The parent, guardian or person with parental responsibilities and rights supplements the child’s limited capacity in litigation and in the agreement for surgical intervention. If the parent wants to assist the child in terms of s 129(3)(c) of the Act the child will have the right to approach the court in terms of s 14 of the Act and to be assisted in doing so. Davel in *Commentary on the Children’s Act* 2-23 correctly explains that s 14 of the Act is much wider in application than representation in s 28(1)(h) of the Constitution and should there be the choice to approach the court to nullify the parent’s refusal to assist in terms of s 129(3)(c), the child may be assisted by a curator *ad litem* or a legal representative in terms of s 28(1)(h) of the Constitution.

⁵⁴³ As is provided for in s 129(4)(b) of the Act, but subject to s 31 of the Act.

⁵⁴⁴ Which deals with major decisions involving a child as set out in s 31(1)(a) of the Act which obliges a person holding parental responsibilities and rights to give due consideration to

inferred from the proviso only being inserted in section 129(4) and not in section 129(3).⁵⁴⁵ However, section 129(9) allows the High Court or children's court to make an order of consent where the court has found that another person⁵⁴⁶ refused to consent to a surgical procedure to be done on a child.

There is provision in section 129 of the Act to cover the situation when the views of the child and the parents differ on medical treatment and surgical operations. It must be kept in mind that all the possibilities available in such a situation are subject to the best interests of the child. In the first place where the child's consent is unreasonably withheld the Minister of Social Development may consent to the medical treatment or surgical procedure on the child to go ahead,⁵⁴⁷ or where either of the parent's or guardian's consent or assistance is unreasonably withheld,⁵⁴⁸ or the parent or guardian is incapable of giving or assisting the child with consent,⁵⁴⁹ or the parent or guardian cannot readily be traced⁵⁵⁰ or is deceased.⁵⁵¹ However, there is also provision in section 129(9) of the Act to approach the High Court or children's court for an order overruling

any views and wishes of a child regarding any decision *inter alia* involving the health of the child. Heaton in *Commentary on the Children's Act 3-28/3-29* opines that s 31 is in keeping with the aims contained in art 12 of the CRC (especially art 12(1), which has the proviso that the child must be capable of forming his or her own views) that the child be granted the right to express those views freely in all matters affecting the child. However, Heaton *op cit* 3-29 expresses the view that the child's ability to participate in s 31(1)(a) is not a requirement for the child expressing his or her views and wishes. Fact of the matter is that if the child cannot convey his or her views and wishes appropriately it will all come to naught as Heaton *op cit* 3-29 acknowledges "[o]bviously a very small child is unable to express either his or her views and wishes".

⁵⁴⁵ Slabbert 2004 *PER* 170 discusses the impact of the Choice on the Termination of Pregnancy Act 92 of 1996 on the Child Care Act. She comments that a separate set of rules applies to the termination of pregnancies and other medical interventions. This situation appears not to have changed with the provisions of s 129(3) of the Children's Act.

⁵⁴⁶ A wide interpretation of another person allows the inclusion of a child refusing consent or a parent or guardian refusing consent for a surgical operation. See also Sloth-Nielsen in *Commentary on the Children's Act 7-35* who refers to the possible inclusion of a child in the phrase "another person".

⁵⁴⁷ S 129(8)(a) of the Act. One has to agree with Sloth-Nielsen in *Commentary on the Children's Act 7-35* that this is a rather cumbersome route to follow.

⁵⁴⁸ S 129(7)(a) of the Act.

⁵⁴⁹ S 129(7)(b) of the Act.

⁵⁵⁰ S 129(7)(c) of the Act.

⁵⁵¹ S 129(7)(d) of the Act.

parental refusal where applicable, or another person's refusal for medical treatment or surgical procedure.⁵⁵²

Section 130⁵⁵³ provides that a child may consent to a HIV-test if he/she is over the age of twelve years and is of sufficient maturity to understand the benefits, risks and social implications of such a test. The difference between sections 129 and 130 of the Act regarding the child's consent is found with children under the age of twelve years. A child under twelve years of age can independently consent to a HIV-test only if the child is of sufficient maturity to understand the benefits, risks and social implications of such a test.⁵⁵⁴ Sections 129⁵⁵⁵ and 130⁵⁵⁶ require of a child the mental capacity to comprehend the benefits, risks, social and other implications of the medical treatment and/or surgical operation.⁵⁵⁷

⁵⁵² S 129(9) of the Act provides that a High Court or children's court may grant the required consent in all instances where another person that may give consent refuses or is unable to give such consent. The term "another person" ought to be interpreted extensively to include a child; if not it would mean that the child holds a veto regarding the children's court, but not the Minister of Social Development that is conferred such authority in terms of s 129(8) of the Act. The whole aim of the extension of the power or jurisdiction to grant consent to the children's court is as Sloth-Nielsen in *Commentary on the Children's Act 7-35/7-36* explains to "ensure a speedier and more cost-effective avenue with reference to *Ex parte Nigel Redman* (unreported WLD Case No 14083/2003) where orphaned babies who were HIV-positive were refused treatment and no one was willing to consent to them receiving medical treatment. The High Court granted the required consent". The High Court's view is presented in *Hay v B* 2003 (3) SA 492 (W) 495H/I-J.

⁵⁵³ S (2)(a) of the Act which became operative on 1 July 2007.

⁵⁵⁴ S 130(2)(a)(ii) of the Act which has been in operation since 1 July 2007 by way of GG 30030 dated 29 June 2007. Compare further Sloth-Nielsen in *Commentary on the Children's Act 7-38* who remarks that the age of twelve years is a fixed age because of the disjunctive use of the word "or" as opposed to "and" with s 129 of the Act. Consent required remains informed consent as required by the common law.

⁵⁵⁵ Ss 129(2)(b), (3)(b), (4)(b) and (5)(b) of the Act. The determination of a child's capacity to be able to understand the benefits, risks, social and other implications associated with medical treatment, surgical operations and HIV testing is difficult to circumscribe and will have to be done on an individual basis.

⁵⁵⁶ S 130(2)(a)(ii) of the Act which is operative since 1 July 2007.

⁵⁵⁷ This requirement is founded on the common law principles of informed consent. See Strauss "Toestemming deur 'n jeugdige" 1964 *THRHR* 121-122 124 who informs that no definite age was set in common law. See also Strauss *Doctor, Patient and the Law* (1991) hereafter Strauss *Doctor and the Law* 7-8 171-174; Clark "My right to refuse or consent": The meaning of consent in relation to children and medical treatment" 2001 *THRHR* 610-612; Kruger "Traces of Gillick in South African jurisprudence: Two variations on a theme" *Codicillus* 2005 13-14 concludes that a similar test to the *Gillick* competency test was indirectly introduced by the court in *Christian Lawyers' Association v Minister of Health* 2005 (1) SA 509 (T) by finding that provided in s 5 of Choice on Termination of Pregnancy Act 92 of 1996 is the "informed consent" of the pregnant woman for the termination of the

The importance of ascertaining the consent of a child perceived of having the mental capacity to understand the benefits, risks, social and other implications of medical treatment and surgical operations is reflected in section 129 of the Act. The principle of consent of a patient⁵⁵⁸ is entrenched in the idea of self-determination.⁵⁵⁹ Sloth-Nielsen⁵⁶⁰ discusses the piecemeal history of children's health rights with reference to the common-law principles aimed at failure to acquire informed consent to treatment and the present statutory provisions contained in the Child Care Act.⁵⁶¹

The pioneering decision of *Gillick v West Norfolk and Wisbech Area Health Authority*⁵⁶² in 1985⁵⁶³ heralded in a new era which was later confirmed in

pregnancy. Compare also Gallinetti "Child participation and consent" in Gallinetti, Kassan, Mbambo, Sloth-Nielsen and Skelton *Draft Training Materials on the Children's Act; Children's Amendment Act and Regulations* Foundation Phase (2009) unpublished note 80 who list the following aspects "for the determination whether a child can participate in the Children's Act:

- cognitive ability of the child (level of understanding);
- is the child within the usual milestone threshold for other children of his or her age?;
- the circumstances of the family, community and school system the child finds him or herself in – children mature quicker due to environmental factors;
- biological age;
- mental age (not necessarily the same as biological age);
- level of maturity in comparison to peers;
- whether the child is at school, and if so, is he or she in the grade appropriate to his or her age;
- ability to read, write, comprehend;
- ability to understand questions and give reasonable answers;
- does the child's level of understanding match his or her actions/what he or she does as a result of the understanding?;
- does the child usually participate in other types of decisions at school, in the family, at church or extra-mural activities?;
- is the child easily influenced?"

As an addition one may add: "what comparative experience does the child have?" (The addition in the second brackets is not those of the author.)

⁵⁵⁸ Here the child is the patient and the autonomy of the child as patient is the focal point.

⁵⁵⁹ The basis of the concept of informed consent to medical treatment and/or procedures is fully canvassed in *Castell v De Greef* 1994 (4) SA 408 (C). Compare further Mahery 49-53.

⁵⁶⁰ In *Commentary on the Children's Act* 7-29.

⁵⁶¹ Unauthorised medical contact or invasion of a person's body could constitute assault. The importance of consent is therefore self-evident.

⁵⁶² The first decision was reported in [1985] 3 All ER 402. The facts briefly entail that the mother of five girls under the age of sixteen years, which is the age of legal capacity to consent to medical examination and treatment, is seeking assurance that no contraceptive advice or treatment would be rendered to any of her daughters while under sixteen years of age without her knowledge and consent. The local health authority refused to give such assurance explaining that in accordance with the guidance they issued the final decision was that of the doctor. The mother applied for a declaratory order that the memorandum

legislation in England⁵⁶⁴ and the Convention on the Rights of the Child.⁵⁶⁵ At the forefront of ongoing debates are the children's capacity to make health care decisions and their evolving capacities and recognition of their autonomy.⁵⁶⁶ The importance of decisions after *Gillick* serves as a guide for a possible development in South Africa with the commencement of section 129 of the Act.⁵⁶⁷

Evolving from the *Gillick* decision in the United Kingdom, there has been an expansion on a variety of related issues in child law and medical treatment.⁵⁶⁸ In Australia the mature minor⁵⁶⁹ test has been approved as being in accordance with the child's psychological development as described by Piaget who suggests that "the capacity to make an intelligent choice, involving the ability to

gave advice which was unlawful and adversely affected parental rights and duties. The court did not grant the mother's request and she appealed to the Court of Appeal. The Court of Appeal ruled that parental rights yielded to the child's right to make his or her own decision if the child was "of sufficient understanding and intelligence".

⁵⁶³ [1985] 3 All ER 402; [1986] AC 112.

⁵⁶⁴ The *Children Act* of 1989. Compare Freeman "Rethinking *Gillick*" 2005 *IJCR* 201-217 who discusses the decisions after *Gillick* and the move away from the *Gillick* decision. The finding in *Gillick* (423) by Lord Scarman on behalf of the majority that "a minor's capacity to make his or her own decision depends on the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judicially fixed age limit" and further (423) that "it will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law" is a firm finding of the evolving capacity and increasing independence of young people (and by implication a child of sufficient maturity and mental capacity) and that "[t]he law ignores these developments at its peril".

⁵⁶⁵ Art 12 of the CRC.

⁵⁶⁶ Later decisions moved away from the *Gillick*-competent children and acknowledged that there are concurrent decision-making powers vesting in the parents and the *Gillick*-competent children. A comparative analysis is found in 6 3 1 *infra*.

⁵⁶⁷ To date there have been very few decisions involving *Gillick*-competent children and their health issues. Sloth-Nielsen in her overview of the historical situation with relation to protective measures relating to the health of children in *Commentary on the Children's Act* 7-29/7-30 gives a glimpse of the development over twenty years found in England. This will be discussed in more detail in 6 3 1 *infra*.

⁵⁶⁸ Sloth-Nielsen in *Commentary on the Children's Act* 7-30. The *Gillick* decision according to Freeman 2005 *IJCR* 201-202 has prompted optimistic comments from commentators like Seymour "An 'uncontrollable' child: A case study in children's and parents' rights" in Alston, Parker and Seymour *Children, Rights and the Law* (1995) 100-101 who contends that *Gillick* "opened the way for case-by-case decisions in a range of situations whenever children are old enough to argue that they have the capacity to make informed assessments. If this view is accepted, it might be seen as establishing a new right for older children, one which could be defined as: *an entitlement, in all disputes, to have their actual capacities determined, rather than being subject to presumptions based on their ages*". (Emphasis is that of the author.)

⁵⁶⁹ Which according to Slabbert 2004 *PER* 168 equates to the "*Gillick*-competency" test.

consider different options and consequences, generally appears in a child ... [somewhere] between the ages of 11 and 14”.⁵⁷⁰

One can well imagine the impact that section 10 of the Act may eventually have on family-law matters in South Africa. Mindful of the provisions set out in articles 12 of the Convention on the Rights of the Child and 4(2) of the African Charter underpinning the participatory rights of the child, and recent reported judgments on the right of the child to legal representation,⁵⁷¹ the stage is set for the child's voice to be heard in legal proceedings affecting the child.⁵⁷²

5 4 5 3 Participation of children in the children's court

The Children's Act has incorporated a number of processes through which children are given the opportunity to participate in matters concerning them.⁵⁷³ This is also the case with respect to children's court proceedings.⁵⁷⁴ Although

⁵⁷⁰ Slabbert 2004 *PER* 169 who refers to the case of *Department of Health and Community Services v JWB (Marion's case)* (1992) 175 CLR 218; 106 ALR 385 (HCA) CLR 237-238; ALR 395.

⁵⁷¹ Starting with *Soller v G* 2003 (5) SA 430 (W) and following on in *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T); *R v H* 2005 (6) SA 535 (C); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T); *F v F* 2006 (3) SA 42 (SCA) par [10] 48B-C; *P v P* 2007 (5) SA 94 (SCA); *J v J* 2008 (6) SA 30 (C); *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁵⁷² The interaction of the best interests standard of the child as reflected in s 7 and enshrined in s 9 of the Act and ss 10 and 14 of the Act read with ss 28(1)(h) and 28(2) of the Constitution broadens the scope of the participatory rights of the child.

⁵⁷³ Eg proceedings regarding their care and protection, parental responsibilities and rights of their parents, parental agreements, care and contact, major decisions involving children, adoption including inter-country adoption, child abduction, trafficking in children. S 23(2)(a) of the Act provides that, where the court considers granting a contact or care order, the court must take into account the best interests of the child. S 10 of the Act deals with the participation of a child who is of such age, maturity and stage of development as to express a view. S 31(1) of the same Act extends the participation of the child to the child's wishes also to be considered.

⁵⁷⁴ The following sections of the Children's Act (which, barring s 10 are not yet in operation) provide for child participation in children's court proceedings; ss 10 (child participation), 52(2) (rules and court proceedings which include the avoiding of adversarial procedures), 53(2)(a) (child affected by or involved in a matter to be adjudicated may approach a court), 54 (legal representation of choice), 55 (legal representation at state expense), 56(b) (child involved in a matter has right to attend court proceedings), 58(a) (child involved in the matter before court has the right to adduce evidence, question witnesses and produce argument), 59(1)(b) (child whose rights may be affected by an order of court may request the summons of witnesses), 60(1)(c)(i) (a child involved in a matter before court may question and cross-examine a witness), and 61(participation of children in children's court proceedings in general).

the Child Care Act allowed children to participate in care proceedings and adoptions, children's participatory rights are entrenched in the Children's Act in matters affecting them.⁵⁷⁵ Included in the definition of a "party" in the Children's Act we find "a child".⁵⁷⁶ The importance of being a party to proceedings is found in the assurance of standing, which in turn allows the party full participation in the proceedings as well as the right to legal representation.⁵⁷⁷ A party to proceedings also has the right of appeal which has been extended considerably in the Act.⁵⁷⁸

Section 10 of the Act ensures "[e]very child that is of such 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 the views expressed by the child *must*⁵⁷⁹ be given due consideration".⁵⁸⁰ Arguably this participatory right is more extensive than section 28(1)(h) of the Constitution because the focus of section 28(1)(h) is on legal representation which enhances the child's participation.⁵⁸¹

According to Gallinetti the right to participation is essentially a procedural right.⁵⁸² The Children's Act has incorporated specific procedures for the conduct

⁵⁷⁵ The participatory rights of children are now further enhanced by the Children's Act.

⁵⁷⁶ S 1(a) of the Act includes "child" in the definition of "party" in relation to a matter involving a child before a children's court.

⁵⁷⁷ The right to legal representation in children's court proceedings will be discussed in 5 4 6 *infra*.

⁵⁷⁸ S 51 of the Act has removed the limitations previously placed on appeals by s 16A in terms of the Child Care Act. S 51(1) provides that *any party* involved in a matter before a children's court may appeal against *any order* or any refusal to make an order, or against the variation, suspension or rescission of such order of the court to the High Court having jurisdiction. (Emphasis added.)

⁵⁷⁹ Emphasis added.

⁵⁸⁰ The section goes further than reg 4(1) of the Child Care Act which assured that in children's court proceedings in terms of s 13 of the Child Care Act the child shall have the same rights and powers as a party to a civil action in a magistrate's court in respect of examining witnesses, adducing evidence and addressing the court.

⁵⁸¹ *Soller v G* 2003 (5) SA 430 (W) par [26] 438C-D where the court succinctly underpins the child's right to participate by commenting that "a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner". See also discussion of the child's participatory right in 5 4 5 1 *supra*.

⁵⁸² Gallinetti *Draft Training Materials on the Children's Act; Children's Amendment Act and Regulations* 75 comments that the obligation to allow the child's participation requires a presiding officer to ensure that the child's views are heard and to what extent those views

of children's court proceedings to accommodate the child's participation⁵⁸³ in proceedings of this court. Section 61(1)(a) of the Act is one such procedure to ensure the child's right to express his or her view in a matter concerning him/her.⁵⁸⁴ The court must be satisfied that the child is of such age, maturity and stage of development, any needs that he/she may have are met and to be able to participate in the proceedings if the child chooses to do so.⁵⁸⁵

The child's right to be heard in adoption proceedings is a further indication of the extension of the child's participatory right when compared with the Child Care Act.⁵⁸⁶ Previously a child below the age of ten was not required to consent

will be considered. This participation is not limited to only judicial proceedings and appears in certain other provisions of the Act. Compare Davel in *Commentary on the Children's Act* 2-13. Schäfer *Family Law Service* par E87 draws a comparison between s 10 of the Act and s 28(1)(h) of the Constitution and alludes to the distinct functions of the two sections. S 10 allows participation "in an appropriate way" which according to Schäfer suggests the possibility of various means of allowing the child to be heard. S 28(1)(h) focusing on legal representation on the other hand, effectively makes the child a party to the proceedings.

⁵⁸³ S 60(1)(c)(i) of the Act provides that the presiding officer in a matter before a children's court controls the conduct of the proceedings and may, to the extent necessary to resolve any factual dispute which is directly relevant in the matter, allow that person to be questioned or cross-examined by the child involved in the matter.

⁵⁸⁴ Gallinetti in *Commentary on the Children's Act* 4-26 rightly mentions that the aim of s 61 is to ensure that the obligation set out in art 12 of the CRC regarding the child's participation is met. The various "safeguards" adopted in s 61 is to "assure" the child of expressing his or her views.

⁵⁸⁵ S 61(1)(b) of the Act further provides that where the court finds that a child is unable or unwilling to participate or express a preference in the proceedings, the court must record the reasons for this. To assist the child in participating s 61(1)(c) provides that the presiding officer may intervene in the questioning and cross-examination of the child if the court finds that it would be in the interests of the child. This is an indication of the steps taken in the Act to move away from the previous adversarial process that dominated children's court proceedings. S 61(2) of the Act prescribes that s 170A of the Criminal Procedure Act 51 of 1977 is applicable to a child who is a party or a witness in the proceedings before a children's court where this would be in the best interests of that child. The court is also empowered in terms of s 61(3)(a) to order at any stage of the proceedings that the matter or any issue in the matter before the children's court be disposed of separately and in the absence of the child if this would be in the best interests of that child and to record the reasons for such order in terms of s 61(3) of the Act. The participation of children is ensured in proceedings where evidence is received in a language in which the child is not conversant with the provision of s 52(2)(b) of the Act provides allowing for the use of suitably qualified or trained interpreters.

⁵⁸⁶ Although adoption played an important role in Roman law (see discussion 2 1 5 2 2 *supra*) it was not received in Roman-Dutch law, compare De Groot *Inleidinge* 1 6 3; Voet 1 4 3; Van der Keessel *Praelectiones* 1 6 1; Van der Linden *Koopmans Handboek* 1 4 2. South Africa received adoption as part of its legal system by statutory enactment (see 3 1 4 *supra*). See also Ferreira 19-35.

to his or her adoption;⁵⁸⁷ even less were the views of a child below ten years considered.⁵⁸⁸ However, the Children's Act provides that where a child who is younger than ten years, but is of such age, maturity or stage of development to understand the implications of such consent, that child's consent is required for his or her adoption.⁵⁸⁹ The child's consent to his or her adoption is the most direct form of participation in a legal matter affecting the child and in line with the child-centred approach advocated in the Children's Act.⁵⁹⁰ The consent of

⁵⁸⁷ Joubert 1983 *THRHR* 136 poses the question whether the consent of the child should be regarded as a mere rule of practice in order to ensure the success of the adoption. This question is asked with regard to children of ten years (or as he argues of eleven years) or older. It seems to be accepted that if the child is younger than ten years the adoption will always be in the child's best interests. Heaton 160 regards the present South African position where the parent or guardian need not consent to the adoption on behalf of a child less than ten years as satisfactory. Her argument is that it would be futile to require consent on behalf of the child because the aim is to determine whether the child wants to be adopted or not. Her suggestion that the Child Care Act be amended to accommodate the wishes of the child who is younger than ten years has been incorporated into s 233(1)(c)(ii) of the Children's Act which entered into operation fully on 1 April 2010.

⁵⁸⁸ This is why S 18(4)(c) of the Child Care Act referred to the requirement of the proposed adoption serving "the interests and is conducive to the welfare of the child". The comprehensiveness of the required report in terms of regs 2(4)(a) to (h) for the purposes of s 14(2) care proceedings as opposed to the generalisations of s 18(4)(a) to (c) of the Child Care Act was striking. The regulations issued in terms of the Children's Act do not contain a specific format for an adoption report as is the case for a report to be submitted by a designated social worker for consideration by the children's court in terms of s 155(2) of the Children's Act. However, the best interests of the child standard is used as a focal point in any adoption report. Beside the provisions of ss 233(1)(c)(i) and (ii), 234(2) and (6)(b)(ii), 243(1)(a) allowing the child direct participation, there are also the other provisions of the Children's Act that enhance the participatory rights of the child as discussed in 5 4 5 and 5 4 6 *infra*.

⁵⁸⁹ S 233(1)(c)(ii) of the Act. The implication of the child's consent is to be counselled by the social worker facilitating the adoption. In terms of s 233(4) of the Act a child who is ten years or older or a child who is of such age, maturity and stage of development so as to understand the implications of his or her consent, must receive counselling from the social worker facilitating the adoption on the decision to make the child available for adoption and by implication of the child's consent to adoption.

⁵⁹⁰ Ferreira (290-295) presents convincing arguments that the child's consent to his or her adoption should be confined to the child's understanding of the nature and import of his or her adoption. She argues that that the consent required in the Child Care Act was too rigid. She adds that the nature and import of the child's consent was not addressed adequately in the Child Care Act and contends that where the child's understanding of the nature and import of his or her specific adoption is insufficient, the child's consent should be discounted. S 19 of the Child Care Act did not provide for the dispensing with the child's consent. However, s 241(1) of the Children's Act provides that where a person referred to in s 233(1) (and this may conceivably include a child, however, it is doubted as it could be considered not to be in the best interests of the child) withholds consent, a children's court may, despite the absence of consent, grant an order of adoption if the consent (a) has been withheld unreasonably and (b) the adoption is in the best interests of the child. The requirement in s 233(4) of the Act for counselling prior to the child's consent will reduce the risk of a child consenting to his or her adoption without understanding the nature and import of his or her consent to adoption.

the child must be informed consent.⁵⁹¹ Where the parents of the child are themselves still children, the Children's Act requires the mother or father of the child to be assisted with their consent for the adoption of their child.⁵⁹²

Where a child younger than ten years expressed a desire that the adoption should not continue, it would be only where the best interests of the child dictated the contrary, that the court would disregard the views of the child.⁵⁹³

⁵⁹¹ This was evident from the wording of s 18(4)(e) of the Child Care Act that the child "if over the age of ten years, consents to the adoption and *understands the nature and import of such consent*". It is suggested that the same understanding is to be derived from the wording of ss 233(1)(c)(i) and (ii) of the Children's Act. Ferreira 296 argues that s 233(1)(c)(i) does not require the child's understanding of his or her consent. The requirement of counselling for children prior to consenting in s 233(4) of the Act then becomes irrelevant. The presiding officer before whom the child has to sign his or her consent in terms of s 233(6)(a)(ii) and who has to verify the child's signature in terms of s 233(6)(a)(iii) of the Act is obliged to ensure that the best interests of the child prevail. It is doubtful whether a child's signature will be verified if it appears that the consent is not informed consent.

⁵⁹² S 18(4)(d) of the Child Care Act required that the consent to an adoption order must have been given by both parents of the child, or, "if the child is born out of wedlock, by both the mother and the natural father of the child, whether or not such mother or natural father is a minor ... and whether or not he or she is assisted by his or her parent, guardian". S 233(1)(a) of the Children's Act provides that consent for the adoption of a child must be given by each parent of the child provided that "if the parent is a child, that parent is assisted by his or her guardian". Mosikatsana and Loffell "Adoption" in Davel and Skelton *Commentary on the Children's Act* (2007) 15-11/15-12 refer to the fact that if the parent of the adoptive child is him or herself a child then assistance of his or her parent is required. They observe that this requirement seems to be at odds with s 5(2) of the Choice on Termination of Pregnancy Act 92 of 1996. Louw "Adoption of Children" in Boezaart *Child Law in South Africa* 148 mentions that the wording of s 233(1)(a) has revived the legal position as held in *Dhanabakium v Subramanian* 1943 AD 160 regarding the involvement of "minor's" parents in the adoption of the "minor's" child. The question posed by Louw (*op cit*), regarding the uncertainty if the child's parents do not assist the child with his or her consent, whether that is important. Her argument that if the judgment in *Dhanabakium v Subramanian* is anything to go by, then it may be that where the parents (or guardian for that matter) have not assisted the child with the required consent, then the adoption order may be regarded as having been granted without the parent's consent. This may then be considered as a valid ground for an application for rescission (in terms of s 243(3)(b)) of the adoption order. Ferreira 288 views the provisions of s 233(1)(a) as a retrogressive step. Where the consent of the unmarried parent who is still a child to the adoption of their child is not assisted by the unmarried child's parent, it is suggested that the route in s 241(1) of the Children's Act be followed and that the children's court may dispense with the assistance of the child's parents in the best interests of the child.

⁵⁹³ Ferreira 299 suggests that a provision listing the circumstances where the consent of the child may be dispensed with should be inserted in the Children's Act. This would be a radical departure from all pieces of legislation dealing with adoption up to the present. Louw in *Child Law in South Africa* 145 n 108 refers to the SALC Discussion Paper 103 par 18 4 7 where the consent of the child concerned is discussed. What is apparent from the responses received is that the views of the child had to be considered and it appears that the dispensing with the child's consent was not an option. S 230(1)(a) of the Children's Act provides that a child may (only) be adopted if the adoption is in the best interests of the

The child has a period of 60 days in which to withdraw his or her consent to the adoption.⁵⁹⁴ The inclusion of children within this so-called “cooling-off” period is something that may present problems in future.⁵⁹⁵

A new innovation with adoptions is the post-adoption agreement which may be entered into between the parent or guardian of a child and the prospective adoptive parent.⁵⁹⁶ The post-adoptive agreement may not be entered into without the consent of a child who is of such age, maturity and stage of development to understand the implications of such an agreement.⁵⁹⁷ A post-adoptive agreement will only be confirmed by the court if it is in the best interests of the child⁵⁹⁸ and only takes effect after it has been made an order of the court.⁵⁹⁹ Such post-adoptive agreements may be amended or terminated only by order of the court on application by among others such adopted child.⁶⁰⁰

The Act further prescribes that such a post-adoptive agreement may not be entered into without the consent of the child if the child is of such age, maturity and stage of development to understand the implications of such an agreement.⁶⁰¹ A post-adoption agreement may also be amended or terminated

child. This overarching requirement read with s 229 of the Children’s Act, which sets out the purpose of adoption, presents sufficient guidance to the court when considering the consent of the child.

⁵⁹⁴ S 233(8) of the Act. The Child Care Act in terms of s 18(4)(e) placed no time limit on the withdrawal of the child’s consent, which might have occurred at any time before the adoption order was granted. It may be argued that it is not in the child’s best interests to have the same period of 60 days to reconsider for children. As Mosikatsana and Loffell in Davel and Skelton *Commentary on the Children’s Act* 15-13 rightly mention that the decision for adoption is difficult and needs careful consideration on the part of the consenting party, here the child.

⁵⁹⁵ S 243(1)(a) of the Children’s Act allows a child to apply for rescission of his or her adoption order. S 243(3)(a) provides that rescission of an adoption order may be granted if it is in the best interests of the child, which is a very wide-ranging ground taking the provisions of s 7 of the Children’s Act into consideration.

⁵⁹⁶ S 234(1) of the Act.

⁵⁹⁷ S 234(2) of the Act.

⁵⁹⁸ S 234(4) of the Act.

⁵⁹⁹ S 234(6)(a) of the Act.

⁶⁰⁰ S 234(6)(b)(ii) of the Act.

⁶⁰¹ S 234(2) of the Act. S 234(3) of the Act obliges the adoption social worker facilitating the adoption to assist the parties, which will include a child of such age, maturity and stage of development to understand the implications of the agreement, and to counsel them on the implications of such an agreement. Compare Louw “Open adoption: Panacea or Pandora’s box” 2003 *De Jure* 262-277. Ferreira 2006(2) *Spec Jur* 135-136 voices her concern

by order of the court by any of the parties⁶⁰² to the agreement or by the adopted child.⁶⁰³ It is conceivable that a post-adoption agreement may introduce a variety of possibilities regarding communication and contact with the adopted child, but what needs to be emphasised is the active involvement of the child concerning his or her future.⁶⁰⁴ The requirement of coming to such an agreement before the adoption is sound in theory and practice for its prerequisite of openness and mediated agreement.⁶⁰⁵

A child may in terms of the Children's Act apply for the adoption to be rescinded.⁶⁰⁶ The guiding criterion for the rescission of an adoption is the best interests of the child and an adoption will thus only be rescinded if the rescission is in the best interests of the child.⁶⁰⁷

The adopted child as party to the adoption proceedings is also authorised to file an application for the rescission of the adoption order not later than two years

regarding the possible effect of the post-adoption agreement may have on the adoption application. Louw 2003 *De Jure* 277 shares Ferreira's views in general terms and then highlights her concern about the child's stability being jeopardised because the child "must now 'bond' with a variety of persons acting as parents" and this could result in endless possibilities for disputes between the various "parents" giving rise to increased litigation regarding issues ranging from religious upbringing to contact arrangements and the maintenance of the child concerned. Compare Ferreira 309-310; Louw in *Child Law in South Africa* 150. See discussion on adoption and the child's involvement in post-adoption agreements in 4 3 1 *supra*.

⁶⁰² S 234(6)(i) of the Act.

⁶⁰³ S 234(6)(ii) of the Act.

⁶⁰⁴ Ss 234(1)(a) and (b) of the Act setting out the aim of the post-adoption agreement. The concern of Ferreira 2006(2) *Spec Jur* 135-136 regarding the effect which the post-adoption agreement may have on the adoption application will be dealt with when considering the best interests of the child in 5 5 *infra*. The view of Louw 2003 *De Jure* 277 that the SALC did not canvass the possibility of formalising post-adoption agreements in greater depth does not sufficiently recognise the mediatory element of a post-adoption agreement. Mosikatsana and Loffell in *Commentary on the Children's Act* 15-14 refer to the promotion of "honesty and openness" that is achieved by not attempting to create legally enforceable rights, but rather promote voluntary agreements.

⁶⁰⁵ The confirmation of the post-adoption agreement will only be ordered by the court in terms of s 234(6)(a) of the Act if the agreement is in the best interests of the child.

⁶⁰⁶ S 243(1)(a) of the Act. The option was not available for the child in the Child Care Act; s 21(1) of the Child Care Act did not mention the child as a party who could apply for a rescission.

⁶⁰⁷ S 243(3)(a) of the Act. The best interests of the child standard has already been applied for the rescission of an adoption order; see *T v C* 2003 (2) SA 298 (W) par [18] 307B/C-307C/D and *A S v Vorster* 2009 (4) SA 108 (SE) 122I/J. S 51 of the Act provides that any refusal to make an order may be appealed thus allowing for an appeal against the refusal to grant an adoption order.

after the order for adoption was made.⁶⁰⁸ The guiding principle for granting of a rescission of an adoption order is the best interests of the child. There is specific provision for the rescission of an adoption order if the parent whose consent was required was not obtained,⁶⁰⁹ but not if the consent of the child was not obtained.⁶¹⁰ However this does not mean that the child would not be able to apply for a rescission of an adoption because the governing principle of the best interests of the child would come to the assistance of the child in such an application for rescission.⁶¹¹

The jurisdiction of the children's court has been enhanced considerably with the provisions of section 45⁶¹² and orders that the children's court can make in terms of section 46.⁶¹³ This is in addition to the orders which the children's court

⁶⁰⁸ S 243(1)(a) of the Act. S 243(2) of the Act provides that an application for rescission must be lodged within a reasonable time, but not exceeding two years after the order of adoption.

⁶⁰⁹ S 243(3)(b) of the Act.

⁶¹⁰ This may be the situation where the consent of a child under the age of ten years, but who has sufficient maturity to understand the implications of being adopted was never obtained because it was accepted that the child is too young (eg nine years old). It is therefore suggested that where the court is of the opinion that the child is of sufficient maturity to understand the implications of an adoption, the child's opinion is to be considered.

⁶¹¹ S 243(3)(a) of the Act.

⁶¹² See discussion 5 4 3 *supra*.

⁶¹³ In addition to the extended jurisdiction found in s 45, s 46(1) provides that a children's court may make the following orders-

- “(a) An alternative care order, which includes an order placing the child;
 - (i) in the care of a person designated by the court to be the foster parent of the child;
 - (ii) in the care of a child and youth care centre; or
 - (iii) in temporary safe care;
- (b) an order placing the child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court;
- (c) an adoption order, which includes an inter-country adoption order;
- (d) a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night or for a specific period;
- (e) shared care order instructing different care-givers or child and youth care centres to take responsibility for the care of the child at different times or periods;
- (f) a supervision order, placing a child, a parent or care-giver of a child, or both the child and the parent or care-giver, under the supervision of a social worker or other person designated by the court;
- (g) an order subjecting a child, a parent or care-giver of the child, or any person holding parental responsibilities and rights in respect of a child, to –
 - (i) early intervention programme; or
 - (ii) a family preservation programme; or
 - (iii) both early intervention services and a family preservation programme;
- (h) a child protection order, which includes an order-

can make in terms of section 156 of the Act, having determined that the child is a child in need of care and protection.⁶¹⁴ Furthermore there are also the

-
- (i) that a child remains in, be released from, or returned to the care of a person, subject to conditions imposed by the court;
 - (ii) giving consent to medical treatment of, or to an operation to be performed on, a child;
 - (iii) instructing a parent or care-giver to undergo professional counselling, or to participate in mediation, family-group conference, or other appropriate problem-solving forum;
 - (iv) instructing a child or other person involved in the matter concerning the child to participate in a professional assessment;
 - (v) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, pending further inquiry;
 - (vi) instructing a person to undergo a specified skills development, training, treatment or rehabilitation programme where this is necessary for the protection or well-being of a child;
 - (vii) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure;
 - (viii) instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure;
 - (ix) instructing that a person be removed from a child's home;
 - (x) limiting access of a person to a child or prohibiting a person from contacting a child; or
 - (xi) allowing a person to contact a child on the conditions specified in the court order;
 - (i) a contribution order in terms of the Act;
 - (j) an order instructing a person to carry out an investigation in terms of section 50; and
 - (k) any other order which a children's court may make in terms of [another] provision of the Act."

In terms of s 46(2) of the Act a children's court may withdraw, suspend or amend an order made in terms of s 46(1), or replace such an order with a new order.

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Orders which the children's court can make is a vast improvement on the four types of orders which the children's court could make in terms of s 15(1) of the Child Care Act. The improvement in the number and variation of the types of orders that can be implemented is welcomed, see eg Matthias and Zaal "Children in need of care and contribution orders" in Davel and Skelton *Commentary on the Children's Act* 9-22. The scope of this research does not allow for a detailed discussion of the new improved format of children's court orders. It suffices to mention that the court is empowered to make various orders aimed at the care and protection of the child after the court has found the child to be a child in need of care and protection in terms of s 155 of the Act. Matthias and Zaal in *Commentary on the Children's Act* 9-22 mention that the new provision in s 156 may be divided into five main categories. These provide that a child in need of care and protection –

- (a) Be left in the care or returned to the care of a parent or care-giver with no prescribed conditions if they are found to be suitable to provide for the safety and well-being of the child;
- (b) Be placed with a parent or care-giver, but subject to prescribed conditions (an in-home placement); or
- (c) Receive an alternative-care placement, such as foster care, temporary safe care pending adoption, or placement in a child and youth care centre or special needs facility.
- (d) Be referred for medical, psychological or other treatment (eg for dependence-producing substances).
- (e) Be protected by interdict which prevents another person who may harm the child from having contact with the child (s 156(k) of the Act). S 153 sets out the procedure which

additional powers of the children's court set out in section 48 the important provisions being the variation and termination of any order.⁶¹⁵ Another important section which relates directly to the participation of children is the improved rights of appeal set out in section 51.⁶¹⁶ It is clear therefore that the participation of children in the children's court has not only received general statutory recognition in the Act through section 10 of the Act but, as will be seen in the ensuing discussion, has been enhanced notably by actual participation.⁶¹⁷

allows for a person who has committed domestic violence to be removed from the house where the child is residing. In terms of ss 153(5) and (6) the children's court can confirm that a person who has committed an act of domestic violence and given notice to appear before the court, be removed from the child's home in order to protect the child. However, as Matthias and Zaal in *Commentary on the Children's Act 9-17* argue a possible interpretation of s 153(6) is that the children's court must have heard the alleged offender before the court can act further in terms of s 153(6). The non-appearance could possibly in terms of this interpretation govern the actions of the court. It must be agreed that this interpretation could never have been the intention of the legislature.

See further in general regarding the new format of orders which a children's court can impose Matthias and Zaal "The Child in Need of Care and Protection" in *Boezaart Child Law in South Africa* 176-180.

⁶¹⁵ S 48 grants additional powers to the children's court and provides –

- "(1) A children's court may, in addition to the orders it is empowered to make in terms of this Act-
- (a) grant interdicts and auxiliary relief in respect of any matter contemplated in section 45(1);
 - (b) extend, withdraw, suspend, vary or monitor any of its orders;
 - (c) impose or vary time deadlines with respect to any of its orders;
 - (d) make appropriate orders as to costs in matters before the court; and
 - (e) order the removal of a person from court after noting the reason for the removal on the court record.
- (2) A children's court may for the purposes of this Act estimate the age of a person who appears to be a child in the prescribed manner."

Gallinetti in *Commentary on the Act 4-15* draws attention to the need for empowering the children's court to grant relief by way of interim orders in urgent cases which has its origin in recommendations contained in the SALC Discussion Paper 103 par 23 2 1 pp 1144-1145, 1147.

⁶¹⁶ This section has removed the limitations placed on appeals by s 16A of the Child Care Act, which restricted appeals to any order or refusal to make an order in terms of ss 11 (removal of a child to a place of safety on order of the court or sworn information), 15 (orders of children's court after inquiry) or 38(2)(a) (orders of children's court after an absconders inquiry) or against the variation, suspension or rescission of such order. S 51(1) provides that *any party* involved in a matter before a children's court may appeal against *any order* or *any refusal* to make an order, or against the variation, suspension or rescission of such order of the court to the High Court having jurisdiction. (Emphasis added.)

⁶¹⁷ There can be little doubt that participation as one of the founding principles of the Act will play a major role in the further development of children's rights in South Africa.

The involvement of children, irrespective whether from married or unmarried parents, in the new process of parental responsibilities and rights agreements⁶¹⁸ and parenting plans,⁶¹⁹ is indicative of the recognition of the children's views in matters affecting children. A child may also bring an application, with leave of the court, for the suspension for a period or the termination of some or all of the parental responsibilities and rights which a specific person has in respect of the child.⁶²⁰ Section 29 of the Act deals with court proceedings and confers jurisdiction on the court within the area where the child is ordinarily resident to hear applications in terms of specific sections of the Act.⁶²¹ Section 29(4)⁶²² of the Act specifically refers to a court considering an application referred to in section 29(1)⁶²³ to be guided by the general principles set out in chapter 2 of the

⁶¹⁸ S 22(6)(a)(ii) provides that a child, acting with leave of the court, may file an application for the parental responsibilities and rights agreement registered by the family advocate to be amended or terminated. Where the children's court has made a parental responsibilities and rights agreement an order of court, a child may similarly in terms s 22(6)(b)(ii) with leave of the court apply to have a parental responsibilities and rights agreement amended or terminated. Only the High Court may in terms of s 22(7) confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of the child. Compare regs 8(3)(a), 8(3)(b), 8(4) and 11 confirming the participation of children who are of such age, maturity and stage of development in the preparation of parental responsibilities and rights agreements and parenting plans involving them referred to in 4 5 2 *supra*.

⁶¹⁹ S 34(5)(b) of the Act provides that a child, with leave from the court may apply for the amendment or termination of a parenting plan.

⁶²⁰ S 28(3)(c) of the Act .

⁶²¹ S 29(1) of the Act stipulates that applications in terms of ss 22(4), 23, 24, 26(1)(b) or 28 may be brought in the children's court as one of the three forums with jurisdiction, the other two being the High Court and a divorce court dealing with a divorce matter. S 29 does not refer to s 34(5) but s 34(6) provides that s 29 applies to an application in s 34(2) for the registration of a parenting plan, but no mention is made regarding the jurisdiction of the children's court for an application in terms of s 34(5). There is only reference to a "court" in s 34(5) and "court" is not defined in s 1 of the Act. Heaton "Parental responsibilities and rights" in Davel and Skelton *Commentary on the Children's Act 3-36/3-37* suggests that the children's court would have jurisdiction to consider such application by virtue of the provisions of ss 45(1)(a), (b) and (k) empowering the children's court to adjudicate any matter involving children's protection and well-being, care, contact and any other matter relating to the care, protection or well-being of a child which is provided for in the Act.

⁶²² Heaton in *Commentary on the Children's Act 3-26* opines that s 29(4) is superfluous because of the provisions in s 6(1) of the Act. However, the whole ch 2 of the Act is applicable and not only s 6(1) of the Act. Therefore the provisions of ss 10 and 14 specifically apply.

⁶²³ That is applications for orders concerning parental responsibilities and rights agreements (s 22); the assigning of care and contact orders to interested persons (s 23); assigning of guardianship orders by the High Court (s 24); orders confirming paternity (s 26(1)(b)); the termination, extension, suspension or restriction of parental responsibilities and rights.

Act.⁶²⁴ Section 29(6) of the Act is subject to section 55 which refers only to legal representation in a children's court.⁶²⁵

The child is not only assured of full participatory rights⁶²⁶ in the children's court in terms of the Act, but is also assured of a child-friendly atmosphere. A child may be brought before a children's court in more than one way. Starting with section 47, when it appears to any court in the course of those proceedings that a child involved in or affected by those proceedings⁶²⁷ is in need of care and protection,⁶²⁸ the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for investigation.

⁶²⁴ Of interest for the present discussion is the best interest standard referred to in s 6(2)(a), set out in s 7 and confirmed in s 9 of the Act. The participatory right of the child contained in s 10 read with s 14 of the Act is of specific importance.

⁶²⁵ It appears that s 29(6) provides three possibilities for legal representation. In the first place the court may appoint a legal representative in terms of s 55(1) of the Act. This appointment will be when the court is of the opinion that it would be in the best interests of the child to have a legal representative. However, it is the Legal Aid Board (now Legal Aid South Africa) who decides in terms of s 55(2) whether to appoint a legal representative. The Legal Aid Guide for 2009 (effective from 10 February 2009) par 4 18 1, informs that the allocation of legal aid to a child in civil matters is guided by the substantial injustice provision in s 28(1)(h) of the Constitution stipulating that "[e]very child has the right to have legal aid assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result". The criteria used to decide if a child has a right to legal aid in civil cases at state expense are: the seriousness of the issue for the child, eg if the child's constitutional rights or personal rights are at risk; the complexity of the relevant law and procedure; the ability of the child to represent himself or herself effectively without a lawyer; the child's chances of success in the case and whether the child has a substantial disadvantage compared with the other party in the case. The implications of the provisions of s 55 of the Act for the child will be discussed in more detail in 5 4 6 2 *infra*. The second option is to appoint legal representation for the child and to order the parties or any one of them to pay the costs of such representation. The third option is for the child to appoint his or her own legal representative as provided for in s 54 of the Act. Both sections 54 and 55 of the Act are not yet in operation. Heaton *in Commentary on the Children's Act* 3-26 informs that the powers conferred in terms of ss 29(5) and (6) of the Act broadly correspond to those a court has in terms of a divorce of a couple with minor dependent children as provided for in ss 6(2) and (4) of the Divorce Act 70 of 1979 and s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987.

⁶²⁶ As a party to children's court proceedings this assurance is found in ss 1, 6(2)(a), 10, 11(3), 12(1), 13, 14, 15(2)(a), 22(6)(a)(ii), 28(3)(c), 29(6)(a), 31(1)(a), 34(5)(b), 51(1), 52(2)(a), 53(2)(a), 54, 55(1), 56(b), 57(2), 58(a), 59(1)(b), 60(1)(c)(i), 61, 63(3), 65(4), 69(3), 70(1), 71(1), 129, 130, 132, 133, 134, 159(2), 233(1)(c)(i) and (ii), 234(2) and 234(6)(b)(ii), 238(2)(a), 243(1)(a), 261(9) and 262(9), 286(1)(iv), 287(b) and 289 of the Act.

⁶²⁷ Eg in a criminal court on a charge of rape it appears that the victim is a child in need of care and protection.

⁶²⁸ As contemplated in s 150 of the Children's Act.

Section 53(2)(a)⁶²⁹ allows a child who is affected by or involved in a matter to be adjudicated by the children's court to approach that court.⁶³⁰ Section 61(1)(a) obliges the presiding officer in children's court proceedings before him or her to allow the child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so.

Furthermore, the Children's Act provides for possible participation of children in conferences prior to children's court proceedings.⁶³¹ The limited experience in utilising this form of informal dispute resolution is acknowledged in care and protection proceedings.⁶³² However, the securing of the child's voice in matters concerning the child, even where this would involve informal hearings, can be

⁶²⁹ S 53(2)(a) of the Act provides that a child, who is affected by or involved in a matter to be adjudicated by a court, may approach the clerk of the children's court for the referral of a matter to the children's court (the section refers to persons who may approach "a court" but reference ostensibly is to the children's court). S 53(2)(a) is one of four ways in which a matter may be brought to the children's court's attention.

⁶³⁰ In terms of s 53(1) of the Act the child will bring the matter which falls within the jurisdiction of the children's court, to the attention of a clerk of the children's court for referral to a children's court. The reg 6 sets out how this clerk must go about ensuring that the required information is obtained and placed before the presiding officer.

⁶³¹ S 69(3) of the Act dealing with pre-hearing conferences provides that a child involved in a children's court matter may attend and may participate in such conference unless the children's court decides otherwise. Ss 70 and 71 of the Act dealing with family-group conferences and other lay forums respectively do not mention the participation of children specifically. However, s 49(2) of the Act requires the children's court before ordering a lay-forum hearing to take into account all relevant factors including –

- (a) the vulnerability of the child;
- (b) the ability of the child to participate in the proceedings;
- (c) the power relationships within the family; and
- (d) the nature of any allegations made by the parties in the matter.

Gallinetti in *Commentary on the Children's Act* 4-16 draws attention to the parallel between lay-forum hearings where there is a balancing of rights and responsibilities and restorative justice where the focus is on the identification of responsibilities, addressing the needs of the child and promotes healing. According to Skelton "Juvenile justice reform: Children's rights and responsibilities versus crime control" in Davel *Children's Rights in a Transitional Society* (1999) 94 the main aim of this form of conferencing is to formulate a plan for how best to right the wrong. The SALC Discussion Paper 103 par 23 5 1 pp 1157-1158 discussed the application of the family-group conference as a form of self-help and self-empowerment for dysfunctional or disputing families. The SALC Discussion Paper 103 par 23 6 3 1 p 1166 recommended that the most appropriate form of extra-curial remedy available should be at the disposal of the children's court (referred to in the discussion paper as Child and Family Courts).

⁶³² Gallinetti in *Commentary on the Children's Act* 4-34.

the platform to propel the participation which the children have asked for.⁶³³ Children are ensured of their participatory rights⁶³⁴ with their right to approach the children's court regarding any matter which falls within the jurisdiction of a children's court.⁶³⁵

The child's right of participation in inter-country⁶³⁶ adoptions⁶³⁷ is recognised in the Act.⁶³⁸ Therefore the provisions of sections 10, 14 and 55 apply in general. This ensures that the views of the child, the right of the child to access a children's court and to be assisted in doing so and the right to legal representation are maintained.⁶³⁹

⁶³³ SALC Discussion Paper 103 par 3 1 1 p 36 reflected that the right to be heard, consulted, respected, taken seriously, etc was accentuated in the majority of responses from children.

⁶³⁴ S 53(2) of the Act provides that the following persons may approach the children's court (the section refers to "a court" but reference ostensibly is to the children's court) –

- (a) a child who is affected by or involved in a matter to be adjudicated;
- (b) anyone acting in the interest of the child;
- (c) anyone acting on behalf of a child who *cannot act in his or her own name*;
- (d) anyone acting as a member of, or in the interest of, a group or class of children; and
- (e) anyone acting in the public interest. (Emphasis added.)

This section is similar to the provisions contained in s 15 of the Act (which came into effect on 1 July 2007). Both sections can be seen as reaffirming s 38 of the Constitution. This section confirms the *locus standi* of children before the children's court as well as the *locus standi* of persons acting in the interests of children and persons acting on behalf of children.

⁶³⁵ S 53(1) of the Act provides that any person listed in subs (2) may bring a matter falling within the jurisdiction of a children's court to this clerk for referral to a children's court.

⁶³⁶ As Human in *Commentary on the Children's Act* 16-3 points out there is a difference in the spelling of the word with the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption opting for "intercountry" and the CRC and Children's Act using "inter-country". For the sake of consistency the hyphenated form will be used.

⁶³⁷ Arts 4(d)(1) to (4) of the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (unanimously adopted at the 17th session of the Hague Conference on Private International Law on 29 May 1993 and ratified by South Africa on 21 August 2003) sets out the requirements regarding the consent of a child who is of such age and degree of maturity to understand the implications of adoption. Art 21 of the CRC requires states parties who recognise and/or permit the system of adoption to ensure that the "best interests of the child shall be *the* paramount consideration" and that "the adoption of a child is authorised only by competent authorities ... and if required, the persons concerned [who includes a child of sufficient maturity to understand the implications of adoption] have given their informed consent to the adoption on the basis of such counselling as may be necessary". (Emphasis added.)

⁶³⁸ The purpose of chapter 16 as set out in s 254 of the Act is reflected in the following: (a) to give effect to the Hague Convention on Inter-country Adoption; (b) to provide for the recognition of certain foreign adoptions; (c) to find fit and proper adoptive parents for an adoptable child; and (d) generally to regulate inter-country adoptions.

⁶³⁹ The children's court as forum of choice and application was confirmed in *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) par [62] B-C/D.

5 4 5 4 How does section 10 affect the participatory rights of children in family-law matters?

The participation of children is interrelated in a myriad of family matters and beyond, thereby confirming that the traditional method of distinguishing between private-law and public-law matters cannot comprehensively encompass child law.⁶⁴⁰ There has been increasing recognition of the child's views in divorce matters as well as care and contact related matters.⁶⁴¹

The novelty⁶⁴² of receiving the views of children in the divorce of their parents is something new in South African jurisprudence.⁶⁴³ Although children's rights are

⁶⁴⁰ Keightley in *Children's Rights* 1; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 275; Boezaart in *Child Law in South Africa* 3.

⁶⁴¹ The new terminology of the Act relating to "custody" and "access" is adhered to and where required the provision as set out in s 1(2) of the Act requiring any law, including the common law, referring to "custody" and "access" to be construed as referring to "care" and "contact" will be followed. The views of the child have retained their prominence in child abduction matters as is reflected in s 278(3) of the Children's Act. Where the child is of such age and maturity the court must give the child an opportunity to raise an objection to being returned and must give due weight to such objection.

⁶⁴² Burman, Matthias, Sloth-Nielsen and Zaal "Beyond the Rights of the Child" in Burman *The Fate of the Child: Legal Decisions on Children in the New South Africa* 1 comment that, seen in broad historical context, children as identifiable clients of the justice system were largely invisible before the mid-1980s.

⁶⁴³ Burman, Matthias, Sloth-Nielsen and Zaal *loc cit* make the following important statement regarding the effect of family-law decisions on children "[d]ecisions that radically affect children's futures – whether custody decisions on divorce, fostering, children's homes, adoption placements, or juvenile court decisions – have lifelong consequences". Compare Van Bueren *Rights of the Child* 137. Kassan 2003 *De Jure* 164 cautions against the unnecessary involvement of children in divorce proceedings. Robinson 2007 *THRHR* 269 found that there was not a single reported judgment on the provisions of s 6(4) of the Divorce Act 70 of 1979 which empowers the court to appoint a legal practitioner to represent the child at divorce proceedings of his or her parents. He adds that this may be indicative of the courts not seriously considering such legal representation in divorce matters. Sloth-Nielsen 2008 *SAJHR* 503 shares this view and opines that this may be due to the office of the Family Advocate being regarded as theoretically representing the best interests of the child and especially with the Mediation in Certain Divorce Matters Act 24 of 1987 providing for a court in certain circumstances to consider the report and recommendations of a Family Advocate before granting a decree of divorce such as variation, rescission or suspension of orders with regard to custody or guardianship of minor children, in order to safeguard the interests of such children. However, for concerns regarding the efficacy of presenting the views of the child compare Burman and McLennan "Providing for children? The Family Advocate and the legal profession" in Keightley *Children's Rights* (1996) 69-81; Africa, Dawes, Swartz and Brandt "Criteria used by family counsellors in child custody cases: a psychological viewpoint" in Burman *The Fate of the Child: Legal Decisions on Children in The New South Africa* 132; Pillay "The custody evaluation process at the Durban office of the Family Advocate: An analysis of the criteria used by family counsellors in the drafting of assessment reports" (Dissertation:

now firmly entrenched in the Constitution and have gained acceptance in case law in the recent past, there is still a long way to go before the voice of the child in divorce matters may become commonplace.⁶⁴⁴

Judgments which have been handed down since the coming into operation of section 10 refer to the provisions of section 28(1)(h) of the Constitution and in some instances the provisions of articles 12 of the Convention on the Rights of the Child and 4(2) of the African Charter. However, reading section 10 with section 14 of the Act as well as section 28(1)(h) of the Constitution justifies the implication that section 10 is to be regarded as the key in domestic legislation for transmitting the provisions of article 12(1) of the Convention on the Rights of the Child to the family-law sphere.⁶⁴⁵

Interdisciplinary Masters Degree in Child Care and Protection 2003 UDW) 42; Pillay and Zaal "Child-interactive video recordings: A proposal for hearing the voices of children in divorce matters" 2005 *SALJ* 684-695.

⁶⁴⁴ Sloth-Nielsen and Mezmur "2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)" 2008 *IJCR* 16 mention that the previous invisibility of children in civil proceedings, especially in divorce proceedings, have altered significantly. Reference to the important judgments handed down in this facet of family law affecting children are as follows: *Fitschen v Fitschen* [1997] JOL 1612 (C) the court refused an application for a court-appointed legal representative for the children in a hotly disputed custody battle during the divorce of the parents. *Soller v G* 2003 (5) SA 430 (W) is the first reported judgment which fully canvasses the interpretation and the application of s 28(1)(h) of the Constitution. However, for purpose of the present discussion it is also the first reported judgment of a child bringing an application for the variation of a custody order granted during the divorce of his parents. *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) the court appointed a legal representative for the two children in an application by the father to have his access to his two daughters defined. The court also made an order in terms of which the two children were allowed to intervene and be joined as parties to the proceedings. The latest reported case where a child of twelve applied directly to Legal Aid South Africa to be assisted in an acrimonious litigation concerning the custody of the young girl is reported as *Legal Aid Board v R* 2009 (2) SA 262 (D). See also *HG v CG* 2010 (3) SA 352 (ECP) par [6] 355 H-J where the court specifically refers to the provisions of s 10 and par [17] 361 F-H where the court applies s 10 by saying that "[b]y 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". (Emphasis added.)

⁶⁴⁵ The linking of s 10 of the Act with art 12(1) of CRC, which has been described as the "soul" of the CRC, brings the legal subjectivity of children in South Africa into the legal limelight. For the importance of art 12 as one of the four principle articles in the CRC, compare De Villiers 1993 *Stell LR* 298; Sloth-Nielsen 1995 *SAJHR* 410-411; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 273; Robinson and Ferreira 2000 *De Jure* 56; Van Bueren in *Introduction to Child Law in South Africa* 203 and Robinson 2007 *THRHR* 270-277. Davel in *Commentary on the Children's Act 2-12/2-13* mentions *inter alia* that participation would refer to all the rules that allow the child to be heard directly, without an intermediary and include rules that require children to be consulted about their opinion, or enable children to

Judging from judgments handed down during the past decade it appears that there is a definite move towards a child-centred approach in divorce matters and care and contact applications where the views of the child are being considered and applied progressively in the best interests of the child.⁶⁴⁶ The following discussion of the prominent judgments from the past decade leaves no doubt as to the confirmation of the movement.

The tone was set in *McCall v McCall*⁶⁴⁷ and followed up in *Lubbe v Du Plessis*.⁶⁴⁸ The courts had identified the need to ensure that where the child was of sufficient intellectual and emotional maturity, weight and serious consideration should be given to the views of the child.⁶⁴⁹

become parties to legal actions, in order to allow them the right to participate in proceedings and/or demand a certain remedy.

⁶⁴⁶ Commentators like Pillay and Zaal 2005 *SALJ* 684-695 have frequently referred to the importance of arts 12 of the CRC and 4(2) of the ACWRC and how the standard which is set by the two articles can be employed to achieve an acceptable standard which our courts will be able to use when applying them in divorce litigation so as to gain an accurate understanding of the views and wishes of any children concerned. See also Robinson and Ferreira 2000 *De Jure* 55-58; Barratt 2002 *THRHR* 557-573; *The Fate of the Child: Legal Decisions on Children in the New South Africa* 146-149; Kassan 2003 *De Jure* 165-179; Davel in *Gedenkbundel vir JMT Labuschagne* 17-21. Robinson 2007 *THRHR* 270-271 informs that s 10 clearly establishes the right of the child who is competent to participate in any matter concerning that child including the divorce of his or her parents. This view is shared by Sloth-Nielsen and Mezmur 2008 *IJCR* 16-17, albeit with reference to art 12 of the CRC and not s 10 of the Act. However, the Supreme Court of Appeal in *F v F* 2006 (3) SA 42 (SCA) pars [25] and [26] 54F/G 54I 55C was not willing to accede to the request of the father to allow the child of ten years to express her views directly to the court, Acting Judge of Appeal Maya holding that it would not be proper that she be allowed to do so (mindful that the Supreme Court of Appeal is a court of record) due to a number of procedural and evidentiary problems that could arise. See also the recent decision of *HG v CG* 2010 (3) SA 352 (ECP) discussed in n 498 *supra*.

⁶⁴⁷ 1994 (3) SA 201 (C) 207H-I/J where Judge King set the direction in which development was to follow when it came to the question of hearing children whose parents were involved in divorce proceedings, holding that "if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment [then] weight should be given to his [the child's] *expressed preference*". (Emphasis added.)

⁶⁴⁸ 2001 (4) SA 57 (C) 73G-H/I where the court emphasised that if a child has sufficient intellectual and emotional maturity the court "should give *serious consideration* to the child's *expressed preference* and not lightly give an order which overrides this". (Emphasis added.)

⁶⁴⁹ Pillay and Zaal 2005 *SALJ* 686 comment that the combined efforts of *McCall* and *Lubbe* were to establish within the jurisdiction of the Cape High Court that the relevant views of a sufficiently mature child is to be regarded as a significant factor which the divorce courts need to consider carefully in determining post-divorce parenting arrangements. See also Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 156 who concludes that in custody and access decisions the South African divorce law requires

The decision of *Soller v G and Another*⁶⁵⁰ highlighted the child's right to participation when a fifteen-year old boy sought a variation of his custody order on the ground that he wanted custody to be awarded to his father.⁶⁵¹ The initial application was brought on behalf of the boy, K, by the applicant, an attorney who turned out to be struck from the roll. The court nevertheless decided that the matter required an assignment of a legal representative under section 28(1)(h) of the Constitution to assist K in his application. The court explained that a legal representative did not fulfil the same role as the office of the Family Advocate.⁶⁵²

The court said that the right contained in section 28(1)(h) of the Constitution is of potential application to a range of civil proceedings affecting a child.⁶⁵³ The court added and that there are few proceedings of greater importance to a child than those that determine the circumstance of his residence and family life, under whose authority he should live and the continuance and development of a relationship with both living parents and his sibling.⁶⁵⁴

the best interests of the child to be considered and that the wishes of the child (but only those children who are capable of forming their own views with reference to art 12 of the CRC because art 12 does not give an unequivocal right to be heard) should be given due weight. Robinson 2007 *THRHR* 270-272 in principle holds the same view. He further correctly mentions that s 10 should not be read *in vacuo* because there are a "battery of provisions" indicating the clear intention of the legislature to treat the legal position (of the child) on a totally different basis. Concluding his brief overview of the relevant provisions of the Bill (now Act) Robinson opines that the Bill (now Act) has elevated children's rights from a notion with a purely paternalistic ring to it to one where children now also have a right to participate.

⁶⁵⁰ 2003 (5) SA 430 (W). This case is referred to generally for its impact on the assigning of a legal representative to a child in terms of s 28(1)(h) of the Constitution. However, the first step is the right to participation which serves as a gateway to the right of the child to legal representation in civil matters as set out in s 28(1)(h) of the Constitution, mindful of the fact that the application of s 28(1)(h) is broader than s 10 as it applies to every child and not only those children who are of such age, maturity and stage of development to participate in an appropriate way.

⁶⁵¹ Par [1] 433G/H-I/J of the judgment starts off with the following statement "[t]his matter concerns the custody of a 15-year-old boy who, himself, seeks variation of a custody order ... at the heart of the application is the extent to which the views and desires of a young adult should be decisive of custodial and access issues". See discussion 5 2 3 1 4 *supra*.

⁶⁵² Par [20] 437B-C.

⁶⁵³ Par [5] 434F-F/G. The sphere of application for children is visibly opening up, eg adoptions, maintenance matters, domestic violence, children's court proceedings, inheritance, health care to name but a few. *In casu* the court was seized with the issue of custody of and access to K subsequent to the divorce of his parents.

⁶⁵⁴ Par [7] 434G-H. The importance of the provisions of s 31 of the Children's Act is illustrated here.

K's views had up to the proceedings before the court not been given due consideration and the court expressed the view that K was entitled to be listened to and his views were to be given respectful and careful consideration.⁶⁵⁵ The importance of the new child-centred approach in the *Soller* case is to be found in the court's acceptance that the paternalistic approach, which is often found with the best interest of the child,⁶⁵⁶ may in given

⁶⁵⁵ Pars [9] and [10] 435B-D/E. Robinson 2007 *THRHR* 269 observes that *Soller's* case raises some serious concerns. He mentions the following; the court *in casu* decided that the child was entitled to be listened to and to have his views respected and carefully considered, the reason being that any decision made by the court will impact heavily on the child (K) himself; the court conveyed that as a child, K was deserving of the protections set out in s 28 of the Constitution; the proceedings in which K was involved were of crucial importance in K's current life and future development; therefore the views and wishes of K were of particular importance to the divorce proceedings and thereafter the court appointed a legal practitioner for K. The concern that needs to be addressed is that K's position as a fifteen-year old does not really differ from that of other children who are caught up in the divorce of their parents. Robinson rightly expresses his concern why courts in general refrain from their constitutional and statutory duty of appointing legal representation for children. Divorce proceedings are of crucial importance to children and their lives are affected directly. One has to agree with Robinson's conclusion that the current position with regard to the hearing of the child's voice in essence reflects a typical paternalistic approach, also known as the *kiddie-saver* approach. Robinson is also concerned about the lack of clear principles to examine the issue of developing autonomy, ie how the decision-makers and courts should respond in a meaningful way to the expressed wishes of children who are not yet competent. It is further also disturbing that there is a lack of clear jurisprudence on other crucially important questions such as whether the voice of the child should be heard anyway, whether chronological age or emotional maturity should be the criterion, or how to converse with children in chambers in such a way that the contributions of professionals are not rendered obsolete. Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 151 expresses her concern regarding the tendency in South African decisions to focus on whether or not the child should be regarded as competent to make a choice or express a view. This creates an all-or-nothing approach – either the child is competent or not, and the child's wish is granted or refused accordingly. Freeman "Why it Remains Important to Take Children's Rights Seriously" 2007 *IJCR* 8 makes the following telling statement "[t]he most fundamental of rights is the right to possess rights" and adds that rights are important because those who have them (children) can exercise agency. He adds that agents are decision-makers. They are people who can negotiate with others, who are capable of altering relationships or decisions and there is now clear evidence that even the youngest can do this. Furthermore, he adds that giving people (children) rights without access to those who can present those rights, and expertly, without the right to representation is of little value.

⁶⁵⁶ Archard and Skivenes "Balancing a Child's Best Interests and a Child's Views" 2009 *IJCR* 2 opine that the best interests of the child and the child's wishes as two opposing commitments sometimes present a problem in reconciling the two although "it is surely an intention of those who drafted the Convention [on the Rights of the Child] and those who appeal to it that it is possible to reconcile the two commitments". They add that it is a real problem understanding how this reconciliation is to be done. Freeman 2007 *IJCR* 14 refers to this dilemma and explains that there are commentators like Dworkin (*Taking Rights Seriously*) who believe that children have the right to make mistakes. Freeman *op cit* 15 presents his view as "liberal paternalism" and admits of being critical of decisions which have removed the rights of adolescents when they refuse to consent to medical treatment. For more on children's right and self-determinism, see Fortin "Children's Rights: Are the

circumstances have to be weighed against the views of the child and it must be accepted that the views of the child may not always coincide with what adults perceive to be in his or her best interests.⁶⁵⁷ The child-centred approach in *Soller's* case highlights the importance of the views and wishes of child who is of sufficient maturity to be considered on par with that of an adult.⁶⁵⁸

Judge Satchwell was attentive to not only the wishes of K, but his behaviour as well.⁶⁵⁹ K's expressed views to both parents, Family Advocate, psychologists and his legal practitioner left the court in no doubt where K's preferred choice of residence lay, irrespective of the negative influence it has on him.⁶⁶⁰ The court

Courts Now Taking Them More Seriously?" 2004 *KJLJ* 258-271 where the author concludes that there are cases where the courts have taken children's rights very seriously but the progress is patchy. The fact that children are claiming the same rights as adults are creating dilemmas for which there are not always very obvious answers.

⁶⁵⁷ As Pillay and Zaal 2005 *SALJ* 686 explain sometimes "the wishes of a sufficiently mature child must be allowed to override other best-interests considerations". This view is echoed in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 177J-178D and *HG v CG* 2010 (3) SA 352 (ECP) par [17] 361G-G/H.

⁶⁵⁸ See Pillay and Zaal 2005 *SALJ* 686. However, compare the concerns of Robinson 2007 *THRHR* 269 and Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 151. Also compare Freeman 2007 *IJCR* 8. The last three commentators share a common concern that emphasis is placed on the views of the competent child while the views and wishes of the younger child may just get lost in the adults' perception of the best interests of the child and in doing so perpetuate the paternalistic approach. A good example of how easily a child's views, either direct or through a legal representative, can be disregarded is found in *DB v MP* (case number 0716/2010, North Gauteng High Court, 26 May 2010, unreported) where an urgent application was brought regarding the residence and primary care of an eleven-year old boy. The parties had been divorced since 2005. The boy was the central figure in the proceedings before the court. The court held that despite the "above average intelligence" of the child he was still too young to decide on his own what is in his best interests. Judge Motajane declined to interview the child because he was of the view that the child had not yet reached a stage in his development to make an informed decision about what is in his best interest.

⁶⁵⁹ Pars [44] and [46] 443C/D-H/I where the court refers to the letter of K in which he clearly expresses his choice "I still want to live with my dad and I want you to respect that ... My mind is made up and this is what I want". This is not the first decision in which the expressed views of a child has swayed the court to consider the request of the child, see *Meyer v Gerber* 1999 (3) SA 650 (O) 655B-B/C where a fifteen-year old boy wrote a letter to his mother informing her of his choice to be with his father and in addition filed two affidavits to this effect. The mother of the child had been awarded custody of him after the divorce of his parents. The child's father approached the court to amend the court order to award custody of the boy to his father. See also *I v S* 2000 (2) 993 (C) where the court held that the children were old enough to give an independent opinion as to their refusal to have contact with their father.

⁶⁶⁰ Par [53] 445E/F-G/H where this is evidenced as follows by the court: "I am reluctantly compelled to accept that K is uncontrollable when it comes to the issue of custody – he has made up his mind and will not be deterred by his mother, the Courts or threats of custodial care. I set out my views below with regard to his best interests. However, it is my concern with regard to the impact of his father's behaviour and the possibility that *K is not beyond*

mentions that it is trite in family law that the best interests are paramount *inter alia* in determining the custody and access arrangements of a child. That this standard of the best interests of the child is an elusive concept may also be regarded as trite.⁶⁶¹ Of importance is the finding of the court that in K's circumstances his expressed view to stay with his father has moved beyond being a persuasive factor to one that had become the determinant factor.⁶⁶²

For very different considerations⁶⁶³ the *Soller* case has set the tone of possible developments of child participation in family matters in future.⁶⁶⁴ The positive to be extracted from *Soller's* case is the voice of the child being elevated to the same level as that of the other parties in divorce matters, and care and contact matters as circumstances may dictate, without abdicating the best interests of the child.⁶⁶⁵

In *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁶⁶⁶ this new approach is taken further with the views of the parents' two girls being

saving that has influenced the orders which I have made in respect of custody." (Emphasis is that of the court.) The court ordered that K remain in the custody of his mother with the right to provisionally reside with his father. This brings to mind Fortin's view in 2004 *KCLJ* 259 that "[t]his straightforward and gentle paternalistic way of interpreting the rights of teenagers bears the hallmark of commonsense, combined with theoretical rigour". See also Kruger "Traces of Gillick in South African jurisprudence: Two variations on a theme" 2005 *Codicillus* 8.

⁶⁶¹ Especially with provisions such as contained in s 31(1) of the Act. Therefore only time will tell whether s 7 of the Act setting out the standard of the best interests of the child will make it easier for the courts to balance the best interests of children with the developing autonomy of children in legal matters.

⁶⁶² Par [56] 446A/B-B/C.

⁶⁶³ The court refers to this in pars [65] to [69] 447D/E-448C/D. Some of the concerns to which Robinson 2007 *THRHR* 269 has alluded are all too clear in the *Soller* case. However, the facts of this case are probably not that different from any other acrimonious divorce case. The more apparent difference being the opportunity given to the child to voice his opinion and express his wishes.

⁶⁶⁴ The advent of children's rights in the Constitution and with the ratification of the CRC and ACRWC as well as the new Children's Act, has brought with it new challenges which the courts will be facing. A comparative approach in future may serve as guidance for further challenges in this regard.

⁶⁶⁵ A number of commentators nationally and internationally are agreed that the move away from a parent-centred approach to a child-centred approach, especially where the child is of such age and maturity to make certain decisions or voice its views and wishes is positive, see eg Fortin 2004 *KCLJ* 259; Kruger 2005 *Codicillus* 8; Pillay and Zaal 2005 *SALJ* 686; Davel in *Commentary on the Children's Act* 2-13; Robinson 2007 *THRHR* 269; Freeman 2007 *IJCR* 15; Archard and Skivenes 2009 *IJCR* 10.

⁶⁶⁶ [2005] JOL 14218 (T). See discussion 5 2 3 1 4 *supra*.

acknowledged by the court.⁶⁶⁷ The father had approached the court after a final decree of divorce to have his rights of access confirmed. His two daughters had refused to submit to treatment and therapy in terms of a previous order. The mother, concerned about being held in contempt, approached the Centre for Child Law, which facilitated an application for the appointment of either a curator *ad litem* or a legal representative in terms of section 28(1)(h) of the Constitution. The court expressed the view that rather than appointing a curator *ad litem*, the State Attorney ought to appoint a legal representative for the children in terms of section 28(1)(h) of the Constitution.⁶⁶⁸ The court made an order in terms of which the two daughters were allowed to intervene and be joined as parties in the proceedings between their parents.⁶⁶⁹

One of the most recent cases where *inter alia* the participatory rights of the child were considered by the court is *Legal Aid Board v R and Another*.⁶⁷⁰ A twelve-year old girl contacted Childline and requested assistance in appointing a legal representative for her to allow her to present her views to the court. With the assistance of the Centre for Child Law a legal representative was appointed by the Legal Aid Board in Durban.

⁶⁶⁷ The court refers to the views of children, fourteen and twelve-and-a-half years old, not receiving attention where in par [6] of the judgment the following is mentioned “but that the children, so far, have not had an opportunity to state their views or to have their interests independently put before the court”. Interestingly the behaviour and actions of the two girls also played a prominent part in their plight to have their views heard.

⁶⁶⁸ Judge Hartzenberg setting out his reasons in par [6].

⁶⁶⁹ Par [8] referring to the Canadian matter of *Re Children’s Aid Society of Winnipeg and AM and LC Re RAM* (1983) 37 RFL (2nd) 113 (7 CRR) where Judge of Appeal Matas held that unless a child is a party to the proceedings affecting his guardianship, it will be impossible to appeal against an order which adversely affects him. Judge Hartzenberg held that it is a persuasive consideration to hold that to give proper effect to the provisions of s 28(1)(h) of the Constitution, a court is entitled to join minors as parties to proceedings affecting their interests and that unless the children are joined as parties they will not be able to appeal against an adverse order. Davel in *Commentary on the Children’s Act 2-14* draws attention to art 4(2) of the ACRWC which provides that the child may be heard “directly or through an impartial representative as a party to the proceedings”. Compare Chirwa 2002 *IJCR* 161; Davel in *Gedenkbundel vir JMT Labuschagne* 20-21.

⁶⁷⁰ 2009 (2) SA 262 (D). For the circumstances leading up to the appointment of a legal representative for the child and the reasons for upholding the appointment of the legal representative for the child, see discussion 5 2 3 1 4 *supra*. The implication of the legal representative’s appointment for the child and the impact of legal representation for the child in family-law matters will be discussed in 5 4 6 *infra*.

The mother contested the appointment of the legal representative for the child on the basis that as she was the child's guardian she should have been approached for such an appointment. The mother said that she would refuse any contact and consultations between the child and her legal representative, implying that her child's views should be placed before the court independently.

For purposes of the present discussion the participatory rights of the child are specifically investigated.⁶⁷¹ The court considered the mother's objection that the Legal Aid Board has no power to appoint a person to represent a child in legal proceedings. Furthermore that such appointment can only be made at the instance of the child's lawful guardian or person exercising parental responsibilities and rights in relation to the child or the court on application for such an appointment.⁶⁷² The court disposed of the arguments by *inter alia* concluding that the voice of the child has been "drowned out" by the warring voices of her parents and that the child should be afforded the assistance of a legal practitioner to make the child's voice heard.⁶⁷³

The court remarked that in situations such as the present, the guardian or person exercising parental responsibilities and rights may have their own reasons for not wanting the child to be legally represented.⁶⁷⁴ If the child wished to approach the court, how would the child be able to do that if the child was not already legally assisted? It is quite possible that there may be situations where such communication would be inappropriate, for example where the parent or person exercising parental responsibilities and rights might be the target of civil litigation at the instance of the child.⁶⁷⁵

⁶⁷¹ Par [21] 269I-270B/C where Acting Judge Wallis remarked that he has "borne in mind that the impetus for the Legal Aid Board's intervention was an approach by SR herself to Mrs Van Niekerk of Childline ... and that she [SR] expressed the desire that he [Mr Stilwell her attorney] should represent her in these proceedings".

⁶⁷² Par [17] 268H/J-269A/B.

⁶⁷³ Par [20] 269G-H.

⁶⁷⁴ Par [35] 275A-B/C where the court observed that, the child's legal guardian or person who is exercising parental responsibilities and rights may claim that they are acting in the best interests of the child as indicated in the present litigation.

⁶⁷⁵ Pars [36] to [37] 275B/C-H/G.

Legal Aid Board v R and Another is a landmark decision in child law and has far-reaching implications for the participatory rights of children in matters affecting their daily lives.⁶⁷⁶ Recently the provisions of section 10 have received further authority for the views of the child to be placed before court and to be considered by the court.⁶⁷⁷

Participation of children in domestic violence applications has not as yet been considered in reported judgments. However, the general principles referred to above and the provision for children's applications for protection orders in terms of the Domestic Violence Act⁶⁷⁸ leaves no doubt that the participatory rights of children are safe and sound in securing their protection.

The same principle would apply in maintenance matters where the child wants to file an application for maintenance and has no guardian or person exercising parental responsibilities and rights in respect of the child who is to be maintained. Should any of the four requirements in terms of the common law apply to the child, the child may in terms of the decision in *Legal Aid Board v R*

⁶⁷⁶ See in general the comments of Du Toit 2009(1) *JQR* par 2 1. Matters which immediately come to mind in the magistrates' courts are maintenance as well as domestic violence. Par [1] 264C-C/D Acting Judge Wallis AJ refers to comment of Chief Justice Langa in *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) par [56] 494F-G that "[t]he need for the child's voice to be heard is perhaps even more acute when it concerns children of Sunali's age [sixteen-year old] who should be increasingly taking responsibility for their own actions and beliefs". This is also evident the recent decision of *J v J* 2008 (6) SA 30 (C) pars [40] and [43] where the court took views of a twelve-year old boy into consideration in deciding that the child should remain at his present school. In *HG v CG* 2010 (3) SA 352 (ECP) par [19] where the court received the views of the children, aged fourteen and eleven years, as conveyed verbatim in a report. The court held, par [23], that the children were of such age and level of maturity to make an informed decision and that it would not be their best interests to order a change in the parenting plan.

⁶⁷⁷ Compare the court's views on the participatory rights of children in matters affecting them in *HG v CG* 2010 (3) SA 352 (ECP) par [6] where the court says that "[s] 10 of the [Children's] Act explicitly recognises a child's *inherent* rights in any matter affecting him or her". (Emphasis added.) At par [17] the court considered the children to be of an age and maturity to fully comprehend their situation and therefore their voices cannot be stifled, but must be heard.

⁶⁷⁸ Act 116 of 1998. S 4(4) of the Act provides that notwithstanding the provisions of any other law, any minor (minor is not defined, the section therefore has reference to a child as defined in s 1(1) of the Children's Act) or any person on behalf a minor (this may include a legal representative of the child) may apply to the court for a protection order without the assistance of a parent, guardian or any other person (which may now include a person exercising parental responsibilities and rights in respect of that child).

and *Another*⁶⁷⁹ apply directly to the Legal Aid Board for the appointment of a legal practitioner to assist him or her with an application for maintenance.⁶⁸⁰

With the provisions of section 15 of the Act⁶⁸¹ in mind, it may be argued that a child who is prejudiced by the actions of a parent refusing directly or indirectly, which includes refusing to support a child or to act against such parent who refuses to support, a child may approach a maintenance court independently.⁶⁸² Section 15 has reaffirmed the enforcement of fundamental rights as referred to in section 38 of the Constitution with specific reference to children.⁶⁸³ Besides including the child as someone who may approach a competent court, allowance is also made for anyone acting in the interest of a child or on behalf of another person who cannot act in their own name;⁶⁸⁴ or anyone acting as member of, or in the interest of, a group or class of persons;⁶⁸⁵ and anyone acting in the public interest.⁶⁸⁶ It may be argued that this section serves as confirmation of the enhancement of children's rights.

⁶⁷⁹ 2009 (2) SA 262 (D). See discussion in 5 2 3 1 4 *supra*.

⁶⁸⁰ Here the legal representative will have a dual purpose. In the first place, assisting the child in terms of s 14 of the Children's Act to access the court and secondly representing the child as legal representative in terms of s 28(1)(h) of the Constitution. See also *Govender v Amurtham* 1979 (3) SA 358 (N) 360G-H regarding the *sui generis* nature of maintenance proceedings.

⁶⁸¹ This section came into operation on 1 July 2007.

⁶⁸² S 15(1) of the Children's Act provides that anyone listed in s 15(2) of the Act has the right to approach a competent court alleging that a right in the Bill of Rights or of the Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. S 15(2)(a) lists a child who is affected by or involved in a matter to be adjudicated as one of the persons who may approach a (competent) court.

⁶⁸³ Davel in *Commentary on the Children's Act* 2-25.

⁶⁸⁴ S 15(2)(b) of the Act. Compare *Centre for Child Law v Minister of Justice and Constitutional Development* [2008] JOL 22687 (T) and *Centre for Child Law v Minister of Justice and Constitutional Development* [2009] JOL 23881 (CC).

⁶⁸⁵ S 15(2)(c) of the Act.

⁶⁸⁶ S 15(2)(d) of the Act. See *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T). The application was brought before s 15 of the Act came into operation on 1 July 2007. Although the application was brought in terms of s 38(d) of the Constitution, there is nothing to prevent a similar application to be brought now in terms of s 15(2)(d) of the Act.

5 4 6 Legal representation of children

5 4 6 1 Introduction

Flowing from international identification⁶⁸⁷ two specific children's rights have received South African recognition with the advent of the South African Constitution⁶⁸⁸ and more recently the implementation of the "new" Children's Act.⁶⁸⁹ The first right is that of the child to be heard in any judicial proceedings affecting the child and the second is the right of the child to be legally represented either in criminal proceedings as an accused⁶⁹⁰ or in civil proceedings⁶⁹¹ in matters affecting the child.⁶⁹² The two rights which have, since the advent of the South African Constitution, been ratified are the Convention on the Rights of the Child and the African Charter, and, particularly with the

⁶⁸⁷ Notably the CRC and the ACRWC.

⁶⁸⁸ The Constitution of the Republic of South Africa, 1996.

⁶⁸⁹ Reference to the "new" Children's Act is simply because prior to the enactment of the Children's Act of 2005 there had been two previous Children's Acts. The first was enacted in 1937 and the second in 1960. Further reference will be to the Children's Act, and obviating any confusion to the Children's Act, where required reference to the previous two Children's Acts will include the specific year.

⁶⁹⁰ S 35(3)(g) of the Constitution which provides that every accused person (including a child) has the right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

⁶⁹¹ S 28(1)(h) of the Constitution. The child's right to legal representation in child abduction matters is specifically referred to in s 279 of the Children's Act.

⁶⁹² There has been a good deal of academic writing the past decade or so in which the child's right to legal representation has been reflected on. See eg Zaal *Do Children need Lawyers in the Children's courts* Community Law Centre, University of Western Cape 1996; Zaal "When should children be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution" 1997 *SALJ* 334; Sloth-Nielsen and Van Heerden "The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?" 1996 *SAJHR* 649; Zaal and Skelton "Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts" 1998 *SAJHR* 539; Robinson and Ferreira 2000 *De Jure* 54; Kassan 2003 *De Jure* 164; Davel in *Gedenkbundel vir JMT Labuschagne* 15; Robinson 2007 *THRHR* 263; Sloth-Nielsen "Realising children's rights to legal representation and to be heard in judicial proceedings: An update" 2008 *SAJHR* 495.

domestication of the Convention on the Rights of the Child,⁶⁹³ these two have been accepted as fundamental rights.⁶⁹⁴

The assurance of legal representation for every child presupposes that every child has the right of access to any judicial proceedings affecting the child.⁶⁹⁵

Section 14⁶⁹⁶ echoes this right of access to the courts which everyone has in South Africa.⁶⁹⁷ When comparing section 14 with article 12(2) of the Convention on the Rights of the Child⁶⁹⁸ and article 4(2) of the African Charter,⁶⁹⁹ the

⁶⁹³ As Sloth-Nielsen and Mezmur 2008 *IJCR* 1 refer to the incorporation of the CRC into the domestic legislation of South Africa. With the enactment and full implementation of the Children's Act (with effect from 1 April 2010) the recognition of fundamental rights of children and especially their participation and representation has come full circle.

⁶⁹⁴ This can be regarded as universal with the worldwide ratification of the CRC and more so in South Africa where the ACRWC has also been ratified. Furthermore, the majority of commentators on children's rights worldwide accept this in acknowledging and accepting the CRC. For discussion on the CRC and ACRWC see 5 2 2 1 and 5 2 2 2 *supra*.

⁶⁹⁵ Art 12(2) of the CRC provides for the participation of a child and the representation of the child in judicial proceedings. Art 4(2) of the ACRWC has a similar though different worded provision. For a discussion of the CRC and ACRWC, see 5 2 2 1 and 5 2 2 2 *supra*.

⁶⁹⁶ This section grants every child the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court.

⁶⁹⁷ Contained in s 34 of the Constitution. "[E]veryone" in s 34 of the Constitution includes a child and s 14 transmits this right to children in the Children's Act. S 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.

⁶⁹⁸ The provision that the child "shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child" is the execution of the assurance given in art 12(1) of the CRC, therefore the precursor "[f]or this purpose". Art 37(d) of the CRC provides that every child deprived of his or her liberty shall have the right to "prompt access to legal and other appropriate assistance" as well as the right to challenge the legality of such deprivation of liberty before a court or other competent, independent, and impartial authority. Where a child is removed and placed in temporary safe care without a court order in terms of s 152 of the Act the removal is to be "reviewed" by the court as soon as possible. The deprivation of the child's liberty in a children's court matter is no less traumatic than the deprivation of a child's liberty in a criminal matter. Yet in a criminal matter art 37(d) of the CRC comes to the child's rescue with prompt access to legal assistance. However, in children's court proceedings in terms of s 55 of the Act, the presiding officer decides if it would be in the best interests of the child to have legal representation and then refers the matter to Legal Aid South Africa who uses the substantial injustice criterion.

⁶⁹⁹ A similar provision is founded with the words "[i]n all judicial or administrative proceedings affecting a child ... opportunity shall be provided for the ... child to be heard ... as a party to the proceedings". See Kassan 22 who agrees that allowing the child as a party to the proceedings "creates the basis for the child to be included as third parties (with representation) in divorce proceedings in addition to their parents being parties". The application goes further than divorce proceedings and indeed includes all proceedings where the child has a major interest as a party, eg application for protection by a parent in domestic violence, maintenance and care and contact disputes to name some instances. S 4(4) of the Domestic Violence Act 116 of 1998 provides that "[n]otwithstanding the

section should be interpreted extensively to allow the broadest possible platform for the voice and views of children to be heard and considered in court.⁷⁰⁰ Therefore it can be argued that section 14⁷⁰¹ joins up with section 28(1)(h) of the Constitution⁷⁰² and extends beyond the reach of section 10 which limits participation to those children who are able to participate and are “of such age,

provisions of any other law, any minor ... may apply to the court for a protection order without the assistance of a parent, guardian or any other person”. Therefore, any child who is of such age, maturity and stage of development may apply for a protection order and has the right to legal representation at state expense if substantial injustice would otherwise result.

⁷⁰⁰ See *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) par [56] 494 D/E-G. This is in line with the provisions of art 12(2) of the CRC and especially art 4(2) of the ACRWC, both of which emphasise the participation through a representative, which may be a legal representative. Art 4(2) of the ACRWC creates a platform for children to be granted legal representation as a party to proceedings instituted by their parents such as divorce proceedings (Kassan 22). Davel in *Commentary on Children’s Act 2-23* indicates that the word “assisted” in s 14 of the Act has a more extensive application than “representation” as found in s 28(1)(h) of the Constitution. Sloth-Nielsen “Realising children’s rights to legal representation and to be heard in judicial proceedings: An update” 2008 *SAJHR* 500 draws an important distinction between the appointment of a curator *ad litem* representing the interests of the child as opposed to the views of the child itself.

⁷⁰¹ S 14 refers to “every child” and places no limitation on the right of access to court.

⁷⁰² S 28(1)(h) of the Constitution provides that “[e]very 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”. This is the view of Davel in *Commentary on the Children’s Act 2-20*. However, Heaton *Law of Persons* 89 does not agree and argues that assistance does not necessarily mean that the child is entitled to legal representation. She takes this argument further (89 n 44) and comments that assistance is not the equivalent of legal representation and therefore it cannot be said that s 14 of the Act links up with s 28(1)(h) of the Constitution. Assistance is a different concept from legal representation and refers to the conduct that is needed to supplement the minor’s limited capacity to act or to litigate. This argument is difficult to implement when a child’s guardian is withholding assistance from the child and the child wants to approach the court for a remedy. Eg the child wants to enforce his or her right to maintenance against the child’s parents and not one of the parents is willing to assist in bringing the matter to court. This principle was considered in *Legal Aid Board v R* 2009 (2) SA 262 (D) where a twelve-year old approached Childline for assistance in a divorce dispute where custody was fervently disputed. The court held (par [3] 264E/F-F/G) that the Legal Aid Board was entitled to render assistance to a minor in the discharge of the state’s obligation in terms of s 28(1)(h) of the Constitution at the state’s expense if the failure to do so would otherwise result in substantial injustice. The court further held (par [4] 264F/G-G/H) that the Legal Aid Board was not constrained by a need to obtain either the consent of the child’s guardian or that of any person exercising parental responsibilities and rights in relation to the child, or an order of court. The same principle but from a different angle was decided in *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) in a contested application for access (now contact) by the father. The court held the view that a legal representative for the two children was to be appointed by the State Attorney in terms of s 28(1)(h) of the Constitution to represent the two children instead of appointing a legal representative as curator *ad litem* for the children. The two children were later joined as parties to the proceedings because the court held that they had an interest in the outcome of the proceedings, but would not be able to appeal against an adverse order if the children were not parties to the proceedings.

maturity and stage of development” as to be able to participate and express their views in an appropriate way.

Children are assured the right to legal representation in criminal matters⁷⁰³ and with the right of legal representation in section 28(1)(h) of the Constitution extended to civil matters, the scope of legal representation has broadened the range of proceedings affecting children.⁷⁰⁴ The provision of section 14 of the Act allows the broadest possible platform of access for children to court and the guarantee of legal representation entrenched in section 28(1)(h) of the Constitution ensures that where the assistance for children is required, it may best be met with legal representation.

5 4 6 2 Legal representation of children in general

As pointed out previously⁷⁰⁵ the influence of international instruments in the expansion of children’s rights in South Africa cannot be ignored. The main focus of this discussion will be directed at the right to and application of legal representation of children in family-law matters, civil matters affecting children⁷⁰⁶ and children’s court enquiries.⁷⁰⁷ For the sake of completeness

⁷⁰³ S 35(3) of the Constitution provides the right of every accused person (and this includes a child) to a fair trial and in subs (g) the right to have a legal practitioner assigned to the accused person by the state at state expense, if substantial injustice would otherwise result. Compare further Bekink and Brand in *Introduction to Child Law in South Africa* 193, they say that s 28(1)(h) of the Constitution is an extension of s 35(3). See also Zaal and Skelton “Providing effective representation for children in a new Constitutional Era: Lawyers in the criminal and children’s courts” 1998 *SAJHR* 541; De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 466; Kassan 36; Davel in *Commentary on the Children’s Act* 2-20; Sloth-Nielsen 2008 *SAJHR* 500.

⁷⁰⁴ Eg *Soller v G* 2003 (5) SA 430 (W); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T); *Legal Aid Board v R* 2009 (2) SA 262 (D). Compare Kassan 36-37 who draws a comparison between s 28(1)(h) of the Constitution and art 12(2) of the CRC and art 4(2) of the ACRWC commenting that art 12(2) does not refer to a “legal representative” but a “representative” and art 4(2) an “impartial representative” whereas s 28(1)(h) of the Constitution refers to a “legal representative”. However, the application is broader in s 28(1)(h) with reference to “every child” irrespective of the ability of the child to communicate his or her views. See further Davel in *Commentary on the Children’s Act* 2-20; Sloth-Nielsen 2008 *SAJHR* 495-496.

⁷⁰⁵ See 5 2 3 1 *supra*.

⁷⁰⁶ S 28(1)(h) of the Constitution as seen against the background of s 14 of the Children’s Act. The view being that s 14 of the Children’s Act links up with s 28(1)(h) of the Constitution.

reference will be made to the right of legal representation for children in conflict with the law.⁷⁰⁸

5 4 6 2 1 Legal representation in family-law and civil matters

Family-law matters affecting children are mainly matters relating to divorce proceedings⁷⁰⁹ or where arrangements concerning the children are brought before court.⁷¹⁰ Section 6(4) of the Divorce Act 70 of 1979 provides that a divorce court may appoint a legal practitioner to represent the child at the divorce proceedings of his/her parents and order any one or both the parties to pay the costs of such an appointment. However, this option has seldom been used in the past.⁷¹¹

The provisions of section 6(4) of the Divorce Act 70 of 1979 create problems where there are financial constraints and divorcing parents are unable to meet the costs which such an appointment may incur.⁷¹² Section 28(1)(h) of the Constitution, in contrast to section 6(4) of the Divorce Act, grants a right to legal

⁷⁰⁷ Adoption enquiries are included in children's court enquiries. Sloth-Nielsen 2008 *SAJHR* 498 mentions there are mainly three types of court proceedings where children's right to legal representation are of particular relevance in the South African context: being children's court enquiries, civil proceedings in general where a curator *ad litem* is appointed and family-law matters.

⁷⁰⁸ S 35(3)(g) of the Constitution. The Child Justice Act 75 of 2008 which was assented on 7 May 2009 and published in GG 32225 of 11 May 2009. The Act became operational on 1 April 2010. For a discussion see 5 4 6 3 *infra*.

⁷⁰⁹ The involvement of children generally has its origin in disputed custody claims.

⁷¹⁰ This may involve custody, care and contact and related matters which may eg involve applications to remove children from South Africa to another country where the parent is planning to relocate.

⁷¹¹ Palmer in *Children's Rights* 112; Kassan 2003 *De Jure* 169-170 also mentions that s 6(4) of the Divorce Act 70 of 1979 does not allow the appointment of a legal practitioner at state expense thereby creating the impression that only children of the wealthy stand to benefit from such an appointment. See also Robinson 2007 *THRHR* 263 and especially 269 where the author mentions there in not a single reported case on s 6(4) of the Divorce Act.

⁷¹² Kassan 2003 *De Jure* 170 alludes to the fact that s 6(4) of the Divorce Act does not comply with the provisions contained in s 28(1)(h) of the Constitution since it does not provide for legal representation at state expense if any of the divorcing parents are indigent and cannot contribute to the costs incurred for the child's legal representation. The author further mentions that unlike s 28(1)(h) of the Constitution, s 6(4) has no proviso that legal representation will be granted at state expense if "substantial injustice would otherwise result". Sloth-Nielsen 2008 *SAJHR* 502 agrees with Kassan and mentions that s 6(4) of the Divorce Act pre-dates the constitutional right. Robinson 2007 *THRHR* 276-277 asserts that s 6(4) of the Divorce Act does not create a right to legal representation for the child.

representation in civil matters⁷¹³ if substantial injustice would otherwise result.⁷¹⁴ The scope of legal representation of children in terms of section 28(1)(h) of the Constitution is wider than the equivalent contained in section 6(4) of the Divorce Act and article 12(2) of the Convention on the Rights of the Child or article 4(2) of the African Charter.⁷¹⁵

Case law has alleviated some of the procedural problems referred to by Davel⁷¹⁶ regarding the appointment of a legal representative for children in terms of section 28(1)(h) of the Constitution. This recent case law is discussed below.

⁷¹³ Civil matters referred to in s 28(1)(h) of the Constitution has a broad application and may invariably include divorce proceedings especially in view of the decision in *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁷¹⁴ The child's right to legal representation in divorce matters has been surveyed over the last decade; eg Kassan 2003 *De Jure* 170 177-178; Kassan 47-58; Davel in *Gedenkbundel vir JMT Labuschagne* 21-26; *Commentary on the Children's Act 2-19/2-23*; Schäfer *The Law of Access to Children* 103-105; Robinson 2007 *THRHR* 276-277; Sloth-Nielsen 2008 *SAJHR* 502-507.

⁷¹⁵ S 28(1)(h) of the Constitution refers to the appointment of legal representation at state expense in civil proceedings *affecting* the child, if substantial injustice would otherwise result. (Emphasis added.) Kassan 49 mentions that the right afforded to children in s 28(1)(h) of the Constitution is not given full effect in s 6(4) of the Divorce Act and therefore s 6(4) fails to meet the standard provided for in s 28(1)(h). This may be so but the coming into operation of the Children's Act has addressed the concern expressed in *Fitschen v Fitschen* at 63 of the judgment that s 28(1)(h) of the Constitution has not been incorporated into domestic legislation. This would also address the concern of Kassan 2003 *De Jure* 170. Davel in *Commentary on the Children's Act 2-20* correctly confirms the wide ranging effect the right contained in s 28(1)(h) has; it is available to all children and not subjected to the limitation of s 10 of the Children's Act, art 12(1) of the CRC or art 4(2) of the ACRWC. Sloth-Nielsen and Mezmur 2008 *IJCR* 15 agree that s 28(1)(h) is broader in application in that it is available to children irrespective of whether they are parties to proceedings and not directly before court; they also mention that because the Interim Constitution of 1993 did not contain a similar provision in s 30 and there is no available evidence of a lobby for the inclusion of s 28(1)(h), it seems that the constitutional drafters included this right of their own accord and this might explain why its domestication in legislation and practice has been rather uneven, halting, and practically quite fraught with problems.

⁷¹⁶ In *Gedenkbundel vir JMT Labuschagne* 21 where the author refers to the following issues that need to be addressed: What is the correct procedure relating to the assignment of a legal representative?; Which body should make the assignment, for instance, is it the State Attorney or the Legal Aid Board?; Can a legal representative be assigned by the High Court?; What will constitute "substantial injustice"?; Who will decide whether "substantial injustice" will otherwise result?; According to which principles will this decision be made? Du Toit in *Child Law in South Africa* 101-102 also alludes to practical issues regarding the assigning of a legal representative for a child. She dilutes three main issues that need to be considered, namely circumstances under which a child is entitled to a legal representative in terms of s 28(1)(h) of the Constitution, the implementation of the rights envisaged in terms of s 28(1)(h) and the scope and functions of the legal representative appointed in terms of s 28(1)(h) of the Constitution.

*Soller v G and Another*⁷¹⁷ was the first case⁷¹⁸ in which the court addressed the interpretation of section 28(1)(h). The matter to be considered involved an application by a fifteen-year old boy for the variation of a custody order in which his custody was allocated to his mother.

Judge Satchwell decided that the matter required the assignment of a legal representative for the child in terms of section 28(1)(h).⁷¹⁹ The court explained that a legal representative did not fulfil the same role as the office of the Family Advocate.⁷²⁰ This is important for a number of reasons, not the least being the role of the Family Advocate in the Children's Act where the forum is the children's court.⁷²¹

The Family Advocate in theory had been regarded as representing the best interests of the child.⁷²² The Mediation in Certain Divorce Matters Act 24 of 1987 had been instrumental in providing for consideration by the court in certain circumstances of a report and recommendations of a Family Advocate before a final decree of divorce or other relief was granted. The Mediation in Certain

⁷¹⁷ 2003 (5) SA 430 (W). This case is referred to generally for its impact on the assignment of a legal representative to a child in terms of s 28(1)(h) of the Constitution. However, the first step is the right to participation which serves as a gateway to the right of the child to legal representation in civil matters as set out in s 28(1)(h) of the Constitution, mindful of the fact that the application of s 28(1)(h) is broader than s 10 of the Children's Act as it applies to every child and not only those children who are of such age, maturity and stage of development to participate in an appropriate way. See discussion of legal representation of children in terms of s 28(1)(h) of the Constitution 5 2 3 1 4 *supra*.

⁷¹⁸ The question of assigning a legal representative in terms of s 28(1)(h) was previously considered in the matter of *Fitschen v Fitschen* [1997] JOL 1612 (C). The application failed due to the court finding that substantial injustice would not result because the children's views were taken into consideration in reports of the psychologists and Family Advocate.

⁷¹⁹ Pars [1] to [17].

⁷²⁰ Par [20] 437B-C.

⁷²¹ The referral of a dispute between the two unmarried parents of the child regarding paternity for mediation in terms of 21(3) of the Act; the registration of a parental responsibilities and rights agreement with the Family Advocate; the input of the Family Advocate in terms of s 23(3)(a) of the Act in the application for an order granting care of and contact with the child; an application by the Family Advocate in terms of s 28(3)(e) of the Act for the termination, extension, suspension or restriction of parental responsibilities and rights; the preparation of a report and recommendations of the Family Advocate in terms of s 29(5)(a) of the Act as juxtaposed with s 29(6) of the Act regarding the appointment of a legal practitioner; the involvement of the Family Advocate in major decisions involving the child in terms of s 31(1) of the Act; the involvement of the Family Advocate in terms of s 33(5)(a) of the Act in the formulation of a parenting plan; the involvement of the Family Advocate in the formalities of the family plan in terms of s 34(3)(b)(ii)(aa) of the Act.

⁷²² Sloth-Nielsen 2008 SAJHR 503.

Divorce Matters Act provides for the mediation in certain divorce proceedings as well as certain applications arising from such proceedings, such as variations, rescissions or suspension of orders regarding the custody or guardianship of children so as to safeguard their interests.⁷²³

Judge Satchwell emphasised that a Family Advocate is not appointed to represent any party to a dispute, but rather required to remain neutral and assist the court by considering all the relevant facts and make a balanced recommendation.⁷²⁴ The office of the Family Advocate was in place long before legislature created the provision contained in section 28(1)(h). Judge Satchwell formulated her conclusion regarding the difference between the two offices very clearly.⁷²⁵ The court's summation of the legal practitioner appointed in terms of

⁷²³ *Soller's case* pars [21] and [22] 437C-G. Davel in *Gedenkbundel vir JMT Labuschagne 23* briefly explains the functions of the office of the Family Advocate which is to monitor all court documentation and settlement agreements in order to ensure that the agreements are prima facie in the best interests of the child. Secondly to mediate between the parties and finally the office carries out full evaluations in cases where it is required, compiling a report and making recommendations to the court. See also on the role of the Family Advocate Grasser "Taking Children's Rights Seriously" 2002 *De Jure* 223-235; "Can the Family Advocate adequately safeguard our children's best interests?" 2002 *THRHR* 74-86; "Custody on divorce: assessing the role of the family advocate" in Burman *The Fate of the Child: Legal Decisions on Children in the New South Africa* 108-121; Barratt "The child's right to be heard in custody and access determinations" 2002 *THRHR* 571-573; *The Fate of the Child* 145-157; Kassan 2003 *De Jure* 164-179; Robinson 2007 *THRHR* 265-266; Africa, Dawes, Swartz and Brandt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 122-144; Davel in *Commentary on the Children's Act 2-21/2-22*; Sloth-Nielsen 2008 *SAJHR* 503. On the importance and value of the recommendations of the Family Advocate and to what extent the court is bound to follow the recommendations see *Whitehead v Whitehead* 1993 (3) SA 72 (SE); *P v P* 2007 (5) SA 94 (SCA) and De Ru "The Value of Recommendations made by the Family Advocate and Expert Witnesses in Determining the Best Interests of a Child" 2008 *THRHR* 702-705.

⁷²⁴ The court referred to the role of a Family Advocate, mentioning in par [21] 437C-E that the powers and duties of the Family Advocate are set out in s 4 of the Mediation in Certain Divorce Matters Act providing *inter alia* that the Family Advocate "furnish the Court ... with a report and recommendations on any matter concerning the welfare of each minor or dependant child of the marriage concerned or ... regarding such matter as is referred to him by the Court". Adding in par [22] that the Family Advocate is required to report on the facts which were found to exist and to make recommendations based on professional experience acting as "an advisor to the Court and perhaps as a mediator between the family who has been investigated and the Court".

⁷²⁵ After drawing a clear distinction between the role of a Family Advocate and a legal practitioner in pars [20] to [27] 437B-438F/G, mentioning in par [20] that the court was concerned to ensure "that the distinction between the respective functions of the office of the Family Advocate and the legal practitioner assigned [to a child] in terms of s 28(1)(h) be understood". The court continued in par [26] 438A/B-D mentioning that particularly "s 28(1)(h) envisages a 'legal practitioner' ... to ascertain the views of a client, present them ... and argue the standpoint of the client in the face of doubt or opposition from an opposing

section 28(1)(h) applied to the facts of the case is succinctly explained by Judge Satchwell as follows:

[T]he legal practitioner assigned to K [the child in question] in terms of s 28, ably and concisely summarised his role as follows: Firstly, it is to “put K’s case in respect of his wishes to stay with his dad”. Secondly, “it is to make sure that he is under no duress of any sort. He is, after all a minor under disability”. Thirdly, “there are consequences I can foresee which may not be foreseen by the child and I should report on these and alert the Court to them”.⁷²⁶

The court explained that the child’s legal practitioner is not a mere mouthpiece of the child, in the course of advocating the child’s views, the legal practitioner should also provide adult insight into the wishes of the child and apply legal knowledge and expertise to the child’s perspective.⁷²⁷

Following on the case of *Soller v G* the court in *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁷²⁸ appointed legal representation for both children in terms of section 28(1)(h) of the Constitution. The court went further and ordered that the two children be allowed to intervene and be joined as parties to the proceedings between their parents.⁷²⁹

party or a court ... a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice [and] such voice is exercised through the legal practitioner”. Further concluding in par [27] 438D/E that it would seem that the “[F]amily Advocate and the s 28 legal practitioner occupy dissimilar positions” and in par [28] 438D/E-F/G that “this task is not without certain inbuilt limitations. The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child’s perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece”. See further Davel in *Commentary on the Children’s Act 2-22*; Sloth-Nielsen 2008 SAJHR 503 -504.

⁷²⁶ Par [26] 438B/C-D where the court indicates that s 28(1)(h) does not allow the appointment of a social worker, psychologist or counsellor. What is required is a lawyer who will use particular skills and expertise to represent the child. The court goes further and mentions that “[n]eutrality is not a virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador”.

⁷²⁷ Par [27] 438E-F/G.

⁷²⁸ [2005] JOL 14218 (T).

⁷²⁹ Par [8] of the judgment the court held that in order to give proper effect to the provisions of s 28(1)(h) of the Constitution a court is entitled to join minors as parties to proceedings affecting their best interests because unless they are joined as parties they will not be able to appeal against an adverse order.

In *R v H and Another*⁷³⁰ in which an application for an order suspending the father's right of access was made, the court *mero motu* raised the question as to the desirability of appointing a legal representative for the child in terms of section 28(1)(h) of the Constitution. The court appointed a legal representative for the child in terms of section 28(1)(h) of the Constitution.⁷³¹

The appointment of a legal representative in terms of section 28(1)(h) of the Constitution for unaccompanied foreign children was the interesting turn of events in *Centre for Child Law and Another v Minister of Home Affairs and others*.⁷³² The Centre for Child Law and the curator *ad litem* brought an urgent application for children held at Dyambo Youth Centre amongst others to be brought before the children's court in order for inquiries to be commenced in terms of the provisions of section 12(2)(c) of the Child Care Act.⁷³³ Prior to this application the curator *ad litem* had filed a report setting out the conditions at Lindela recommending that *inter alia* steps be taken to affect children's court proceedings as soon as possible for each child.⁷³⁴

The curator *ad litem* in the present application applied for and was granted an order in terms of section 28(1)(h) of the Constitution appointing a legal

⁷³⁰ 2005 (6) SA 535 (C).

⁷³¹ Par [8] 540C-D mentioning that the appointment was to "articulate the views of J [the child] and to represent his interests in the proceedings". The appointment was *pro amico* thus involving no expense for the state. The legal representative brought an application for a restraining order against the father citing a direct and substantial interest in applying to be admitted as a party to the proceedings. The court held that convenience, equity and the avoidance of a multiplicity of actions and costs dictated that the legal representative be joined as second defendant in the proceedings. Sloth-Nielsen and Mezmur 2008 *IJCR* 17 assert that not only hearing the child's voice (in casu an eleven-year old boy) but also his interests became directly protected in the proceedings.

⁷³² 2005 (6) SA 50 (T).

⁷³³ On 3 March 2004 the Centre for Child Law brought an urgent application on behalf of a number of unaccompanied foreign children who were detained in Lindela repatriation centre. The children were facing imminent and unlawful deportation to their respective countries of origin. The court granted an interdict preventing the Minister of Home Affairs and others from proceeding with the deportation of the children. The court appointed a curator *ad litem* for the children whose powers and duties included *inter alia* investigating the circumstances of the children in detention, and to make recommendations to the court regarding their future and to institute legal proceedings in the enforcement of their rights.

⁷³⁴ It transpired that the commissioner of child welfare Krugersdorp had refused to conduct children's court proceedings because he had been of the view that foreign children do not fall within the ambit of the Child Care Act.

practitioner for each of thirteen children being detained in Dyambo and to be brought before the children's court in Krugersdorp.⁷³⁵

The present situation in South Africa is not altogether settled. Problems associated with the appointment of a legal representative in terms of this section abound.⁷³⁶ A case in question is *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁷³⁷ where the interpretation and essence of children's right to legal representation was considered. Due to prior events regarding the compliance with a court order, some procedural problems which presented themselves in this case left two possible forms in which legal representation could be secured for the children. The first option was to follow the common-law route and secure the interests of the children with an

⁷³⁵ The curator *ad litem* after investigating the children's situation was able to report more fully on the ongoing admission of unaccompanied foreign children to Lindela repatriation centre. Furthermore to apply for the appointment of legal representatives in terms of s 28(1)(h) for each child to present and argue the "wishes and desires of the child". Sloth-Nielsen 2008 SAJHR 501 mentions that here the curator *ad litem* was able to investigate and present the interests of the children, but a legal representative in terms of s 28(1)(h) was required to "present and argue the wishes and desires of the children". Sloth-Nielsen and Mezmur 2008 IJCR 19 comment that this case presents another important way of bringing the interests of children to the attention of the court. It should be mentioned that the court (pars [27] and [28] 58H/I-59C) in discussing the application of s 28(1)(h) and *Soller v G supra* as well as the right to legal representation appointed by the state in respect of foreign citizens, justifies the inference that if a child is deprived of his or her liberty the child has the right to legal representation at state expense even if it is in terms of children's court proceedings. This right is now confirmed in s 55 of the Children's Act.

⁷³⁶ See Davel in *Gedenkbundel vir JMT Labuschagne* 24-25, *Commentary on the Children's Act* 2-22/2-23; Sloth-Nielsen 2008 SAJHR 505-506; Sloth-Nielsen and Mezmur 2008 IJCR 20-21; Du Toit 2009(1) JQR par 2 1. The problems facing the appointment of a legal representative in terms of s 28(1)(h) as requested presented itself in *Reardon v Mauvis* (unreported, DCLD Case no 5493/02, 24 February 2004) which is discussed in detail by Kassan 78 alluding amongst others to the fact that the order of the court made on 27 February 2004 was set aside on 15 September 2004 *inter alia* because the initial order could, due to technical reasons, not be executed.

⁷³⁷ [2005] JOL 14218 (T) and pars [4] and [5] where the court summarises the events leading to the judgment of the court handed down on 22 June 2004. There had been an order on 10 September 2003 calling on the parents to identify a clinical psychologist alternatively authorising the Family Advocate to identify one so that the parents and children (two girls of twelve and thirteen years) could submit to the psychologist for the necessary treatment and therapy in order to restore a healthy relationship between the father and his daughters, under the supervision of the Family Advocate. The mother was ordered to take all steps necessary to persuade the children to submit to the treatment and therapy. Both parents and the Family Advocate were granted permission to approach the court if the order was not complied with. The children refused to submit to treatment and the mother, fearing being held in contempt of court, approached the centre for Child Law at the University of Pretoria who contacted Lawyers for Human Rights who in turn brought an application on 2 December 2003 for the appointment of a curator *ad litem* for the children.

appointment of a curator *ad litem*.⁷³⁸ The second option was the assignment of a legal representative in terms of section 28(1)(h) of the Constitution.⁷³⁹

During an unopposed application for the appointment of a curator *ad litem* on 2 December 2003,⁷⁴⁰ Judge De Villiers agreed that the children required legal assistance, but was in favour of appointing a legal representative in terms of section 28(1)(h).⁷⁴¹ After the matter had stood down, the Legal Aid Board declined to assign a legal representative because the Centre for Child Law was not seeking an assignment at state expense. However the State Attorney agreed to assign a legal representative and in a later unopposed motion this assignment was noted by the court.⁷⁴² Although the initial objective had been reached, the option of the State Attorney at that time did not present a viable one.⁷⁴³

The latest case where *inter alia* the child's right to legal representation was considered by the court is *Legal Aid Board v R and Another*.⁷⁴⁴ The case concerns a twelve-year old girl who had been subjected to acrimonious litigation between the child's parents regarding the custody of the child over a period of five years. The girl contacted Childline and requested assistance in appointing a legal representative for her to allow her to present her views to the court. With

⁷³⁸ For the difference between an appointment of a curator *ad litem* and a legal representative in terms of s 28(1)(h) of the Constitution, see discussion 5 4 6 2 3 *infra*.

⁷³⁹ Par [5] in summary Judge Hartszenberg mentions that on 20 January 2004 the court heard argument on an unopposed basis before Judge De Villiers who expressed the view that rather than appointing a curator *ad litem*, the State Attorney should appoint a legal representative for the children in terms of s 28(1)(h) of the Constitution.

⁷⁴⁰ This is according to the judgment par [5]. However, for a discussion of events leading up to the application see Davel in *Gedenkbundel vir JMT Labuschagne* 25-26 and in *Commentary on the Children's Act* 2-23.

⁷⁴¹ Davel in *Gedenkbundel vir JMT Labuschagne* 26 mentions that Judge De Villiers was inclined to the view that it was inappropriate to appoint a curator *ad litem* because the mother of the children was available and willing to assist them. The court was not willing to usurp the mother's functions and was not persuaded by the arguments of a potential conflict of interests.

⁷⁴² On 10 February 2004 before Van der Merwe J.

⁷⁴³ Davel in *Gedenkbundel vir JMT Labuschagne* 26, *Commentary on the Children's Act* 2-23; Sloth-Nielsen 2008 SAJHR 505.

⁷⁴⁴ 2009 (2) SA 262 (D). The implication of this judgment on the participatory rights of the child is discussed in 5 4 5 4 *supra*. For a discussion of the factual background, see 5 2 3 1 4 *supra*.

the assistance of the Centre for Child Law a legal representative was appointed by the Legal Aid Board in Durban.

The mother opposed the appointment of the legal representative for the child on the basis that as she was the child's guardian she should have been approached for such an appointment. The mother said that she would refuse any contact and consultations between the child and her legal representative. For purposes of the present discussion the child's right to legal representation is specifically investigated.⁷⁴⁵ The court considered the mother's objection that the Legal Aid Board has no power to appoint a person to represent a child in legal proceedings. Furthermore that such appointment can only be made at the instance of the child's lawful guardian or person exercising parental responsibilities and rights in relation to the child or the court on application for such an appointment.⁷⁴⁶

The court disposed of the arguments among others by concluding that the voice of the child has been "drowned out" by the warring voices of her parents. The court concluded that substantial injustice to the child would result if the child is not afforded the assistance of a legal practitioner to make the child's voice heard.⁷⁴⁷ The court was satisfied that the Legal Aid Act⁷⁴⁸ does not impose a limitation on the Legal Aid Board's power to grant legal assistance to a child in terms of section 28(1)(h) of the Constitution as was argued by the child's mother. Furthermore, there is nothing in the Legal Aid Act which requires the

⁷⁴⁵ Pars [3]-[5], [31] and [34]-[35] 264F-H, 273F-H and 274G-275B. In par [34] 274G-H the court says that "there is nothing in the Legal Aid Act that imposes a limitation on the Legal Aid Board's power to grant legal assistance to a child in terms of s 28(1)(h) of the Constitution". Acting Judge Wallis adds (par [34] 274H) there is also nothing in the Legal Aid Act that requires the Legal Aid Board "to seek authority from a third person or from the court before extending legal aid [as mentioned in section 28(1)(h) of the Constitution]", noting that it is not suggested that "a similar consent [is needed] before providing legal aid to a minor accused of a crime". Acting Judge Wallis then significantly asks (par [35] 274I) why should a different principle apply when granting a child legal assistance, implying there should be no difference with reference to s 28(1)(h) as opposed to providing a child legal aid when the child is accused of a crime.

⁷⁴⁶ Par [17] 268H/J-269A/B.

⁷⁴⁷ Par [20] 269G-H.

⁷⁴⁸ 22 of 1969 as amended by the Legal Aid Amendment Act 20 of 1996.

Legal Aid Board to seek authority from any third person or from the court before extending legal aid to a child.⁷⁴⁹

The court remarked that in situations such as the present, the guardian or person exercising parental responsibilities and rights may have their own reasons for not wanting the child to be legally represented.⁷⁵⁰ The court added that if the child wished to approach the court, the child needed to be legally assisted. In many instances where the Legal Aid Board is approached to provide legal assistance in civil proceedings to a child, it would be appropriate to contact the child's guardian in order to decide whether to grant the requested legal assistance. However, there may be situations where such communication would be inappropriate, for example where the parent or person exercising parental responsibilities and rights might be the target of civil litigation at the instance of the child.⁷⁵¹ The court concluded that it has been unable to find any legal provision or rule of law that requires the Legal Aid Board to seek the approval of either the child's guardian or the court before granting legal assistance to a child under section 28(1)(h) of the Constitution.⁷⁵²

Legal Aid Board v R and Another is a landmark decision in child law and has far-reaching implications not only for the participatory rights of children in matters affecting their daily lives,⁷⁵³ but also for the legal representation of children in such cases.⁷⁵⁴

⁷⁴⁹ Par [34] 274G-H/I.

⁷⁵⁰ Par [35] 275A-B/C where the court observed that based on the reasons advanced by the mother any of those reasons would be able to block the child's access to legal assistance.

⁷⁵¹ Pars [36] to [37] 275B/C-H/G.

⁷⁵² Par [40] 276E-F/G.

⁷⁵³ Matters which immediately come to mind in the magistrates' courts are maintenance and domestic violence.

⁷⁵⁴ See in general the comments of Du Toit 2009(1) *JQR* par 2 1 who says that this is the first definitive judgment on the issue of separate legal representation for a child in a civil matter. Du Toit in *Child Law in South Africa* 106 points out that the Children's Act does not include a specific section providing for separate legal representation for children in general. S 55 of the Children's Act only refers to legal representation for children appearing before the children's court. Other matters affecting children in magistrate's courts will have to be dealt with in terms of s 28(1)(h) of the Constitution. However, see *DB v MP* (case number 30377/2008, North Gauteng High Court, 27 May 2010, unreported) involving a disputed application, a variation of residence and primary care order of an eleven-year old child where the appointment of a legal representative for the child was not considered.

There appears to be no reason why a child may not now approach the Legal Aid Board to assist him/her in instituting legal proceedings where he/she has no guardian or person exercising parental responsibilities and rights, or such guardian and person exercising parental responsibilities and rights cannot be found, or is not available, or there is a conflict of interest, or a possibility of such conflict, or the guardian or person exercising parental responsibilities and rights unreasonably refuses to assist the child.⁷⁵⁵ It is suggested that where children are of such age, maturity and stage of development, the better option would be for the child to apply directly to the Legal Aid Board for the appointment of a legal practitioner in terms of section 28 (1)(h) of the Constitution.⁷⁵⁶

Something missing in the yellow part?

The general principles referred to above would apply in domestic violence and maintenance matters where the child wants to file an application for a protection order or maintenance and has no such person in respect of the child who wants protection or is to be maintained. Should any of the four requirements in terms of the common law apply to the child, the child may in terms of the decision in *Legal Aid Board v R and Another*⁷⁵⁷ apply directly to the Legal Aid Board for the appointment of a legal practitioner to assist him or her with an application for a protection order or maintenance. A child may even request legal assistance where the child has a parent, guardian or person who exercises parental responsibilities and rights in respect of the child if a parent, guardian or person who exercises parental responsibilities and right in respect of the child cannot be found, or where the interests of the child are in conflict with such parent,

⁷⁵⁵ The established grounds in South Africa for the appointment of a curator *ad litem* remain. See Davel in Commentary on the Children's Act 2-24 and authority cited. In terms of s 33 of the Magistrates' Court Act 32 of 1944 application for the appointment of a curator *ad litem* may be brought in the magistrate's court thereby importing common law into the mentioned Act. See Erasmus and Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates' Courts Act in South Africa* vol I (1996) 137-141. The different functions of a curator *ad litem* and legal representative is discussed in 5 4 6 2 3 *infra*.

⁷⁵⁶ The provisions of s 28(1)(h) of the Constitution are wider than s 55 of the Children's Act, which limits the child's right to legal representation to children's court proceedings.

⁷⁵⁷ 2009 (2) SA 262 (D).

guardian or person who exercises parental responsibilities and right in respect of the child or there is a possibility of such conflict.⁷⁵⁸

5 4 6 2 2 Legal representation in terms of the Children's Act

Section 54 allows a child to appoint a legal representative at own expense.⁷⁵⁹

The main thrust for the legal representation of children in terms of the Children's Act, however, is found in section 55 that deals with legal representation of children.⁷⁶⁰ Initially the provisions relating to legal representation in the South African Law Commission's Report⁷⁶¹ were more extensive than are contained in the present section 55 of the Children's Act.⁷⁶²

Section 55(1) of the Act provides that if a child in a matter before the children's court is not legally represented and the court is of the opinion that it would be in the *best interests of the child*⁷⁶³ to have legal representation, then the court

⁷⁵⁸ Where a parent through his or her actions significantly and adversely affects the rights of a child as mentioned in s 6(5) and ss 31(1)(a) and (b)(iv) of the Children's Act it is suggested that the principle enunciated in *Legal Aid Board v R* would apply with a proper reading of ss 10 and 14 of the Act as well as s 28(1)(h) of the Constitution. The child would be able to apply for legal assistance and approach a court for relief.

⁷⁵⁹ In terms of s 1(1) of the Act a child is included in the definition of "party". Technically the child may in terms of s 14 of the Act require the assistance of his or her own legal representative and compensate the legal representative with money from his or her own estate. Clause 78(2)(a) of the draft Bill, annexure C of the SALC Report on the Review of the Child Care Act, specified that the child could appoint a legal representative of choice at own expense to represent a child in a matter. Clause 78(2)(b) of the draft Bill obliged a court to terminate such an appointment if the legal representative did not serve the interests of the child or served the interests of any other party such matter. For a discussion on clause 78 of the draft Bill, see 5 4 1 *supra*.

⁷⁶⁰ See in general Gallinetti in *Commentary on the Children's Act* 4-21/4-22. The initial provisions regarding legal representation for children contained in the draft Bill which was annexed to and formed part of the SALC Report on the Review of the Child Care Act. The Act specifically provides for legal representation of a child in children's court proceedings in s 55. S 14 of the Act provides that every child has the right to bring, and be assisted in bringing a matter to a court, provided that the matter falls within the jurisdiction of the court. This section may to be read with s 28(1)(h) of the Constitution thereby allowing a legal practitioner to assist a child in bringing a matter to court.

⁷⁶¹ On the Review of the Child Care Act.

⁷⁶² See clause 78 of the draft Bill referred to in n 759 *supra*.

⁷⁶³ Emphasis added. The paramountcy principle of s 28(2) of the Constitution read with the provisions of ss 7, 8 and 9 of the Children's Act is applicable when the court has to form an opinion whether it would be in the best interests of the child to have legal representation. (Emphasis in the text added.) The consideration for the court is therefore not whether substantial injustice would otherwise result if legal representation is not assigned to the child. This is more in line with a child-centred approach and is welcomed. Clause 78(5) in

*must*⁷⁶⁴ refer the matter to the Legal Aid Board for consideration.⁷⁶⁵ Section 55(2) of the Act requires the Legal Aid Board to deal with the referral to the court in terms of subsection (1) of the Act in accordance with the provisions of section 3B of the Legal Aid Act 22 of 1969 read with the changes required by the context of the of the section.⁷⁶⁶

Reference to the changes that are required by the context of section 55(1) of the Act allows for a number of scenarios which could occur with a referral by the court. The *Legal Aid Guide* (2009) contains criteria regarding the consideration of legal representation for children originating from different matters affecting the child.⁷⁶⁷

the draft Bill included in the SALC Report on the Review of the Child Care Act contained a number of provisions aimed at the best interests of the child and a child-centred approach. See Gallinetti *loc cit*.

⁷⁶⁴

Emphasis added.

⁷⁶⁵

Gallinetti in *Commentary on the Children's Act 4-22* comments that it is disappointing to note that the legal representation provisions contained the draft Bill have been reduced to what is contained in s 55 of the Children's Act.

⁷⁶⁶

S 3B of the Legal Aid Act addresses the direction for legal aid by a court in criminal matters and prescribes that:

“(1) Before a court in criminal proceedings directs that a person (child) be provided with legal representation at State expense, the court shall –

(a) take into account –

- (i) the personal circumstances of the person (child) concerned;
- (ii) the nature and gravity of the charge on which the person (child) is to be tried or of which he or she has been convicted, as the case may be;
- (iii) whether any other legal representation at State expense is available or has been provided; and
- (iv) any other factor which in the opinion of the Court should be taken into account; and

(b) refer the matter for evaluation and report by the board.

(2) (a) If a court refers a matter under subsection (1)(b), the board shall, subject to the provisions of the Legal Aid Guide, evaluate and report on the matter.

(b) The report in question shall be in writing and be submitted to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the court and the person (child) concerned.

(c) The report shall include-

- (i) a recommendation whether the person (child) concerned qualifies for legal representation;
- (ii) particulars relating to the factors referred to in subsection (1)(a)(i) and (ii); and
- (iii) any other factor which in the opinion of the board should be taken into account.”

⁷⁶⁷

To some extent confirming the concern of Gallinetti in *Commentary on the Children's Act 4-22* that the decision as to whether a child will receive legal representation at state expense now vests with an administrative official of the Legal Aid Board who has no guidelines to assist in the decision-making process save the *Legal Aid Guide* and the reference to “substantial injustice” resulting if legal representation is not provided.

The *Legal Aid Guide* specifies the kind of Children's Act matters where legal representation for children can be ordered.⁷⁶⁸ The following matters regarding children are listed: parental responsibilities and rights agreements; assignment of contact and care; assignment of guardianship by order of the court; person claiming paternity; termination, extension, suspension or restriction of parental responsibilities and rights; child in need of care and protection; adoption and child abduction provisions of the Hague Convention.⁷⁶⁹

Other legislation requiring legal representation for children includes the following: intervention in divorce, maintenance or custody proceedings;⁷⁷⁰ administration of estates; road accident fund and personal injury claims; domestic violence matters; matters in terms of the Refugees Act 130 of 1998;⁷⁷¹ money claims; applications for appointment of curator *ad litem* and curator *bonis*.⁷⁷²

It is clear from the *Legal Aid Guide* that the Legal Aid Board as an independent statutory body aims to achieve its goals set out in its mandate and to comply with the requirements contained in the Constitution regarding legal representation for children in civil matters.⁷⁷³

⁷⁶⁸ Par 4 18 6 of the *Legal Aid Guide*.

⁷⁶⁹ Par 4 18 6(a) to (h) in the *Legal Aid Guide*.

⁷⁷⁰ In terms of par 4 18 7 of the *Legal Aid Guide* the Regional Operations Executive must give prior written consent for a child to get legal representation to intervene in divorce, custody or maintenance proceedings between the parents of a child if legal representation is required to protect the best interests of the child and if substantial injustice would otherwise result.

⁷⁷¹ Par 4 18 7 of the *Legal Aid Guide*.

⁷⁷² Par 4 18 8 of the *Legal Aid Guide*. Applications for a curator *ad litem* and curator *bonis* must be referred to the Regional Operations Executive for a decision.

⁷⁷³ It is apparent that the *Legal Aid Guide* first and foremost is a guide and should be interpreted and applied extensively. Sloth-Nielsen 2008 SAJHR 510 accurately regards the Legal Aid Board as the main role player in providing legal representation for children in South Africa. Information copiously dealt with by Sloth-Nielsen *op cit* 515-522 reflects an increase in number of children benefitting from legal representation in children's court matters.

5 4 6 2 3 The difference between an appointment of a curator *ad litem* and a legal representative in terms of section 28(1)(h) of the Constitution

An appointment of a curator *ad litem* for a child⁷⁷⁴ originates from the common law and presently in South Africa there are four grounds which have crystallised where such an appointment will be made.⁷⁷⁵ In the first instance where the child is without a parent or guardian;⁷⁷⁶ secondly where a parent or guardian cannot be found or is not available;⁷⁷⁷ thirdly where the interests of the child are in conflict with those of the parent or guardian, or there is a possibility of such conflict;⁷⁷⁸ and lastly where the parent or guardian unreasonably refuses to assist the child.⁷⁷⁹

In terms of section 28(1)(h) “every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings

⁷⁷⁴ *Rein v Fleischer* 1984 (4) SA 863 (A) 874C where the Judge of Appeal Hoexter referred to “that vigilant protection of the rights of minors which our system of law seeks to promote by the appointment, in an appropriate case, of a curator *ad litem*”. Compare De Groot 1 4 1, 1 8 4; Voet 5 1 11; Van Leeuwen *Cen For* 2 1 10 8; Spiro *Parent and Child* 200; Cockrell in *Boberg’s Law of Persons and the Family* 902; Davel in *Gedenkbundel vir JMT Labuschagne* 25; *Commentary on the Children’s Act* 2-24; Boezaart in *Child Law in South Africa* 34-35; Du Toit in *Child Law in South Africa* 107-108. More recently the Constitutional Court held in *Du Toit v The Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par [3] 201F/G-G/H that “where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them ... Where there is risk of injustice, a court is obliged to appoint a curator to represent the interests of children”. Acting Judge Skweyiya observed that this obligation ‘flows from the provisions of s 28(1)(h) of the Constitution”.

⁷⁷⁵ Sloth-Nielsen 2008 *SAJHR* 500 explains that the appointment of a curator *ad litem* is to supplement the child’s lack of capacity to litigate and the appointment of a curator *ad litem* for a child is to represent the child’s interests (in contrast to the child’s views) where such interests may be affected. Du Toit in *Child Law in South Africa* 109 comments that the curator *ad litem* has a duty to assist the court and the child during legal proceedings and to look after the child’s interests.

⁷⁷⁶ *Ex parte Greeve* (1907) 24 SC 202; *Swart v Muller* (1909) 19 CTR 475; *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T); *Yu Kwam v President Insurance Co Ltd* 1963 (3) SA 766 (A) 772; *Gassner v Minister of Law and Order* 1995 (1) SA 322 (C); *Multilateral Motor Vehicle Accident Fund v Mkgohloa* 1996 (1) SA 240 (T); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T).

⁷⁷⁷ *Ex parte Bloy* 1984 (2) SA 410 (D); *Moosa v Minister of Police, KwaZulu* 1995 (4) SA 769 (D).

⁷⁷⁸ *Wolman v Wolman* 1963 (2) SA 452 (A) 459C; *B v E* 1992 (3) SA 438 (T); Cockrell in *Boberg’s Law of Persons and the Family* 903 n 12 and authority cited.

⁷⁷⁹ Van der Vyver and Joubert *Persone- en Familiereg* 178; Cockrell in *Boberg’s Law of Persons and the Family* 904 n 13 and authority cited.

affecting the child, if substantial injustice would otherwise result”.⁷⁸⁰ With *Soller v G*⁷⁸¹ the court emphasised the importance of giving a child the opportunity to express his or her views and to be assisted in doing so by a legal practitioner assigned in terms of section 28(1)(h).⁷⁸²

The curator *ad litem* has the child’s interests at heart.⁷⁸³ This is amplified by the reported judgments to date⁷⁸⁴ on the appointment of a curator *ad litem* to assist a child in matters which may possibly affect the interests of that child.

A case in question is *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*.⁷⁸⁵ An application for the appointment of a curator *ad litem* was brought before Judge De Villiers, who agreed that that the children required legal assistance, but was in favour of an appointment in terms of section 28(1)(h). Following on the decision in the *Van Niekerk* case, the court drew a distinction between a curator *ad litem* and a legal representative appointed in terms of section 28(1)(h) of the Constitution in *Centre for Child Law v Minister of Home Affairs*.⁷⁸⁶ The court at first appointed a curator *ad litem* to represent the unaccompanied foreign children held in detention at the Lindela repatriation centre. The powers and duty of the curator *ad litem* for the children was *inter alia* to investigate the circumstances and make recommendations to the court regarding their future treatment and to institute legal proceedings in the enforcement of their rights.⁷⁸⁷

⁷⁸⁰ The wording of the section on face value seems clear enough, but the execution may lead to problems due to the vague description of “substantial injustice” and the assignment of a legal practitioner at state expense.

⁷⁸¹ 2003 (5) SA 430 (W).

⁷⁸² See 5 2 3 1 4 *supra* for a discussion of the case and considerations for the appointment of a legal representative in terms of s 28(1)(h) of the Constitution.

⁷⁸³ The duty of the curator *ad litem* is to assist the court and the child during legal proceedings and look after the interests of the child. See Kassan 48; Sloth-Nielsen 2008 *SAJHR* 500-502.

⁷⁸⁴ Some of which have been referred to in 5 4 6 2 1 *supra*.

⁷⁸⁵ [2005] JOL 14218 (T). For a discussion of events leading up to the appointment of a legal representative in terms of s 28(1)(h) of the Constitution and the judgment handed down later, see 5 2 3 1 4 *supra*.

⁷⁸⁶ 2005 (6) SA 50 (T). For a discussion of events leading up to the appointment of a curator *ad litem*, see 5 2 3 1 4 *supra*.

⁷⁸⁷ Par [6] 54C-E.

The curator *ad litem* subsequently, on reporting back to the court, successfully applied for an order in terms of section 28(1)(h) whereby the commissioner of child welfare Krugersdorp was instructed to appoint a legal practitioner for each of the thirteen children at Dyambo Youth Centre who was ordered to appear before the children's court within five days from date of the order.⁷⁸⁸ The court clearly distinguished between the roles of a curator *ad litem* from that of a legal representative appointed in terms of section 28(1)(h).⁷⁸⁹

The importance of *Legal Aid Board v R and Another*⁷⁹⁰ *inter alia* is to be found in the court's decision that a child, here a twelve-year old girl, may approach the Legal Aid Board directly for the appointment of a legal representative in terms of section 28(1)(h).⁷⁹¹ In *Legal Aid Board v R* the court appointed a legal practitioner in terms of section 28(1)(h) due to the court's finding that substantial injustice would likely result if a separate legal representative was not appointed for the child.⁷⁹²

There are numerous examples to be found in judgments where curators *ad litem* are appointed in diverse circumstances to safeguard the interests of children. A few examples serve to illustrate such appointments. The case of *Du*

⁷⁸⁸ Par [13] 60I-J where Judge De Vos specifically ordered in point 10 of the order that "the ninth respondent [commissioner of child welfare Krugersdorp] appoint a legal practitioner for each of the 13 foreign children presently detained at Dyambo, in terms of s 28(1)(h) of the Constitution of South Africa, 1996, if it appears that substantial injustice would otherwise result".

⁷⁸⁹ Par [23] 58B/C-C/D where the court was informed of the children's plight and the ongoing admission of children in the repatriation centre with the appointment of a *curator ad litem*. The court (par [27] 58I) appointed the curator *ad litem* as the children's legal representative in terms of s 28(1)(h), referring to *Soller v G* 2003 (5) SA 430 (W) at 438 where the task of a legal practitioner in terms of s 28(1)(h) is set out, and added (par [29] 59C-D) that all unaccompanied children that find themselves in South Africa illegally should have legal representation appointed to them by the state.

⁷⁹⁰ 2009 (2) SA 262 (D).

⁷⁹¹ Thus validating the view of Davel in *Commentary on the Children's Act* 2-24 that it should be possible for a child to apply directly to the Legal Aid Board for a legal representative in terms of s 14 of the Children's Act. The limitation found in s 28(1)(h) of "substantial injustice" does not apply in s 14 and therefore it would be possible for the child to be "assisted" by a curator *ad litem* if one of the established grounds in the South African law for the appointment of a curator *ad litem* are present. This view is shared by Du Toit in *Child Law in South Africa* 106 where she comments that it is implicit that, in order to bring a matter to court, a child will need the assistance of legal practitioners. For a general discussion of the applicability of s 14, see 5 4 5 1 and 5 4 5 3 *supra*.

⁷⁹² Par [20] 269G-H.

*Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*⁷⁹³ dealt with the joint adoption of children by a same-sex couple. The court had a thorough report filed by a curator *ad litem* appointed by the court *a quo* regarding the welfare of the couple's teenage children, and of children (born and unborn) in general.⁷⁹⁴ The importance of addressing the interests of children is illustrated in *S v M (Centre for Child Law as Amicus Curiae)*,⁷⁹⁵ a case which involved the sentencing of the primary care-giver of young children. Although section 28(1)(h) could not apply, the matter being of criminal nature, the court nevertheless appointed the Centre for Child Law as *amicus curiae* who in turn made written and oral submissions from a child-rights perspective. A curator *ad litem* was also appointed to represent the interests of the children of the appellant.⁷⁹⁶

5 4 6 3 Legal representation for children in conflict with the law⁷⁹⁷

South Africa having ratified various international instruments⁷⁹⁸ dealing with the plight of the child in conflict with the law and having introduced a dedicated

⁷⁹³ 2003 (2) SA 198 (CC).

⁷⁹⁴ Par [3] 201F/G-G/H where the court held that "where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them ... Where there is risk of injustice, a court is obliged to appoint a curator to represent the interests of children". Acting Judge Skweyiya observed that this obligation "flows from the provisions of s 28(1)(h) of the Constitution". Sloth-Nielsen 2008 SAJHR 501 rightly questions whether a child's legal representative fulfils or should equate to, a curator *ad litem*. The legal representative does not represent the views of "non-clients" not before court, such as children generally, nor is it clear that all the foreign children as clients in the *Centre for Child Law* case would necessarily have given their legal representative the same instructions.

⁷⁹⁵ 2008 (3) SA 232 (CC).

⁷⁹⁶ Par [6] 240 read with par [30] 250. Sloth-Nielsen 2008 SAJHR 501 mentions that the court did not explicitly consider whether the curator *ad litem*'s appointment afforded sufficient representation of the children's views as opposed to the children's interests. Par [36] 252-253 of the judgment indicates that what is apparent is that the court did not indicate that the appointment of a curator *ad litem* is not called for when considering the best interests of the child in a criminal matter such as the present where the best interests of the child are accounted for when considering an appropriate sentence for the child's parent.

⁷⁹⁷ Referred to for the sake of being complete, but without discussion. The Child Justice Act 75 of 2008 which commenced on 1 April 2010.

⁷⁹⁸ Notably the CRC which provide in arts 40(2)(b)(ii) and (iii) that the child has to be informed promptly and directly of his or her right to have legal or other appropriate assistance in the preparation and presentation of his or her defence. Furthermore to have the hearing determined without delay and in the presence of legal representation or other appropriate assistance unless it is considered not to be in the interests of the child, in particular, taking

section on children's rights in the South African Constitution,⁷⁹⁹ has sought to create a separate criminal system for children.⁸⁰⁰ The child's right to legal representation when in conflict with the law has come a long way.⁸⁰¹ In the well-known case of *In re Gault*⁸⁰² the American Supreme Court introduced due process guarantees into child justice court procedures, one of which was the child's right to legal counsel.⁸⁰³ The right to legal representation flows from the adversarial nature of criminal court proceedings and the fact that it will seldom be in the best interests of the child to appear without the assistance of a suitably qualified person.⁸⁰⁴

into account the age or situation of the child, the parents or legal guardians of the child. Art 37(d) of the CRC also specifies that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance. The ACRWC echoes these provisions in art 17(2)(c)(iii) which specifies that every child accused of infringing the penal law shall be afforded legal and other appropriate assistance in the preparation and presentation of his or her defence. There are also other international instruments like the United Nations Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) which require that a minimum standard has to apply, eg rule 15 1 of the Beijing Rules provides that "the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country".

⁷⁹⁹ S 28 of the Constitution.

⁸⁰⁰ The route followed leading up to the signing into law of the Child Justice Act is very briefly referred to by Gallinetti *Getting to know the Child Justice Act* (2009) hereafter Gallinetti *Child Justice Act 7*; Sloth-Nielsen 2008 *SAJHR* 507-511. A more in-depth discussion of the route followed from the appointment of a Project Committee of the South African Law Commission to investigate juvenile justice leading up to the introduction of the Child Justice Bill 49 of 2002 does not fall within the ambit of this thesis. It suffices to say that it followed the same cumbersome route as did the Children's Act varying in volume but not in intensity.

⁸⁰¹ Recently confirmed again in *S v Thomas* 2001 (2) SACR 608 (W). See in general Sloth-Nielsen "Child Justice and Law Reform" in Davel *Introduction to Child Law in South Africa* 383-385.

⁸⁰² 387 US 1 (1967) an appeal from the Supreme Court of Arizona where the Supreme Court of the United States reversed the court *a quo's* decision regarding the procedure followed where children appear in criminal courts.

⁸⁰³ The court held that following minimum constitutional requirements should be evident during adjudication of a criminal matter of a child, notice of charges, right to (legal) counsel, the right to challenge witnesses and cross-examine, the right against self-incrimination, the right to a transcript of the hearing and the right of appeal.

⁸⁰⁴ Sloth-Nielsen in *Introduction to Child Law in South Africa* 457. See Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) hereafter Steytler *Constitutional Criminal Procedure* 304 who also mentions that the right to parental assistance found in the provision of s 73(3) of the Criminal Procedure Act 51 of 1977 does not replace the right to legal representation. Steytler *op cit* 302 rightly asserts that the right to legal representation is an essential feature of the right to a fair trial. See further Zaal and Skelton 1998 *SAJHR* 540.

The South African Constitution makes provision for all detained persons⁸⁰⁵ and accused persons to acquire legal representation.⁸⁰⁶ The legal representation of children in criminal matters has been taken one step further with the enactment of the Child Justice Act.⁸⁰⁷ Chapter 11 of the Child Justice Act specifically deals with legal representation for children.⁸⁰⁸ There are a number of innovative aspects which may yet prove to be of guidance for other fora.⁸⁰⁹ A discussion of the sections addressing the issue of legal representation will highlight the requirements and functioning of legal representation for children in criminal courts.⁸¹⁰

A child is also ensured of legal representation during a preliminary hearing⁸¹¹ in terms of section 43 of the Child Justice Act. This procedure is part of the innovative approach regarding children in conflict with the law⁸¹² and is compulsory in respect of every child if the exception referred to in the Child Justice Act is not applicable.⁸¹³

⁸⁰⁵ S 35(2)(c) of the Constitution which refers in general terms to everyone and therefore includes a child. The section provides that everyone who is detained has the right to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

⁸⁰⁶ S 35(3)(g) of the Constitution which provides that every accused person has the right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

⁸⁰⁷ 75 of 2008.

⁸⁰⁸ Ss 80 to 83 of the Act. See in general Gallinetti *Child Justice Act* for a brief overview of the Child Justice Act.

⁸⁰⁹ A comparison between the provisions of the Children's Act and the Child Justice Act may be a worthy exercise in future. Both the Acts have the best interests of the child as a standard and in differing ways have to consider the deprivation of the child's liberty be it for a short or a longer period. However, a comparison does not fall within the scope of the present research.

⁸¹⁰ Gallinetti *Child Justice Act* 58 points out that ch 11 seeks to give effect to section 35 of the Constitution.

⁸¹¹ S 81 of the Child Justice Act provides that a child may be represented by a legal representative at a preliminary inquiry.

⁸¹² Gallinetti *Child Justice Act* 38 draws attention to the aim of a preliminary hearing that is to prevent children from getting lost in the criminal justice system. S 43(2)(g) of the Child Justice Act encourages the participation of the child

⁸¹³ S 43(3)(a) of the Child Justice Act lists three exceptions where children are not required to be subjected to a preliminary inquiry, namely where-

- (i) the matter has been diverted by a prosecutor in terms of chapter 6 of the Act;
- (ii) the child is under the age of ten years;
- (iii) the matter has been withdrawn.

When a child appears before a criminal court,⁸¹⁴ section 82 of the Child Justice Act provides the steps which the presiding officer is obliged to take in order to ensure legal representation for the child.⁸¹⁵ A child may not waive his or her legal representation.⁸¹⁶ Where a child has indicated his or her wish not to have a legal representative or declines to give instructions to an appointed legal representative, the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the Legal Aid Guide be appointed to assist the court.⁸¹⁷ The Child Justice Act requires of a legal representative to comply with the provisions of section 80 of the Act in order to act on behalf of a child in criminal proceedings.⁸¹⁸ Where the legal representative, in the opinion of the presiding officer, at any stage during the conduct of any proceedings under the Act, does not comply with the provisions of section 80 of the Child Justice Act, the presiding officer must record such non-compliance and order appropriate remedial action or sanction. The presiding officer must also provide the notification of the court's action or

⁸¹⁴ The Child Justice Act refers to a child justice court.

⁸¹⁵ S 82 provides that a child may be provided with legal representation at state expense in certain instances –

- “(1) where a child appears before a child justice court ... and is not represented by a legal representative of ... choice, at ... own expense the presiding officer must refer the child to the Legal Aid Board for the matter to be evaluated by the Board;
- (2) no plea may be taken until the child ... has been granted a reasonable opportunity to obtain a legal representative or a legal representative has been appointed.”

⁸¹⁶ S 83(1) of the Child Justice Act.

⁸¹⁷ S 83(2) of the Child Justice Act. Gallinetti *Child Justice Act* 59 is of the view that the court may appoint a legal representative which is more in line with the provisions of s 35(3)(g) of the Constitution which grants a fundamental right, but does not compel the bearer of such right to make use of it. Where a legal representative is appointed *contra* the request or wish of the child and is appointed at the direction of the court such an appointment may be subject to constitutional scrutiny. The intention may be good but the execution could create a problem.

⁸¹⁸ These provisions are contained in s 80(1) which obliges a legal representative to –

- “(a) allow the child, as far as is reasonably possible, to give independent instructions concerning the case;
- (b) explain the child's rights and duties in relation to any proceedings under the Act in a manner appropriate to the age and intellectual development of the child;
- (c) promote diversion, where appropriate, but may not unduly influence the child to acknowledge responsibility;
- (d) ensure that the assessment, preliminary inquiry, trial or any other proceedings in which the child is involved, are concluded without delay and deal with the matter in a manner to ensure that the best interests of the child are at all times of paramount importance; and
- (e) uphold the highest standards of ethical behaviour and professional conduct.”

sanction to the appropriate law society, Legal Aid Board or controlling body of the advocate.

5 4 6 4 The effect of substantial injustice on the child's right to legal representation

Substantial injustice as a proviso is mentioned in both sections 28(1)(h) and 35(3)(g) of the Constitution.⁸¹⁹ Substantial injustice is not referred to in either the Convention on the Rights of the Child or the African Charter.⁸²⁰ The interpretation attached to the phrase “substantial injustice” is of vital importance to children in children's court proceedings or civil proceedings, especially if the children are too young to form their own views and voice any concerns in matters affecting them.⁸²¹ There are numerous situations that might arise where the determination of refusing or granting of the child legal representation could lead to “substantial injustice” without the court realising this.⁸²²

⁸¹⁹ However, with the signing into law of the Child Justice Act 75 of 2008 the applicability of s 35(3)(g) of the Constitution to children has been greatly reduced. Gallinetti *Child Justice Act* 58 mentions that ch 11 of the Child Justice Act seeks to give effect to s 35 of the Constitution as far as it relates to children. The Legal Aid Board has to decide whether the child qualifies for a legal representative at state expense or not. The *Legal Aid Guide* par 5 3 2 specifies that for legal aid under s 35(3)(g) of the Constitution, a child will not have to qualify for legal aid through the means test if the child needs legal representation in a criminal case.

⁸²⁰ The International Covenant on Civil and Political Rights in art 14(3)(d) sets out the rights of an accused as being “entitled to defend himself ... and to have legal assistance assigned him, in any case where the interests of justice so require”. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides a similar right in that an accused has the right to “defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

⁸²¹ Keeping in mind that s 28(1)(h) of the Constitution requires no age limit to qualify for legal representation in civil matters. Matters that come to mind are domestic violence where the child is not the complainant; maintenance where one or both the parents are legally represented and reach an agreement without considering the best interests of the child; the administration of estates where young children are involved is a real concern in reality where untrained clerks have to take a decision whether to refer the matter to the Legal Aid Board or not.

⁸²² Especially because there is no definition of “substantial injustice” in the Children's Act. Matters that come to mind are domestic violence, maintenance and administration of estates of deceased persons devolving according to either the South African common law or customary law.

The term “substantial injustice” needs to be investigated in order to determine what legislature had intended with the incorporation of the phrase in the various sections of legislation referred to. “Substantial injustice” has been referred to as being just as vague as the best interests of the child standard.⁸²³ What is meant by “substantial injustice”⁸²⁴ and how is “substantial injustice” determined?⁸²⁵ The importance of this question lies in the fact that the majority of family and civil matters involving children are heard in magistrates’ courts throughout South Africa. If there is a lack of understanding of what is meant by “substantial injustice” and there are no guidelines to assist magistrates in their decisions in applying the test in practice, then ultimately children are at risk.⁸²⁶ Steytler

⁸²³ Zaal 1997 SALJ 335; Zaal and Skelton 1998 SAJHR 541 mention that the “substantial injustice” test may prove difficult to delineate in practice. See also Friedman and Pantazis “Children” in Woolman, Klaaren, Stein and Chaskalson in *Constitutional Law of South Africa* 47-28.

⁸²⁴ Du Plessis and Corder *Understanding South African’s Transitional Bill of Rights* (1994) 174 observe that the drafters of the interim Constitution were intent on limiting the possible burden on the state by drafting the legal aid obligations of the state as narrowly as possible. They used the term “substantial injustice” rather than the more general expression “where the interests of justice so require”. Rothman 2001 *The Judicial officer* “The need for legal representation for children in the children’s court proceedings – fact or phobia?” 11 calls for a definition of the phrase “substantial injustice” and ventures the following as definition “when considerable administrative and judicial unfairness may occur in the proceedings relating to any matter affecting child that is, where a child, capable of forming his or her own views [thus of such age, maturity and stage of development], is denied the right and opportunity to best express those views at such proceedings through a legal representative”. See also Davel in *Gedenkbundel vir JMT Labuschagne* 21 who, regarding the appointment of legal representatives, asks what constitutes “substantial injustice” and who decides whether “substantial injustice” will result. S 7 of the Children’s Act has set out guidelines to be used regarding the best interests standard of the child, but no such guideline has been forthcoming for “substantial injustice”.

⁸²⁵ Steytler *Constitutional Criminal Procedure* 308 observes that the determination of whether substantial injustice may otherwise result is the responsibility of the court. Sloth-Nielsen in *South African Constitutional Law: The Bill of Rights* 23-24 comments on some of the factors to be considered such as the child’s age, complexity of the case, the ability of the child to express his or her wishes. Friedman and Pantazis in *Constitutional Law of South Africa* 47-28 make an interesting observation when they mention that the question whether the phrase “if substantial injustice would otherwise result” qualifies the whole section or just the part dealing with funding. According to the authors it is possible to interpret the section (section 28(1)(h)) so that the right of a child to a lawyer at civil proceedings only arises if substantial injustice would result. See further Cockrell in *Bill of Rights Compendium* 3-18; Kassan 2003 *De Jure* 168; Davel in *Gedenkbundel vir JMT Labuschagne* 26-27.

⁸²⁶ Rothman *The Judicial Officer* 11 correctly holds that there is a difference between the term “substantial injustice” and the standard of the best interests of the child and should not be confused with each other. The author opines that “substantial injustice” relates to proper and fair administrative and legal proceedings whilst the standard of the best interests of the child deals with the ultimate objective to be achieved in order to secure the well-being of the child. I agree with this, however, it must be kept in mind that the best interests of the child do not appear at the end of proceedings, but is present from the start to the end of proceedings and even subsequent to that. The right to legal representation for children in

makes a valid statement regarding “substantial injustice” when he observes that the constitutional question then is “to distinguish between injustices which could be tolerated and those substantial ones which should be avoided through the appointment of counsel”.⁸²⁷

The Child Justice Act has brought about a complete change in the approach of legal representation for children in conflict with the law.⁸²⁸ It is difficult to imagine a situation where a child in conflict with the law would not qualify for legal representation due to the application of the test for “substantial injustice” contained in section 35(3)(g) of the Constitution. Compared with the Child Justice Act⁸²⁹ it appears that children in civil matters (which include children’s court proceedings) are not on an even keel with children in conflict with the law when it comes to legal representation for such children.⁸³⁰

civil matters in terms of s 28(1)(h) is a fundamental right. The determination of whether “substantial injustice” would otherwise result requires recognition and evaluation of a whole spectrum of fundamental rights to which the child is entitled under the overarching standard of the best interests of the child in which paramountcy is enshrined in s 28(2) of the Constitution. See Davel in *Gedenkbundel vir JMT Labuschagne* 27 who mentions that art 12 of the CRC and the Constitution provides the child with a right to legal representation. See also Robinson in *Introduction to Child Law in South Africa* 82-83. However, Sloth-Nielsen in *South African Constitutional Law: The Bill of Rights* 23-25 feels that such uncertainty precludes the development of a coherent and uniform set of criteria of broader application in the legal system and furthermore it appears at this stage that whether or not the child’s right to legal representation is raised will depend on the inclination of individual judges and, one might add, magistrates.

⁸²⁷ *Constitutional Criminal Procedure* 308.

⁸²⁸ See discussion 5 4 6 3 *supra*.

⁸²⁹ 75 of 2008.

⁸³⁰ S 82(1) of the Child Justice Act provides that where a child appears before a child justice court in terms of ch 9 (which deals with the trial of a child in a child justice court) and is not represented by a legal representative of his or her own choice, at his or her own expense the court refers the child to the Legal Aid Board for the matter to be evaluated by the Board as provided for in s 3B(1)(b) of the Legal Aid Act 22 of 1969. The *Legal Aid Guide* (ratified in terms of section 3A(2) of the Legal Aid Act 22 of 1969 (as amended) by the National Assembly on 23 October 2008 and by the National Council of Provinces on 11 November 2008 with effective date 11 February 2009) provides in par 5 3 2 that for legal aid under s 35(3)(g) of the Constitution a child will not have to qualify for legal aid through any means test if the child needs legal representation for a criminal case. The same par 5 3 2 of the *Legal Aid Guide* provides that for legal aid under s 28(1)(h) of the Constitution, read with any relevant regulation, the child will *have to qualify* for legal aid, as set out in par 4 1 18. Par 4 1 18 provides that legal representation must be granted at state expense in civil proceedings affecting a child if substantial injustice would otherwise result. The following criteria are used to determine if a child has the right to legal aid in civil cases at state expense: the seriousness of the issue for the child, for example, if the child’s constitutional rights or personal rights are at risk; the complexity of the relevant law and procedure; the ability of the child to represent himself or herself effectively without a lawyer; the financial

The situation, however, is not the same for children who want to qualify for legal representation in terms of section 28(1)(h) of the Constitution.⁸³¹ Section 55 of the Children's Act does not call on the court to apply the "substantial injustice" test. It only contains a weakened version of what is contained in clause 78 of the draft Bill regarding the child's right to legal representation, but the phrase "if substantial injustice would otherwise result" remains one of nine possibilities.⁸³²

The test of "substantial injustice"⁸³³ has come a long way in criminal matters and the courts have had to grapple with its application at the onset of the new constitutional dispensation.⁸³⁴ However, it is its application in civil matters which now requires attention.

situation of the child or the child's parents or guardians; the child's chances of success in the case; whether the child has a substantial disadvantage compared with the other party in the case. Where these criteria are met, the child *should* get legal aid as long as the Legal Aid Board has the necessary resources and the other requirements of the *Legal Aid Guide* are met. (Emphasis added.)

⁸³¹ Sloth-Nielsen in *South African Constitutional Law: The Bill of Rights 23-25* comments that although it is commendable that South African courts have begun to come to grips with the application of s 28(1)(h) in the absence of domestic legislation detailing the circumstances under which substantial injustice might arise, this is occurring on a case by case basis which is highly undesirable.

⁸³² For clause 78 of draft Bill, see 5 4 1 *supra*. Sloth-Nielsen in *South African Constitutional Law: The Bill of Rights 23-26* (referring to the Children's Bill 70 of 2003) mentions that there are possibly two instances where what is required in s 28(1)(h) may present problems (she refers to clauses 55(4) and (5) of the Children's Bill 70 of 2003); in the first instance the child may request legal representation where no substantial injustice is likely. Secondly it does not permit the presiding officer to arrange for legal representation for a child who does not request it; even if there is a likelihood of substantial injustice arising. S 55 of the Children's Act has addressed the first concern to some extent (regarding children appearing in the children's court). However, if a child appears before a magistrate's court in a family-law matter (eg maintenance and domestic violence) s 28(1)(h) will apply directly. It is suggested that if it appears that there is no possibility of substantial injustice, the court will have to record its reason for refusing the child's application. Regarding Sloth-Nielsen's second concern, it is suggested that the best interests of the child should dictate the court's decision in this regard.

⁸³³ Davel in *Gedenkbundel vir JMT Labuschagne 26* refers to the test built into s 28(1)(h) which limits the child's right to legal representation. As the legal representation referred to in s 28(1)(h) of the Constitution is not an interest but a fundamental right accorded to the child in terms of the Bill of Rights, Davel is probably correct in referring to "substantial injustice" as a test for determining whether the child will qualify for having a legal representative assigned to assist voicing his or her views in the civil matter affecting the child.

⁸³⁴ Steytler *Constitutional Criminal Procedure* 311.

Substantial injustice has been considered in some reported judgments over the last decade. In *Fitschen v Fitschen*⁸³⁵ the court held that it was the court that had to decide whether there would be “substantial injustice” if a legal representative was to be assigned to the child or not.⁸³⁶ The court held that “substantial injustice” would not result if a legal representative was not assigned because the views of the children had been properly canvassed by the expert evidence placed before the court.

A contrary view was held in *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁸³⁷ where the court held that “the parents accuse each other for the attitude of the children but that the children, so far, have not had the opportunity to state their views or have their interests independently put before the court”.⁸³⁸ The court was of the view that the children had an interest in the outcome of the proceedings and that their best interests were reduced to a subordinate role.⁸³⁹

Recently the courts have had the opportunity to refer to and discuss the issue of “substantial injustice” in family law related matters. In *Soller v G*⁸⁴⁰ the court specifically referred to the question of “substantial injustice” mentioning that the significance of section 28(1)(h) lies in the recognition that, because the child’s interests and the adult’s interests do not always intersect, there exists a need for separate representation of the child’s views.⁸⁴¹ This is important because any decision made by the court will impact most heavily on a child and the civil

⁸³⁵ [1997] JOL 1612 (C).

⁸³⁶ At 63 where the court held that “[m]inderjarige kinders se reg op regsverteenwoordiging in siviele sake wat hulle belange raak (artikel 28(1)(h) van die Grondwet) is onderhewig aan die voorbehoud dat dit ‘andersins tot wesenlike onreg sou lei’. Na my mening is die vraag of dié voorbehoud aanwending vind ‘n aspek wat ... deur myself beoordeel moes word”.

⁸³⁷ [2005] JOL 14218 (T).

⁸³⁸ Par [6].

⁸³⁹ Par [7] holding that it is clear that “in the fight between the parents the best interests of the children play a subordinate role”. Judge Hartzenberg added (par [7]) it is only when the children “or somebody [unattached to either one of the parents] on their behalf [presents] their case ... will a court have a balanced presentation of the situation”.

⁸⁴⁰ 2003 (5) SA 430 (W).

⁸⁴¹ Par [8] 434H-435A.

proceedings concerned “are of crucial importance to his current life and future development”.⁸⁴²

In *R v H*⁸⁴³ the court of own accord appointed a legal representative in terms of section 28(1)(h) of the Constitution. It may be inferred from the reasons that the court gave that it had decided that “substantial injustice” would result if a legal representative was not assigned.⁸⁴⁴

In the recent case of *Legal Aid Board v R*⁸⁴⁵ the child applied for legal aid in view of the ongoing acrimonious litigation concerning her custody. The court held that where the court is dealing with acrimonious litigation which concerns fundamentally important questions⁸⁴⁶ and if the court concluded that the voice of the child is drowned out by the warring voices of her parents, it is a necessary conclusion that substantial injustice would result if the child is not afforded legal representation to make her voice heard.⁸⁴⁷

It appears from the cases referred to above that there are various factors, some of which have been discussed in the cases referred to, which may be indicative of the appropriateness of assigning legal representation in terms of section 28(1)(h) of the Constitution. Davel⁸⁴⁸ mentions that *Soller v G* and *Ex parte Centre for Child Law*⁸⁴⁹ have indicated that legal representation in terms of section 28(1)(h) of the Constitution is required for the child that feels the Family Advocate has not properly considered his or her views or has made a

⁸⁴² Par [10] 435D.

⁸⁴³ 2005 (6) SA 535 (C).

⁸⁴⁴ Par [6] 539G-540A where the court mentions in the first place that the plaintiff was seeking drastic relief in the existing access arrangement (the mother was applying for sole custody and sole guardianship of the child) which could have serious implications for the child; secondly, the interests of the child may not be compatible with those of the custodian parent; thirdly, there may be a need to articulate the views of the child in these proceedings in the interests of justice (which included the best interests of the child); lastly, separate legal representation may be in the best interests of the child.

⁸⁴⁵ 2009 (2) SA 262 (D).

⁸⁴⁶ Par [20] 269F-G mentioning factors such as where the child shall live and who shall be responsible for the child’s principal day-to-day care and the central decisions concerning her schooling, health, religion and the like.

⁸⁴⁷ Par [20] 269 G-H.

⁸⁴⁸ In *Gedenkbundel vir JMT Labuschagne* 27.

⁸⁴⁹ Reported as *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T).

recommendation that is contrary to the wishes of the child. It has also been suggested that the level of acrimony between parents⁸⁵⁰ or a conflict of interests between the child and one of the parents⁸⁵¹ may indicate that it would be apposite to appoint a legal representative in terms of section 28(1)(h) of the Constitution.⁸⁵² Davel⁸⁵³ concludes her comment with reference to the wording of section 28(1)(h) of the Constitution which implies/indicates that “substantial injustice” *would* result. However, it would be impossible to decide undeniably that “substantial injustice” would result. It would therefore be more correct to the fundamental right which the section accords to the child to add meaningful content in saying that in the absence of legal representation, substantial injustice would probably result.⁸⁵⁴

In closing it may be opportune to note the concern of Zaal⁸⁵⁵ regarding the absence of guidelines for the consideration of legal representation in children’s court proceedings and his suggested guidelines. Although the proposed guidelines are not directed specifically at presiding officers of the magistrate’s court, it may very well serve as a guide in the children’s court dealing with family-law matters as well.⁸⁵⁶ The proposed guidelines of Zaal are well considered and reflect the input of the magistrates interviewed.⁸⁵⁷ However, as

⁸⁵⁰ As was evidenced in *Legal Aid Board v R* 2009 (2) SA 262 (D). See also Kassan 2003 *De Jure* 178.

⁸⁵¹ Kassan 2003 *De Jure* 178.

⁸⁵² Davel *loc cit*.

⁸⁵³ *Ibid*.

⁸⁵⁴ *Ibid*. What is important of this conclusion is that it aligns the reality of what happens in practice with the legal theory contained the section. As Davel *op cit* 30 concludes a judge (and for that matter a magistrate) is in a very strong position to assess whether substantial injustice would or would not probably result and assign a legal practitioner to that child.

⁸⁵⁵ 1997 *SALJ* 342-343 where Zaal observes that the view that children never require legal representation in care proceedings is not tenable. He cautions that only lawyers with appropriate motivation, knowledge of the legal provisions and ability to relate and communicate should be utilised. This view is shared by Kassan 2003 *De Jure* 178 who expresses concern that using lawyers who are not experienced in family-law work might not have the expected results in ensuring that children that are afforded the independent legal representation they require. Davel in *Gedenkbundel vir JMT Labuschagne* 30 concludes that it remains to be seen how the legal profession is going to manage the challenge.

⁸⁵⁶ S 55 of the Children’s Act requires of the court to form an opinion whether it would be in the child’s best interests to have legal representation and if so then to refer the matter to the Legal Aid Board for consideration.

⁸⁵⁷ Zaal 1997 *SALJ* 336 where the author refers to 42 magistrates that were interviewed.

section 8A⁸⁵⁸ and the subsequent regulation 4A⁸⁵⁹ have not come into operation and probably will not come into operation,⁸⁶⁰ the following guide is suggested when considering whether “substantial injustice would otherwise result” if legal representation at state expense were not considered.⁸⁶¹ The guidelines are aimed at children’s court proceedings as well as family-related proceedings which are dealt with in the children’s court⁸⁶² and include the following situations.⁸⁶³

- (a) where the child is a party to the proceedings;
- (b) where at least one of the parties involved in a matter affecting a child have legal representation;⁸⁶⁴

⁸⁵⁸ Inserted in terms of the Child Care Amendment Act 96 of 1996, but will not come into operation.

⁸⁵⁹ Inserted into the 1986 regulation by GN R416 of 1998 but will not come into operation.

⁸⁶⁰ Sloth-Nielsen and Mezmur 2008 *IJCR* 15 refer to the abortive attempt to legislate more substantive criteria for the appointment of legal representatives for children in welfare-orientated children’s court inquiries.

⁸⁶¹ Keeping in mind the guide of Zaal 1997 *SALJ* 343 and the suggestions of Kassan 2003 *De Jure* 178 as well as the criteria considered by the Legal Aid Board in *Legal Aid Guide* for 2009 par 4 18 1. Sloth-Nielsen 2008 *SAJHR* 499 mentions that according to information gathered from the University of the Western Cape Law Clinic children’s court attorneys, magistrates in children’s court enquiries usually exercise their discretion in situations where there is conflict between the child and parent on issues which may result in the removal of the child from the parent, ie adoption or foster placement. It is then usually the magistrate who sources the representation on behalf of the child, or the social worker acting on instruction from the magistrate.

⁸⁶² The provisions of s 55 of the Children’s Act are kept in mind as well as the concerns that Gallinetti in *Commentary on the Children’s Act* 4-21/4-22 expresses. Sloth-Nielsen 2008 *SAJHR* 513-514 mentions that the *Legal Aid Board Business Model – Children Units* (May 2006) provides for the following justiciable needs of children to be undertaken by the Children’s Units in relation to children’s court enquiries:

- (a) The paramountcy of the “best interests of the child” of matters referred to the Legal Aid Board in terms of s 55 of the Children’s Act;
- (b) In terms of s 28(1)(h) of the Constitution children should not be required to qualify for legal aid in terms of the means test if legal representation is required by or on behalf of a child in relation to civil proceedings where the primary issue is the adoption of the child, the question whether the child is the victim of parental abuse and/or neglect or whether the child should be placed in foster care;
- (c) In any disputed adoption or foster placement including where the child shows reluctance as far as placement regarding such adoption or foster placement is concerned, legal representation for the child must be provided in order to protect the interests of the child.

⁸⁶³ This suggested guide should be considered in conjunction with principles referred to by Sloth-Nielsen 2008 *SAJHR* 513-514.

⁸⁶⁴ This will obviate the appointment of a legal representative for a child in the so-called uncontested children’s court proceedings which presently constitute the majority of the children’s court proceedings in South Africa according to information gathered from magistrates the past two years during children’s court seminars at Justice College. Sloth-Nielsen 2008 *SAJHR* 514 agrees that where the parent is legally represented the child should have a legal representative appointed to assist the child.

- (c) any matter in which section 31 of the Children’s Act is applicable and the best interests of the child requires independent legal representation of the child; and
- (d) where the court requests legal representation for the child after inquiry and finds that the best interests of the child requires legal representation of the child.⁸⁶⁵

5 5 Best interests of the child revisited⁸⁶⁶

5 5 1 General and introductory remarks⁸⁶⁷

The “best interests of the child” as a guiding principle in matters affecting the child are found in the common law of South Africa and was given acknowledgement and paramountcy as early as 1948 in the then Appellate Division.⁸⁶⁸ References to “the best interests of the child” appeared frequently in reported judgments where the rights, or rather privileges,⁸⁶⁹ of the child were affected.⁸⁷⁰

⁸⁶⁵ This would address the concerns of Gallinetti in *Commentary on the Children’s Act* 4-22. It should be added that presently where magistrates refer requests that a legal representative be assigned to a child in a “marginal” matter, the Legal Aid Board has in the past responded positively in the best interests of the child.

⁸⁶⁶ See generally Palmer in *Children’s Rights* 98 *et seq*; Barratt *The Fate of the Child: Legal Decisions on Children in The New South Africa* 145 *et seq*; Müller and Tait “The Best Interests of Children: A Criminal Law Concept?” 1999 *De Jure* 322-329; Clark 2000 *Stell LR* 3-20; Davel and De Kock “In ‘n Kind se beste Belang” 2001 *De Jure* 272-291; Bekink and Bekink *De Jure* 21-40; Davel in *Commentary on the Children’s Act* 2-2/2-12; Malherbe “The Constitutional dimension of the best interests of the child as applied in education” 2008 *TSAR* 267-286.

⁸⁶⁷ The “best interests of the child” standard will be discussed insofar as it relates to the right of the child to participate and right to legal representation in legal matters affecting the child.

⁸⁶⁸ In *Fletcher v Fletcher* 1948 (1) SA 130 (A) 134 however, the court did not articulate what would be the best interests of the child nor did it set out any particular criteria to be considered.

⁸⁶⁹ In the sense of now being entrenched in the Bill of Rights in s 28(2) of the Constitution. In *Kleynhans v Kleynhans* [2009] JOL 24013 (ECP) 24018 Judge Pillay commented that in an application or other related procedure the interests of the child “surges above all else”.

⁸⁷⁰ Tebbut AJ (as he then was) described the best interest of a child in *Kaiser v Chambers* 1969 (4) SA 224 (C) 228G as a “golden thread which runs through the whole fabric of our law relating to children”.

Previously⁸⁷¹ it was mentioned that the best interests of the child principle⁸⁷² was fortified in case law and thereby confirmed the common-law principle of the best interests of the child as part of South African law involving a child. In the following discussion the development and applicability of this well-known and repeatedly used principle will be examined to determine how the entrenchment in the South African case law involving children's rights came about.⁸⁷³

The best interests of the child as an entrenched standard in South African law⁸⁷⁴ emerged in South African case law in *Simey v Simey*⁸⁷⁵ where the court held that, whilst looking at all the circumstances of the case, the court must "chiefly be guided by the consideration of the best interests of the children".⁸⁷⁶ In interim there were regular references to the interests of the child in cases referred to,⁸⁷⁷ but not allowing the interests of the child to go beyond other

⁸⁷¹ See 5 2 3 *supra* with reference to *Fletcher v Fletcher* 1948 (1) SA 130 (A) and discussion at 5 3 3 *supra*.

⁸⁷² This principle may sometimes be referred to as the "welfare of the child" as is found in eg *Cronje v Cronje* 1907 TS 871 872 or just "interests of the child" as in *Milstein v Milstein* 1943 TPD 227 228.

⁸⁷³ The terms of reference will be the applicability to the participatory rights of the child as well as the legal representation of the child in legal matters affecting the child.

⁸⁷⁴ S 28(2) of the Constitution has entrenched the best interests of the child in South Africa in determining that "[a] child's best interests are of paramount importance in every matter concerning the child".

⁸⁷⁵ (1880-1882) 1 SC 171, the judgment was handed down on 20 May 1881. The matter that had to be considered was the judicial separation of the parents and the interests of their child, a boy of six-and-a-half years.

⁸⁷⁶ Per Judge Smith 176. He was the only one of three judges, the other two being Judges Dwyer and Jacobs, who specifically referred to the interests of the child to be considered.

⁸⁷⁷ See eg *Cronje v Cronje* 1907 TS 871 872 where the court considering the custody of a child held that "[i]n all cases the main consideration for the court in making an order with regard to the custody of the children is, what is the best interests of the children themselves". See also *Tabb v Tabb* 1909 TS 1033 1034 where the court considered the mother's application for her child's custody after divorce. Chief Justice Innes made the following comment "the guiding principle to be borne in mind is not what the *feelings of the parents* are, but what is best for the children". (Emphasis added.) Compare *Borcherds v Borcherds and Jooste* (1902 Supreme Court not reported) where Chief Justice Innes held that the interests of children must always be the main consideration. Further also *Rogers v Rogers* 1930 TPD 469 470 where Judge Solomon maintained that the court "will have to consider the whole question from the point of view of the children's best interests". In *Cook v Cook* 1937 AD 154 163 Acting Judge of Appeal Fleetham reiterated that "[i]n all cases the main consideration for the Court in making an order with regard to the custody of the children is, what is the best interests of the children themselves". In *Milstein v Milstein* 1943 TPD 227 228 Judge President Greenberg held on the question of custody that he has always understood the position to be that "if the interests of the child or children will clearly be served better by its [sic] being in the custody of one spouse, then custody will be given to that spouse even though the other spouse is both the father and the innocent party".

interests and assert its intended consideration of paramountcy. Ultimately it was in *Fletcher v Fletcher*⁸⁷⁸ that the Appeal Court (as it was then known) highlighted the best interests of the child principle⁸⁷⁹ and elevated it to the paramount consideration in custody matters affecting children.⁸⁸⁰ One of the main concerns regarding the best interests of the child standard has been the vagueness and indeterminacy of the principle.⁸⁸¹ Because a finding based on the principle is factual, there remains an ever-present possibility of a subjective application of the principle.⁸⁸²

5 5 2 Statutory recognition of the best interests of the child standard in South Africa

South Africa was slow to enact legislation in which the best interests of the child were identified and defined. The Matrimonial Affairs Act⁸⁸³ makes reference to the guardianship and custody of children⁸⁸⁴ and prescribes that the court may make any order as to the custody or guardianship of or access to children it

⁸⁷⁸ 1948 (1) SA 130 (A).

⁸⁷⁹ *Fletcher v Fletcher* 134 Judge of Appeal Centlivres hints at the prominence of the child's rights when he says that he does not like the expression "rights of the innocent spouse" because it implies that the one spouse has rights against the other spouse to claim custody of a child "as if the child were a mere chattel". He added that the real issue in all custody cases (and indeed all matters affecting a child) is the interests of the child.

⁸⁸⁰ *Fletcher v Fletcher* 143 Judge of Appeal Schreiner refers to the well-established but variously expressed rule that the interest of the children is the main or paramount consideration, or furnishes the guiding principle to be observed by the court. Further at 144 the court said that it would be useful to repeat the preponderating importance of the welfare of the child. At 145 the court re-affirmed the finding of Judge President Greenberg in *Milstein v Milstein* at 228 that the paramountcy of the welfare of the children could be given effect most satisfactorily by holding that "questions of fatherhood or innocence come into account only when it is not clear what is best for the children". Bekink and Bekink 2004 *De Jure* 22-23 observe that the *Fletcher* decision confirmed that the best interest standard must undoubtedly be the main consideration in matters concerning the child. More importantly they point out that the court stated that the best interest standard has never been appropriately defined or given exhaustive content in either South African law or comparative international or foreign law.

⁸⁸¹ Clark 2000 *Stell LR* 15. Compare also Bonthuys "The best interests of children in the South African Constitution" 2006 *IJLPF* 23-43.

⁸⁸² Clark *loc cit* with reference to *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W). Bonthuys 2006 *IJLPF* 31 argues that courts sometimes simply maintain that certain situations are either good or bad for children.

⁸⁸³ 37 of 1953.

⁸⁸⁴ The Act refers to minors.

deems fit.⁸⁸⁵ The Divorce Act⁸⁸⁶ incorporated the interests of the children as a prerequisite for the granting of a final decree of divorce.⁸⁸⁷ Although the best interests of the child are not raised, the provisions of the Act regarding children imply that these have to be considered with reference to “the best that can be effected in the circumstances”.⁸⁸⁸

The primary statute governing the care and protection of children in South Africa is the Children’s Act which specifically addresses the best interests of the child.⁸⁸⁹ With the commencement of certain sections of the Children’s Act⁸⁹⁰ the best interests of the child have been enumerated and the participatory rights as well as the representative rights of the child brought into line with binding international instruments.⁸⁹¹

The Mediation in Certain Divorce Matters Act⁸⁹² provides for the Family Advocate to institute an enquiry and file a report and recommendations on any matter concerning the welfare of the child.⁸⁹³ The introduction of the office of the Family Advocate is aimed at assisting the court in determining what would be in the best interests of the child.⁸⁹⁴

A major change in the statutory recognition of the best interests of the child was brought about by the Constitution of the Republic of South Africa, 1996.⁸⁹⁵

⁸⁸⁵ S 5(1) which further provides that the court may in particular, if it is in the interest of the child, grant sole guardianship or sole custody of the child to a parent.

⁸⁸⁶ 70 of 1979.

⁸⁸⁷ S 6(1)(a) provides that a decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor child of the marriage are satisfactory or are the best that can be effected in the circumstances.

⁸⁸⁸ S 6(1)(a).

⁸⁸⁹ Ss 7, 8 and 9 of the Act. See also Matthias and Zaal in *Child Law in South Africa* 163-184; Ngidi “Upholding the Best Interests of the Child in South African Customary Law” in Boezaart *Child Law in South Africa* 226-230.

⁸⁹⁰ Sections of general application, notably ss 6, 7, 8, 9, 10, 14, and 31 with effect from 1 April 2007.

⁸⁹¹ Especially CRC and ACRWC.

⁸⁹² 24 of 1987.

⁸⁹³ S 4 of the said Act.

⁸⁹⁴ Clark 2000 *Stell LR* 6; Bekink and Bekink 2004 *De Jure* 23.

⁸⁹⁵ The Constitutional Assembly adopted the final constitutional text on 8 May 1996 which was certified, after amendments, in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification judgment)* 1997 (2) SA 97 (CC). The

Building on the confirmation of the best interests of the child principle enunciated in *Fletcher v Fletcher*,⁸⁹⁶ the principle was taken a step further in the constitutional dispensation. The best interests of the child principle requires the court to exercise its discretion as upper guardian of all children to promote the interests of the child, rather than focusing on the rights and entitlements of the parents.⁸⁹⁷ The Constitution provides clear and unequivocal confirmation that the best interests of the child are entrenched with the provisions of section 28(2) of the Constitution.⁸⁹⁸

The paramountcy principle in section 28(2) addresses two aspects in South Africa. In the first place, it brought South Africa in line with international jurisdictions where the best interests of the child had already been enacted.⁸⁹⁹ Furthermore, it went one step further in complying with the requirement of international instruments, which bind South Africa through ratification.⁹⁰⁰ South Africa has in a short space of time built up a notable volume of case law in which the best interests of the child principle has repeatedly been emphasised and applied in a number of matters affecting the child.⁹⁰¹

The Natural Fathers of Children Born out of Wedlock Act⁹⁰² intended to address the plight of the natural father and not so much the best interests of the child.⁹⁰³

Constitution was signed into law by President Nelson Mandela at Sharpeville on 4 February 1997.

⁸⁹⁶ 1948 (1) SA 130 (A) where the Appeal Court held that the most important factor to be considered in issues such as custody and access is not the rights of the parents but, the best interests of the child.

⁸⁹⁷ Mosikatsana in *The Bill of Rights Handbook* 467.

⁸⁹⁸ This section prescribes that a child's best interests are of paramount importance *in every matter* concerning the child. (Emphasis added.) Case law confirming this constitutional imperative is discussed in 5 4 4 *supra*.

⁸⁹⁹ Eg the *Children's Act* of 1989 of England and the Australian *Family Law Reform Act* of 1995. Closer to home, the *Children's Act* 560 of 1998 of Ghana, the *Children's Act* 8 of 2001 of Kenya and the *Children's Act* of 1997 of Uganda. For a comparative analysis of the best interests of the child, participatory rights and legal representation of children, see 6 3 and 6 4 *infra*.

⁹⁰⁰ South Africa ratified the CRC on 16 June 1995 and the ACRWC on 7 January 2000.

⁹⁰¹ Recent case law regarding the best interests of the child standard is discussed in 5 4 4 *supra*. Bonthuys 2006 *IJLPF* 26-29 maintain that there has not been consistency with the Constitutional Court nor the High Courts in its reference to the best interests of the child as a "principle", "standard" or "right".

⁹⁰² 86 of 1997.

The Act did, however, have a proviso that the court shall not grant an application unless the court is satisfied that it is in the best interests of the child.⁹⁰⁴ Section 2 of this Act contained a set of factors which the court had to consider when deciding an application.⁹⁰⁵

The South African legislature has responded in addressing the need and protection of children with the Children's Act. The echoing of the constitutional imperative of the best interests of the child has been entrenched in a standard enhancing the best interests of the child which has for the first time been enacted.⁹⁰⁶ The Children's Act does not define the best interests of the child,

⁹⁰³ The preamble highlights the focus of the Act in that it mentions that provision is made for the possibility of access to and custody and guardianship of children born out of wedlock by their natural fathers. S 2(1) provides that a court may on application by the natural father of a child born out of wedlock make an order granting access rights to or custody or guardianship of the child on conditions determined by the court.

⁹⁰⁴ S 2(2)(a) of the said Act.

⁹⁰⁵ There were a number of circumstances set out in subs (5) that the court, when considering an application, had to, where applicable, take into account none of which required any participation on the part of the child.

⁹⁰⁶ S 7 of the Children's Act enumerates the best interests of the child standard:

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely–

- (a) the nature of the personal relationship between–
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards–
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from–
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any care-giver or person, with the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child–
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's–
 - (i) age, maturity and stage of development;
 - (ii) gender;

but it does attempt to give a non-exhaustive interpretation of what must be considered when dealing with the best interests of the child.⁹⁰⁷ The Children's Act⁹⁰⁸ also repeals a number of pieces of legislation,⁹⁰⁹ some of which was regarded necessary at the time of enactment to address deficiencies in the parent-child relationship.⁹¹⁰ The Children's Act as an all-embracing code for the care, protection and enhancement of children's rights which includes the best

-
- (iii) background; and
 - (iv) any other relevant characteristics of the child;
 - (h) the child's physical and emotional security and his or her intellectual, emotional, social cultural development;
 - (i) any disability that the child may have;
 - (j) any chronic illness from which a child may suffer;
 - (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 - (l) the need to protect the child from physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) any family violence involving the child or a family member of the child; and
 - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child.

⁹⁰⁷ Eg s 6(2)(a) of the Children's Act prescribes that *all* proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in s 7 and the rights and principles set out in the Children's Act, subject to any lawful limitation. S 7 contains the best interests of the child standard. S 8 deals with the application of the rights of the child contained in the Children's Act and prescribes that the rights a child has in terms of the Children's Act supplement the rights which a child has in terms of the Bill of Rights. S 9 asserts that in *all* matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied. (Emphasis added.) However, s 7 of the Act is not an open-ended list as found in *McCall v McCall* 205B-G. Compare Davel in *Commentary on the Children's Act* 2-8.

⁹⁰⁸ For an analysis of the Children's Act see 5 4 *supra*.

⁹⁰⁹ Some remaining sections of the Children's Act 33 of 1960 with effect from 1 April 2010; s 1 of the General Law Further Amendment Act 93 of 1962 with effect from 1 July 2007; the Age of Majority Act 57 of 1972 with effect from 1 July 2007; the Child Care Act 74 of 1983 with effect from 1 April 2010; the Children's Status Act 82 of 1987 with effect from 1 July 2007; s 4 of the Prevention of Family Violence Act 133 of 1993 with effect from 1 April 2010; the Guardianship Act 192 of 1993 with effect from 1 July 2007; the Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996 with effect from 1 April 2010; the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 with effect from 1 July 2007.

⁹¹⁰ Eg the Natural Fathers of Children Born out of Wedlock Act which also had a checklist in which the best interests of the child was incorporated.

interests of the child standard, compares well with its international counterparts.⁹¹¹

5 5 3 Comparative analysis of the best interests of the child standard

Sections 39(1)(b) and (c) of the Bill of Rights require a court, tribunal or forum to consider international law and may consider foreign law in its deliberations.⁹¹² Bekink and Bekink⁹¹³ emphasise the importance of international law and the guiding significance of foreign law,⁹¹⁴ which are nowadays regarded as constitutional prerequisites, mentioning that their respective values should not be overlooked. If compared with international law, it is clear that section 28(2) of the Constitution is in line with the universal recognition of the best interests of the child prevailing throughout. The confirmation of the best interests of the child is assured in international documents like the Convention on the Rights of

⁹¹¹ Compare international instruments in 5 2 2 1 and 5 2 2 2 *supra*.

⁹¹² 108 of 1996.

⁹¹³ 2004 *De Jure* 25.

⁹¹⁴ There are a number of foreign legislative enactments that incorporate the best interests principle in their own domestic legislation; eg Ghana in their *Children's Act* 560 of 1998, s 2 defining the welfare principle of the child provides that "[t]he best interests of the child shall be paramount in a matter concerning a child". Kenya in their *Children Act* 8 of 2001, s 4(2) in prescribing the best interests of the child provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Uganda in their *Children Act* 1997 stipulates in s 3 that the welfare principles and the children's rights set out in the First Schedule to the Act shall be the guiding principles in making any decision based on the Act. In the First Schedule art 1 under the heading "welfare principle" prescribes that "[w]henever the State, a court, a local authority or any person determines any question with respect to – the upbringing of a child; or the administration of a child's property or the application of any income arising from it, the child's welfare shall be of *the* paramount consideration". In 1995 the *Family Law Reform Act* 1995 amended the *Family Law Act* 1975 (Cth) of Australia to incorporate the expression "best interests" and s 60CC prescribes how a court determines what is in a child's best interests and s 65E provides that in deciding whether to make a parenting plan, a court must regard the best interests of the child as the paramount consideration. New Zealand introduced a similar principle in their *Children, Young Persons, and Their Families Act* 24 of 1989 in s 6 prescribing that in "all matters relating to the administration or application of this Act ... the welfare and interests of the child or young person shall be the first and paramount consideration". The English *Children Act* of 1989 provides for the "court's paramount consideration of the child's welfare". In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [25] 249 Judge Sachs discusses the "more difficult problem ... to establish an appropriate operational thrust for the paramountcy principle". He mentions that the word "paramount" is forceful and adds to this, in n 32, that "paramount" is notably stronger than the phrase "primary consideration" referred to in international instruments such as art 3(1) of the CRC and 4(1) of the ACRWC. For comparative review of mentioned and other jurisdictions, see 6 3 and 6 4 *infra*.

the Child, the African Charter and the Hague Convention on International Child Abduction.⁹¹⁵

In the most important international instruments on children's rights, the best interests of the child is regarded as a primary and in the most important regional instrument on children's rights the best interest of the child is *the* primary consideration in all actions concerning the child.⁹¹⁶ Two aspects need to be considered. In the first instance international instruments are unanimous on the definition of a child.⁹¹⁷ Secondly, how the international and regional instruments go about ensuring the best interests principle.⁹¹⁸

The first concern of Bekink and Bekink⁹¹⁹ centres on article 3 of the Convention on the Rights of the Child which determines that the best interests of the child must be a primary consideration.⁹²⁰ Article 4(1) of the African Charter has a more determinable approach to the best interest of the child declaring that in all actions concerning the child undertaken by any person or authority, the best

⁹¹⁵ Bekink and Bekink 2004 *De Jure* 25 with reference to Hlope in "The judicial approach to summary applications for the child's return: A move away from the best interests principle?" 1998 *SALJ* 440.

⁹¹⁶ Emphasis added to illustrate the divergent views of the importance of the best interests of the child between the CRC (a primary consideration) and the ACRWC (the primary consideration).

⁹¹⁷ Art 1 prescribes that a child as a human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier. Art 2 of the ACRWC is more to the point stating that for the purposes of this Charter, a child means every human being below the age of eighteen years. For discussion of CRC and ACRWC see 5 2 2 1 and 5 2 2 2 *supra*.

⁹¹⁸ Bekink and Bekink 2004 *De Jure* 26 raise three issues regarding art 3 of the CRC and explain the technical weakened status of the best interests of children when compared with art 4(1) of the ACRWC. Secondly *op cit* 27 they draw attention to the influence of art 12 of the CRC and thirdly they argue that the CRC does not provide a definition or a list of factors that would constitute the best interests of the child.

⁹¹⁹ *Loc cit*.

⁹²⁰ Emphasis added. Art 3 of the CRC specifies that in all actions concerning children, whether undertaken by public or private social-welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a *primary* consideration. (Emphasis added.) Bekink and Bekink *loc cit* argue that the status of the best interests of children is technically weakened by the phrase "a paramount consideration" as used in the CRC. The risk created by this downgrading of the status of the best interests of children is that it may lead to states parties or even courts of law to equating the best interests of children with other primary interests such as religion and culture (both of which rank high as primary interests in South Africa).

interests of the child shall be *the* primary consideration.⁹²¹ Both the international and regional instruments, however, include a condition that their provisions do not affect any provision that is more conducive to the realisation of children's rights, and in doing so afford children the highest level of protection.⁹²²

The word "paramount" describes the level of importance to be attached to the best interest standard when considering the interests of children.⁹²³ Some dictionaries give a very clear description of the word "paramount".⁹²⁴ It may therefore be concluded that the drafters of the international instruments had in mind that the best interests of children should be a "primary" or the "primary" consideration in all matters concerning children.⁹²⁵ Using the best interests of

⁹²¹ Emphasis added. In contrast with the generalised approach of the CRC where the best interests of the child is but one of the primary considerations, the ACRWC determines that the best interests of the child shall be the primary consideration. Thus if every consideration is equal then the best interests of the child will be the determining consideration. See eg *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) where the court explained what is meant with the paramountcy of the "best interests of the child". Bekink and Bekink 2004 *De Jure* 26 refer to the risk of relegating the status of the best interests of the child to equal consideration with other primary considerations such as religious and cultural considerations. Bekink and Bekink *loc cit* maintain that more recognition should be given to the ACRWC because the interests of children are considered the determining consideration. See also Visser "Some ideas on the 'best interests of the child' principle in the context of public schooling" 2007 *THRHR* 461 who comments that theoretically formulated the application of s 28(2) would mean that other competing interests, which is provided for by rights, competencies, powers and functions, will have to be disregarded to the extent that they are incompatible with the due recognition given to the "best interests" of the child.

⁹²² See art 1(2) of the ACRWC which clearly reads that "[n]othing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State". Art 41 of the CRC has a similar provision which reads that "[n]othing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in (a) [t]he law of a State Party; or (b) [i]nternational law in force for that State". See further Bekink and Bekink 2004 *De Jure* 26.

⁹²³ Interestingly the word "paramount" does not appear in either of the two children's rights instruments under discussion. It seems to be accepted that primary and paramount are synonyms and may therefore be used interchangeably.

⁹²⁴ Fowler and Fowler *The Concise Oxford Dictionary of Current English* (1951) define paramount as "supreme"; "pre-eminent or superior". *The Reader's Digest Universal Dictionary* (1987) presents a clearer definition of paramountcy as "of chief concern or significance"; "primary"; "foremost".

⁹²⁵ Davel in *Commentary on the Children's Act* 2-6 refers to the interchangeable use of the term "primary" and "paramount" in international instruments referring to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 1979 where in arts 5(b) and 16(1)(d) the term "paramount" is used instead of "primary".

children as standard, foreign legislatures have gone one step further in clothing the child's best interests in its paramountcy garb.⁹²⁶

A comparison of the best interests of the child principle between foreign jurisdictions of Europe, Africa, Australia, New Zealand and South Africa highlights the focus area of each jurisdiction. The best interests of children are not isolated in one single section of foreign legislation or one article of one international or regional instrument. When considering other sections and articles enhancing the best interests principle, then a holistic framework of the best interests of children emerges.⁹²⁷

In the second instance reference is made to article 12 of the Convention on the Rights of the Child and the important role it plays in interpreting article 3 of the Convention on the Rights of the Child.⁹²⁸ The assurance found in article 12 for the child's voice to be heard in all matters affecting the child is also conveyed in

⁹²⁶ It may be argued that the aim was uniformity, but moving the interests of children from first in line as a "primary" consideration to the chief concern as a "paramount" consideration emphasises the importance of the consideration. One is inclined to agree with Clark that opposing rights will be trumped by children's rights, see Bekink and Bekink 2004 *De Jure* 26. See also *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 178B-C where the court reiterated the view that s 28(2) founds a fundamental right for each child and when balancing the interests of the children with that of the competing parties which include the fundamental rights of those competing parties, the children will find themselves in the forefront with their fundamental rights concluding at 178C/D "[h]oe onbevredigend dit ook uit die oogpunt van die applikante mag wees, moet hulle belange terugstaan voor dié van die minderjariges". See also *Kleynhans v Kleynhans* [2009] JOL 24013 (ECP) 24018 where Judge Pillay commented that in an application or other related procedure the interests of the child "surges above all else". Davel and Jordaan *Law of Persons* 58 draw attention to continual constitutional tension between the interests of the child on the one hand and that of the parent or other person on the other. However, as Deputy Chief Justice Langa unequivocally stated in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) par [55] 432A-B/C that "the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that s 28(2) of the Constitution 'trumps' other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted in this Court that constitutional rights are mutually interrelated and interdependent in a single constitutional value system. This Court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36".

⁹²⁷ Eg art 12 of the CRC; art 4(2) of the ACRWC; s 28(1)(h) of the Constitution; s 6, 7, 9, 10, 14 and 31 of the Children's Act; s 1(1) of the *Children Act* 1989 of England; s 68F of the *Australian Family Reform Act* 1995; s 4(4) and 77 of the *Children Act* 8 of 2001 of Kenya; s 16(1) of the *Children Act* 1997 of Uganda.

⁹²⁸ Bekink and Bekink 2004 *De Jure* 27.

article 4(2) of the African Charter.⁹²⁹ Some of the foreign jurisdictions have taken the wide approach of the Convention on the Rights of the Child and incorporated it into their domestic legislation.⁹³⁰

In the third instance it is shown that the Convention on the Rights of the Child⁹³¹ does not provide a definition of the best interests of the child, nor does it contain a list of factors to assist in determining what the best interests of the child are.⁹³² A list of factors may however assist in ensuring that important considerations are not disregarded in determining what the best interests of the child are in a given situation.⁹³³

England set the tone in the *Children Act* of 1989 with the “welfare checklist” to assist in determining the best interests of the child.⁹³⁴ Bedingfield is correct in observing that there is no other phrase in the legal lexicon as amorphous, vague and uncertain as “the best interests of the child”, unless it is the corollary concept that the best interests of the child should be “the paramount

⁹²⁹ Comparing the two versions leaves one with a narrower application of participation in art 4(2) where reference is made to “all judicial and administrative proceedings” as compared with art 12(1) of the CRC where reference is made to “all matters affecting the child”.

⁹³⁰ See eg *Uganda’s Children Act* of 1997 where it provides in s 3 that the welfare principles and the children’s rights set out in the first schedule to the Act shall be the guide in reaching any decision based on the Act. In the first schedule clause 3 provides that in determining any question relating to circumstances set out in pars 1(a) and (b), the court or any other person shall have regard in particular to the ascertainable wishes and feelings of the concerned considered in the light of his or her age and understanding. The *Kenyan Children Act* 8 of 2001 in s 4(4) provides that in any matters of procedure affecting the child, the child shall be accorded an opportunity to express his or her opinion, and that opinion shall be taken into account as may be appropriate taking into account the child’s age and the degree of maturity. S 77 also allows legal aid for a child who is brought before a court in proceedings under the Act or any other written law and the court may where the child is unrepresented, order that the child be granted legal representation.

⁹³¹ Bekink and Bekink 2004 *De Jure* 27 only refer to the CRC but the same applies to the ACRWC in its equivalent articles. Robinson 2002 *Stell LR* 316 uses the same examples.

⁹³² The reluctance to provide a list of factors may be apparent, but to some extent it does show that at the very least the particular situation will dictate what ought to be considered as being in the best interests of a child in each case. Robinson 2002 *Stell LR* 316 admits that the list of factors competing for the core of “best interests” would be endless.

⁹³³ The view of Bekink and Bekink *loc cit* that the provision of a basic checklist and the importance of evaluating the factual situation should not be seen as contradicting it, is acceptable. This view is endorsed by the checklists that have been introduced in foreign domestic legislation. Compare in this regard Sloth-Nielsen and Van Heerden “New Child Care and Protection Legislation for South Africa? Lessons from Africa” 1997 *Stell LR* 270-272.

⁹³⁴ See 6 4 1 1 1 *infra* for the best interests of the child contained in section 1(1) *Children Act* as well as the “checklist” contained in section 1(3) of the said Act.

consideration” when courts determine matters concerning the care and upbringing of children.⁹³⁵ The persistence of foreign jurisdictions with some assemblage of criteria to assist in the determination of the best interests of the child is illustrated in the *Australian Family Law Act* of 1975, which incorporated drastic changes when legislature introduced⁹³⁶ a similar, but more comprehensive checklist in section 68F.⁹³⁷ Section 68F(2) added to the English “best interests checklist” and also introduced several innovations,⁹³⁸ among others the incidence of domestic violence as a relevant factor in determining what would be in the best interests of the child in judicial proceedings affecting the child.⁹³⁹ The “checklist” tendency found its way to the African continent and has been used in some of the African legislative enactments.⁹⁴⁰

⁹³⁵ *Advocacy in Family Proceedings: A Practical Guide* (2005) hereafter Bedingfield *Family Proceedings* 69 where the author refers to the judgment of Lord MacDermott in *J v C* [1970] AC 710-711: “[The principle that a child’s best interest is paramount] means more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in questions. [The sentiments] connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed the course to be followed will be that which is most in the interests of the child’s welfare as that term is now understood ... [it is] the paramount consideration because it rules upon or determines the course to be followed.” Heaton “Some general remarks on the concept ‘best interests of the child’” 1990 *THRHR* 95; Thomas and O’Kane “When children’s wishes and feelings clash with their ‘best interests’” 1998 *IJCR* 138-139; Van Heerden in *Boberg’s Law of Persons and the Family* 503 and authority cited in nn 13 15; Clark 2000 *Stell LR* 15 mentions that one of the major concerns that have been expressed about the application of the best interest standard is its vagueness and indeterminacy. Davel and De Kock 2001 *De Jure* 274 reiterate the factual evaluation of each set of circumstances that have to be determined to ascertain what is in the best interests of the child.

⁹³⁶ Part VII of the Family Law Act of 1975 was amended by the Australian *Family Law Reform Act* of 1995 which became fully operative on 11 June 1996. Compare Van Heerden in *Boberg’s Law of Persons and the Family* 530; Davel and De Kock *De Jure* 2001 278; Bekink and Bekink 2004 *De Jure* 28.

⁹³⁷ See 6 4 3 1 1 *infra* for discussion of the best interests of the child and the amendments to the “checklist” initially set out in section 68F(2) of the Australian *Family Law Reform Act* of 1996.

⁹³⁸ S 68F(2)(f) which referred to the “child’s maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders) and any other characteristics of the child that court thinks are relevant”. Davel and De Kock *De Jure* 2001 278 draw attention, against the milieu of South Africa’s cultural diversity, to the inclusion of culture and race as factors in determining what would be in the best interests of the child.

⁹³⁹ Ss 68F(2)(g) to (i). See Davel and De Kock *loc cit* who specifically refer to this aspect as does Van Heerden in *Boberg’s Law of Persons and the Family* 530 and Bekink and Bekink 2004 *De Jure* 28. This aspect was not included in the “best interests standard” set out in the Children’s Act. For an analysis of the Children’s Act, see 5 4 *supra*.

⁹⁴⁰ Uganda being one of the first jurisdictions to include a statement of guiding principles to underpin and inform child legislation. See 6 3 2 1 2 *infra* for reference to and a discussion of the welfare principles of the child set out in eg art 3 of the *Children Act*, 1997.

In South Africa the incorporation of a “checklist” of sorts in case law⁹⁴¹ came before the advent of the Constitution in 1996 and ultimately the Children’s Act of 2005. For the first time in *Van Deijl v Van Deijl*⁹⁴² the court attempted to determine certain guiding factors in order to decide the best interests of the child. In *French v French*⁹⁴³ the court repeated this procedure. However, it was

⁹⁴¹ A number of reported decisions reflect the court’s consideration of a basic criterion in order to determine the best interests of the child; eg *Van Deijl v Van Deijl* 1966 (4) SA 260 (R) 261H; *Manning v Manning* 1975 (4) SA 659 (T) 661G-H where the court took the gender, age, health, and educational and religious needs of the child into account as well as the social and financial position of each parent, his or her character, temperament and past behaviour towards the child. The court further held that where the child reaches the age of discretion the child’s personal preferences may also weigh with the court. Further also *Kastan v Kastan* 1985 (3) SA 235 (C) 236H-J; *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O) 101B-C. Compare also Hahlo *Husband and Wife* 389-391; Van Heerden *Boberg’s Law of Persons and The Family* 526-529 and authority cited in nn 116 to 118; Palmer *Children’s Rights* 99-101; Davel and De Kock 2001 *De Jure* 274-275; Barratt *Fate of the child* 145-146; Bekink and Bekink 2004 *De Jure* 28. In *Kastan v Kastan loc cit* the court referred to the experience and competency of both parents, the fact that the children have bonded with both their parents and love their parents very much. Of importance is the following remark at 236I: “[t]he children, young as they are, have expressed their satisfaction with and approval of this arrangement”. In *Greenshields v Wyllie* 1989 (4) 898 (W) 899F the court held the opposite view when it remarked that “a Court is not inclined to give much weight to the preferences of children of 12 and 14”.

⁹⁴² 1966 (4) SA 260 (R) 261H in a matter regarding custody and guardianship the court held the view that regard must be had to the following considerations being “[t]he interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, and religious considerations. Emotional needs and the ties of affection must also be regarded and in the case of older children their wishes cannot be ignored”. The importance of the views and wishes of a child in matters affecting them has in the recent past received extensive attention in publications internationally as well as nationally see eg Thomas and O’Kane 1998 *IJCR* 137-154; Hale “Children’s participation in family law decision making: Lessons from abroad” 2006 *AJFL* 119-126; Boshier “Involving children in decision making: Lessons from New Zealand” 2006 *AJFL* 145-153; Robinson and Ferreira 2000 *De Jure* 54-67; Davel and De Kock 2001 *De Jure* 272-291; Barratt 2002 *THRHR* 556-573; Kassan “The Voice of the Child in Family Law Proceedings” 2003 *De Jure* 164-179; Bekink and Bekink 2004 *De Jure* 21-40; Davel in *Gedenkbundel vir JMT Labuschagne* 16 referring to the direct and indirect receiving of the child’s views; Pillay and Zaal “Child-interactive video recordings: A proposal for hearing the voices of children in divorce matters” 2005 *SALJ* 684-695; Robinson 2007 *THRHR* 263-277; Sloth-Nielsen “Realising children’s rights to legal representation and to be heard in judicial proceedings: an update” 2008 *SAJHR* 495-524; De Jongh “Giving children a voice in family separation issues: a case for mediation” 2008 *TSAR* 785-793. The importance of the child’s voice has been given prominence in a number of reported judgments, eg *French v French* 1971 (4) SA 298 (W) 299C-D 299H; *Manning v Manning* 1975 (4) SA 659 (T) 661H; *Kastan v Kastan* 1985 (3) SA 235 (C) 236I; *Märtens v Märtens* 1991 (4) SA 287 (T) 294C-295A; *McCall v McCall* 1994 (3) SA 210 (C) 207G-208E; *Meyer v Gerber* 1999 (3) SA 650 (O); *Lubbe v Du Plessis* 2001 (4) SA 57 (C) 73G-H; *Soller v G* 2003 (5) SA 430 (W) *Ex parte Van Niekerk v Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] *JOL* 14218; *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁹⁴³ 1971 (4) SA 298 (W) 298H the court regarded four categories in deciding where a child must be placed, mindful of the best interests of the child. In the first instance the preservation of the child’s sense of security; secondly, the suitability of the custodian parent which was to be established by enquiring into the parent’s character, religious

only in *McCall v McCall*⁹⁴⁴ that the court finally succeeded in compiling a general list of suitable guiding factors to apply in custody matters.⁹⁴⁵

A new constitutional dispensation dawned in South Africa on 27 April 1994. In the Interim Constitution⁹⁴⁶ the best interests criterion was given constitutional force in section 30(3) which provided that in all matters concerning a child his or her best interests shall be paramount.⁹⁴⁷ The final Constitution of the Republic of South Africa, 1996, followed in which the best interests of the child were finally entrenched.⁹⁴⁸ However, the Constitution does not have a provision in which the participation of children in legal matters is directly addressed.⁹⁴⁹ The inclusion therefore of section 10⁹⁵⁰ and section 14⁹⁵¹ in the Children's Act has bridged this shortcoming.

5 6 Conclusion

Since the advent of the new constitutional dispensation children's rights in South Africa have been the focal point of numerous discussion groups, academic writing and prominent judgments. It may rightly be seen as the high-water mark in the development of a human rights culture in South African jurisprudence.

language, and the fitness of the parent to guide the moral, cultural and religious development of the child; thirdly, material considerations; lastly, the wishes of the child.

⁹⁴⁴ 1994 (3) SA 201 (C) 205B-G.

⁹⁴⁵ The "checklist" expounded in *McCall* has been applied to a lesser or greater degree in subsequent judgments, see eg *Krasin v Ogle* [1997] 1 All SA 557 (W) 567j-569e; *Soller v G* 2003 (5) SA 430 (W) par [54]-[55] 445H-J.

⁹⁴⁶ Act 200 of 1993.

⁹⁴⁷ This subsection determines "[f]or the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interests shall be paramount".

⁹⁴⁸ S 28(2) providing "[a] child's best interests are of paramount importance in every matter concerning the child".

⁹⁴⁹ Similar to art 12 of the CRC or art 4(2) of ACRWC.

⁹⁵⁰ Which prescribes that "[e]very child that is of such 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".

⁹⁵¹ Prescribing that "[e]very child has the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court".

It may appear to have been plain sailing up to now, but the real challenge is yet to come. The Children's Act and the Child Justice Act are the result of more than a decade's toil and problems. From the very first decision taken to review the Child Care Act and to align South Africa with the rest of equivalent democracies, those developed and those developing, it has cost arduous work and the utmost commitment.

In this we see how the recognised international instruments such as the Universal Declaration of Human Rights, United Nations Declaration on the Rights of the Child, Beijing Rules and especially the Convention on the Rights of the Child, together with regional instruments such as the African Charter, have influenced the formation of a complete code encompassing all the internationally accepted and entrenched children's rights in one single document. South Africa opted for two codifications for children; one addressing children in conflict with the law and the other a code illuminating what has now been accepted as child law.⁹⁵²

The South African Constitution is committed to a range of rights specifically for children set out in section 28 of the Constitution.⁹⁵³ South Africa having ratified the Convention on the Rights of the Child and the African Charter set out to transfer and realise the rights contained in those international instruments into a single all embracing Act. South Africa has succeeded in doing so with the Children's Act as well as the Child Justice Act.

The fundamental right of children to form their own views and the right to express those views freely in all matters affecting them has been investigated and South Africa has succeeded in enhancing and entrenching this right. South Africa has to the same extent secured the child's right to legal representation in

⁹⁵² The Children's Act reaches far wider than only application of civil or family law. It addresses the full spectrum of rights that a child has and not only those that were found in the repealed Child Care Act.

⁹⁵³ This is in addition to the fundamental rights contained in the Bill of Rights which applies to all children unless specifically excluded as a right pertaining to adults such as the right to vote in s 19(3)(a) of the Constitution.

all matters affecting the child. This has been achieved under the overarching right set out in the best interests standard and confirmation of the paramountcy of the best interests of the child.