

# The role of a curator *ad litem* and children's access to the courts

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## OPSOMMING

### Die Rol van die Kurator *ad litem* en Kinders se Reg op Toegang tot die Howe

Normaalweg is dit 'n kind se ouer(s) wat hom of haar in litigasie bystaan of vir en namens die kind litigeer. In uitsonderlike gevalle is dit egter nie moontlik of wenslik om hierdie funksie aan die ouers of voogde oor te laat nie. Dit is deel van ons Romeins-Hollandse regsêreerfenis dat kurators *ad litem* in hierdie gevalle gebruik word om kinders se ontbrekende of beperkte verskyningsbevoegdheid aan te vul. In hierdie bydrae word aangetoon dat die regspraak die rol van die kurator *ad litem* duidelik omskryf het deur dit onder andere te onderskei van die rol van die Gesinsadvokaat en 'n regsvertegenwoordiger. Daar word voorts ook aangetoon dat die houe egter verder gegaan het en die rol van die kurator *ad litem* wat vir kinders optree, uitgebrei het om onder andere ook die belange van kinders in die algemeen te dien, dus in gevalle waar hulle nie voor die hof was nie. Die uitbreiding van die rol van hierdie kurators kan op vele maniere verklaar word. Dit kan egter nie betwyfel word dat die Kinderwet 38 van 2005 en litigasie wat in die openbare belang ten behoeve van kinders onderneem word, 'n leeu-aandeel hierin gespeel het nie.

Hierdie uitbreiding word verwelkom omdat toegang tot die houe noodsaaklik is ten einde sosiale geregtigheid te bewerkstellig en kinderregte te verwesenlik. Daar word egter ook aangetoon dat die Suid-Afrikaanse kinderreg in hierdie verband by ander regstelsels kan kersopsteek, aangesien kinders in sekere gevalle steeds hul reg op deelname aan belangrike besluitneming ontnem word.

## 1 Introduction

Access to the courts is essential to achieve social justice. This is true with respect to everybody, including children. A curator *ad litem* legally assists children in litigation.<sup>1</sup> A curator *ad litem* is appointed "to avoid injustice.

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1 See *Molete v MEC for Health, Free State* (2155/09) [2012] ZAFSHC 126 where it was decided that a curator *ad litem* would serve no purpose because the trial had been finalised. The court did proceed to appoint a curator *bonis* to manage the child's estate and compensation that the child received.

... [T]he Court has power to appoint, and will appoint, a curator *ad litem* to assist persons to vindicate rights where there is no other suitable means...”.<sup>2</sup> The purpose of this article is to establish the role of a curator *ad litem* appearing for children in South African courts, and in particular whether the role of the curator *ad litem* has developed to the extent that it improves children’s right of access to the courts.

A very brief comparative study will be included comparing the curator *ad litem* under South African law to similar appointments in other jurisdictions. The aim of this comparison is to shed light on the contribution these appointments make in securing access to the courts for all children.

## 2 The Common Law Origin

The Roman Dutch law distinguished between an *infans*, a child under the age of seven years, and a *minor*, a child of seven years or older, when considering the legal capacity of the child.<sup>3</sup> The *infans* had no capacity to litigate, at least not in his or her own name.<sup>4</sup> The parent or guardian of the *infans* had to sue or be sued on behalf of the *infans*.<sup>5</sup> A *minor* had limited capacity to litigate.<sup>6</sup> The general tenor regarding litigation in the common law involving minors was that minors had no *persona standi in iudicio* and could not institute court proceedings or defend legal proceedings without the assistance of their parents or guardians.<sup>7</sup> De Groot explained that minors do not have the capacity to litigate because they do not care for themselves or manage their own affairs.<sup>8</sup>

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- 2 Per Reynolds J in *Ex parte Phillipson and Wells* NNO 1954 1 SA 245 (E) 246.  
 3 Voet 2 4 4. However, it must be borne in mind that “*minor*” sometimes refers to all children, thus including *infantes* and sometimes in the narrow sense, only referring to children aged seven and above.  
 4 Voet 2 4 4, 26 7 12. This incapacity of the *infans* originated in Roman law. See De Groot 1 8 4; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 8 4.  
 5 De Groot 1 4 1, 1 6 1, 1 7 8. He confirmed 1 8 4 that all legal proceedings must be conducted in the name of the guardian. Compare also Voet 2 4 4, 5 1 11, 26 7 12; Van Leeuwen *RHR* 5 3 5; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 4 1, 1 8 4; Van der Linden *Koopmans Handboek* 3 2 2.  
 6 De Groot 1 4 1, 1 8 4. Compare Van der Vyver “Verskyningsbevoegdheid van minderjariges” 1979 *THRHR* 129 131.  
 7 De Groot 1 4 1 mentions an exception in criminal matters.  
 8 De Groot 1 4 1. See also De Groot 1 6 1, 1 7 8, 1 8 4; Groenewegen *De Leg Abr* 3 6 3 2; Van Leeuwen *RHR* 5 3 5. Voet 2 4 4 mentions that minors may not be summoned without the authority of a guardian. He adds (5 1 11) that a minor ought not to institute proceedings without a guardian and explains (26 7 12) that a guardian’s duty is to appear on behalf of his ward in legal proceedings, whether he institutes an action on behalf of a minor or defends him when the minor has been sued by another. See also Van der Keessel *Theses Selectae* 127 explaining that a minor could not appear in court either as plaintiff or defendant without the assistance of his or her guardian. In *Praelectiones* 1 8 4 he comments that minors who institute proceedings or defend such proceedings could not do so in their own

From the above it is clear that a child lacks the capacity to conduct himself/herself in legal proceedings. The parent(s) or guardian will usually assist the child or act for and on behalf of the child to supplement this deficiency. If that is not possible or desirable a curator *ad litem* is appointed to assist the child in litigation.

In the common law there were four established grounds for the appointment of a curator *ad litem* for a child.<sup>9</sup> Case law confirms that curators *ad litem* are still being appointed in all four these instances, namely where:

- (a) The minor is without parents or guardian.<sup>10</sup>
- (b) A parent or guardian cannot be found or is not available (for example, due to an accident).<sup>11</sup>
- (c) The interests of the minor are in conflict with those of the parent or guardian, or there is a possibility of such a conflict.<sup>12</sup>

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name. Compare Van der Linden *Koopmans Handboek* 1 5 5, 3 2 2 where he mentions that if an action is to be instituted by a minor, it must be brought in the name of the guardian and if one wishes to sue a minor, the guardian must be summonsed.

<sup>9</sup> De Groot 1 4 1, 1 8 4; Voet 5 1 11; Van Leeuwen *CF* 2 1 10 8.

<sup>10</sup> *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), confirmed on appeal in 1965 3 SA (A) 772; *Thole v Trans-Drakensberg Bank Ltd* 1967 2 SA 214 (D); *Guardian National Insurance v Van Gool* NO 1992 4 SA 61 (A) 66F-H; *Gassner NO v Minister of Law and Order* 1995 1 SA 322 (C), where the mother of an "extra-marital child" died and no guardian was appointed (the out-dated terminology is used in this contribution only because it was used in the case(s) referred to); *Multilateral Motor Vehicle Accident Fund v Mkgohloa* 1996 1 SA 240 (T), where the mother of the "extra-marital child" had deceased; *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T). In the last mentioned case the court appointed a curator *ad litem*, to represent the unaccompanied migrant children detained in a repatriation centre on whose behalf the Centre for Child Law launched an application for their separation from adult detainees and for the opening of welfare proceedings prior to their deportation.

<sup>11</sup> *Curator ad litem of Letterstedt v Executors of Letterstedt* 1874 Buch 42 45, where the guardian was abroad; *Ex parte Bloy* 1984 2 SA 410 (D), where the whereabouts of the parents were unknown; *Moosa v Minister of Police, KwaZulu* 1995 4 SA 769 (D), where the mother of "extramarital children" had abandoned them and could not be found.

<sup>12</sup> *Wolman v Wolman* 1963 2 SA 452 (A) 459C, where the father applied to have the grandfather's will set aside when such will would be to the detriment of the son; *B v E* 1992 3 SA 438 (T); Van Heerden *et al* *Boberg's Law of Persons and the Family* (1999) 903 n12, where the child's injuries are attributable partly to the parent's negligence and partly to the negligence of a third party and this is why Boberg "Law of Delict" 1959 *Annual Survey of South African Law* 114 criticised *Kleinhans v African Guarantee & Indemnity Co Ltd* 1959 2 SA 619 (E). There was a conflict between the father's interests as plaintiff in his representative capacity as the child's guardian, and his interests as a potential defendant in a subsequent action by the present defendant to recover a contribution from him. Boberg opined that under those circumstances a curator *ad litem* should have been appointed.

- (d) The parent or guardian unreasonably refuses to assist the minor.<sup>15</sup>

It is also customary to appoint curators *ad litem* for the unborn, for example where their hereditary interests are at stake.<sup>14</sup> While the child's parents/guardians are still alive, curators are only appointed in *exceptional* circumstances, such as the instances mentioned above. This is the reason why the application for the appointment of a curator *ad litem* was dismissed in *Ex parte Oppel*.<sup>15</sup>

*Ex parte Kajee* creates the impression that curators *ad litem* are appointed to represent the interests of minors in dependants' claims.<sup>16</sup> This is true if both parents die, for example in a motor vehicle collision, like in *MacDonald v Road Accident Fund*,<sup>17</sup> or when the whereabouts of the parents are unknown, as in *Ex parte Bloy*.<sup>18</sup> It would be incorrect, however, to appoint a curator *ad litem* if one of the parents is able to institute action for and on behalf of the child or to duly assist the child, the exception being if the parent's negligence contributed to the child's damage. In such a case the breadwinner's contributory negligence would result in the breadwinner and the third party being regarded as joint wrongdoers against the dependant.

In the past, a child had to be represented by a *curator ad litem* in paternity suits/proceedings for an order declaring the child to be "illegitimate".<sup>19</sup> This was apparently done because the finding could affect the status of the child, but the practice was criticised and rightly

15 *Ex parte Oppel* 2002 5 SA 125 (C) 126A-B, 1451; Van der Vyver & Joubert *Persone- en Familiereg* (1981) 178; Van Heerden *et al* 904 n13.

14 *Du Plessis NO v Strauss* 1988 2 SA 105 (A); *G v Superintendent, Groote Schuur Hospital* 1993 2 SA 255 (C) 257D, 259C-G. But not when the pregnant mother applied for an abortion in terms of the now repealed Abortion and Sterilisation Act 2 of 1975: *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O).

15 2002 5 SA 125 (C) 129G-H. An application was presented to the court for the appointment of a curator *ad litem* to prepare a report regarding the need to appoint a curator *bonis* or trustee for the estate of the minor son of the applicants. He was involved in a motor vehicle collision and suffered serious head injuries. The applicants sued the Road Accident Fund for damages. The parties eventually entered into a settlement agreement. The settlement offer was subject to the appointment of a curator *bonis* to the estate of the minor. See also *Moleté v MEC for Health, Free State* [2012] ZAFSHC 126 par 15, 59.

16 2004 2 SA 534 (CPD).

17 [2012] ZASCA 69.

18 1984 2 SA 410 (D).

19 *V v R* 1979 3 SA 1006 (T) 1009H; *Seetal v Pravitha* 1983 3 SA 827 (D) 863D-E; *Ngubane v Ngubane* 1983 2 SA 770 (T) 772; *M v R* 1989 1 SA 416 (O) 419I-J; *B v E* 1992 3 SA 438 (T) 439E-F read with 442D; *S v L* 1992 3 SA 713 (EC) 714; *O v O* 1992 4 SA 137 (C) 139G; *D v K* 1997 2 BCLR 209 (N) 221D-H.

so.<sup>20</sup> Now the Children's Act<sup>21</sup> (CA) has abolished discrimination against children based on their parents' marital status. The finding that a child is not the offspring of a married father but the child of an unmarried father (because the *pater est quem nuptiae demonstrant* presumption has been rebutted) does not affect the child's status in the same way. It is therefore no longer essential to appoint a curator *ad litem* for the child under these circumstances.

Herbstein and Van Winsen<sup>22</sup> allege that section 6(1) [*sic*] of the Divorce Act 70 of 1979 provides for the appointment of a curator *ad litem* to represent the interests of minor or dependent children of a marriage which is to be dissolved. This is clearly not correct. The subsection at issue is subsection 6(4) which states that

[f]or the purpose of this section the court may appoint a *legal representative*<sup>23</sup> to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.<sup>24</sup>

This opinion of Herbstein and Van Winsen makes it necessary to comment on the different roles of a curator *ad litem* and a legal representative in children's matters. Before doing so, the role of a curator *ad litem* should be considered in the context of the Constitution.<sup>25</sup>

### 3 Curator *ad litem* for Children in the Constitutional Era

In 1984, years before the acceptance of the 1996 Constitution and the Bill of Rights, Hoexter JA in *Rein v Fleischer NO*<sup>26</sup> referred to the appointment of a curator *ad litem* as "that vigilant protection of the rights of minors which our system of law seeks to promote". In the light of the

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20 See the criticism of Van der Vyver 1979 *THRHR* 129 135-136. Where a child's extra-marital birth was raised in maintenance proceedings, the same was not done: Van Heerden *et al* 360. See *Park v De Necker* 1978 1 SA 1060 (N) and the well-founded criticism of Van der Vyver & Joubert 215-216.

21 38 of 2005.

22 *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* Vol 2 (eds Cilliers, Loots & Nel) 1571.

23 Own emphasis.

24 See also Kassan "Children's right to legal representation in divorce proceedings: proposed guidelines concerning when a s 28(1)(h) legal practitioner might be deemed necessary or appropriate" in *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (eds Sloth-Nielsen & Du Toit) (2008) 227 231 *et seq* on s 6(4). See also *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) where De Villiers J was of the view that the case was not an appropriate one in which to appoint a curator *ad litem*, because the mother of the children was available and willing to assist them. He was not persuaded by arguments regarding a potential conflict of interests. The court agreed that the children needed legal assistance, but favoured the assignment of a legal representative in terms of s 28(1)(h).

25 Constitution of the Republic of South Africa, 1996.

26 1984 4 SA 863 (A) 874C.

present South African constitutional dispensation we have become *more* vigilant about the protection of children's rights.

The South African Constitution is renowned for its specific provision for children and the rights provided to children over and above the fundamental rights guaranteed to all persons.<sup>27</sup> In the context of children's right of access to the courts, section 28(1)(h) is of vital importance. In terms of section 28(1)(h) every child has the right to have a legal practitioner assigned to him or her by the state at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result. The Constitutional Court has interpreted this right of children to include the appointment of a curator *ad litem*. In *Du Toit v Minister of Welfare and Population Development*<sup>28</sup> the court referred to its obligation to appoint a curator *ad litem* for children where there is a risk of substantial injustice and specifically stated that in matters where children's interests are at stake, those interests must be "fully aired" before the court so as to avoid substantial injustice to those children and possibly to others.<sup>29</sup> This broad interpretation of section 28(1)(h) to include the appointment of a curator *ad litem* is clearly correct.<sup>30</sup>

The principle of proclaiming children's best interests to be paramount is also important in this context. The Bill of Rights dictates that a child's best interests are of *paramount* importance in every matter affecting that child.<sup>31</sup> The Constitutional Court found that the best interests standard creates a right that is independent of the other children's rights specified in section 28(1) of the Constitution.<sup>32</sup> In *Christian Education South Africa v Minister of Education*<sup>33</sup> Sachs J found the failure to appoint a curator *ad litem* to represent the children's interests in a constitutional attack on the prohibition of corporal punishment in schools very unfortunate. He explained his view as follows:

The children concerned were from a highly conscientised community and many would have been in their late teens and capable of articulate expression. Although both the State and the parents were in a position to speak on their behalf, *neither was able to speak in their name*.<sup>34</sup> 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

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27 S 28.

28 2005 2 SA 198 (CC) 201G par 3. See also *S v Mokoena* 2008 5 SA 578 (T) 589C.

29 201G-201H: "Where there is a risk of injustice, a court is obliged to appoint a *curator [ad litem]* to represent the interests of children. This obligation flows from the provisions of s 28(1)(h) of the Constitution..."

30 See also Du Toit "Legal representation of children" in *Child law in South Africa* (ed Boezaart) (2009) 93 97.

31 S 28(2).

32 *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) par 17.

33 2000 4 SA 757 (CC) par 53.

34 Own emphasis.

experiential foundations for the balancing exercise in this difficult matter would have been more secure.

There is a debate regarding the constitutionality of the appointment of curators *ad litem* for persons with mental or physical disabilities as it is regarded as interference with those persons' constitutional rights to freedom of the person, security and control over their bodies, dignity and privacy.<sup>35</sup> Without addressing any of the arguments in that particular debate, it is submitted that the constitutionality of the appointment of curators *ad litem* for children cannot be questioned.

#### 4 The Procedure to Appoint a Curator *ad litem*

The appointment of a curator *ad litem* is usually<sup>36</sup> based on an *ex parte* application<sup>37</sup> to the High Court<sup>38</sup> or on notice<sup>39</sup> to the Magistrate's Court,<sup>40</sup> stating the grounds on which the applicant claims *locus standi*, the court's jurisdiction,<sup>41</sup> the child's age and gender, the relationship between the child and the applicant and the name and address of the person suggested for appointment as curator *ad litem*.<sup>42</sup> The office of curator *ad litem* must preferably be held by an advocate of the High Court

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35 Cockrell *Bill of Rights Compendium* LAWSA par 3E33 -3E34. See ss 12, 10, 14 Constitution.

36 The courts have inherent discretion to appoint a curator *ad litem mero motu*. See *Legal Aid Board in re Four Children* [2011] ZASCA 39 par 12. The sole guide in exercising this discretion is the child's best interests: par 13.

37 The child or any person who is able to show an interest in the child may bring this application.

38 R 57(1) Uniform Rules of Court. However, in *Nkosi v Minister of Justice* 1964 4 SA 365 (W) 367 the application for the appointment of a curator *bonis* was in "unusual circumstances" made from the bar. In that particular case a curator *ad litem* represented a paralysed adult (prisoner) who had suffered gunshot wounds in the neck in a claim for damages. This action was then settled and the application to appoint a curator *bonis* to manage the "substantial sum of" money was made from the bar. No case could be found where a curator *ad litem* was appointed in this way.

39 Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa (Volume II: The Rules)* by Van Loggerenberg ad s 33.

40 S 33 Magistrate's Court Act 32 of 1944 states that the court may appoint a curator *ad litem* in any case in which such a curator is required or allowed by law for a party to any proceedings brought or to be brought before the court. Note that s 33 deals with a curator *ad litem* only. The Magistrate's Court has no power to appoint other curators.

41 Which in the case of children need not be domiciled or in permanent residence but have a mere physical presence in that court's jurisdiction: *Ex parte Kajee* 2004 2 SA 534 (C) 542-543. Also see the remark made by Sachs J in *AD v DW (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* 2008 3 SA 183 (CC) par 30 that a child's best interests "should not be mechanically sacrificed on the altar of jurisdictional formalism".

42 R 57(2) Uniform Rules of Court. When the court appoints a curator *ad litem* it usually directs the Bar Council to appoint a suitable advocate as curator. However, the court may also appoint a specific advocate to that position.

with no interest in the matter, failing such, by an attorney.<sup>43</sup> A statement by the nominated person consenting to act as curator *ad litem* must be annexed to the papers.<sup>44</sup> Notice of the application for the appointment of a curator *ad litem* must be given to the party against whom the minor would be bringing the lawsuit.<sup>45</sup> The latter party can then oppose the application if he or she is of the opinion that the appointment is not justified.<sup>46</sup>

Most divisions of the High Court have their own Practice Rules regarding the appointment of curators *ad litem*. These Practice Rules contain additions to the above-mentioned directives, for instance that the applicant must establish the experience of the proposed curator *ad litem* in the type of litigation which the litigant wishes to institute,<sup>47</sup> that the costs of the application be reserved for determination in the contemplated trial<sup>48</sup> and that a settlement may only be reached with the approval of a judge.<sup>49</sup> It is interesting to note that these Practice Rules in essence correspond with the reasoning behind the two-stage approach followed in *Ex parte Bloy*,<sup>50</sup> namely to ensure that the person appointed as curator *ad litem* for a child has sufficient experience and expertise and to avoid the child being responsible for the costs of unsuccessful litigation.<sup>51</sup> This two-stage approach entails that the notice of motion contains two prayers: The first, for the appointment of the curator *ad litem* for the minor to investigate and report back to court, and the second for the granting of further powers to the curator as may be necessary for due prosecution of the action. The court opined that in personal injury claims an application for the appointment of a curator *bonis* should be included in the second prayer.<sup>52</sup>

It has been suggested that Family Advocates accept appointment as curators *ad litem* in certain circumstances involving divorce litigation.<sup>53</sup>

43 R 57(5) Uniform Rules of Court. See also *Ex parte Griesel* 1948 2 SA 219 (O) 220; *Ex parte Maritz*; *Ex parte De Klerk* 1968 4 SA 130 (C) 134F-H; *Ex parte Van der Linde* 1970 2 SA 718 (O) 721F; *Ex parte Bloy* 1984 2 SA 410 (D) 413. Kriek J stating that it is obligatory; *Martin v Road Accident Fund* 2000 2 SA 1023 (W) 1035G.

44 *Ex parte Bloy* 1984 2 SA 410 (D) 412E; Van der Vyver & Joubert 179.

45 *Ex parte Wilkinson* 1946 2 PH F79 (C).

46 *Ex parte Donaldson* 1947 3 SA 170 (T) 174. In motor vehicle insurance claims on behalf of a minor, this includes the insurance company; Joubert & Faris (eds) *LAWSA Vol 4* (3rd ed) "Appointment of curators to minors and persons absent from jurisdiction" by Harms & Harms par 500. Service on the master is normally required in all such cases: *ibid*.

47 R 15.9 no 1 North Gauteng Practice Rules.

48 R 15.9 no 3 North Gauteng Practice Rules.

49 R 15.9 no 4 North Gauteng Practice Rules. See also no 5 that the approval may be granted by a judge in chambers that has been allocated by the Deputy Judge-President.

50 1984 2 SA 410 (D) 413. See Van der Vyver & Joubert 377.

51 *Ex parte Padachy* 1984 4 SA 320 (D&C) 326G which followed *Ex parte Bloy* 1984 2 SA 410 (D) 411-413.

52 *Ex parte Bloy* 1984 2 SA 410 (D) 413.

53 Van Heerden *et al* 904 n13.



However, this statement is neither supported by the enabling statute nor by the distinct roles associated with these offices and should therefore be rejected. The Family Advocate is a creation of statute. The role and function of the Family Advocate is defined in the Mediation in Certain Divorce Matters Act<sup>54</sup> and is limited to those functions as set out in that Act. The office has three main functions. The first is to monitor all court documentation and settlement agreements to ensure that the agreements are *prima facie* in the best interests of the child.<sup>55</sup> The second function is to mediate between the parties.<sup>56</sup> Lastly, the office carries out full evaluations in cases where this is required, culminating in a report<sup>57</sup> that sets out its findings and recommendation to the court.<sup>58</sup> Section 2(1) of the Mediation in Certain Divorce Matters Act which mandates or empowers the Family Advocate, makes no mention of the appointment as a curator *ad litem*. The Family Advocate takes on a neutral role<sup>59</sup> while the same cannot be said of a curator *ad litem*. Indeed, the court has on occasion reprimanded a curator who approached his responsibilities in a neutral manner. In *Du Plessis NO v Strauss*<sup>60</sup> an order had been made by a court in favour of the persons represented by the curator. On appeal the curator advanced argument in favour of the appeal because he considered that it would assist the court if he adopted a “more objective view”.<sup>61</sup> Van Heerden JA took him to task:<sup>62</sup>

*Hierdie houding was klaarblyklik strydig met sy pligte, want dit is nouliks nodig om te sê dat 'n curator-ad-litem se eie seining ontersaaklik is en dat van hom verwaag word om alle moontlike argumente ten behoewe van die minderjariges en*

54 24 of 1987.

55 Van Heerden *et al* 522.

56 *Soller v G* 2003 5 SA 430 (W) par 22. Mediation is not defined in the Act, but is described by Van Zyl, a former Family Advocate, as being an alternative dispute-resolution mechanism used by the Family Advocate to actively encourage the parties to participate in a discussion seeking a mutually acceptable solution in regard to matters pertaining to children: 2000 *Obiter* 372 377-378.

57 *Soller v G* 2003 5 SA 430 (W) par 21. The Family Advocate may also appear in court when requested by the court or *mero motu* in cases where he or she deems it to be in the best interests of any child: s 4(3) of the Mediation in Certain Divorce Matters Act 24 of 1987. See *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T) 166; Van Heerden *et al* 519; Robinson “Children and divorce” in *Introduction to Child Law in South Africa* (ed Davel) (2000) 68.

58 See *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC) 606-610 indicating that these functions and powers could be somewhat contradictory. Also compare *R v M* (unreported, case no 5493/0, 20040227) par 16 where Govindasamy AJ found that there are many complex cases where the office of the Family Advocate cannot contribute sufficiently. He reached the conclusion that the Family Advocate could not play an effective role in that particular case. However, the same Govindasamy AJ sat aside that judgment on 2005-09-15. The court may also choose not to follow the recommendations of the Family Advocate: *Whitehead v Whitehead* 1993 3 SA 72 (SE).

59 See also *FB v MB* 2012 2 SA 394 (GSJ) 397F par 17.

60 1988 2 SA 105 (A).

61 145J.

62 146A-B. See also *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 par 21.

*ongeborenes aan te voer; soveel te meer indien uitspraak reeds in hulle guns gegee is.*

This can clearly be contrasted with the role of the Family Advocate who does not represent any particular party to the dispute, not even the child, but rather considers the relevant facts to assist the court with balanced recommendations as to the best care and contact arrangements for the child.<sup>63</sup>

## 5 The Duties of a Curator *ad litem* for Children

The position of a curator *ad litem* is a responsible one because the court depends on his or her report.<sup>64</sup> The child must be interviewed without delay, the child must be informed of the reason for the visit and the curator must make such further enquiries as he or she deems necessary. The curator's report should bring any facts or circumstances pertinent to the application to the court's attention. The curator *ad litem* represents the best interests of the child by advancing all arguments that can reasonably be put forward on the child's behalf.<sup>65</sup> This denotes the real difference between a curator *ad litem* and a child's legal representative. The curator *ad litem*, while assisting the court and the child during the legal process, advances the child's best interests; the legal representative takes instructions from the child and represents the child's views.<sup>66</sup> This is why (in Hague abduction applications) it is said that<sup>67</sup>

[i]n cases where very young children are involved, the role of the legal representative would be more akin to that of a *curator ad litem*, while with older children, the legal representative would take instructions from the child, act in accordance with those instructions and represent the views of the child.<sup>68</sup>

63 *Soller v G* 2003 5 SA 430 (W) par 23, 24. See also par 27 that the Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer.

64 In certain circumstances functioning rather as *amicus curiae*: R 57(5) Uniform Rules of Court; *Steyn v Steyn* 1972 4 SA 151 (NC) 152G, providing the court with the necessary information/evidence.

65 *Du Plessis NO v Strauss* 1988 2 SA 105 (A) 146B. The personal opinion of the curator is thus irrelevant: *Du Plessis NO v Strauss* 1988 2 SA 105 (A) 145J-146B; *Martin NO v Road Accident Fund* 2000 2 SA 1023 (W) 1035A-B.

66 *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) par 23 for the distinction between the roles of a curator *ad litem* and a legal representative. The legal representative is however not a mouth piece. He or she adds adult insight and legal knowledge to the views of the child: *Soller v G* 2003 5 SA 430 (W) par 27.

67 Woodrow & Du Toit "Child abduction" in *Commentary on the Children's Act* (eds Davel & Skelton) (Revision Service 5, 2012) 17-27. See also Du Toit 109.

68 Approved in *Central Authority of the Republic of South Africa v B* 2012 2 SA 296 (GSJ) par 2; *B v G* 2012 2 SA 329 (GSJ) par 12.

Whether these different roles should be undertaken by the same person in a particular case by and large depends on the experience, skills and qualifications of the person concerned.<sup>69</sup> It is also undesirable for a person to be both curator and legal representative if the earning of professional fees might create a conflict of interest.<sup>70</sup> A curator *ad litem* may in his or her official capacity be substituted as a party in place of the child.<sup>71</sup> The court may appoint a curator *ad litem* for a child without his or her knowledge and even against his or her will if it can be shown to the court that the appointment will be for the child's benefit and in his or her best interests.<sup>72</sup>

## 6 The Developing Role in the Case of Children

In recent years the courts have been interpreting the common law relating to curators *ad litem* and are using curators *ad litem* in a wide range of circumstances:

- (a) *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*<sup>73</sup> dealt with the joint adoption of children by a same-sex couple in terms of the now repealed Child Care Act.<sup>74</sup> The Constitutional Court had a 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.<sup>75</sup>
- (b) The case of *S v M (Centre for Child Law as Amicus Curiae)*<sup>76</sup> involved the sentencing of the primary care-giver of young children. The Constitutional Court appointed a curator *ad litem* to investigate the circumstances of the children of the appellant.<sup>77</sup>

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69 *Legal Aid Board in re Four Children* [2011] ZASCA 39 par 14.

70 *Martin NO v Road Accident Fund* 2000 2 SA 1023 (W) 1034B-C per Wunsh J.

71 *Kotze NO v Santam Insurance Ltd* 1994 1 SA 237 (C) 249A, in which case it was done for a person (an adult) suffering from mental incapacity due to a head injury; *Santam Insurance Ltd v Booï* 1995 3 SA 301 (A) 313C, in a similar case on the strength of the common-law authorities on this issue; *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 471C-D, where the court applied the *dictum* of the *Booï* case.

72 *Jones & Buckle ad section 33*, ostensibly because the dissatisfied child had no *locus standi* to appear in opposition of the appointment. See *Legal Aid Board in re Four Children* [2011] ZASCA 39 par 12. However, see *Ex parte Burton* 1948 4 SA 602 (O) where the court was prepared to postpone the case until after the minor's attaining majority, which was just a month away.

73 2003 2 SA 198 (CC).

74 74 of 1983.

75 Par 3. Skweyiya AJ observed that this obligation "flows from the provisions of s 28(1)(h) of the Constitution". However, equating the roles of legal representatives and curators *ad litem* overlooks the fact that the curator in this case also reported on the interests of other children and even the unborn. This is not something that a legal representative would do. A legal representative is concerned only with his or her client(s).

76 2008 3 SA 232 (CC).

77 Parr 16, 31. The court also had the benefit of the Centre for Child Law admitted as *amicus curiae* to make submissions on the rights of the children involved.

- (c) *S v S (Centre for Child Law as Amicus Curiae)*<sup>78</sup> once again dealt with the sentencing of a mother, convicted of forgery, uttering and fraud, who contended that both the Regional Court and the Supreme Court of Appeal failed to establish whether she was a primary care-giver and paid insufficient regard to the best interests of the children. She thus applied to the Constitutional Court for leave to appeal. The Centre for Child Law was admitted as *amicus curiae* and urged the court to appoint a curator *ad litem* to investigate whether there had been significant changes and what the best interests of the children would entail, even if the mother was incarcerated.<sup>79</sup> The Constitutional Court appointed a curator *ad litem* to report on two matters, namely what the effect (if any) of a custodial sentence would be on the children and what measures (if any) needed to be taken if the mother was incarcerated.<sup>80</sup>
- (d) In the case of *Van den Burgh v National Director of Public Prosecutions*,<sup>81</sup> which dealt with the seizure of a family home under the Prevention of Organised Crime Act,<sup>82</sup> the court declined to appoint a curator when urged to do so by the Centre for Child Law as *amicus curiae* in the matter, because it held that there was sufficient information about the children before the court.<sup>83</sup> However, the court did state that it may be necessary for a court to appoint a curator *ad litem* in matters such as these, “in exceptional circumstance – where there is insufficient information about the children, or where the information before the court leaves some doubt regarding the children’s wellbeing”.<sup>84</sup>
- (e) In *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)*<sup>85</sup> the Constitutional Court appointed a curator *ad litem* in a matter where an American couple applied for sole guardianship of a child in order to remove the child from South Africa and adopt the child in the United States. The curator’s report established the ripeness of the matter because it contained all the information relating to the child’s age and development and proved to be decisive.
- (f) In the case of *S v J*<sup>86</sup> the Supreme Court of Appeal appointed a curator *ad litem* to present argument on behalf of a four year-old child caught up in a parental responsibilities and rights dispute between her father and maternal grandparents, even though this was at the appeal stage. The court required up to date information about the real-life circumstances of the child in order to establish what would be in the child’s best interests.<sup>87</sup>
- (g) The High Courts have also appointed curators *ad litem* in a number of ground-breaking cases that suggest a broader role than that which was

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78 2011 7 BCLR 740 (CC).

79 Par 27.

80 Par 28.

81 [2012] ZACC 11.

82 121 of 1998.

83 See also *Member of the Executive Council for Health, Free State v MM* [2012] JOL 29178 (FSB).

84 Par 72.

85 2008 3 SA 148 (CC). See also Schäfer *Child law in South Africa: Domestic and international perspectives* (2011) 514.

86 2011 3 SA 126 (SCA) par 4.

87 Par 49.

traditionally foreseen. The Centre for Child Law appointed a curator *ad litem* to investigate the circumstances of children with behavioural disorders and to report back to the court with recommendations.<sup>88</sup>

- (h) A curator *ad litem* was appointed for a child who had been burnt by soldiers in Chad and had been brought to South Africa for surgery. The care-giver, the boy's grandmother who accompanied him, and the South African organisation assisting him found themselves in a dispute about his care and treatment. A curator *ad litem* was appointed to investigate all issues pertaining to the child, liaise between the parties, obtain the views of the child, find solutions and make recommendations to the court.<sup>89</sup>
- (i) The Aids Law Project successfully brought an application to have a curator *ad litem* appointed in respect of 56 unaccompanied children who were living at the Central Methodist Church in Johannesburg, in order to investigate the circumstances, obtain the views of all the parties, including the children, and make recommendations regarding the care arrangements for the children.<sup>90</sup> The report included recommendations regarding unaccompanied foreign children more generally.<sup>91</sup>
- (j) In 2010 the MEC for Social Development in the North West brought an application before the North Gauteng High Court for a curator *ad litem* to be appointed to investigate the circumstances surrounding the cases of 15 children, in a situation where a presiding officer in the children's court had made allegations that the adoption practices being followed by a care and protection organisation were tantamount to child trafficking. The curator undertook the investigation and reported back to the court.<sup>92</sup>
- (k) The Western Cape High Court *mero motu* appointed a legal representative (but with powers akin to a curator *ad litem*) to assist the children who attended a public school on a private property and who were facing eviction.<sup>93</sup>
- (l) The KwaZulu-Natal High Court in Durban in *Ex parte Centre for Child Law in re: six minor children*<sup>94</sup> appointed a curator *ad litem* to conduct an enquiry and report to the court regarding the circumstances of the inter-country adoption of six children and to determine whether the legal rights of the said children were being infringed.<sup>95</sup> The case dealt

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88 Boezaart & Skelton "From pillar to post: Legal solutions for children with debilitating conduct disorder" in *Aspects of disability law in Africa* (eds Grobbelaar-du Plessis & Van Reenen) (2011) 107 *et seq* on these cases.

89 *Ex Parte Centre for Child Law (For the appointment of a curator ad litem for the minor child RZD)* unreported case no 12166/08 (NGP).

90 *The Aids Law Project v Minister of Social Development, the MEC for Social Development, Gauteng and the City of Johannesburg* unreported case no 52895/09 (SGJ).

91 Par 7.2 of the curator's report.

92 *Ex Parte MEC for Social Development, Women, Children and People with Disabilities, North West (For the Appointment of a curator ad litem)* unreported case no 18923/11 (NGP).

93 *Botha NO and others v MEC for Education, Western Cape and others* unreported case no 24611/11 (WC).

94 Unreported case no 11762/2012.

95 Aged between 18 months and 2 years and 10 months.

with inter-country adoptions of South African children by Canadian citizens. The adoption process was facilitated from South Africa's side by an accredited agency but then stalled due to a moratorium placed on adoptions between South Africa and Canada. The Canadian High Commission in South Africa did not issue travel documents to these children due to an investigation into alleged irregularities regarding inter-country adoptions. The six children who were already matched (and had Skype contact) with Canadian parents were left in limbo for several years. The curator *ad litem* was given extremely wide powers to review the documents and to make enquiries to persons and government officials who she believed would be able to provide information to her or to facilitate the resolution of the matter. The curator *ad litem* consulted various role players to investigate the alleged irregularities and consulted with a clinical psychologist on the likely effect the bungled adoptions might have on the children. The curator *ad litem* found that the delay in investigation was unconscionable and that various fundamental children's rights were being violated. She unsuccessfully resorted to both the Canadian High Commission and the South African authorities. Finally, she filed an urgent application to court for an order directing the authorities to finalise the investigation by no later than 30 April 2013.

- (m) The KwaZulu-Natal High Court in Pietermaritzburg appointed a curator *ad litem* to investigate the situation and advise on the best interests of children who were moved from a children's home that had been closed down by the government and moved to other places.<sup>96</sup> In a similar case in Gauteng, the South Gauteng High Court appointed a curator to protect the interests of the children living in a children's home that was being threatened with closure.<sup>97</sup>

## 7 The Reason Behind the Developing Role

Many reasons may be presented to explain and/or substantiate the developing role of curators *ad litem*:

- (a) International law clearly provides for children's participation in legal proceedings on the basis of their best interests. The Convention on the Rights of the Child (CRC) obliges state parties to act in a child's best interests (article 3) and to ensure that the child's views are heard and duly considered (article 12).<sup>98</sup> The African Charter on the Rights and Welfare of the Child (ACRWC) contains a powerful statement that the best interests of the child shall be *the* primary consideration and ensures the child's right to be heard.<sup>99</sup> It is significant that the ACRWC

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96 *The MEC for Social Development, KwaZulu-Natal v Patricia Dawn Irons NO: KwaZulu-Natal*, unreported case no 5919/12, KwaZulu-Natal High Court, Pietermaritzburg.

97 *The Amazing Grace Children's Home v The Minister for Social Development: Gauteng*, unreported case no 44443/2012, South Gauteng High Court, Johannesburg.

98 Art 12(2) CRC assures the child "the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the rules of national law". South Africa has ratified the CRC 19950616.

provides for the child who is capable of communicating his/her own views as "a party to the proceedings".<sup>100</sup>

- (b) The Constitution made a huge impact. Access to the courts is a fundamental right afforded to everyone.<sup>101</sup> As far as children are concerned, section 28(1)(h) of the Constitution incorporated, to a degree, the principles contained in article 12(2) of the CRC, providing for the child's 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. The paramountcy of the best interests of the child is also clearly articulated.<sup>102</sup>
- (c) The important role of the CA is unquestionable. Section 9 reiterates that children's best interests are paramount. Section 10 provides for child participation in conformity with the dictates of international law. Section 14 of the CA ensures that every child has access to the courts, provided that the matter falls within the jurisdiction of that court. Section 14 takes the matter one step further in providing that children have the right to be "assisted" in bringing a specific matter to a court. Unfortunately, section 14 does not prescribe the manner in which a child is to bring a matter to court. In *FB and Another v MB*<sup>103</sup> a divorced father who intended to relocate (to Portugal) and his son who wished to accompany him applied for the appointment of a specific advocate to represent the second applicant and his interests in an application to change the residency arrangements. The court confirmed that section 14 does not determine the manner in which a child is to bring a matter forward, the paramount consideration being or remaining, the best interests of the child concerned.<sup>104</sup>
- (d) The upsurge in public interest litigation. Both the Constitution<sup>105</sup> and the CA<sup>106</sup> contain provisions on public interest litigation. Nearly anybody can act in a child's best interests on the basis of section 15(2)(b) of the CA, which provides that anyone who acts in the interest of a child may approach a court. Section 15(2)(d) coincides with section 38(d) of the Constitution, which authorises anyone acting in the public interest to approach a court.<sup>107</sup> The common law rules of standing have been broadened to ensure the upholding of fundamental rights.<sup>108</sup>
- (e) Legal Aid South Africa has played a prominent role in securing children's right of access to the courts.<sup>109</sup> It could happen that neither of the parents of the child is supporting the child to bring an application

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99 In sub-arts 4(1), 4(2) respectively. Own emphasis added. Also see art 7. South Africa has ratified the ACRWC 2000-01-07.

100 Own emphasis.

101 S 34.

102 S 28(2).

103 2012 2 SA 394 (GSJ).

104 Par 12.

105 S 38; *Legal Aid Board in re Four Children* [2011] ZASCA 39 par 25.

106 S 15.

107 *Jonker v Manager, Gali Thembali/JJ Serfontein School* [2013] JOL 30108 (E) 10.

108 *Stutterheim High School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2009] 4 All SA 364 (E) par 51, 52.

109 In line with s 3 Legal Aid Act 22 of 1969. See also *Legal Aid Board in re Four Children* [2011] ZASCA 39 par 19, 22, 24.

for the appointment of a curator or legal representative. *Legal Aid Board v R*<sup>110</sup> indicated that a litigant-parent is not entitled to intervene or influence the decision by Legal Aid South Africa to appoint a representative for the child in a civil matter.<sup>111</sup> In this case a 12 year-old girl approached Childline for assistance in a divorce matter where custody (now “care”) was in dispute. The court held that the Legal Aid Board was entitled to render assistance to a child at the state’s expense in the discharge of the state’s obligation in terms of s 28(1)(h) of the Constitution if the failure to do so would otherwise result in substantial injustice.<sup>112</sup> The court further held 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 the court.<sup>113</sup> It is submitted that the Legal Aid Board could also have applied to the court for the appointment of a curator *ad litem* in terms of section 14 of the CA. In such cases the child would not have the opportunity to choose any particular lawyer, but the appointment can be made even after litigation has commenced.<sup>114</sup>

## 8 Access to the Court for Children in Other Jurisdictions

A comparative survey is difficult due to the inconsistency in terminology and the lack of an agreed definition of curator or guardian *ad litem* internationally. In the United States of America children lack capacity to litigate and they have a “next friend” or guardian *ad litem* to represent them in court.<sup>115</sup> It is usually the parents who would assist a child in this way and generally they need not be formally appointed.<sup>116</sup> When there is a conflict of interests, for instance when parents apply to court to have their disabled child sterilised, any person with an interest in the welfare of the child could act as the child’s “next friend”.<sup>117</sup> The guardian *ad litem* is responsible for representing and protecting the best interests of the child in a particular court proceeding.<sup>118</sup> Legislation on the prevention and treatment of child abuse gave prominence to the role of a guardian

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110 2009 2 SA 262 (D). Also see Boezaart & De Bruin “Section 14 of the Children’s Act 38 of 2005 and the child’s capacity to litigate” 2011 *De Jure* 416 431-432.

111 Par 6.

112 264E-G par 3.

113 264F-H par 4.

114 Par 8.

115 Fed R Civ P 17(c), where minors and incompetent persons are treated identically and *In re Marriage of Osborn* 135 P 3d 199 (Kan Ct App 2006), where a teenager was denied standing to modify contact with her father so that she could attend a summer camp.

116 Davidson “The child’s right to be heard and represented in judicial proceedings” 1990-1991 *Pepperdine LR* 255 257.

117 *In re Grady* (1981) 426 A 2d 475 NJ.

118 Davidson 1990-1991 *Pepperdine LR* 255 258.



*ad litem*.<sup>119</sup> The *Child Abuse Prevention and Treatment Act* required that each state must provide children in child protection proceedings with a guardian *ad litem*.<sup>120</sup> The idea was that these guardians *ad litem* act as counsel, advocate, investigator and guardian in the interests of the children involved.<sup>121</sup> After significant changes were made to that Act in 1996, it specified that a guardian *ad litem* may be an attorney or a special court appointed advocate "to obtain first-hand, a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interests of the child".<sup>122</sup> There are huge differences in the different states with regard to the role and function of these guardians *ad litem* and guardians *ad litem* appointed in other cases. In some states guardians *ad litem* are unpaid lay citizens and volunteers.<sup>123</sup> It has been shown that the volunteer model is effective and that the services provided to children are even superior to that of lawyer guardians as far as investigation and monitoring activities are concerned.<sup>124</sup> This model might seem attractive because of saving on costs, but this should be discounted against the infrastructure, training, recruitment, management and support systems that it requires.<sup>125</sup> It has also been suggested that the term "guardian *ad litem*" should be eliminated or at least that lawyers should not fulfil this role.<sup>126</sup> As in South African law, it is undesirable in the United States that one person

119 Child Abuse Prevention and Treatment Act of 1974 Pub L No 93-247 s 4(B)(3) 88 Stat 4 (1974) 42 USC s 5101-5119c (2005), commonly referred to as CAPTA.

120 Referred to as GAL. See also Davidson 1990-1991 *Pepperdine LR* 255 268; Atwood "Representing children: The on-going search for clear and workable standards" 2005 *J Am Acad Matrimonial Lawyers* 183 188-189.

121 Peters "How children are heard in child protective proceedings, in the United States and around the world in 2005: Survey findings, initial observations, and areas for further research" 2005-2006 *Nev LJ* 966 997 n100.

122 Child Abuse Prevention and Treatment Act Amendments of 1996 Pub L No 104-235 § 107 107(b)(2)(A)(ix)(1)-(11) 110 Stat 3063, 3073-74 (1996) 42 USCA 5105a(b)(2)(A)(ix)(1)(11). In 2003 further amendments were made to require appropriate training of guardians *ad litem*: 42 USC 5106a(b)(2)(A)(xiii).

123 Davidson 1990-1991 *Pepperdine LR* 255 261; Adams "CASA: A child's voice in court" 1995-1996 *Creighton LR* 1467; Prescott "The guardian *ad litem* in custody and conflict cases: investigator, champion, and referee?" 2000 *U Ark Little Rock LR* 529 537; Peters 2005-2006 *Nev LJ* 966 1002; Bilson and White "Representing children's views and best interests in court: An international comparison" 2005 *Child Abuse Rev* 220 229; Atwood 2005 *J Am Acad Matrimonial Lawyers* 190, 192-193, 196.

124 Bilson & White 2005 *Child Abuse Rev* 220 229.

125 Adams 1995-1996 *Creighton LR* 1467 1468-1469; Bilson & White 2005 *Child Abuse Rev* 220 230.

126 Elrod "Client-directed lawyers for children: It is the right thing to do" 2007 *Pace LR* 869 910. The context of Elrod's suggestion must be seen against the backdrop of her plea that child-directed lawyers should be employed but then not to do mediation, case management and counselling. Her view point is shared by Spinak 2006 *Nev LJ* 1385 1386. Also see Atwood 2005 *J Am Acad Matrimonial Lawyers* 185 where she states that "[the] chameleon designation of 'guardian *ad litem*' has given rise to rampant confusion".

acts as both the curator *ad litem* and the legal representative.<sup>127</sup> The literature reveals a drive towards client-directed lawyers for children in the United States with less optimism towards guardians *ad litem* in certain circumstances.<sup>128</sup>

The term guardian *ad litem* (or “next friend”) is also used in the United Kingdom.<sup>129</sup> The guardian role had its roots in the Children Act of 1975.<sup>130</sup> The “tandem model” developed which is very similar to the South African practice where both a curator *ad litem* and a legal representative can be appointed. The guardian *ad litem*’s role was increasingly regulated. At first panels of guardians were established and later these were absorbed in a non-departmental agency, the Child and Family Courts Advisory and Support Services (CAFCASS).<sup>131</sup>

In Scotland the role of the South African equivalent of the curator *ad litem* is fulfilled by “Safeguarders”.<sup>132</sup> They also report back to court while advancing all arguments reflecting the best interests of the child.<sup>133</sup>

Northern Ireland has guardians *ad litem* who are usually social workers.<sup>134</sup> These guardians *ad litem* appoint a lawyer to represent the child following the tandem model mentioned above.

In Germany the *Kindschaftsrecht* introduced guardians *ad litem* in 1998 and in 2000 a professional association was established, the National Association of Guardians *Ad Litem* for Children and Young People, which accepted and published national standards.<sup>135</sup> The guardian *ad litem* may be ordered to act for a minor to further the child’s interests but must be appointed in certain circumstances, for instance if there is conflict between the child and his or her legal representative.<sup>136</sup>

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127 Atwood 2005 *J Am Acad Matrimonial Lawyers* 185 185-186, 200-201, 205, 211, 221-222. See in particular 203-205 on how states have tried to address the conflicts inherent in such a situation.

128 *Idem* 185-186, 196-198, least in care/custody disputes; Spinak 2006 *Nev LJ* 1386; Elrod 2007 *Pace LR* 907-909, 919.

129 See *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 where the child was given leave to intervene in an international parental abduction application by his litigation friend who was somebody of the Children’s Legal Centre.

130 Bilson & White 2005 *Child Abuse Rev* 220 223.

131 *Idem* 224.

132 *Idem* 225.

133 S 41(1)(b) Children Act (Scotland) 1995.

134 Bilson & White 2005 *Child Abuse Rev* 220 226.

135 *Idem* 227.

136 *Ibid.*

In Australia children also need a guardian *ad litem* or a “next friend”<sup>137</sup> to institute civil litigation<sup>138</sup> and although it is usually the child’s legal guardian, it is not always the case.<sup>139</sup> Guardians *ad litem* are often lay people, like a family member or social worker, who support the child during the proceedings.<sup>140</sup> Australia also employs Independent Children’s Lawyers (ICL) when a court considers that the child’s interest requires independent representation.<sup>141</sup> *Re K*<sup>142</sup> sets out 13 grounds for appointing ICLs and some of these grounds are similar to the instances in which South African courts appoint curators *ad litem*.<sup>143</sup> Other similarities are that ICLs are not children’s legal representatives (but a lawyer and not a lay person) and do not take instructions from the child.<sup>144</sup> The ICL is as much committed to furthering the child’s interests as is a curator *ad litem* in the South African legal system.<sup>145</sup> The *Guidelines for Independent Children’s Lawyers* reveal that the role and functions of ICLs are very similar to South African curators *ad litem* as well. It could serve as an example in areas where South Africa needs to improve on children’s participation rights, such as sterilisation.

## 9 Conclusion

International law, the South African Constitution and the Children’s Act have all played their part in broadening the role of curators *ad litem* assisting children. Most importantly, the role of judicial precedent should not be underestimated. The courts have clearly defined the role of curators *ad litem* differentiating it from the function of the Family Advocate and distinguishing it from the role of a legal representative. The courts have also expanded the common-law rules on legal standing for children in employing curators *ad litem* to investigate and represent the

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137 Also called “litigation guardian” (in the Supreme Court, County Court, Children’s Court, Magistrates’ Court, Victorian Civil Administrative Tribunal or Federal Magistrates’ Court), “litigation friend”, “prochein ami”, “tutor” or “case guardian” (in the Family Court).

138 High Court Rules O 16 r 18. See also Federal Court Rules O 43 r 1(1), (2).

139 The only exception will be if the child is “Gillick-competent”: Fernando *Judicial Meetings with Children in Australian Family Law Proceedings: Hearing Children’s Voices* (PhD Thesis 2011 University of Tasmania) 100. “Gillick-competent” stems from the case *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 and means that the child has matured to such an extent that he or she has sufficient understanding and intelligence to understand fully what the process/proceedings entails.

140 Walsh & Douglas “Lawyers, advocacy and child protection” 2011 *Melbourne ULR* 621 648.

141 Fernando “How can we best listen to children in family law proceedings?” 2013 *New Zealand LR* 387 394.

142 *Re K* (1994) FLC 92-461 82, 774. See Fernando 2013 *New Zealand LR* 387 394.

143 Like conflicting interests.

144 Fernando 2013 *New Zealand LR* 387 394.

145 See Family Law Courts *Guidelines for Independent Children’s Lawyers* (2007) <http://www.familylawcourts.gov.au/wps/wcm/recources/file/eb02ee0237902cd/ICL%20guidelines-6-12-07.pdf> (accessed 2013-07-28). See par 11 of the *Guidelines* on the role of the ICL when sterilisation of a child is considered.

interests of children who are *not* before the court. These developments enhance children's right of access to the courts.

When comparing the role and function of South African curators *ad litem* with similar institutions in other jurisdictions, one should bear in mind that South Africa is still a developing country and should not involve lay people in that role. However, there are lessons to be learnt from other jurisdictions: Guardians *ad litem* or ICLs are used to represent the interests of children when the parents apply for permission to have a child sterilised.<sup>146</sup> In South African law the child enjoys no representation at all under these circumstances.<sup>147</sup> The decision is left to the parents/guardians, one report of a medical practitioner and the panel at the facility where the sterilisation is to be performed.<sup>148</sup> This is not in conformity with the country's international obligations in terms of the CRC,<sup>149</sup> the ACRWC<sup>150</sup> and the Convention on the Rights of People with Disabilities<sup>151</sup> and should be rectified. Curators *ad litem* have a major role to play in realising access to the courts for *all* children.

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146 Eg *In re Grady* (1981) 426 A 2d 475 NJ; *The Secretary, Department of Health and Community Services v J W B and S M B* [1992] HCA 15; (1992) 175 CLR 218 (1992-05-06) (*Marion's case*); *Re: Angela (Special medical procedure)* [2010] FamCA 98 (2010-02-16).

147 Boezaart "Protecting the reproductive rights of children and young adults with disabilities: The roles and responsibilities of the family, the state, and judicial decision-making" 2012 *Emory Int LR* 69 85 available <http://www.law.emory.edu/fileadm/journals/eilr/26/26.1/Boezaart.pdf> (accessed 2013-07-28).

148 Ss 2(3)(b), 3(1)(b), 3(2) Sterilisation Act 44 of 1998.

149 At least arts 3, 12, 23 CRC.

150 At least arts 4(2), 7, 13 ACRWC.

151 Arts 3, 7, 23(1)(c). See Boezaart "The Children's Act: A valuable tool in realising the rights of children with disabilities" 2011 *THRHR* 264 265 (available <http://ssrn.com/abstract=2016861> (accessed 2013-07-28)) on the provisioning for children with disabilities in the international instruments and the strengths and weaknesses of the Children's Act in this regard.