

CRITICAL ANALYSIS OF CHILD PARTICIPATION AND REPRESENTATION OF CHILDREN IN LEGAL MATTERS

by

Adré Engelbrecht

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INDEX

Chapter 1: Introduction

Chapter 2: The status of a Child in the South African Law

- 2.1 Common law position
- 2.2 Children's Act 38 of 2005

Chapter 3: Child participation

- 3.1 Pre-Constitutional development of child participation in South Africa
- 3.2 International law
 - 3.2.1 United Nations Convention on the Rights of the child
 - 3.2.2 African Charter on the Rights and Welfare of the child
- 3.3 Constitutional law
- 3.4 Children's Act 38 of 2005
- 4.4 Alternative ways of child participation

Chapter 4: Critical analysis on legal representation of children

- 4.1 The circumstances under which a child is entitled to a legal representative
- 4.2 The implementation of section 28(1)(h)
 - 4.2.1 Family Advocate
 - 4.2.2 *Curator ad litem*

4.4 Legal representation and a child's capacity to litigate

Chapter 6: Conclusion and recommendation

CHAPTER 1: INTRODUCTION

It is a general legal principle that a child does not usually have the capacity to participate independently in legal matters affecting the child. In terms of the common law, parents or a guardian of a minor child must litigate on behalf of the child or a child must be assisted in bringing a matter to court.

In what seems to be inconsistent with the common law, the Children's Act 38 of 2005 (hereafter "the Children's Act") indicates that children have the right to initiate legal action without the assistance of a parent or guardian.

Section 14 of the Children's Act states that:

Every 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 is however Section 28(1)(h) of the Constitution which is the most important right in South Africa in regards to child participation which reads as follows:

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 justice would otherwise result.

Section 28(1)(h) of the Constitution only mentions the appointment of a legal practitioner for a child and does not make provision for child participation in general, which is a broader right. A legal practitioner, as referred to in the Constitution is only one form of child participation.

With reference to the Constitution as well as section 14 of the Children's Act and the relevant international law, the questions this dissertation will address are: Under which circumstances is a minor child entitled to legal representation in matters concerning them. How are children to practically accomplish obtaining legal representation through a court if they require legal representation to approach the court and finally, what is the function and role of the representative appointed under Section 28(1)(h) of the

Constitution. Is the legal representative obliged to act in the best interest of the child or should they act on instructions of the child? These are all relevant questions that need to be critically analysed to ensure that children's right to participate are given effect in South Africa.

Representation of children in civil matters has revealed that it is a field of legal practice which can present various challenges and dilemmas that professionals are not always expecting or even aware of.¹ Due to the strong development of children's right to participate, more specifically participation through legal representation, the position is unclear as to what is being expected of the various role players involved. It is not clear how children should be assisted and by whom. It will be considered that due to the different role players involved, legal representatives are possibly not properly informed of their duties which may have the effect that children are not being represented properly.

The prominence of the child's views and due consideration thereof in legal matters is also recognized internationally. A child's right to participate in decisions that affect their lives is clearly expressed in the United Nations Convention of the Rights of the Child (hereafter the "CRC") which was ratified by the South African government in 1995.² South Africa is also a signatory to the African Charter on the Rights and Welfare of the Child (hereafter the ACRWC) that guarantees several participation rights.³

For purposes of this study, only child participation and legal representation of children with reference to family law matters will be considered. This study does not include any research on the legal representation and participation of children in criminal law matters. To restrict the study, it will be limited to only legal matters pertaining to child participation of children through legal representation during litigation and only touch briefly on a child's fundamental right to participation.

¹ Heaton, J (2008) *Die Suid Afrikaanse Personereg* p98.

² Moses, S "Overview of Children's Participation in South Africa" (2008) 16 *The International Journal of Children's Rights* p327.

³Boezaart, T (ed) (2009) *Child Law in South Africa* p95.

CHAPTER 2: THE STATUS OF A CHILD IN THE SOUTH AFRICAN LAW

2.1 Common Law position

A person's status can be described as his or her legal position or standing in law.⁴ Various factors can have an effect on the nature and extend of a person's status such as his age, domicile, mental illness etc.⁵ To define a person's status in private law, one must consider his capacity to act as well as his capacity to litigate.⁶ The most important factor for the purpose of this study is a child's *locus standi*, which is his legal capacity to litigate and to be a party to a court procedure.⁷

One of the most vital factors that have an influence on a person's status is his age. The common law makes a distinction between a child's capacity to litigate as an *infans* and as a minor.⁸ It is important to determine whether a person is a minor since this will have a direct influence on his capacity to litigate. Childhood has a significant effect on a person's judgment and therefore children need to be protected, sometimes against their own immaturity.⁹

Various changes in a child's status occur between birth and majority. In terms of the common law, an *infant* comes into existence at birth and has limited legal capacity and no capacity to litigate in his or her own name.¹⁰ It has the effect that an *infans* cannot sue or be sued in their own name but that the parents or guardian of a minor child (under the age of 7 years) had to litigate on behalf of the child and initiate all legal proceedings on their behalf.¹¹ The *infans* is still a party to the legal proceedings and not the parent or guardian. This had the effect that any rights or obligations arising from these legal proceedings were the rights and/or obligations of the *infans* and not those of

⁴Boezaart, T (ed) (2009) *Child Law in South Africa* p18.

⁵*Ibid.*

⁶*Ibid.*

⁷Heaton, J (2008) *Die Suid Afrikaanse Personereg* p95.

⁸Boezaart, T and De Bruin, DW "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" (2011) 44 *De Jure* p417.

⁹Boezaart, T (ed) (2009) *Child Law in South Africa* p18.

¹⁰Boezaart, T and De Bruin, DW "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" (2011) 44 *De Jure* p419.

¹¹*Ibid.*

the parent.¹² The role of the parent or guardian was to represent the *infans* in court since the *infans* did not have independent legal standing in court.¹³

A child who is 7 years or older may initiate court proceedings and litigate with the assistance of his guardian or the guardian can litigate on his behalf.¹⁴ The general sense regarding litigation in the common law involving minors was that minors had no *persona standi in iudicio* and therefore a minor had no capacity to act as a party to a lawsuit or to defend legal action without the assistance of a parent or guardian.¹⁵ This is however not correct since a minor has limited capacity to litigate, and therefore with the assistance of his parents or guardian can initiate legal proceedings and be a party to legal proceedings. Usually a minor must be represented in court by his or her parent or guardian, there are however exceptional cases where the court will grant permission to another person to support and assist a child in legal proceedings.¹⁶ A minor who had not reached the “age of discretion” had to sue or be sued in the name of his or her parent or guardian.¹⁷ In the matter of *Sharp v Dales*,¹⁸ the court refers to an “age of discretion” when the minor child knows what is being done on his or her behalf. In this case, the child was 14 years old. When a minor had reached the “age of discretion”, he or she can choose to act as a party to the proceedings, assisted by the guardian or to initiate legal proceedings through the guardian.¹⁹

2.2 Children’s Act 38 of 2005

¹² Boezaart, T and De Bruin, DW “Section 14 of the Children’s Act 38 of 2005 and the child’s capacity to litigate” (2011) 44 *De Jure* p418.

¹³ *Ibid.*

¹⁴ Heaton, J (2008) *Die Suid Afrikaanse Personereg* p98.

¹⁵ *Wolman v Wolman* 1963 (2) SA 452 (A) 459 A-B.

¹⁶ Heaton, J (2008) *Die Suid Afrikaanse Personereg* p98.

¹⁷ Boezaart, T and De Bruin, DW “Section 14 of the Children’s Act 38 of 2005 and the child’s capacity to litigate” (2011) 44 *De Jure* p419.

¹⁸ 1935 NPD 392.

¹⁹ *Sharp v Dales* 1935 NPD 392.

Common law rules in respect of the child as an *infans* and a minor remained unchanged until the Children's Act came into operation on 1 April 2010.²⁰ The Children's Act contributed to the development of child participation in legal proceedings and the child's right to have access to a court in terms of section 14 of the Children's Act.²¹ Section 14 and 15 of the Children's Act came into operation on 1 July 2007.²²

It is important to bear in mind that the Children's Act defines a child as a person under the age of 18 years. In section 14 of the Children's Act, it is stated that 'every' child has the right to bring and to be assisted in bringing a matter to court. While it is clear that the intention of the legislature was to ensure that every child has access to the courts by including this section into the Children's Act, it is doubted that this intention included supplementing the infant's capacity to litigate.²³ Section 14 raises the question whether or not it is possible for children to initiate court proceedings, without being assisted by a parent or guardian. The possibility that section 14 amended the common law rule that an *infans* does not have the capacity to litigate is also explored by Heaton²⁴ who considers the possibility that section 14 amends the common law by conferring limited capacity to litigate on an *infans* thereby allowing the *infans* to assistance that will supplement the *infans*' limited capacity. However, it is argued by Heaton that it is doubtful whether it was the intention of the legislator to change the common law to that effect. The reason being is that this will have the result that an *infans* would be able to litigate without his or her guardian's support, while being unable to enter into a basic contract without his or her guardian's assistance.²⁵

Heaton²⁶ comments that a child over the age of seven years has the right in terms of section 14 to insist on having his or her limited capacity to litigate be extended by means of his or her parent, guardian, *curator ad litem* or the High Court, since the High

²⁰ Boezaart, T and De Bruin, DW "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" (2011) 44 *De Jure* p417.

²¹ *Ibid.*

²² Proclamation by the President of the Republic of South Africa No. 13, 2007.

²³ Heaton, J (2008) *Die Suid Afrikaanse Personereg* p98.

²⁴ Heaton, J (2008) *Law of Persons* p92.

²⁵ *Ibid.*

²⁶ Boezaart, T and De Bruin, DW "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" (2011) 44 *De Jure* p418.

Court has inherent jurisdiction as the upper guardian of all children.²⁷ However, it must be noted that section 14 does not distinguish between children under the age of 7 years and children above 7 years which makes it difficult to do the necessary differentiation in terms of this section.

²⁷ Boezaart, T and De Bruin, DW “Section 14 of the Children’s Act 38 of 2005 and the child’s capacity to litigate” (2011) 44 *De Jure* p418.

CHAPTER 3: CHILD PARTICIPATION

3.1 Pre-Constitutional development of child participation in South Africa

A child's right to participate by assigning a separate legal representative for the child was anticipated by legislators in section 6(4) of the Divorce Act 70 of 1979. This section gave a court the power to appoint a legal representative in matters where a child is involved in divorce proceedings and to make an order that the parties pay the legal costs of the child's representative.²⁸ This was the only form of participation available for a child at that time. Unfortunately this section was more frequently used to appoint a *curator ad litem* for a child and it was limited to divorce proceedings.²⁹ Hence, there was no general stipulation that made provision for a child to be represented in matters other than divorce proceedings.

Children were treated as if they did not have the ability to make their own decisions as to their own best interest.³⁰ In the matter of *Greenshields v Wyllie*³¹ the court did not take the children's wishes into consideration. It was held by Flemming J that:

The court is not inclined to give much weight to the preferences of children of 1 and 14. It is not because what they say is not important but because the Courts knows that there is more to it than the way they respond emotionally at this stage. It is therefore not that the court simply ignores their desire, but as a father sometimes tell a child 'no', the court as the children's super father, can tell both their father and mother 'no' when it is necessary."

Despite some development, legal representation of children in civil matters is relatively new in South Africa. During the 1970's the emphasis began shifting from a parent-centred to a child-centred approach in litigation proceedings between parents in matters

²⁸Boezaart, T (ed) (2009) *Child Law in South Africa* p93.

²⁹*Ibid.*

³⁰Mahlobogwane, FM "Determining the best interest of the child in custody battles: should the child's voice be considered" (2010) 31 *Obiter* p232.

³¹1989(4) SA 898 (W) p899 F.

where a child is involved.³² Section 8A was incorporated in the Child Care Act 74 of 1983 which stated that a legal representative may be appointed for children in cases where children are concerned in care and protection proceedings in the Children's Court. However, this section never came into operation and therefore had no effect. The movement from a parent-centred approach to a child-centred approach was only made after the rectification of the United Nations Convention on the Rights of the Child in 1989. This movement is also reflected in Michael Freeman's statement that:³³

The liberationist movement challenged those who claimed the status of children should be advanced by conferring on children increased protection. The emphasis shifted from protection to autonomy, from nurturance to self-determination, from welfare to justice.

Since it is of utmost importance that children, as individual rights bearers contribute towards decisions that has an influence on their lives, it was necessary and welcomed that the Constitution made provision for a child's voice to be heard. With reference to the Constitution, together with the ACRWC, South Africa was obliged to align children's rights with International law and to prevent further cases like *Greenshields v Wyllie* where the courts clearly did not consider the opinion and wishes of the child.

3.2 International law

Section 39(1)(b) of the Constitution requires that when interpreting the Bill of Rights, a court must consider international law, which includes international instruments ratified by South Africa. Section 39(2) of the Constitution further enhances a child's right to have access to court and to be assisted in bringing a matter to court. In terms of Section 232 of the Constitution, customary International law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. As such, South African courts are constitutionally obliged to have regard to international law when

³² "Draft guidelines for legal representatives of children in civil matters" (2010) Centre for Child Law.

³³ Freeman, M and Veerman, PE (1992) *The Ideologies of Children's Rights* Brill Academic Pub p3.

interpreting any legislation relating to children and to align children's rights with international laws and standards.

The foundation of a child's right to participate in matters concerning them, originate in the international law and more explicitly in the CRC as well as the ACRWC.³⁴ In 1989 the United Nations General Assembly adopted the CRC, which is a comprehensive internationally binding agreement on the rights of children. The right of children to participate in decisions that affect their lives is clearly expressed in CRC which was ratified by the South African government on 16 June 1995.³⁵ The ACRWC was adopted by the Organisation of African Unity in 1990 and became effective in 1999.³⁶ Similar to the CRC, the ACRWC is an inclusive instrument that sets out the rights and norms for the status of children. The ACRWC was ratified by South Africa on 7 January 2000.³⁷ As at May 2013, the ACRWC was already ratified by 41 of the 54 states of the African Union.³⁸ This has the effect that South Africa is legally obliged to monitor the implementation of the rights of children, as set out in the CRC and ACRWC.³⁹

3.2.1 United Nations Convention on the Rights of the Child

The CRC provides that the best interest of the child principle is to be considered a primary consideration in all actions concerning a child. This principle is also emphasized in the preamble of the CRC which can be summarised as follows:

"... the fact that children, because of their vulnerability need special care and protection , and it places special emphasis on the primary caring and protective responsibility of the family. It also re-affirms the need for legal and other protection of the child before and after birth"

³⁴Boezaart, T (ed) (2009) *Child Law in South Africa* p94.

³⁵ Moses, S "Overview of Children's Participation in South Africa" (2008) 16 *The International Journal of Children's Rights* p327.

³⁶ http://en.wikipedia.org/wiki/African_Charter_on_the_Rights_and_Welfare_of_the_Child (accessed on 19 October 2013).

³⁷ http://www.info.gov.za/speeches/docs/2012/qa_childrens-report.pdf (accessed on 19 October 2013).

³⁸ *Ibid.*

³⁹ Rama, S "Monitoring the implementation of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" (2000) *De Rebus* 36.

The CRC emphasizes the importance to consider the wishes of the child when determining what is in the child's best interest. This will enable the court to look into the child's needs and wishes as well as the personality of the child and their relationship with their parents.⁴⁰

Section 3(1) of the CRC 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 interest of the child shall be a primary consideration.

Participation is one of the key principles of the CRC. This right is incorporated in Article 12 of the CRC which 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 national law.*

Article 12 of the CRC addresses the legal and social status of children who, on the one hand lack the full autonomy of an adult but on the other hand are subjects of rights.⁴¹ The words "shall assure" in article 12(1) and "shall in particular be provided" in article 12(2) places a direct obligation on the state to give the child a chance to take part in proceedings and to express their views and wishes.⁴² Article 12(2) explicitly includes "judicial proceedings". It is thus clear that a child should be given the chance to participate in formal proceedings concerning them, which also includes legal

⁴⁰Mahlobogwane, FM "Determining the best interest of the child in custody battles: should the child's voice be considered" (2010) 31 *Obiter* p235.

⁴¹www.coe.int/t/dg3/children/participation/GRC-C-GC-12.pdf accessed 29/3/2012 'General Comment No 12 (2009): The right of the child to be heard', prepared by the Committee on the Rights of the Child.

⁴²Boezaart, T (ed) (2009) *Child Law in South Africa* p94.

proceedings. To stress the importance attached by the international community to hear the voice of child, the UN Committee on the Rights of the Child stressed the importance of not only listening, but also to give due weight and consideration to a child's opinion and wishes.⁴³ It is necessary to go beyond merely listening to children but to pay attention to their wishes.

3.2.2 African Charter on the Rights and Welfare of the Child

The ACRWC also includes several participation rights. Article 4(2) of the ACRWC states as follows:

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

The ACRWC only states that a child must be "capable of communicating his or her own views." It does not mention the child's age, maturity or stage of development to determine the significance of the child's view. The ACRWC also makes provision for a child to be "a party to the proceedings". This section is more restrictive than the CRC in that it limits the child's participation to "judicial and administrative" proceedings where section 12(1) of the CRC forces the state to ensure participation in all matters where a child is concerned.⁴⁴ Participation should not be interpreted to appoint a separate legal representative in every matter concerning a child since it will also not be necessary to appoint a separate legal representative in every matter. Separate legal representation can be seen as a form of participation.⁴⁵ It is however obligatory for a child to

⁴³ General Comment 12 "The Right of the Child to be Heard" (2009) contained in CRC/C?GC/12, para 28 www.unhcr.org/refworld/docid/4ae562c52.html.

⁴⁴Boezaart, T (ed) (2009) *Child Law in South Africa* p95.

⁴⁵ Davel, CJ "The child's right to legal representation in divorce proceedings" in Nagel, C (ed) *Gedenkbundel vir JMT Labuschgne* (2006) Lexis Nexis, Butterworths p18.

participate in all matters concerning them and to have the opportunity to state their wishes in decisions that will affect them.⁴⁶

Although South Africa ratified the CRC and the ACRWC, and by doing so acknowledge the importance of giving children a voice when important decisions affecting them are to be made, we still have a long way to go in giving detailed substance to this right in specific matters concerning children.⁴⁷

3.3 Constitutional Law

The Constitution of the Republic of South Africa⁴⁸ is one of the most progressive in the world in that it gives full recognition to children's rights at the highest level. In this sense, children are treated as rightful members in society and as legitimate rights-bearers in terms of section 28 of the Constitution.

Section 28(1)(h) of the Constitution states 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 justice would otherwise result.

On the face of it, this section is not an overarching right to participate, it only refers to the appointment of a legal practitioner and not to a child's right to participation, which is a more comprehensive right. The ACRWC and the CRC refers to a 'representative' and not only a 'practitioner', and is therefore more restrictive. However, it is submitted that 'legal practitioner' as used in section 28(1)(h) should be interpreted broadly to include the appointment of a *curator ad litem* and the appointment of a separate legal representative who only argues the views and wishes of the child.⁴⁹ Section 28(1)(h) has been interpreted by the Constitutional Court in combination with the international

⁴⁶Boezaart, T (ed) (2009) *Child Law in South Africa* p95.

⁴⁷Matthias, CR and Zaal, FN "Intrusive care and protection assessments: when should children have a right to say 'no'" (2011) 27 SAJHR p 381-397.

⁴⁸Act 108 of 1996.

⁴⁹Boezaart, T (ed) (2009) *Child Law in South Africa* p97.

law to give effect to children's right to participation. This section has been used to appoint a *curator ad litem* to protect the interest of young children despite the fact that they had the option to appoint a *curator ad litem* in terms of the common law.⁵⁰

It is clearly stated in section 28(1)(h) that a separate legal representative can be assigned at 'state expense' when 'substantial injustice would otherwise result'. It is not clear whether this is an automatic right that children have, or whether this section is only applicable when injustice would otherwise result, as specifically stated in the section.

There are various cases involving a child where the Constitutional Court found that it is essential that children's interests be protected where they are involved in legal matters before court. The importance of child participation as interpreted by the Constitutional Court can be seen in the case of *Christian Education South Africa v Minister of Education*⁵¹ as well as *Minister for Education v Pillay*⁵² where Langa CJ stated:

Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In Christian Education South African v Minister of Education this court held in the context of a case concerning children that their 'actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundation for the balancing exercise in this difficult matter would have been more secure'. That is true for this case as well. The need for the child's voice to be heard perhaps even more acute when it concerns children of Sunali's age who should be increasingly taking responsibility for their own actions and beliefs.

⁵⁰ *Ibid.*

⁵¹ 2000(4)SA 757 (CC) 787.

⁵² 2008 (1) SA (CC) 494 E-G.

The principle that children must have the opportunity to participate in matters concerning them is reiterated in *Minister for Education v Pillay*⁵³ where Langa CJ stated that the position in *Christian Education South Africa v Minister of Education*⁵⁴ is also relevant in this case.

The progress in constitutional case law has shown a clear development in children participating in litigation by having their own legal representatives as well as being a party to legal matters concerning them. This is not yet common practice in our courts since there is still many different cases where legal representation is often not appointed for children.

3.4 Children's Act 38 of 2005

The Children's Act came into operation on 1 April 2010 and makes provision in various sections that children must participate in legal matters involving a child. The Children's Act is the most vital legislation for children in South Africa. It is also clearly stated in the introductory part of the Children's Act that one of the objectives is "to give effect to certain rights of children as contained in the Constitution".

A child's right to participation is also incorporated in section 10 of the Children's Act which reads as follows:

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

With reference to section 10 of the Children's Act, it seems as if the child's age and maturity are the determining factors on how much weight should be given to the opinion and wishes of a child. Section 10 of the Children's Act is an extremely useful principle that establishes a child's right to participation in matters involving them. This general

⁵³ 2008(1) SA474 (CC) 494.

⁵⁴ 2000(4)SA 757 (CC) 787.

principle entrenches a child's right to participation as further set out in the ACRWC and the CRC.

Further to section 10 of the Children's Act, section 6(2)(a) states:

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 interest of the child standard set out in section 7 and the rights and the rights and principles set out in this Act.

The child's best interest were consistently viewed from an adult perspective and resulted in an adult-centred assessment of the best interest of the child.⁵⁵ The Children's Act came into operation and this lead to a clear mind shift from an adult-centred assessment to always considering the best interest of the child in all matters concerning them. This is also in line with *S v M (Centre for Child Law as Amicus Curiae)*.⁵⁶

Also included in the Children's Act is section 31. This section obliges any holder of parental responsibilities and rights to consider the views and wishes of the child when making any decision affecting a child while section 61 of the Children's Act places a duty on the presiding officer to allow the child to express his or her views if the court finds that the child is of such an age, maturity and stage of development to participate in proceedings affecting them and if the child wishes to do so. The judgment whether or not a child has the capacity to express his or her wishes is left to the presiding officer to determine. However section 61(1)(b) requires that the presiding officer must record his or her reasons if they come to the conclusion that a child does not have the capacity to express his or her wishes and can therefore not participate. This is a clear indication of the importance of a child's right to participate.⁵⁷

It is implicit in section 61 that a child must have the choice whether or not he wants to participate in the proceedings. It is not compulsory for a child to participate in each and

⁵⁵ "Draft guidelines for legal representatives of children in civil matters" (2010) Centre for Child Law.

⁵⁶ 2008 (3) SA 232 (CC).

⁵⁷ Gallinetti, J "The children's court" in Davel, CJ and Skelton, AM (eds) (2007) *Commentary on the Children's Act* Juta p4-1.

every matter during court proceedings but section 61 gives a child the opportunity to participate, if he or she wishes to do so. The court however has a responsibility to ensure that a child is given the opportunity to participate if he or she wishes to do so. The final decision to participate in proceedings, whether it is directly or not, lies with the child.

It is therefore concluded that, with reference to the Children's Act, a child who has the needed intelligence and ability to appreciate the important obligation of telling the truth, has the capacity to give evidence in a trial and should be given the opportunity to participate in legal matters concerning them.⁵⁸

4.4 Alternative forms of child participation

There are different methods that can be used to hear a child's voice for example through a separate legal representative, reports, interview with the judge in chambers and directly in a courtroom.⁵⁹ The most common method that is used to hear a child's voice in custody proceedings is through trained professionals.⁶⁰ In using this method, the office of the family advocate is mostly involved in the proceedings. Both the family advocate and trained professionals play an important role to ensure that a child's wishes are brought to the attention of the court. Information regarding the child is then obtained from various sources, for example the child's psychologist, social workers etc.

The other method that can be used is to speak to the child directly, called a judicial interview. This will enable the judge to determine the child's maturity which is an important factor when considering the weight which should be given to the child's views. Although South African legislation directs judges to consider the wishes of the child, it does not require judges to interview children in chambers to familiarize them with the

⁵⁸ Du Bois, F (2007) *Wille's Principles of South African Law* (9th ed) p186.

⁵⁹ Mahlobogwane, FM "Determining the best interest of the child in custody battles: should the child's voice be considered" (2010) 31 *Obiter* p238.

⁶⁰ Mahlobogwane, FM "Determining the best interest of the child in custody battles: should the child's voice be considered" (2010) 31 *Obiter* p232.

wishes of the child.⁶¹ This is a direct way to communicate to the child. However, it is not always desirable since it is not a friendly environment for a child and the interview is done by the judge, which may not be trained to communicate to children. Interviews can be very intimidating for a child which can lead to a child not feeling comfortable to express his honest views.

It is also not desirable for a child to be a witness in an open courtroom since this may lead to children being cross-examined and that children should not be exposed to the intimidating atmosphere of a court room. Children find it very stressful to testify in front of their parents, especially where the parents are in opposing positions.⁶²

The specific circumstances of each case must be interpreted and a decision must be made based on the different relevant factors in each case to determine in which way the child's wishes will be brought before court. This will give effect that either a *curator ad litem* or a separate legal representative will be appointed, based on the circumstances. One has to consider the different role players involved to ascertain how a child's wishes can be brought before court.

⁶¹Mahlobogwane, FM "Determining the best interest of the child in custody battles: should the child's voice be considered" (2010) 31 *Obiter* p240.

⁶²Mahlobogwane, FM "Determining the best interest of the child in custody battles: should the child's voice be considered" (2010) 31 *Obiter* p242.

CHAPTER 4: CRITICAL ANALYSIS ON LEGAL REPRESENTATION OF CHILDREN

A child's right to have a separate legal representative assigned to him during legal proceedings is set out in Article 12(2) of the CRC, as well as Article 4(2) of the ACRWC that states that a child must have an 'impartial representative as a party to legal proceedings'. It is a child's constitutional right to have a representative in legal matters if it has the effect that substantial injustice would otherwise result. The implementation of a child's right to be heard by appointing a separate legal representative for the child, is however not a common practice in South African courts and there are various questions as to how a child can obtain legal representation.⁶³ The three main issues that can be identified are: The circumstances under which a child may be entitled to legal representation in terms of section 28(1)(h) of the constitution; The practical implementation of this right; and The role of a legal representative assigned to a child.⁶⁴

4.1 The circumstances under which a child is entitled to a legal representative in terms of Section 28(1)(h) of the constitution

Section 28(1)(h) indicates when the state should assist a child by appointing a legal representative for the child. It is set out in section 28(1)(h) that a legal representative has to be appointed at 'state expense' if 'substantial injustice would otherwise result'. It is however unclear if the 'substantial injustice' is applicable to the whole chapter or only the part that a legal representative has to be appointed at 'state expense'. Another question that arises is if a child has a certain right to legal representation in civil matters or if this right is only applicable when 'substantial injustice' would otherwise result? Guidance can be drawn from case law where the courts considered when it is necessary to appoint a legal representative for a child.

⁶³ Boezaart, T (ed) (2009) *Child Law in South Africa* p99.

⁶⁴ Boezaart, T (ed) (2009) *Child Law in South Africa* p102.

In *Centre for Child Law and Another v Minister of Home Affairs and Others*⁶⁵ the court expressed the importance of legal representation of children. In this case legal representation was appointed by the state for the children involved in this matter. The court had to safeguard the rights of unaccompanied minors and appointed an advocate for this purpose. These children did not have parents to protect their interest and were even more vulnerable because they could not be assisted by a parent. There is a duty on the court to look after the interest of the minor children, it was ordered that legal representation needed to be appointed for the children. The court also considered the risks involved if these children were not properly represented which might have resulted in their rights to be dishonoured. The court made a clear distinction between a *curator ad litem* and a legal representative appointed in terms of section 28(1)(h) of the constitution. The question now arises if the court only stressed a child's right to legal representation due to the fact that children were unaccompanied minors and therefore had no parent or legal guardian to act on their behalf.

In *Du Toit and Another v Minister of Welfare and Population Development and Others (Gay and Lesbian Equality Project as Amicus Curiae)*⁶⁶ the court found that if there is a risk of substation injustice, the court is obliged to appoint a *curator ad litem* for the child and that this obligation is based on Section 28(1)(h) of the Constitution. In the case of *S v M*⁶⁷ the court specifically appointed a *curator ad litem* to investigate the circumstances of the children in this case.

It was found by Sloth-Nielsen J that:⁶⁸

The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protection and advancing the interest of children; and that courts must function in a manner which at all times shows due respect for children's rights.

⁶⁵ 2005(6) SA 50 (TPD) 58I-59C.

⁶⁶ 2003(2) SA 198 (CC) para 3.

⁶⁷ 2008 (3) SA 232 CC para 16 and 31.

⁶⁸ *S v M* 2008 (3) SA 232 CC para 15.

In both these cases the minor children were not unaccompanied minors and it could therefore be concluded that the court will not only appoint a separate legal representative for a child if he is unaccompanied. The question is therefore not if the child is accompanied or not, but if ‘substantial justice would otherwise result’.

In the case of *Soller NO v G and Another*⁶⁹ the court dealt with the interpretation of section 28(1)(h) as well as the reasons why the child needed separate legal representation. It was stated that:⁷⁰

The significance of section 28(1)(h) lies in the recognition, also found in the Convention on the Rights of the Child, that the child’s interest and the adults’ interest may not always insect and that a need exists for separate legal representation of the child’s views.

However, section 9 of the Children’s Act states 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.

The test to determine if ‘substantial injustice would otherwise result’ is therefore the best interest of the child principle, which is in some circumstances in conflict with the best interest of the adults involved. According to Sloth-Nielsen, the other factors that can be taken into consideration to determine if substantial injustice would occur if a legal representative is not appointed, is the complexity of the case as well as the impact of the final decision on the child’s life.⁷¹

⁶⁹ 2003 (5) SA 430 (W).

⁷⁰ *Soller NO v G and Another* 2003 (5) SA 430 (W) 434-435 para 8.

⁷¹ Kassan, D “Children’s rights to legal representation in divorce proceedings: proposed guidelines concerning when a section 28(1)(h) legal practitioner might be deemed necessary or appropriate” in Sloth-Nielsen, J and Du Toit, Z (eds) (2008) *Trials and Tribulations, Trends and Triumphs* Juta p237 – 238.

4.2 The implementation of section 28(1)(h)

If one considers section 28(1)(h) of the Constitution, it clearly states that a legal practitioner must be appointed ‘at state expense.’ It is therefore not clear who is really responsible for the provisioning of legal representation for children.⁷²

In *Ex parte van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁷³ the court referred the matter to the State Attorney to appoint a legal representative for the children in this matter. This was unsuccessful since the State Attorney does not have the ability to appoint a legal representative in family law matters. The function of the State Attorney is to defend or institute actions and applications against or on behalf of any of the branches of government.⁷⁴

The general approach to assignment of a legal representative has always been that a legal representative can be appointed by the Legal Aid Board of South Africa (hereinafter called “LASA”).⁷⁵ However, this is not the only way in which children obtain legal representation. The other two available options are to approach the LASA personally or a court can direct someone to the LASA to assist them in making the application for legal representation. Once the court found that a child does indeed need legal representation, the matter can be referred to LASA who assigns a specific person to assist the child. LASA has duty to assist the child when a matter is referred to them. The court does not directly assign a legal representative for a child, but a court has discretion to assist them in applying for legal representation. The High Court is at all relevant times the upper guardian of all minors. With its inherent powers the court has discretion to assist a child in obtaining legal representation in circumstances where it is in a child’s best interest to do so.

⁷²Boezaart, T (ed) (2009) *Child Law in South Africa* p103.

⁷³ (2005) JOL 14218 (T).

⁷⁴Boezaart, T (ed) (2009) *Child Law in South Africa* p104.

⁷⁵*Ibid.*

It was shown in *Soller NO v G and Another*⁷⁶ that courts do have the power to interpret this to include the power to appoint a legal representative in terms of section 28(1)(h), and not only the common law power to appoint a *curator ad litem*.⁷⁷

A problem to consider is that the legal representation of children cannot be dependent on the High Court alone. Section 14 of the Children's Act makes provision for a child to initiate legal action. If a child can only have access to legal representation through the High Court, a child would have to appoint a lawyer to assist him in bringing an application to the High Court for legal representation. This route is clearly not practical and will result in legal costs which a child, in most circumstances cannot afford.⁷⁸

It is therefore more practical and cost effective for a child to approach LASA to obtain legal representation. This was also confirmed in the matter of *Legal Aid Board v R and Another*.⁷⁹ This was the first case to deal with the authority of LASA to appoint a separate legal representative exercising its own discretion and not as a consequence of an order by a presiding judge.⁸⁰

In this case there was a 12 year old girl who was involved in a court case where her parents were involved in litigation for over five years. The court instructed the Minister for Justice and Constitutional Development to appoint a legal representative for the child in this case. This order was impractical and could not be carried out. At a later stage in the court proceedings a legal representative was appointed for the child by LASA. The mother, as the guardian of the child did not want the child to have contact with her legal representative. LASA was forced to approach the court on an urgent basis for a declaratory order that they had the authority to appoint a legal representative for the child, that a legal representative had been duly appointed for the child and that the legal representative should be allowed to consult with the child in order to properly represent her. The mother argued that she is the legal guardian of the child and that she should set the terms of the representation of the child. It was further argued by the mother that

⁷⁶ 2003 (5) SA 430 (W).

⁷⁷ Boezaart, T (ed) (2009) *Child Law in South Africa* p104.

⁷⁸ *Ibid.*

⁷⁹ 2009 (2) SA 262 (D).

⁸⁰ Bregman, R "Appointment of a separate legal representative for a child by the Legal Aid Board" (2009) *Juta* available at www.roylaw.co.za accessed on 10 July 2011.

she should be consulted throughout the whole process and that she wants to be part of the consultations with the child,⁸¹ that the powers of the legal representative should be limited. The mother further argued that LASA did not have the authority to appoint a legal representative for a child, that only the court or a guardian has the authority to appoint a legal representative for the child.

The court found that is of utmost importance for a child to have a legal representative in matters where parents have been involved in acrimonious litigation with each other as the child is the one that has to live with the decisions made by the court.⁸² In this case the child clearly stated that she wishes to participate and express her views. It is thus clear that in this case it was necessary to consider the child's wishes, independently from her parents.

It is also not desirable for one of the parents to appoint a legal representative for a child. This often have the result in parents using children as pawns and are only willing to appoint a legal representative for a child to support his or her own case.⁸³ This is another reason why LASA is the most competent institution to go to in this circumstances as since they are independent and do not take this action for their own gain.

The court found in *Legal Aid Board: In re Four Children*⁸⁴ that all that had to be done to ensure that the children's wishes are placed before court, is for the children to ask the court to appoint a suitable person as *curator ad litem*. This was not the order made by court.

It was found by Nugent J that:

I see no reason why the ordinary discretionary powers of the courts at common law do not suffice for the Legal Aid Board to perform its mandate, nor why their

⁸¹ *Legal Aid Board v R* p267F-268E.

⁸² *Legal Aid Board v R* p269G.

⁸³ Bregman, R "Appointment of a separate legal representative for a child by the Legal Aid Board" (2009) *Juta* available at www.roylaw.co.za accessed on 10 July 2011.

⁸⁴ (512/10) [2011] ZASCA p39.

ordinary supervisory function needs to be dispensed with in order for it to do so, particularly if the wishes of the guardians are to be overridden.

In terms of section 3 of the Legal Aid Act 22 of 1969 LASA has a duty to provide legal representation for a child where necessary. The Constitution⁸⁵ requires that legal representation for children must be at 'state expense'. It was held in *Legal Aid Board v R and Another*⁸⁶ that section 3 of the Legal Aid Act can be interpreted to include all situations where the Constitution requires the appointment of legal representation by the state. It can thus be argued that LASA is in fact discharging the state's duty in terms of section 28(1)(h) of the Constitution.⁸⁷ It is clear from *Legal Aid Board v R and Another*⁸⁸ that it is not necessary that the court must assign the legal representative or decide whether or not the representation of the child is necessary. LASA has the authority to assign legal representation for children at their own discretion according to the guidelines of Legal Aid South Africa.⁸⁹

Section 22(6)(a)(ii) and section 34(5)(b) of the Children's Act both state that a child may only engage in litigation with 'the leave of the court'. These sections also indicate that the Children's Act meant for a child to be able to obtain legal representation independent from the court. This has the effect that a legal representative does not have to be assigned by the court.⁹⁰

Section 29 of the Children's Act makes provision that a court may appoint a legal representative for the child and make a cost order against the parties in the matter to pay the costs involved for appointing a legal representative for the child.

Section 55(1) of the Children's Act states that:

⁸⁵ Section 28(1)(h).

⁸⁶ 2009 (2) SA 262 (D).

⁸⁷ Boezaart, T (ed) (2009) *Child Law in South Africa* p106.

⁸⁸ 2009 (2) SA 262 (D).

⁸⁹ Boezaart, T (ed) (2009) *Child Law in South Africa* p106.

⁹⁰ *Ibid.*

Where a child involved in a matter before the children's Court is not represented by a legal representative, and the court is of the opinion that it would be in the best interest of the child to have legal representation, the court must refer the matter to the legal aid board referred to in section 2 of the Legal Aid Act 1969 (Act 22 of 1969).

According to section 55 the discretion still lies with the presiding officer to make the decision whether or not to appoint a legal representative. This is a matter of concern as there will be presiding officers who will appoint legal representatives for children on a regular basis while others decide not to do so. This section also confirms that not only LASA can assign a legal representative but the court also has the discretion to appoint a legal representative. If the court instructs LASA to appoint a legal representative, LASA has a duty to provide a legal representative in cases where a child is not represented.

Legal representation may also be provided by other organisations or practitioners and the duty will only fall on the LASA in cases where the child is not already represented and the court is of the opinion that the child requires legal representation.⁹¹ This does not help the majority of children since children often do not have the necessary resources to obtain their own legal representative.⁹²

4.2.1 Family Advocate

In the case of *Soller NO v G and Another*, the court made a clear distinction between the roles of the family advocate, a *curator ad litem* and a separate legal representative for a child. The office of the family advocate was formed by the Mediation in Certain Divorce Matters Act 24 of 1987.⁹³ The role of the family advocate is clear in that it acts as an advisor to the court and as a mediator between the families whom they

⁹¹Boezaart, T (ed) (2009) *Child Law in South Africa* p107.

⁹²*Ibid.*

⁹³*Ibid.*

investigate.⁹⁴ The role of the family advocate is thus not to represent any of the parties in a legal matter, but to only assist the court and to act as intermediary between the court and the family. It is essential for the family advocate to be neutral to enable them to investigate the family and make the correct recommendations to the court.⁹⁵

In the case of *Soller NO v G and Another*⁹⁶ it was found that:

The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child.

During the investigation by the family advocate, they will often interview the children involved to obtain their opinion on specific aspects related to the divorce proceedings for example with parent they want to have permanent residency after the divorce. After the investigation by the family advocate, they will make certain recommendations to court. However, the family advocate does not at any time represent the child. They only document the wishes and views of the child and make suggestions to the court after their investigation.⁹⁷ The role of the family advocate is clear in that it has to make recommendations on the general best interest of the child, which might sometimes be in conflict with the wishes of the child.⁹⁸

It was never the intention of the legislator for the family advocate to represent children since the role of the family advocate has always been clear. The court is not bound by the reports of the family advocate and the family advocate is only an advisor to the court. The court must still use his own discretion and consider all the facts before court to determine the best interest of the child. It is extremely important that a legal representative of a child must have a different role and responsibilities than the family

⁹⁴ Boezaart, T (ed) (2009) *Child Law in South Africa* p107.

⁹⁵ *Soller NO v G and Another* 2003 (5) SA 430 (W) para [22]-[24].

⁹⁶ 2003 (5) SA 430 (W) par [26].

⁹⁷ *Ibid.*

⁹⁸ Kassan, D "Children's rights to legal representation in divorce proceedings: proposed guidelines concerning when a section 28(1)(h) legal practitioner might be deemed necessary or appropriate" in Sloth-Nielsen, J and Du Toit (eds) (2008) *Trials and Tribulations, Trends and Triumphs* Juta p233.

advocate.⁹⁹ This is essential as a child does not only need to be assisted in divorce matters, but also in several other matters in which they might need the assistance of a legal representative for example care and protection proceedings.

4.2.2 *Curator ad litem*

Children have always had some protection in terms of the common law, in cases where there is no parent or legal guardian that can act on behalf of the child. In these specific cases, the minor was entitled to have a *curator ad litem* appointed to act on his behalf.¹⁰⁰ It is however clear that this is not the only circumstances in which children need to have a legal representative. The difference between a legal representative and a *curator ad litem* is that the role of a *curator ad litem* is to always protect the best interest of the child in cases where the child do not have parents or a legal guardian; or if the parents or guardian cannot be found; or if the best interest of the minor child is in conflict with his parent or guardian; or if the parent or guardian unreasonably refuses to assist the child.¹⁰¹ It can therefore be said that it is the role of a *curator ad litem* to assist the court and the child during legal proceedings and to take care of the best interest of the child, while a legal representative have to obtain instructions from a child and advocates on behalf of the child's views and wishes.¹⁰²

In as early as 1902 the subject was dealt with by the author of *The Judicial Practice of South Africa*:¹⁰³

Such curator is appointed by the Court upon the petition of the minor, or, if he is too young to understand it, of some relative or friend or someone who can show a reasonable interest in him, setting forth that he has no guardian, and is about to

⁹⁹ *Soller NO v G and Another* 2003 (5) SA 430 (W) para [25].

¹⁰⁰ Skelton, AM "*Special Assignment: Interpreting the right to legal representation in terms of section 28(1)(h) of the Constitution of South Africa*" in Sloth-Nielsen, J and Du Toit, Z (eds) (2008) *Trials and Tribulations, Trends and Triumphs* Juta p218.

¹⁰¹ Davel, CJ "General Principles" in Davel, CJ and Skelton, AM (eds) (2007) *Commentary on the Children's Act* Juta p2-24.

¹⁰² *Ibid.*

¹⁰³ Van Zyl, CH (1902, 2nd Edition) *The Theory of the Judicial Practice of the Colony of the Cape of Good Hope and of South Africa Generally* 2ed London, W Colwes and Sons p21-22

institute or defend an action at law, and stating also briefly the nature of the case, and praying that the court appoint a curator ad litem to represent him.

...

A minor may have a curator ad litem appointed for him even against his will, or without his knowledge, if it can be shown to the court that the application will be for his benefit and to his interest.

...

As a general rule a near relative is appointed curator ad litem, but this is discretionary with the court, and frequently the advocate or attorney employed for the minor has been appointed as such. From the time of the appointment of the curator ad litem, the action is to be conducted in the name of the minor, duly assisted by his curator.”

In the case of *Christian Education South Africa v Minister of Education*¹⁰⁴ the court stated as follows:

Although both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.

The most fundamental way in which children’s interests have been brought to the court’s attention, is through the appointment of a *curator ad litem*. A *curator ad litem* is appointed to handle proceedings on behalf of the child, who does not have the legal capacity to litigate.¹⁰⁵ Both a legal representative and a *curator ad litem* can be used as forms of child participation, depending on the specific circumstances of the case before

¹⁰⁴ 2000(4)SA 757 (CC) 787.

¹⁰⁵ Sloth-Nielsen, J “Realising children’s rights to legal representation and to be heard in judicial proceedings: An update” (2008) 24 *SAJHR* p500.

court, as well as the child's ability to give instructions and participate in court proceedings.

4.4 The role of the legal representative and a child's capacity to give instructions

A difficult aspect in regards to child participation is as child's capacity to give instructions. A child's capacity to give instructions are intertwined with the question whether or not a legal representative should be appointed for a child as well as the role and function of the legal representative.

There has not yet been a Constitutional Court case where a separate legal representative was appointed for a child. In all the relevant cases to this study the court established that a *curator ad litem* should be appointed for a child to enable the child or children to participate in the court proceedings. The children involved were in some cases very young and therefore needed a *curator ad litem* to enable them to participate. However, there are High Court cases in which the court ordered that a separate legal representative should be appointed for a child. The two most important cases in this instance are *Soller NO v G and Another*¹⁰⁶ and *Legal Aid Board v R and Another*.¹⁰⁷ The case of *Soller NO v G and Another*¹⁰⁸ was the first reported case that dealt with the interpretation of section 28(1)(h). The court raised the question why the child needed separate legal representation and stated the following:

The significance of section 28(1)(h) lies in the recognition, also found in the Convention on the Rights of the Child, that the child's interest and the adults' interest may not always intersect and that a need exists for separate legal representation of the child's views.

In *Ex parte van Niekerk and Another: In re Van Niekerk v Van Niekerk*¹⁰⁹ the parents in this matter accused each other for the attitude of the children while the children

¹⁰⁶ 2003(5)SA430 (W) 434.

¹⁰⁷ 2009 (2) SA 262 (D).

¹⁰⁸ 2003(5)SA430 (W) 430.

¹⁰⁹ [2005] JOL 14218 (T) para 7.

themselves have not had the opportunity, prior or during court proceedings to state their views or to have their opinions put before court. It was held that: Only if the children or somebody on their behalf puts their case will a court have a balanced presentation of the situation. The court found that it was clear that the children had an interest in the outcome of the proceedings and that they should be joined as parties to the proceedings. Hartzenberg J held that it would be in the best interest of the children to join them as parties to the proceedings. By joining the children as parties to the proceedings, they will be able to appeal against an adverse order.

The court also found in *Soller NO v G and Another*¹¹⁰ that a child's interest and those of an adult is not always the same, and in some instances directly in conflict with each other.

It was said by Warshak that:¹¹¹

Courts should be wary and not delude themselves into thinking that they are hearing a child's voice when in fact they may be receiving "a distorted broadcast laced with the static of a charged emotional atmosphere; or the voice may be delivering a script written by another; or it may reflect the desire to placate, take care of, or pledge loyalty to a parent"

Some guidance can be found to consider whether a representative should be appointed in divorce matters namely: the presence of allegations of sexual, physical or emotional abuse; if the parents have been involved in lengthy and acrimonious litigation over care, contact and maintenance issues; the complexity of the matter, including the length of the hearing or trial, the number of expert witnesses involved and the allegations that one parent is emotionally unstable; and where there is reason to believe that one of the parties is withholding information from the court.¹¹²

¹¹⁰ 2003(5) SA 430 (W).

¹¹¹ Warshak, RA "Playoffs and pitfalls of listening to children" (2003) 52 *Family Relations* p382.

¹¹² Kassan, D "Children's rights to legal representation in divorce proceedings: proposed guidelines concerning when a section 28(1)(h) legal practitioner might be deemed necessary or appropriate" in Sloth-Nielsen, J and Du Toit, Z (eds) (2008) *Trials and Tribulations, Trends and Triumphs* Juta p237-238.

In the case of *McCall v McCall*¹¹³ King J, with consent of the parents interviewed the minor child. It was found by the judge that the minor child was ‘an intelligent, articulate, persuasive sincere and candid child’ who displayed ‘a degree of maturity and intellectual development’ that satisfied him that the child was capable of expressing his views. The Judge also considered that the child was expressing a subjective view and that he might have been influenced to some extent by the views of others. The Judge was however of the opinion the child was expressing ‘a genuine and accurate reflection of his feelings towards his relationship with each of his parents’. The judge was satisfied that he could and should consider the child’s wishes.¹¹⁴

In the case of *R v H and Another*¹¹⁵ the court appointed a separate legal representative for the child in terms of Section 28(1)(h). The court also referred to section 12 of the CRC and stated that the court is ‘required to afford a child who is capable of forming a view on a matter affecting him or her, the right to express those views. Such views are to be given due weight according to the age and maturity of the child’.

As clearly stated in the case of *Minister for Education v Pillay*,¹¹⁶ the older the child is, it becomes more important to consider the views and wishes of the child. The role of a separate legal representative can be determined by the nature of the proceedings and the age, maturity and stage of development of the child. Older children will thus require the assistance of a separate legal representative to enable them to give instructions and to act on their behalf during litigation proceedings. This has the effect that a child is represented by an attorney and counsel in the same way that an attorney and advocate would represent an adult.¹¹⁷ Other factors that needs to be considered are a child’s cognitive and emotional level of functioning, his or her relationship with their parent and to determine how vulnerable they are to pressure from their parents.¹¹⁸

¹¹³ 1994 (3) SA 201 (C).

¹¹⁴ Para 207G-208E.

¹¹⁵ 2005(6)SA 535 (C) 539.

¹¹⁶ 2008 (1) SA 474 (CC)494E-G.

¹¹⁷Boezaart, T (ed) (2009) *Child Law in South Africa* p109.

¹¹⁸ Mahlobogwane, FM “Determining the best interest of the child in custody battles: should the child’s voice be considered” (2010) 31 *Obiter* p236.

In the case of *HG v CG*¹¹⁹ the court went against the recommendations made by the experts involved in the case. The experts in this matter recommended that the court does not consider the wishes of the children involved. The court held that it would act in direct contrast to the provisions in the Children's Act if he does not consider the views and wishes of the children involved since they were of such an age and maturity to make informed decisions.¹²⁰ It is also very important to ensure that a child's wishes are indeed their own and that they are not influenced by one or both parents to push them in a certain direction. Children are vulnerable and can be influenced very easily (especially when they are very young) it is very important to ensure that what is presented to court to be a child's wishes, is indeed their own and not those of a parent who had an influence on the child.

There are relevant and justifiable fears that it would be harmful to involve children in discussions when there is not much hope that their wishes will be met.¹²¹ There are also fears that children are encouraged to speak out and make their voices heard, but once they have done that there are a risk that children might become the target of parental resentment.¹²² Children do have the choice whether or not they want to participate in court proceedings according to section 61 of the Children's Act. This can however result in children choosing not to participate due to different circumstances for example having to choose between their parents. Although this might have the result that important wishes of a child are not placed before court, it is of utmost importance that a child always has the choice to participate or not.

In the case of *Legal Aid Board: In re Four Children*¹²³ there were four children involved, three of them were 11 years old and the fourth was 14. Their parents were divorced and they had joint custody of the children. The mother wanted to relocate to another country and take the children with her but the father objected. The children found themselves in the middle of the dispute between the parents. The first problem that had to be

¹¹⁹ 2009 (3) SA 352 (ECP).

¹²⁰ *Ibid.*

¹²¹ Mahlobogwane, FM "Determining the best interest of the child in custody battles: should the child's voice be considered" (2010) 31 *Obiter* p232.

¹²² *Ibid.*

¹²³ (512/10) [2011] ZASCA 39.

overcome was that a minor is not generally competent to engage in litigation without the assistance of his or her guardian. In this case the guardians were not qualified to assist them since there was a conflict of interest. The easiest way to overcome this problem is to appoint a *curator ad litem* for the children to handle litigation in their name and in their best interest.

To ensure that a child might have the capacity to give instructions, expert evidence can be obtained for that purpose. In the case of *BS and another AVR and Others*¹²⁴ the court expressed doubts whether or not the children involved had the capacity to make affidavits since it was not clear if the children understood taking the oath. It was a sure concern whether or not the children involved could be cross-examined on their affidavits before court. The court requested an expert report to advise the court if the children do have the capacity to understand the litigation proceedings and the meaning of taking the oath. It was also found in *Manning v Manning*¹²⁵ that if a child has the necessary maturity to express his or her views, the court must give the due weight to the child's views. It is generally accepted by the court that the views of the child is sufficiently represented by psychological or social work experts that are involved in a specific case, or by the office of the family advocate.¹²⁶ In the case of *Fitchen v Fitchen*¹²⁷ the court held the opinion that there was no need to appoint a legal representative for the children since the court was of the opinion that the children was sufficiently represented by the family advocate and the psychological experts. Medical doctors, psychiatrists, psychologists, social workers or other professionals may be requested to carry out assessments. Depending on the circumstances, this might not always be the in the best interest of the child since children often experience this as highly intrusive and sometimes even traumatic.¹²⁸ Another aspect to consider is how children's fundamental right to human dignity, bodily and psychological integrity and privacy should be applied when these assessments are made. It is very important to

¹²⁴ Unreported case no 7180 2008 (South Gauteng High Court) handed down on 26 June 2008.

¹²⁵ 1975(4) SA 659 (T).

¹²⁶ *F v F* 2006 (3) SA 42 (SCA).

¹²⁷ Unreported case no 9564 1995.

¹²⁸ Matthias, CR and Zaal, FN "Intrusive care and protection assessments: when should children have a right to say 'no'" (2011) 27 *SAJHR* p381-397..

always consider whether the child wants to participate or not. Unwilling children should not be compelled to participate.¹²⁹

In the case of *HG v CG*¹³⁰ the court went against the recommendations made by the experts involved in the case. The experts in this matter recommended that the court does not consider the wishes of the children involved. However, the judge held that he would be acting in direct conflict with the provisions in the Children's Act if he does not consider the views and wishes of the children involved since they were of such an age and maturity to make informed decisions.¹³¹

If the child does not have the legal capacity to litigate, one must look at the forum in which the case is heard. If the case is heard in the High Court, a *curator ad litem* should be appointed on application to the presiding officer. However, if the matter is heard in the Children's Court a legal representative is still appointed for the child but the role of the legal representative is different from a client-directed representative.¹³² A legal representative for a child in the Children's Court when a child cannot give instructions, acts as a best interests representative. The role of such a legal representative is thus similar to that of a *curator ad litem* in the High Court.¹³³

Should it be found that a child is of such an age and maturity to participate in legal proceedings and to give instructions to a legal representative, a legal practitioner has the responsibility to establish his role in legal proceedings. Once a legal practitioner has taken the role as a client-directed or best interest representative, he may not change his role during the legal proceedings.¹³⁴ The client-directed attorney may not change his role and take on the role of a best interest attorney during the proceedings. Taking such an approach would negate the purpose of providing separate legal representation as the attorney would effectively be subverting the views and wishes of the child and replacing them with his own views."¹³⁵ This form of representation is

¹²⁹ *Ibid.*

¹³⁰ 2009 (3) SA 352 (ECP). .

¹³¹ *Ibid.*

¹³² Boezaart, T (ed) (2009) *Child Law in South Africa* p109.

¹³³ *Ibid.*

¹³⁴ Boezaart, T (ed) (2009) *Child Law in South Africa* p110.

¹³⁵ *Ibid.*

called client-directed representation which is dependent on a child being able and had the capacity to give instructions. This does not mean that one should compare the child's ability to give instructions to those of an adult.¹³⁶ It would however be naïve to expect that all children's statements will be of the same quality as those of the child in the *McCall*-case. However, by interviewing the children the court can compare the views of the child (from the interview) to the reports of the family advocate and those of social workers involved to enable the court to make an informed decision. It is a well-known fact that children that are the same age, is not necessarily on the same stage of development and that their stage of maturity is also not also the same. It is therefore very difficult to determine if a child has the necessary capacity to make discussions that will be affecting their lives and therefore each case must be dealt with individually.

The High Court has discretion to determine whether or not a child has the capacity to give instructions to his or her legal representative. The older the child is, the less likely it is that proof of capacity will be requested by the court,¹³⁷ or other parties involved in the litigation proceedings. If the child is very young, it would be suitable to get an expert report to determine the child's capacity to give instructions.¹³⁸ This will also assist the legal representative to determine if the child has the capacity to give instructions to avoid confusion over his role in the litigation process. This assessment will differ from case to case and must therefore be considered individually.

A child lacks the full autonomy of an adult but on the other hand are subjects of rights. It is not always easy to maintain a balance between children as right bearers, but they do not always have the capacity to act in terms of these rights due to various reasons. For example that they are not aware and informed of these rights or they do not have the necessary support to protect and enforce these rights.

¹³⁶Boezaart, T (ed) (2009) *Child Law in South Africa* p109.

¹³⁷ *Ibid.*

¹³⁸ Mahlogwane, FM "Determining the best interest of the child in custody battles: Should the child's voice be considered" (2010) 31 *Obiter* p242.

CHAPTER 6: CONCLUSION AND RECOMMENDATION

Children's right to participate and to have a separate legal representative assign to them have developed very significantly through case law as well as legislation that was brought into effect throughout recent years. Also the Constitutional court have made a tremendous contribution towards the development of a child's right to be heard and to consider the views, wishes and opinions of children in all matters concerning them. There are various international instruments which also contributed to the normative framework in South African law to develop the child's right to participate in matters affecting their lives, either directly or indirectly. It is submitted that in order to make separate legal representation of children practical and effective, one should consider the international law, section 28(1)(h) of the Constitution as well as the Children's Act to create opportunities for children to participate in litigation in a manner equal to an adult.

The decisive factor to determine if a child needs legal representation is the best interest of the child. Courts are still facing a complex task when having to determine what is in the best interest of the child. It is evident that the different role players involved are not always informed of their specific role in representing children in legal matters. Continued training in this regard is essential to ensure that children have the necessary forums to go and to ensure that the different role players involved have the necessary knowledge to properly assist children in legal matters concerning them.

There are still a number of issues that needs to be solved in case law to develop a practical and efficient way to assist children in bringing a matter to court. The position is still uncertain whether a child should be joined as party or if it is expected of a child to place evidence before the court on an affidavit or consult with the presiding officer in chambers.

If one looks at the nature of the conflict between parents when it comes to litigation, it is very likely and sometimes even inevitable that the views and opinions of the two parents will differ. This is another reason why it is so important for children to have their own separate legal representative, even if it means that parents will not always agree with

the legal representative. From the discussion above one has to consider the possibility that parents sometimes speak through their children in order to favour themselves and that the child's wishes are indeed those of the parent. Since children are vulnerable and can be influenced easily, it is also a possibility that a child favour the parent which is less restrictive and by doing so it can lead to the child to prejudice himself. The conclusion that can be drawn from the above is that it is very important to consider a child's wishes in matters concerning them. However, the courts need to be sensitive to the dangers when considering the wishes of the child.

It seems that the best way to communicate the wishes of a child is through reports from professional people with the necessary skills and qualifications to interpret the child's wishes and advise the court.

Involving children in court matters must be done in a sensitive manner. Children must be given the choice whether or not they want to participate and should not be forced into participation. Although the wishes of a child will not necessarily be the decisive factor, it should be considered and given due weight.

The fact that a child in some cases does not have the capacity to litigate on his or her own does not deprive the child of his or her right of access to a court in terms of Section 14 of the Children's Act.¹³⁹ It is concluded that Section 14 and Section 10 of the Children's Act contributes towards child participation and legal representation of children but it does not influence the formal requirements of the common law that regulates the litigation by a child, or on behalf of a child.

This section confirms that not only the Legal Aid Board can assign a legal representative for the child but clearly states that the Legal Aid Board must provide a legal representative in cases where a child is not represented. Legal representation may also be provided by other organisations or practitioners and the duty will only fall on the Legal Aid Board and that the duty will only fall on the Legal Aid Board in cases

¹³⁹ Boezaart, T and De Bruin, DW "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" (2011) 44 *De Jure* p416.

where the child is not properly represented.¹⁴⁰ This however does not help the majority of children since children often do not have the necessary funds and intellectual ability to obtain their own legal representative.¹⁴¹

Effective legal representation is important to ensure that children enjoy the fundamental right of participation, equally to adults in legal matters involving children. Even though the court made a clear distinction between the roles of the family advocate and a separate legal representative for a child, the court did not give a practical way in which a child can obtain separate legal representation.

Even though the courts have stated that the views of children should be taken into consideration and given the necessary weight, they have failed to provide guidelines on the age, level of maturity and stage of development a minor child would be regarded as capable of expressing his or her views to determine their best interest. It seems like the courts deal with this matter by considering each case individually.

¹⁴⁰Boezaart, T (ed) (2009) *Child Law in South Africa* p107.

¹⁴¹Boezaart, T (ed) (2009) *Child Law in South Africa* p107.

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