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# **The development of the constitutional right to legal representation of children in civil matters**

By

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## Declaration

I, Didintle Reitumetse Mokotedi, declare that this Dissertation, which is hereby submitted for the award of Legumes Magister (LLM) in Private Law, is my original work. It has not been previously submitted for the award of a degree at this or any other tertiary institution. Where works of other people are used, references have been provided.

Signed: DRM MOKOTEDI.

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Date: September 15, 2021

Pretoria, South Africa



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## **Abstract**

Section 28(1)(h) of the Constitution of South Africa is a unique right that permits children to be represented in civil matters, either through a legal practitioner appointed the State or by a legal representative approached by the child or the parent. Article 12 of the United Nations Convention on the Rights of the Child (hereafter CRC) and Article 4(2) of the African Charter on the Rights and Welfare of the Child (ACRWC) have influenced the right for a child to have legal representation as a means to participate in any matter affecting the child. These international law instruments have influenced the enactment of the right under section 28(1)(h) of the Constitution, which in turn has allowed children to be pro-active in any matter that would affect their lives.

In this dissertation, the origin of the right to legal representation in legislation is traced to the Divorce Act, followed by legislation that was later enacted to give effect to a proper implementation of the right in terms of section 28(1)(h).

This dissertation aims to answer the central research question of how the right for a child to have a legal representation in civil matters has developed in South Africa, in assessing the response to this question relevant case law and legislation will be examined to determine the substance of the right.

This dissertation finds that the right to legal representation for children in civil matters that concern them is a right that gives effect to a child's right to participate although this right was previously used mostly in divorce matters, it has gravitated towards being enforced in all civil matters that would affect the child.

This thesis links the right associated with child participation in matters affecting them to having a legal representative appointed to present the views and opinions of the child in matters affecting them. It underscores that there are two linked rights within section 28(1)(h). These are that a child has an automatic right to a legal representative in matters affecting them and that they may also acquire such a legal representation at state expense when substantial injustice would otherwise occur. The dissertation concludes that this right in the Constitution, read within the framework of international law



instruments, and together with South African legislation and interpretation by the courts, has been made effective.



## CHAPTER 1 INTRODUCTION

### 1 1 Children's right to legal representation in civil matters under the Constitution

The right of children to legal representation in civil matters is enshrined in section 28(1)(h) of the South African Constitution, which states:

'Every child has a 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.'<sup>1</sup>

Kilkelly and Liefwaard have observed that this is an unusual right because very few countries have adopted it in their supreme law.<sup>2</sup> They have further noted that it is surprising and a 'significant omission' that section 28(1)(h) of the South African Constitution does not include the right for children to express their views in civil litigation matters.<sup>3</sup> This is because such right is provided for in Article 12 of the United Nations Convention on the Rights of the Child (hereafter CRC) and Article 4(2) of the African Charter on the Rights and Welfare of the Child (ACRWC), stating specifically that such views must be given due weight. The authors are, however, of the view that section 28(1)(h) is a unique provision that reinforces the concept of the child as a legal actor and they observe that in contemplating the child's participation in civil proceedings, section 28(1)(h) reflects an early and progressive understanding of children's access to justice.<sup>4</sup>

Section 28(1)(h), may be considered to give effect to a child's right in terms of international law to be heard 'either directly, or through a legal representative' as outlined in Article 12(2) of the CRC,<sup>5</sup> which forms one part of the child's right to participate. As will be discussed in this dissertation, the gap left by the Constitution has been filled by Section 10 of the Children's Act which provides that '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

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<sup>1</sup> Constitution of the Republic of South Africa, 1996. (Hereafter Constitution)

<sup>2</sup> Kilkelly and Liefwaard "Legal implementation of the UNCRC – lessons to be learned from the constitutional experience of South Africa" (2019) 52 *De Jure* 521, 526 – 527.

<sup>3</sup> Kilkelly and Liefwaard 2019 *De Jure* 521, 528.

<sup>4</sup> Kilkelly and Liefwaard 2019 *De Jure* 521, 528.

<sup>5</sup> Kilkelly and Liefwaard 2019 *De Jure* 521, 528.





has the right to participate appropriately and views expressed by the child must be given due consideration'.<sup>6</sup>

## 1.2 Legal developments regarding legal representation arising from section 28(1)(h)

The right of children to have legal representation in civil matters is not entirely new in South African law. Section 6(4) of the Divorce Act 70 of 1979 provides for a legal representative to be appointed for a child to represent him or her in divorce proceedings, with the cost to be borne by the parents.<sup>7</sup> This Act was passed fifteen years before the Constitution, but it appears to have been rarely if ever used.<sup>8</sup> Before the Constitution, very little was written on the subject. The 1993 Interim Constitution did not include a section on the legal representation of children in civil cases. What led to section 28(1)(h) being included in the 1996 Constitution is not clear, but some authors have indicated that it was inserted by the technical drafting committee during March 1996 following a submission received from the National Children's Rights Committee.<sup>9</sup> Du Toit<sup>10</sup> and Kassan<sup>11</sup> have subsequently observed that it is linked to Article 12 of the CRC, but the wording is not the same.<sup>12</sup>

As early as 1997, just one year after the Constitution was enforced, Zaal wrote an article about section 28(1)(h), specifically regarding care proceedings. In this article, Zaal focused on the determination as to when children should be provided with legal representation in civil proceedings which arose in terms of the Child Care Act 1983.<sup>13</sup> In terms of section 8A of this Act, a child was permitted to have a legal representative at any stage of a proceeding under the Child Care Act.<sup>14</sup> Section 8A(3) and (4) of this piece of

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<sup>6</sup> Children's Act 38 of 2008.

<sup>7</sup> Divorce Act 70 of 1979.

<sup>8</sup> Du Toit "Legal Representative of Children" in Boezaart *Child Law in South Africa* (2017) 106.

<sup>9</sup> Kassan "Child'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" (2006) in Sloth- Nielsen & Du- Toit (eds) *Trials and Tribulations, Trend and Triumphs: JUTA Law* (2008) 237.

<sup>10</sup> Du Toit (2017) 109.

<sup>11</sup> Kassan (2008) 237.

<sup>12</sup> Du Toit (2017) 111. See also Kassan (2008) 237.

<sup>13</sup> Zaal "When Should Children Be Legally Represented in Care Proceedings - An Application of Section 28(1)(h) of the 1996 Constitution" 1997 *SLJ* 334.

<sup>14</sup> Zaal 1997 *SALJ* 334, 335.



legislation stated that such representation may be provided at private or state expense if a children's court commissioner considers that this is in the best interests of the child.<sup>15</sup> According to Zaal, although the children's courts merely conducted what were termed 'inquiries', the weighty concept of the 'substantial injustice' test of s 28(1)(h) should not be excluded from consideration in respect of these inquiries.<sup>16</sup> Decisions taken in these courts are often of critical importance, with substantial injustice to the child being likely to result from an incorrect adjudication.<sup>17</sup>

Application of section 8A of the Child Care Act was made difficult for commissioners to implement. This is because while section 8A(2) refers to a 'right to request legal representation at any stage of the proceeding for a child 'who is capable of understanding' this right, the section did not explain whether or how such a request should affect the discretion of the commissioner to decide on whether representation should be provided.<sup>18</sup> Zaal pointed out that the right of the child merely to 'request' such representation lacks meaning if the commissioner could refuse it.<sup>19</sup>

Zaal emphasised that children ought to be provided with legal representation in all care proceedings,<sup>20</sup> and drew attention to the important issue of the quality of legal representation that children are likely to receive.<sup>21</sup> He articulated that only lawyers with the appropriate motivation, knowledge of the relevant legal provisions, and the ability to relate to and communicate with the child should be utilised.<sup>22</sup> This excludes people such as social workers and psychologists, from 'legally representing' children in court proceedings. To make the appointment of a legal representative at state expense efficient, a selective approach to representation should be used. Zaal proposed that the

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<sup>15</sup> Zaal 1997 SALJ 334, 335. See also Child Care Act 74 of 1983. Under this Act, the presiding magistrate in a children's court inquiry was referred to as a children's court commissioner.

<sup>16</sup> Zaal 1997 SALJ 334, 344.

<sup>17</sup> Zaal 1997 SALJ 334, 344.

<sup>18</sup> Zaal 1997 SALJ 334, 336. See also Zaal & Skelton "Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts" 1998 SAJHR 539, 541.

<sup>19</sup> Zaal 1997 SALJ 334, 336. See also Boezaart General Principles in Davel & Skelton Commentary on the Children's Act [Revision Service 9, 2018] 2-23.

<sup>20</sup> Zaal 1997 SALJ 334, 336.

<sup>21</sup> Zaal 1997 SALJ 334, 344. This observation is also supported by Zaal & Skelton 1998 14 SAJHR 542.

<sup>22</sup> Zaal 1997 SALJ 334, 344. See also Kassan (2008) 234.



commissioner should be tasked with applying these criteria, on appointing the appropriate legal representative for the child.

In 2003, Zaal co-authored an article with Skelton. They commented on the wording of section 28(1)(h), that it creates a right 'to have a legal practitioner' assigned to the child by the state, and at state expense, in civil proceedings affecting the child.<sup>23</sup> The authors pointed out that a weakness of article 12 of the CRC is that it allows for alternatives to legal representation.<sup>24</sup> Thus instead of a lawyer, a non-lawyer may be used or the child may even be required to represent him or herself when appearing before a court.<sup>25</sup> The South African Constitution provides better protection since it does not allow for non-lawyers to substitute for lawyers in court proceedings.<sup>26</sup>

The focal point of Zaal and Skelton's article was that the views and considerations of the child are to be properly presented at any kind of court hearing. According to the authors, child participation is important, either directly or indirectly in this regard because the child should be involved in any proceedings that would affect him or her in which he or she is the main subject of a court hearing.<sup>27</sup> This new responsibility of the legal representative was important, as it ensured that the case of a child was properly presented at any kind of court hearing, as per the CRC, ratified by South Africa on 16 June 1995.<sup>28</sup>

In the same year that Zaal and Skelton's article was published, an important case was heard, *Soller NO v G*,<sup>29</sup> which was the first definitive judgment on the issue of separate legal representation for a child in a civil matter and the application of s 28(1) (h).<sup>30</sup> In *Soller*, a separate legal representative was appointed by the court and the court made valuable contributions by distinguishing between the role of the Family Advocate and a

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<sup>23</sup> Zaal & Skelton *SAJHR* 539, 541.

<sup>24</sup> Zaal & Skelton 1998 *SAJHR* 539, 541.

<sup>25</sup> Zaal & Skelton 1998 *SAJHR* 539, 541.

<sup>26</sup> Zaal & Skelton 1998 *SAJHR* 539, 541. See also Kassan (2008) 228.

<sup>27</sup> Zaal & Skelton 1998 *SAJHR* 539, 542. Also written in section 10 of the Children's Act.

<sup>28</sup> Zaal & Skelton 1998 *SAJHR* 539, 542. See also Kassan (2008) 235.

<sup>29</sup> *Soller v G* 2003 (5) SA 430 (W).

<sup>30</sup> Skelton "Special Assignment: interpreting the right to legal representation in terms of section 28(1)(h) of Constitution of South Africa" in Sloth- Nielsen & Du- Toit (eds) *Trials and Tribulations, Trends and Triumphs: JUTA Law* (2008) 219.



separate legal representative for a child. However, the judgment did not deal specifically with the practicalities of how a child would obtain separate legal representation.<sup>31</sup>

In another attempt to establish the content of children's right to legal representation in terms of s 28(1)(h) of the Constitution, the Centre for Child Law at the University of Pretoria brought an *ex parte* application on behalf of two sisters aged 12 and 13 in December 2003.<sup>32</sup> In this case the State Attorney agreed to assign the children senior counsel identified by the Centre for Child Law in terms of s28(1)(h). The court found it to be a persuasive consideration that providing the children with their own separate legal representative would enable them to appeal any adverse order that affected them and to participate in the decision-making process. The case was reported only two years after the hearing, as *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*.<sup>33</sup>

The development of the interpretation of s 28(1)(h), has become clearer through development on a case-by-case basis. In 2009, a ground-breaking judgment was handed down in the matter of *Legal Aid Board v R*<sup>34</sup> which definitively decided that the Legal Aid South Africa (previously known as the Legal Aid Board) was the correct institution to approach to obtain legal representation.<sup>35</sup> The court set out that when the Legal Aid Board is appointing a legal representative for a child, it is discharging the state's duty in terms of s 28(1)(h) of the Constitution. It also set out that the Legal Aid Board is not constrained from obtaining permission from a parent or guardian when making such appointments.<sup>36</sup> The reasoning of the judgment starts with an examination of s 28(1)(h) of the Constitution and finds that the key test is whether 'substantial injustice' would result if a separate legal representative is not appointed for the child. Willis AJ found that questions about where a child is to live and which parent will be making the most important decisions in the child's

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<sup>31</sup> Skelton (2008) 220.

<sup>32</sup> Skelton (2008) 218 - 219

<sup>33</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* 2005 JOL 14218 (T) par 5.

<sup>34</sup> *Legal Aid Board v R* 2009 (2) SA 262 (D). See also Du Toit (2017) 121.

<sup>35</sup> Bekink and Bekink "Considering the Benefits of Legal Aid and Legal Representation at State Expense for Certain Meritorious Family Institutions and their Members: South African and International Demands" (2009) *Speculum Juris* 87, 94, See also *Legal Aid Board v R* 2009 (2) SA 262.

<sup>36</sup> Stewart "Resource Constraints and a Child's Right to Legal Representation in Civil Matters at State Expense in South Africa" (2011) *International Journal of Children's Rights* 295, 296.



life are of crucial importance for a child.<sup>37</sup> The child will be the subject of the decision and must live with the consequences. It is therefore vitally important that his or her views are taken into consideration when making these decisions.<sup>38</sup> When it is evident that the child's views are being "drowned out by the warring parents", there will likely be a substantial injustice if a separate legal representative is not appointed for the child.<sup>39</sup> Particularly, in this case, the appointment of a legal representative for the child not only allowed the child to participate in the proceedings but also made it clear what kinds of cases would require legal representation by clarifying the kinds of situations where substantial injustice would occur if a child was not represented.<sup>40</sup>

In the same year, the case was delivered, Bekink and Bekink wrote an article on the fundamental right of legal representation and legal aid, which they argued was necessary to ensure that the system is inherently fair and accessible to everyone.<sup>41</sup> The distinction between a right to legal representation and a right to legal aid had been delineated as follows: legal aid includes the provision of legal support or assistance to someone, which assistance could include financial assistance. Legal representation essentially refers to the right that a person has to obtain the assistance of a lawyer in a legal matter, regardless of whether or by whom the lawyer is paid.<sup>42</sup>

Legal aid, in terms of s 28(1)(h), should be provided, depending on the facts of each case and also where the lack of legal aid would affect the child to the extent that it creates substantial injustice. According to Bekink and Bekink, criteria were established by Legal Aid South Africa, in determining when to fulfill such a right by assigning a legal representative and preventing substantial injustice. The authors state that there are two instances, where a child could be awarded a legal representative, namely, where children themselves directly need to enforce and protect particular legal rights<sup>43</sup> and where the children's parents or guardians lack the financial means to do so.<sup>44</sup> The authors submitted

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<sup>37</sup> *Legal Aid Board v R 2009 (2) SA 262 (D) par 22.*

<sup>38</sup> *Legal Aid Board v R 2009 (2) SA 262 (D) par 25.*

<sup>39</sup> *Legal Aid Board v R 2009 (2) SA 262 (D) par 28.*

<sup>40</sup> Stewart 2011 *International Journal of Children's Rights* 259, 306.

<sup>41</sup> Bekink and Bekink 2009 *Speculum Juris* 87, 88.

<sup>42</sup> Bekink and Bekink 2009 *Speculum Juris* 87, 94.

<sup>43</sup> Bekink and Bekink 2009 *Speculum Juris* 87, 95.

<sup>44</sup> Bekink and Bekink 2009 *Speculum Juris* 87, 96.



that in the absence of any statutory guideline on this issue, the courts would have to balance the interests of children on the one hand and the interests of the state or public purse on the other.<sup>45</sup>

### **1.3 Legal developments regarding the legal representation of children under the Children's Act**

In 2005, the Children's Act was passed with some sections coming into operation in 2007, and some in 2010. The Children's Act was drafted under South Africa's obligations to the terms of the CRC, the ACRWC, and the Constitution, and this is discussed in chapter 2. The development of the right to legal representation in civil matters is seen through the importance placed on child participation. This highlights the transformative capacity and influence of international and domestic child rights instruments. Sections 10, 14, and 15 of the Children's Act are a cluster of provisions designed to ensure that children's rights are protected and their dignity is upheld in any proceedings affecting them. Section 10 of the Children's Act entitles every child to participate 'in an appropriate way' in any matter 'concerning the child'.<sup>46</sup> It adds that the 'views expressed' by the child must be given due consideration'. Section 14 recognizes the right of every child to have access to court for the protection and enforcement of their rights.<sup>47</sup> It further entitles every child 'to be assisted in bringing a matter to a court'. Section 15 deals with the enforcement of fundamental rights and reinforces the broad standing provisions of s 38 of the Constitution specifically concerning children.<sup>48</sup>

In 2009, Sloth-Nielsen wrote an article that focused on child participation, understood within the framework of international law, the Constitution, and the Children Act.<sup>49</sup> She emphasised that child participation is incorporated in Article 12 of the CRC and should be interpreted in a way that gives respect and due consideration to the views of the child who is presumed to have a perspective that is material to his or her interests.<sup>50</sup> Child

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<sup>45</sup> Bekink and Bekink 2009 *Speculum Juris* 87, 96.

<sup>46</sup> Children's Act 38 of 2008.

<sup>47</sup> Children's Act 38 of 2008.

<sup>48</sup> Children's Act 38 of 2008.

<sup>49</sup> Sloth-Nielsen "Seen and Heard? New Frontiers in Child Participation in Family Law Proceedings in South Africa" 2009 *Speculum Juris* 1, 1.

<sup>50</sup> Sloth-Nielsen 2009 *Speculum Juris* 1, 1.



participation constitutes a broader approach, which also includes a legal representative being assigned to children in civil proceedings that could affect them if substantial injustice would otherwise result.<sup>51</sup> The Children's Act provides for the discretionary appointment of legal representation at state expense where this is in the best interests of the child, but this relates only to specific types of matters.<sup>52</sup> Section 55 of the Children's Act, requires the court to refer a matter to Legal Aid South Africa to be dealt with in terms of the Legal Aid Act 22 of 1969, where a child is not legally represented and a court 'believes that it would be in the best interests of the child to have legal representation.'<sup>53</sup> The final decision, or the application of determining criteria as to whether such legal representation is, in fact, necessary in the best interests of the child, rests with decision-makers being the Legal Aid Board under Legal Aid South Africa, acting in terms of the policy directives and guidelines developed administratively for their use.<sup>54</sup> Sloth-Nielsen remarked that the Children's Act makes no mention of the constitutional "substantial injustice test" but it can be argued that the best interests of the child demand inevitably that no substantial injustice be allowed to occur.<sup>55</sup> Legal Aid South Africa is a suitable agency specializing in providing free legal representation and is therefore empowered to appoint a legal representative for a child.<sup>56</sup>

A different legal question was examined in a 2012 case that dealt with a matter concerning international relocation. The question of whether a child may only be represented by a legal representative assigned by the state is at the heart of *FB v MB*.<sup>57</sup> An important consideration of whether the right to a legal representative is limited to such assignment.

Du Toit pointed out that, unlike s 28(1)(h) of the Constitution, s 14 of the Act did not limit the assistance to which a child was entitled to that of a legal practitioner assigned by the state<sup>58</sup> and found that it would be in the best interests of the child to be separately legally

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<sup>51</sup> Sloth-Nielsen 2009 *Speculum Juris* 1, 22. See also section 28(1)(h) of the Constitution  
<sup>52</sup> Sloth-Nielsen 2009 *Speculum Juris* 1, 22. See section 55 of the Children's Act 38 of 2008.  
<sup>53</sup> Children's Act 38 of 2008.  
<sup>54</sup> Sloth-Nielsen 2009 *Speculum Juris* 1, 25.  
<sup>55</sup> Sloth-Nielsen 2009 *Speculum Juris* 1, 7.  
<sup>56</sup> Du Toit (2017) 125.  
<sup>57</sup> *FB v MB* 2012 (2) SA 394 (GJS) and Du Toit (2017) 123.  
<sup>58</sup> *FB v MB* para 34.



represented.<sup>59</sup> She further acknowledged that it is essential that a state-funded service is available to allow children access to legal representation at state expense.<sup>60</sup> This is done by Legal Aid South Africa in the normal course<sup>61</sup>. Du Toit, however, emphasised that restricting children to legal representation only by the state would be ‘untenable’ as it limits children’s access to justice.<sup>62</sup>

The most recent and significant case, regarding children’s right to be legally represented separately from their parents is *Centre for Child Law v The Governing Body of Hoërskool Fochville*.<sup>63</sup> This case is different from the other cases discussed in this dissertation because it did not deal with a family law dispute. As Du Toit has explained, the children were not parties to the case in their capacities but were represented as a group by the Centre for Child Law acting on their behalf, and the Centre for Child Law was legally represented by the Legal Resources Centre.<sup>64</sup> The case was about the legal representation of 37 learners who were the subject of an application for an interdict by the Hoërskool Fochville. The School Governing Body of Hoërskool Fochville approached the High Court for an order setting aside the decision of the Department of Education, Gauteng (the GED) to admit the 37 English-speaking learners to the single-medium Afrikaans high school, and to interdict the GED from admitting any more English-speaking learners.<sup>65</sup> To protect the interests of the 37 learners and to place their views before the court, the Centre for Child Law (hereafter the CCL or the Centre) applied for leave to intervene, in its name, acting on behalf of the 37 learners. The founding affidavit supporting the application to intervene set out the views, in the form of questionnaires, of the 37 learners that were obtained during the consultation with the CCL.<sup>66</sup> Instead of filing an answering affidavit, the school opposed the Centre's application, by instituting interlocutory proceedings in terms of rule 35(12) of the Uniform Rules of Court requiring

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<sup>59</sup> Du Toit (2017) 125. See also Section 55 of Children’s Act 38 of 2008.

<sup>60</sup> Du Toit (2017) 125. See also Bekink and Bekink 2009 *Speculum Juris* 87, 94.

<sup>61</sup> Du Toit (2017) 127.

<sup>62</sup> Du Toit (2017) 127.

<sup>63</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA). See also Du Toit (2017) 119.

<sup>64</sup> Du Toit (2017) 119.

<sup>65</sup> Du Toit (2017) 119. See also *Governing Body of Hoerskool Fochville and Another v Centre for Child Law* para 3.

<sup>66</sup> Du Toit (2017) 119. See also Tsele M "Disclosure in Centre for Child Law v the Governing Body of Hoërskool Fochville" 2017 *PER / PELJ* 1, 3.





the Centre to produce for inspection, the questionnaires completed by the learners, in their original form.<sup>67</sup> Later Hoërskool Fochville claimed that the CCL could not intervene on behalf of the learners as the learners were already parties through their parents, who were cited as parties to the dispute.<sup>68</sup>

The CCL substantiated that the children should be involved in matters that could affect them and that they have a right to participate in such matters. Section 28(1)(h) of the Constitution, section 14 and 28(6) of the Children's Act was invoked by the CCL to justify its claims to represent the children.<sup>69</sup> The Centre argued that the 37 learners who wanted to express their views and partake in the litigation should be litigants independently of their parents or guardians.<sup>70</sup>

The application came before Sutherland J in the South Gauteng High Court, who ordered the Centre to produce the questionnaires and hand them over to the school. The High Court found that CCL did not have the standing to act on behalf of the 37 learners, as they were already litigants, through their parent's representation, because they were cited *nomine officio*.<sup>71</sup> The matter was then appealed to the Supreme Court of Appeal (SCA), which stated that in acknowledging the right to a legal representative it would be relevant to take into account the child's right to participate as they could be read to have the same meaning.<sup>72</sup> The court took into account the relevant articles of the CRC and ACRWC which promoted child participation in matters affecting them.<sup>73</sup>

In Du Toit's detailed analysis of the *Fochville* case, she observed that s 28(1)(h) of the Constitution shows that the drafters of the Constitution foresaw that there would be circumstances where children would require legal assistance.<sup>74</sup> Du Toit assesses that

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<sup>67</sup> *Centre for Child Law v the Governing Body of Hoërskool Fochville* para 2, 3.

<sup>68</sup> *Centre for Child Law v the Governing Body of Hoërskool Fochville* para 30.

<sup>69</sup> *Centre for Child Law v the Governing Body of Hoërskool Fochville* para 34.

<sup>70</sup> *Centre for Child Law v the Governing Body of Hoërskool Fochville* para 33-35.

<sup>71</sup> Du Toit (2017) 119 & *Centre for Child Law v the Governing Body of Hoërskool Fochville* para 72.

<sup>72</sup> Du Toit (2017) 119.

<sup>73</sup> Du Toit (2017) 120 & *Centre for Child Law v the Governing Body of Hoërskool Fochville* para 19.

<sup>74</sup> Du Toit (2017) 122.



'[t]he Supreme Court of Appeal tied these provisions together by reiterating that all of the provisions relating to the child's right to participate and to litigate must be informed by s 28(2) of the Constitution'.<sup>75</sup>

This is the first comprehensive judgment from the SCA on the legal representation of children.<sup>76</sup> It definitively recognizes that children may be represented separately from their parents and that they may institute litigation as a form of participation in legal proceedings.<sup>77</sup>

This mini-dissertation seeks to determine how the child's right to legal representation in civil matters has developed since its inclusion in the Constitution and if it has measured up to the requirements to promote legal implementation by international law and in domestic law. This study strives to provide for a better understanding of the formulation of the legal right under section 28(1)(h), by analysing its fundamental intention and context, as well as the 'qualifiers' to the right in terms of the inclusion of the words such as 'assigned by the state, at state expense', and 'if substantial injustice would otherwise result'. It is argued that section 28(1)(h) should be interpreted in a manner that does not undermine the implementation of the right.

The **central research question** is: How has the right to legal representation for children in civil matters, in terms of section 28(1)(h) developed in South African law since its inclusion in the Constitution?

The answer to this overarching research question will be found by answering several secondary research questions. These are:

- (i) How should the right be understood within the framework of international and regional law?
- (ii) How has the right been developed through legislation in South African law?

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<sup>75</sup> Du Toit (2017) 122. See also *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 24.

<sup>76</sup> Du Toit (2017) 121. See also *B v B* (602/11) [2012] ZASCA 151; *Legal Aid Board: In re four children* Unreported SCA 512/2010.

<sup>77</sup> Du Toit (2017) 123.



(ii) How has the right been developed through case law?

(iii) What is meant by 'assigned by the state, and at state expense'?

(iv) How should 'substantial injustice' be interpreted in a manner that does not undermine the implementation of the right?

In all of the chapters, I will adopt a qualitative and desktop research methodology, where I will be drawing on primary texts, including legislation and case law, as well as secondary texts, such as journal articles and chapters in books, and other published and unpublished sources.

## 1 5 Chapter Outline

To answer the central research, I will consider several subsidiary questions in subsequent chapters.

In this **first chapter** I have provided an introduction to the subject matter, and an overview of the relevant case law and literature. The **second chapter** focuses on the consideration of the right within the broader framework of international and regional law, as well as other rights in the South African Constitution. The **third chapter** contains greater detail on how the law has developed after its appearance in the Constitution to when the Children's Act came into operation, indicating how the meaning of the constitutional provision has been clarified through the case law. Then the **fourth chapter** focuses on the developments that have occurred regarding the right since the Children's Act came into operation through an analysis of the relevant provisions in the Act, and how these have been interpreted and developed through case law. The mini-dissertation will conclude with an analysis of the nature and content of children's right to legal representation in civil proceedings as it has developed to present time, and by considering whether any remaining legal developments lie ahead to ensure that the right is fully understood and implemented.

## 1 6 Conclusion

This chapter aimed to give an introduction to the development of the legal representation of children in civil legal matters. It began by setting out the constitutional right and locating



it within the international and regional framework. A literature review was presented which gave an outline of the analysis that will be further developed in this mini-dissertation. The development of the right contained in section 28(1)(h) was traced chronologically through case law, legislation, and analysis of relevant scholarly material.



## CHAPTER 2: INTERNATIONAL, CONSTITUTIONAL AND DOMESTIC LAW FRAMEWORK ON THE RIGHT TO LEGAL REPRESENTATION OF CHILDREN IN CIVIL MATTERS

### 2 1 Introduction

The CRC is the leading international instrument recognizing the human rights of children.<sup>78</sup> Children in South Africa are afforded special protection through the rights set out in section 28 of the Constitution. The section was prompted by the ratification of the CRC, which obliged the state to bring its laws in line with the CRC. Section 28 of the Constitution is dedicated exclusively to children and guarantees a wide variety of measures to protect and promote the rights of a child as a human being who needs special care, protection, and assistance.<sup>79</sup> As Kilkelly and Liefwaard have observed, the Constitution is the starting point for determining the role of international law domestically.<sup>80</sup> This chapter discusses the child's right to participate in light of the prevailing international, constitutional and legislative framework, with a particular focus on a child's right to separate legal representation in civil matters.

### 2 2 International Law

The basis of the child's right to participate in all matters that affect the child can be found in international law, specifically the CRC and the ACRWC.<sup>81</sup> The CRC is a comprehensive international law instrument that identifies children as the individual bearers of rights.<sup>82</sup> The four key principles of the CRC have been identified as protection, prevention, provision, and participation.<sup>83</sup> Work done by the Committee on the Rights of the Child and child rights scholars to promote the implementation of Article 12, has developed a new conceptualised terminology of "participation" even though this word does not appear in

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<sup>78</sup> Kilkelly and Liefwaard 2019 *De Jure* 521, 521.

<sup>79</sup> Kilkelly and Liefwaard 2019 *De Jure* 521, 523.

<sup>80</sup> Kilkelly and Liefwaard 2019 *De Jure* 521, 523.

<sup>81</sup> Du Toit (2017) 109.

<sup>82</sup> Du Toit (2017) 109.

<sup>83</sup> There has been a debate about these four principles, for more on this discussion see Hanson & Lundy "Does exactly what it says on the tin? A critical analysis and alternative conceptualisation of the so-called "general principles" of the convention on the rights of the child" 2017 *International journal of children's rights* 285-306.



Article 12.<sup>84</sup> This is explained by the Committee on the Rights of the Child in its General Comment on the Right of the Child to be Heard:

‘This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.’<sup>85</sup>

This interpretation of children’s right to participation conceives of children as independent people with essential human rights, views, and feelings of their own in matters concerning them.

Kilkelly and Liefwaard, describe the CRC as the leading international instrument recognizing the human rights of children across all areas of their lives.<sup>86</sup> States Parties continue to take steps to incorporate the CRC provisions into national law, and the authors point to evidence that legal and non-legal measures of implementation have shown real benefits for children.<sup>87</sup> Du Toit expanded on the issue of obligations. She pointed out that ‘the Convention lays the responsibility to realize children’s rights on duty bearers, including families and caregivers – with ultimate accountability belonging to the governments that have endorsed and ratified the Convention.’<sup>88</sup> The CRC has made an exceptional effect on the protection and advancement of those rights by governments, societies, and families.

According to O’ Mahony, ‘constitutional amendments should be assessed and analysed against international laws, to ascertain whether the constitution and domestic laws, take a genuine child rights approach.’<sup>89</sup> O’Mahony observes that the central focus should be on whether the national constitution is in harmony with what Verhellen has called the

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<sup>84</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: <https://www.refworld.org/docid/4ae562c52.html> [accessed 27 August 2021]

<sup>85</sup> CRC/C/GC/12 5.

<sup>86</sup> Kilkelly and Liefwaard 2019 *De Jure* 521, 522.

<sup>87</sup> Kilkelly and Liefwaard 2019 *De Jure* 521, 522.

<sup>88</sup> Du Toit (2017) 110.

<sup>89</sup> O’Mahony, “Constitutional Protection of Children’s Rights: Visibility, Agency and Enforceability” 2019 *Human Rights Law Review* 401, 402.



'holistic childhood image in the CRC'.<sup>90</sup> O' Mahony explains that this overarching harmony approach is preferable because

'a national constitution that takes a stance that conflicts with the CRC child rights approaches risks setting a tone for a legal system as a whole that acts to undermine laws protecting children's rights and hinder the effective implementation of the CRC in that state.'<sup>91</sup>

Detrick observes that Article 12(1) entrenches children's general right to express their views in all matters affecting them, by considering if the child is capable of forming a view and by according weight to the view in light of the age and maturity of the child.<sup>92</sup> Section 12(2) provides more specifically that the child must be heard in certain proceedings or 'official matters'<sup>93</sup> affecting them.<sup>94</sup> The Committee of the Rights of the Child in General Comments 12, proposed that the main issues where the views and opinion of the child should be heard are in divorce and separation matters, separation from parents to alternative care, and adoptions where the child understands the implications.<sup>95</sup>

Article 12(1) of the CRC states, 'State parties shall assure to a child capable of forming his or her 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'.<sup>96</sup> According to Du Toit the words 'shall assure' in article 12(1) and 'shall, in particular, be provided in article 12(2) indicate that there is an obligation on States to

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<sup>90</sup> O'Mahony (2019) *Human Rights Law Review* 401, 403. The author refers to Verhellen, "The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective" in Vanderhole (ed) *Routledge International Handbook of Children's Rights Studies* (Oxford: Routledge, 2015) 50.

<sup>91</sup> O'Mahony (2019) *Human Rights Law Review* 401, 404.

<sup>92</sup> Detrick "Commentary on the United Nations Convention on the Rights of the Child" (1999) 219–220.

<sup>93</sup> Lucker-Babel The right of a child to express his views and to be heard: An attempt to - interpret Article 12 of the UN Convention on the Rights of the Child *1995 international Journal of Children's Right* 391, 401.

<sup>94</sup> Van Bueren The International Law on the Rights of the Child (1995) 832, 837.

<sup>95</sup> CRC/C/GC/12 3 -4.

<sup>96</sup> UN Commission on Human Rights, Convention on the Rights of the Child., 7 March 1990, E/CN.4/RES/1990/74, available at: <https://www.refworld.org/docid/3b00f03d30.html> [accessed 8 July [2020]



provide the child with an opportunity to participate in proceedings to express their views should the child want to participate.<sup>97</sup>

Article 4(2) of the ACRWC outlines that a child, who can communicate his or her views, shall be allowed to be heard in any judicial or administrative proceedings affecting the child, either directly or with an impartial representative.<sup>98</sup> Varadan emphasizes that Article 4(2) 'recognised that as children grow and develop, their capacities evolve, and parents must adjust their direction and guidance to enable their children to exercise increasing agency over their lives.'<sup>99</sup> Varadan observes the concept of 'evolving capacity' read with this right represents a distinct break from previous conceptions of childhood and children under international law'.<sup>100</sup> It acknowledges the processes of maturation and learning that all children undergo, recognising that as a child grows, develops, and matures, he or she becomes entitled to increasing levels of agency and responsibility for the exercise of rights.<sup>101</sup> This deviates from the traditional notion in the 'parent-child relationship', that parents hold the rights and children are deemed to be 'recipients of care and protection'<sup>102</sup>. Evolving capacity becomes important when the court has to give weight to the views of the child.

Du Toit observes that a child's right to participation under the ACRWC is 'both stronger and weaker than its equivalent in the Convention on the Rights of the Child'.<sup>103</sup> She points out that the threshold in respect of the child's ability to participate is significantly lower in the ACRWC in that it only requires that the child be 'capable of communicating his or her views, whereas the UNCRC requires the child to be able to form a view'.<sup>104</sup> According to Stewart, the CRC does not cause the weight to be attached to the views of the child but

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<sup>97</sup> Du Toit (2017) 110.

<sup>98</sup> Article 4(2) of the African Charter on the Rights and Welfare of the Child 1990.

<sup>99</sup> Varadan "The principle of evolving capacities under the UN Convention on the Rights of the Child" 2019 *International Journal of Children's Rights* 306, 307.

<sup>100</sup> Varadan 2019 *International Journal of Children's Rights* 306, 307.

<sup>101</sup> Varadan 2019 *international journal of Children's rights* 306, 329. See also UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, 23 available at: <https://www.refworld.org/docid/460bc5a62.html> [accessed 27 August 2021]

<sup>102</sup> Varadan 2019 *international journal of Children's rights* 306, 307.

<sup>103</sup> Du Toit (2017) 110. See also Zaal & Skelton 1998 *SAJHR* 539, 541.

<sup>104</sup> Du Toit (2017) 110. See also Davel (2018) 18.





rather upon the child's age, maturity, and stage of development.<sup>105</sup> Furthermore the ACWRC creates a specific mechanism through which the child may place his or her views before the court because it gives the child the right to be 'a party to the proceedings.'<sup>106</sup> In contrast to this, the CRC provides a clearer and concise interpretation of the right, than its equivalent the ACRWC.<sup>107</sup> This may make the latter easier to utilize in a broader context. The ACRWC only recognises that the child must be capable of communicating his or her views and does not refer to the weight to be connected to the views of the child conditional upon age, development, and stage of development. Both the UNCRC and the ACRWC make mention that the child may participate directly or indirectly, although the ACRWC indicates that it could be through an impartial representative and the UNCRC does not. A weakness highlighted by Zaal and Skelton is that UNCRC and ACRWC allow for other professionals, besides a legal representative, to represent a child in proceedings that may affect the child.<sup>108</sup> This is in contrast to the Constitution, which specifies that a legal representative should represent a child in proceedings that may affect them. This would mean that the views of the child would be adequately presented in courts.

## 2 3 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.'<sup>109</sup>

According to Du Toit, section 28(1)(h) only mentions the appointment of a legal practitioner for a child and does not refer to any broader right of participation attached to children.<sup>110</sup> The terminology that is used in the Constitution, stipulates the "assignment of a legal representative", and does not utilize the terminology in CRC, which specifies a

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<sup>105</sup> Boezaart (2018) 17. See also Stewart 2011 *International Journal of Children's Rights* 259, 306.

<sup>106</sup> Du Toit (2017) 110.

<sup>107</sup> Boezaart (2018) 18. See also Zaal & Skelton 1998 *SAJHR* 539, 541.

<sup>108</sup> Zaal & Skelton 1998 *SAJHR* 539, 539.

<sup>109</sup> Constitution of the Republic of South Africa 1996.

<sup>110</sup> Du Toit (2017) 111. See also Kilkelly and Liefwaard 2019 *De Jure* 521, 526.



“representative” and “impartial representative” as in the ACRWC, whereby, according to Kassan, could be any professional, who works with children's interests and safety.<sup>111</sup>

According to Du Toit, the Constitutional Court has used s 28(1)(h) to appoint curator's *ad litem* to protect the interests of very young children even though it was open to them to do so in terms of the common law.<sup>112</sup> ‘However, section 28(1)(h) has been interpreted by the Constitutional Court in conjunction with the international law to give effect to children’s right to participation.’<sup>113</sup>

Another section that requires South African Courts to give effect to international law is section 231 of the Constitution which says that a treaty binds South Africa after approval by the National Assembly and the National Council of Provinces unless it is self-executing, or of a technical, administrative or executive nature.<sup>114</sup> Section 233 of the Constitution provides that, when interpreting legislation, courts ‘must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’.<sup>115</sup> While section 233 gives more prominent weight to international law, the court will take into consideration whether the significant international law is ‘binding’ on South Africa.<sup>116</sup>

Du Toit has pointed out that ‘The Constitutional Court has indicated in various cases concerning children that their interests must be protected when they are concerned in a case before the court.’<sup>117</sup> The significance of child participation as articulated by the Constitutional Court can be noted in *Christian Education South Africa v Minister of Education*.<sup>118</sup> In this case the court expressed,

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<sup>111</sup> Kassan “How can the voice of the child be adequately heard in family law proceedings?” LLM Thesis University of Western Cape 2004 12.

<sup>112</sup> Du Toit (2017) 111. See also Zaal & Skelton 1998 SAJHR 539, 540 and the *Du Toit and Another v Minister of Welfare and Population Development and Others (Gay and Lesbian Equality Project as Amicus Curiae)* para 24.

<sup>113</sup> Du Toit (2017) 111. See also *Van der Burg v National Director of Public Prosecutions* 2012 (2) SACR 331 (CC) para 32 and *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) para 20 and section 39(1)(b) Constitution of Republic of South Africa, 1996.

<sup>114</sup> Constitution of Republic of South Africa, 1996.

<sup>115</sup> Constitution of Republic of South Africa, 1996.

<sup>116</sup> Du Toit (2017) 111.

<sup>117</sup> Du Toit (2017) 112.

<sup>118</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) 787.



'the children concerned were from an exceedingly meticulous community and many would have been in their late teens and able to express their opinions and views.<sup>119</sup> Although the children, could be represented by the State, their parents, or guardians none of them could speak in their name.'<sup>120</sup>

Section 28(1)(h) has made it easier that an array of representatives could represent them in their name by present their views in certain circumstances, which could be deemed to be child participation in matters that would affect them.

In Du Toit's chapter, she highlighted that the Constitutional Court's implementation of appointing *curator ad litem* for children involved in cases before the court. She emphasized that the appointment of a *curator ad litem* seems to have a dual purpose:

'First, the children's interests are protected by placing all the relevant information before the court that would enable the court to decide on their best interest.'<sup>121</sup>

'Secondly, it allows children to participate in proceedings that may affect them and creates a mechanism to place the children's views before the court.'<sup>122</sup>

Another important, consideration was in the matter of *S v M (Centre for Child Law as Amicus Curiae)*, where the court was concerned with the obligations of the sentencing court regarding s 28(2) of the Constitution when sentencing a primary caregiver of children.<sup>123</sup> An appeal was brought against a sentence of direct imprisonment which was against a single mother of three minor children<sup>124</sup>. On appeal, the High Court converted her sentence to one of imprisonment under section 276(1)(i).<sup>125</sup> As this still involved a short term of imprisonments, she appealed to the Constitutional Court. That court-appointed *curator ad litem* to represent the interest of the minor children. The curator thoroughly assessed the circumstances of the children, in terms of the effect of section 28 of the Constitution which, it argued, creates a general practice for sentencing courts

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<sup>119</sup> *Christian Education South Africa v Minister of Education* para 34.

<sup>120</sup> Du Toit (2017) 110.

<sup>121</sup> Zaal & Skelton (1998) SAJHR 539, 540.

<sup>122</sup> Zaal & Skelton (1998) SAJHR 539, 540. See also Sloth-Nielsen 2008 SAJHR 495.

<sup>123</sup> Du Toit (2017) 113.

<sup>124</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 3.

<sup>125</sup> *S v M (Centre for Child Law as Amicus Curiae)* para 3.



to give 'specific and independent consideration' of how a custodial sentence of a primary caregiver could impact the children concerned.<sup>126</sup>

In the case of *Van der Burg v National Director of Public Prosecutions*, the Constitutional Court emphasized that law enforcement must always be child-sensitive and courts must at all times show due regard for children's rights.<sup>127</sup> The court in this case decided that there was no need for the appointment of a curator *ad litem*, and took into consideration the appointment of a social worker under section 150 of the Children's Act<sup>128</sup> to determine if whether the children need care and protection under section 147 of the Children's Act<sup>129, 130</sup> It was held that the Court has to weigh the facts of the case it is presented with to determine the necessity of appointing a curator *ad litem*. However, this case does not detract from the importance of legal representation of children, it was simply not deemed necessary in this case, and at the stage that the case was at. However, the term 'legal practitioner' as inscribed in s 28(1)(h) should be read broadly to include the appointment of a *curator ad litem* and the assigned separate legal representative who argues the views of the child.<sup>131</sup>

## 2 4 Domestic Law

### 2 4 1 Divorce Act

The right for children to have a legal representative appointed to them was introduced in South African law by the Divorce Act 70 of 1979. In this Act under section 6, a legal representative can be appointed by the Court if it deems it necessary to do so and further that the cost of the legal representative shall be bore by the parents.<sup>132</sup> This section appears to be rarely ever used since its insertion. The progression of this right since its establishment in this section under the Constitution has changed immensely in that a legal representative appointed under section 28(1)(h) could be appointed by a court at state expense and also independently by the parent of the child.

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<sup>126</sup> *S v M (Centre for Child Law as Amicus Curiae)* para 7.

<sup>127</sup> *Van der Burg v National Director of Public Prosecutions* 2012 (2) SACR 331 para 14.

<sup>128</sup> Children's Act 38 Of 2005.

<sup>129</sup> Children's Act 38 Of 2005.

<sup>130</sup> *Van der Burg and Another v National Director of Public Prosecutions* para 76.

<sup>131</sup> Zaal & Skelton (1998) SAJHR 539, 541.

<sup>132</sup> Divorce Act 70 of 1979.



## 2 4 2 Child Care Act

At the time when the Constitution came into operation, the main law that dealt with children's rights was the Child Care Act no 74 of 1983. In an apparent endeavor to give substance to the constitutional right for each child to have a legal representative assigned to him or her by the state, and at state cost, in civil proceedings, unless substantive injustice would otherwise result, an amendment was drafted in section 8A(1) of the Child Care Act.<sup>133</sup> It provided that a child may have legal representation at any stage of a proceeding in the children's court. To guide the Commissioners of Child Welfare (who were the presiding officers in the children's court) as to when an appointment of a legal representative was necessary important guidelines were provided. These related to instances when such a legal representative would be appointed automatically for a child involved in the proceeding, these instances include:

- '(a) Where it is requested by the child;
- (b) Where it is recommended in a report by a social worker or an accredited social worker;
- (c) Where it appears or is alleged that the child has been sexually, physically or emotionally abused;
- (d) Where the child, a parent or guardian, a parent-surrogate or would-be adoptive or foster parent contests the placement recommendation of a social worker who has investigated the current circumstances of the child;
- (e) Where two or more adults are applying in separate applications for the placement of the child with him, her or them;
- (f) Where any other party besides the child will be legally represented at the hearing;
- (g) Where it is proposed that a child be trans-racially placed with adoptive parents who differ noticeably from the child in ethnic appearance;

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<sup>133</sup> Child Care Amendment Act No. 96 of 1996.



(h) In any other situation where it appears that the child will benefit substantially from the representation either regarding the proceedings themselves or concerning achieving the best possible outcome for the child.<sup>134</sup>

Furthermore, under section 8A (3), if the parent appointed a legal representative for a child, the children's court may have to accept such an appointment, but only if this was in the best interest of the child. The provision of legal representation for a child at state expense could be ordered by the children's court at the commencement of any other stage of the proceedings.<sup>135</sup> If such a legal representative was 'ordered' by the Commissioner, then an appointment would be made by the Legal Aid Board, under 8A(5) and (6), who would then compile a detailed evaluation and report on the matter.<sup>136</sup> Sadly, however, this amendment to the Act was never brought into operation.<sup>137</sup>

The review of the Child Care Act conducted by the South African Law Reform Commission (SALRC) resulted in recommendations for extensive provisioning of legal representation for children in the Children's Act to give effect to s 28(1)(h) of the Constitution and the international law.<sup>138</sup> The SALRC report pointed out that legal representation in children's court inquiries was rather the exception than the rule.<sup>139</sup> The SALRC report was concerned about the fact that section 8A of the Child Care Act, 1983, had never been brought into operation.<sup>140</sup> The failure to put this protective measure into operation after more than five years was apparently due to the inability of the Departments of Social Development and Justice and Constitutional Development to agree as to who should pay for these services.<sup>141</sup> There had been contradictions in the interpretation of the right itself the words 'who is capable of understanding' were vague. This was because many children who were involved in the children's court proceedings were of tender

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<sup>134</sup> South African Law Reform Commission Paper 103, Project 110 2002 *Review of the Child Care Act* Report December 2002 98. Regulation 4A Child Care Act 74 of 1983.

<sup>135</sup> South African Law Commission 103 (2002) 99.

<sup>136</sup> South African Law Commission 103 (2002) 100.

<sup>137</sup> Zaal & Skelton 1998 *SAJHR* 539, 540.

<sup>138</sup> Kassan (2008) 230.

<sup>139</sup> South African Law Commission 103 (2002) 99.

<sup>140</sup> South African Law Commission 103 (2002) 100.

<sup>141</sup> South African Law Commission 103 (2002) 99.



age.<sup>142</sup> Another issue that transpired was in instances where a child requested a legal representative and the Commissioner refused the appointment. This is because even though the Commissioner should enter reasons for refusal into the minutes, there was no clear obligation to do so. Further, there was no clarity for the consideration of whether the best interests of the child-led to legal representation being appointed.<sup>143</sup> The implementation of section 8A was never implemented because there was no proper strategy to put it into practice.

### **2 4 3 The Children's Act 38 of 2005**

Child's right to participate was incorporated in the Children's Act 38 of 2005, notably in section 10 of the Act, 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.'<sup>144</sup>

In terms of section 14 of the Act states:

'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.'<sup>145</sup>

The child's right to participate is a central theme in the Children's Act and the Act provides opportunities for the child to participate and to express his or her views.<sup>146</sup> This means that the child could approach Legal Aid South Africa to be assisted with instituting any legal proceedings that may affect them.<sup>147</sup> Section 15 of the Act, also gives children the right to approach a competent court when their rights under the Bill of Rights and also the Children's Act has been infringed or threatened.

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<sup>142</sup> South African Law Commission 103 (2002) 99.

<sup>143</sup> South African Law Commission 103 (2002) 99- 100.

<sup>144</sup> Children's Act 38 Of 2005.

<sup>145</sup> Children's Act 38 Of 2005.

<sup>146</sup> Du Toit (2017) 112. See also Kassan (2006) 237.

<sup>147</sup> *Legal Aid Board v R* [2011] ZASCA 39.



Section 29(6) is also important, in terms of which the court may appoint a legal representative to represent a child in court proceedings, in matters concerning the care, contact, and guardianship of the child.<sup>148</sup> Sloth- Nielsen emphasised that section 29(6) should be read together with section 55 that which provides that a child involved in a matter before the children’s court is not represented, and the court believes that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid South Africa’.<sup>149</sup> This section has taken the approach of the Child Care Act, where the court is to consider if it would be in the best interest of the child to appoint such a representative. This grants the children the opportunity to participate.

Section 61 of the Act applies to proceedings in the Children’s Court, which, according to Stewart, ‘places a clear injunction’ on a presiding officer to allow the child to express his or her views’.<sup>150</sup> Du Toit expresses the view that this section reflects the importance of the child’s participation and the fact that the child’s view must be seriously considered by the presiding officer.<sup>151</sup> Another section of the Children’s Act that promotes legal representation for children in proceedings that affect them, is section 279. This section outlines that a legal representative should be appointed for child-involved proceedings under the Hague Convention on International Child Abduction.<sup>152</sup>

While the participation of children should be encouraged, Lansdown comments that ‘children must not be forced against their will to take decisions they do not feel competent or willing to take’, suggesting that ‘it is one of the rights of childhood that children are not burdened with inappropriate levels of responsibility.’<sup>153</sup>

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<sup>148</sup> Children’s Act 38 Of 2005.

<sup>149</sup> Sloth-Nielsen “Realising Children’s Rights to Legal Representation and To Be Heard in Judicial Proceedings: An Update” 2008 24 *SAJHR* 498-499.

<sup>150</sup> Stewart 2011 *International Journal of Children’s Rights* 295, 306.

<sup>151</sup> Du Toit (2017) 114.

<sup>152</sup> Children’s Act 38 Of 2005.

<sup>153</sup> Lansdown *The Evolving Capacities of the Child* (UNICEF, 2005) ix <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> accessed on 27 August 2021.





#### 2 4 4 The Legal Aid Act.

The Legal Aid Act 22 of 1969 ( hereafter LAA) came into operation with the main aim to provide legal aid (and thereby also legal representation) for indigent persons, and for that purpose to establish a Legal Aid Board and to define its powers and functions.<sup>154</sup> Under section 2 of the LAA, the Legal Aid South Africa is established as a corporate body with the objects of rendering or making available legal aid to indigent persons and providing legal representation at state expense as contemplated in the Constitution.<sup>155</sup> Legal Aid South Africa, when consulted, must consider the particulars of the legal aid scheme in a guide called the Legal Aid Guide. The provisions of the Legal Aid Guide must be applied by Legal Aid South Africa when the application is made for legal aid under the Constitution or otherwise unless legal aid is directed by a court.<sup>156</sup>

Owing to budgetary and resource constraints, legal aid can only be provided in terms of the Legal Aid Act to truly indigent persons.<sup>157</sup> According to the Legal Aid Act, a means test as set out in the Legal Aid Guide is applied to determine whether a person is indigent. This position applies to criminal and civil matters, and if funds are available.<sup>158</sup> To determine if a child should be legally represented at state expense, the LAB will have to establish whether substantial injustice would result in the absence of such representation. This entails attaching a weight to the means test. The LAB plays an important role in appointing a legal representative for children, at state expense, should it be at the request of the court or through the approach of the child. In assisting indigent persons, it could be said that legal representation of children, in this instance could be established, because children cannot afford legal fees on their own. In determining if a person qualifies for legal aid an assessment through a means test is considered, where an adult seeks legal aid then Legal Aid would take into consideration if the person is employed, if so if they earn less than R7 400 after their salary is taxed.<sup>159</sup> In the instance of children, it would be quite

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<sup>154</sup> Bekink and Bekink 2009 *Speculum Juris* 89, 100.

<sup>155</sup> Legal Aid Act 22 of 1969. Also see s 15 of the Legal Aid South Africa Act 39 of 2014, which is the new act applicable now.

<sup>156</sup> See ss 3A and 3B of the LAA.

<sup>157</sup> Chapter 5 of the Legal Aid Guide.

<sup>158</sup> Bekink and Bekink 2009 *Speculum Juris* 87, 100.

<sup>159</sup> Section 27 of the LAA.



different because children are not employed. In criminal matters, they are awarded automatic assistance whereas in civil proceedings Legal Aid South Africa would assess the family of the child in terms of the means test.<sup>160</sup> In *Legal Aid Board v R and Another* Wallis AJ made it clear that the Legal Aid Board was authorized by section 3 of the Legal Aid Act 22 of 1969, to provide legal assistance to children in circumstances where section 28(1)(h) would prevail.<sup>161</sup> According to the decision, in this case, the Legal Aid Board has the discretion to determine if they would appoint a legal representative to a child or not, without permission granted by the parent to do so or court order, and even if the family has money to pay. Legal Aid is an independent structure, which could determine if there is a need to appoint a legal representative for a child at state expense if necessary. However, it is important to note that the right under section 28(1)(h) is not only considered when a legal representative is appointed at state expense but rather broadly to include where a child may choose, with the assistance of his parent to appoint a legal representative independently. Such a lawyer might be willing to act pro bono or the legal cost is payable by the parents of the child.<sup>162</sup>

## 2 5 Conclusion

The right to legal representation is a fundamental right in the South African legal system that prides itself on being equitable, fair, and democratic.<sup>163</sup> There should be no doubt that the provision of legal representation is to be regarded as a necessity rather than a luxury. In South Africa, the right to legal representation is now constitutionally recognized and the state is obliged to protect, fulfill and enhance this right. Nevertheless, legal aid in civil matters is not available to everyone, as a means test is applied.

This chapter aimed to distinguish the development of the right in South African legislation and also taking into account international laws. Child participation is also upheld as an important concept in the Children's Act, which is implied in terms of the CRC. Present law was viewed against the historical backdrop of the CCA, which is no longer operative, as

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<sup>160</sup> How to acquire Legal Aid <https://legal-aid.co.za/how-it-works/> accessed on 8 July 2021.

<sup>161</sup> *Legal Aid Board v R and Another* 2009 (2) SA 262 (D) 32.

<sup>162</sup> *FB and Another v MB* 2012(2) SA 394 (GSJ).

<sup>163</sup> Bekink and Bekink 2009 *Speculum Juris* 87, 108.



well as the Divorce Act, which is rarely used, and must be interpreted to give effect to a proper and broader understanding to the application of the right under section 28(1)(h) in term of child participation. All the legislation discussed above should be interpreted together to give effect to a broader meaning of 'child participation' to the children's rights within the Constitution.



## CHAPTER 3: DEVELOPMENT OF THE RIGHT TO LEGAL REPRESENTATION IN SOUTH AFRICA THROUGH CASELAW

### 3 1 Introduction

The right to legal representation in South Africa has developed incrementally, with case law guiding how the right should be implemented. The case law has provided clarity on the assignment of legal representatives in terms of section 28(1)(h) of the Constitution. It has also made clear which arm of the state is meant to provide the service 'at state expense', how the views of the child shall be placed before the court (orally or through reports), and what is meant by a substantial injustice. Implementation of the child's right to be heard has developed slowly in South African courts and at first, it was considered novel in court proceedings to listen to the child directly, or even through their legal representative.

It was generally acknowledged that the views of the child were adequately canvassed by psychologists or social work experts involved within the case or by the Office of the Family Advocate. Du Toit has observed that the courts have increasingly recognized the importance of ascertaining the views of the child involved in disputes,<sup>164</sup> and in proceedings that may affect the child's rights or well-being. As time progressed, it was determined that when the court is satisfied that the child has the necessary mental capacity to give their views, to make an informed choice, or take a specific position, weight ought to be given to his or her expressed opinion. Du Toit highlighted an important concept that the forum of the proceedings is not as important as the nature of the proceeding.<sup>165</sup> This means that whether it be in the High Court or the Children's Court, the important consideration of the need to appoint a legal representative lies in the complexity of the proceeding, whether it be divorce proceedings or care and protection proceedings.<sup>166</sup>

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<sup>164</sup> Du Toit (2017) 111.

<sup>165</sup> Du Toit (2017) 118.

<sup>166</sup> Du Toit (2017) 118.



This chapter focuses on unpacking how the right to legal representation has been interpreted in case law, within the broader context of international law and South African law.

### 3 2 *Soller NO v G*

The first case that dealt entirely with the interpretation of section 28(1) (h) of the Constitution involved a 15-year-old boy, K, who sought a variation of the custody order on grounds that custody should be awarded to his father.<sup>167</sup> Initially, the application was brought in terms of section 28(1)(h), by Soller, an attorney who had been struck off the roll, seeking an order from the court to appoint him as K's legal representative.<sup>168</sup> Satchwell J determined that the boy indeed required a legal representative, but due to Soller having been struck off the roll, she assigned an attorney in private practice, Charles Mendelow, who agreed to act on behalf of the child on a *pro bono* basis.<sup>169</sup>

Skelton illustrated that this application was motivated by Article 12(2) of the CRC, which emphasises that:

‘for purpose of expressing his views, the child shall be provided with an opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly or through an appropriate body, in a manner consistent with the procedural rules of national law’.<sup>170</sup>

Judge Satchwell, made an important determination on the distinction between the role of a legal practitioner assigned under section 28(1)(h) and the Family Advocate established under the Mediation in Certain Divorce Matter Act 24 of 1987<sup>171</sup>. The distinction has played a vital role in the development of the right for courts, for the distinct role between a Family Advocate and a legal representation appointed under section 28(1)(h).

Skelton raised the fact that there was an apparent concern on the part of the applicants that the Court may reject the application. This was because the Family Advocate, who

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<sup>167</sup> *Soller N.O. v G and Another* 2003 5 SA 430 w.

<sup>168</sup> *Soller N.O. v G and Another* para 14. Also see Skelton (2008) 220.

<sup>169</sup> *Soller N.O. v G and Another* para 16- 17.

<sup>170</sup> Skelton (2008) 220.

<sup>171</sup> *Soller N.O. v G and Another* para 20 & 21.



investigates the situations and circumstances of the parties during the divorce proceedings, could be classified as a 'representative who puts the views of the parties before the court'<sup>172</sup>. For this reason, arguments were prepared on the basis that the Family Advocate had only met with the child for 10 minutes, and had ignored their views in the report they had presented to the court.<sup>173</sup> The Judge had to determine whether the child's view is a decisive factor in determining custody and access, particularly in light of him being alienation from one parent to another due to possible allegations of manipulation from the other.<sup>174</sup> In determining this, the court considered K's attempts to express his wishes to live with his father. This involved considering the numerous occasions he had run away to be with his father together with a letter he wrote to his mother stating his intention to live with his father no matter what views she expressed.<sup>175</sup>

The father was seen by the Court to be a vexatious litigant because when the divorce order was granted, he instructed the child to be obstructive, placing him in a position of having to choose between the family members.<sup>176</sup> A psychologist who had interviewed the child found that the 'views' of the child stemmed from the so-called parental alienation syndrome, essentially from the post-divorce alignment with one parent at the cost of affection with the other.<sup>177</sup> This particular syndrome arose chiefly from the influence of the father together with the child's contribution to the campaign of 'denigration of the other parent.'<sup>178</sup> It appeared through evidence that K's views were influenced by his father and the emotional impact that the divorce had on him holistically. In considering the child's views, the court regarded that the views of K in the case were a determinate factor, rather than a persuasive factor for the court to consider that K could live with his father with supervision.<sup>179</sup> Judge Satchwell, in arriving at this conclusion, was convinced that K would not obey a court order where custody was awarded to the mother. This showed that K

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<sup>172</sup> Skelton (2008) 220.

<sup>173</sup> Skelton (2008) 220.

<sup>174</sup> *Soller N.O. v G and Another* para 431.

<sup>175</sup> *Soller N.O. v G and Another* para 432 D.

<sup>176</sup> *Soller N.O. v G and Another* para 431.

<sup>177</sup> *Soller N.O. v G and Another* para 52.

<sup>178</sup> *Soller N.O. v G and Another* para 432 I-J.

<sup>179</sup> *Soller N.O. v G and Another* para 58-62 G.



has been adamant to live with his father, through his actions and his expressions to the lawyer and the psychologist.

The importance of this case lies with the fact that the court, determined the difference between the legal representative assigned under section 28(1)(h) and the Family Advocate, and the distinction between their respective functions and roles.<sup>180</sup> Satchwell J pointed out that the Family Advocate provides a professional and neutral channel of communication between conflicting parents (and perhaps the child) and the Court, while the legal representative assigned under section 28 (1)(h) is “squarely in the corner of the child and has the task of presenting and arguing the child's wishes in Court”.<sup>181</sup> The legal practitioner also has to provide ‘adult insight into those wishes and apply legal knowledge to the child's perspective, giving the child a voice without being merely a ‘mouthpiece’’.<sup>182</sup>

Skelton observed that there are three functions of a Family Advocate, namely, the ‘first is to monitor all court documentation and settlement agreements to ensure that the agreements are in the best interest of the child’.<sup>183</sup> The second function is to ‘mediate between parties’.<sup>184</sup> The third function is to ‘carry out a full evaluation in cases where this is required, culminating in a report which sets out the findings and recommendations to the court’.<sup>185</sup> She further stated that the Family Advocate can appear in Court on behalf of the child in cases that may be deemed in the best interest of any child in terms of section 4(3) of Mediation in Certain Divorce Matter Act 24 of 1987.<sup>186</sup>

If all attempts of mediation fail, then the Family Advocate reports will serve as evidence to help the court reach a good judgment in favour of the parties involved. ‘The Family Advocate acts as an advisor to the court and as a mediator between the family who has been investigated and the court’.<sup>187</sup> ‘The Family Advocate is not an appointed representative for any party to a dispute and is thus required to be neutral in their

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<sup>180</sup> *Soller N.O. v G and Another* para 431.

<sup>181</sup> *Soller N.O. v G and Another* para 27.

<sup>182</sup> *Soller N.O. v G and Another* para 27. See also Skelton (2004) (2008) 221.

<sup>183</sup> Skelton (2008) 220.

<sup>184</sup> Skelton (2008) 220

<sup>185</sup> Skelton (2008) 220.

<sup>186</sup> Skelton (2008) 220.

<sup>187</sup> *Soller N.O. v G and Another* para 22. See also Skelton (2008) 221.



approach so that the wishes and desires of the disputing parties can be closely examined and the facts and circumstances ascertained'.<sup>188</sup>

Judge Satchwell concluded that the legal representative who is appointed in terms of section 28(1)(h) will not assume the roles and responsibilities of a Family Advocate, but rather must fulfill other 'responsibilities and roles,'<sup>189</sup> determined as follows:

'an independent individual with the relevant acquaintance and understanding of the law, with the ability to determine the views of the client, present them in a sound articulate manner, and argue solely on the stance of the client against the opposition, taking the side of the child and acting as his ambassador'.<sup>190</sup>

The Judge emphasized that the legal representative appointed by the court should also provide insight into the child's desired outcome, be someone in whom the child could confide as well as someone who could make an argument favourable to child'.<sup>191</sup> The Family Advocate is not the intended representative to administer the duties and roles of section 28(1)(h). The legislature knew before, introducing section 28(1)(h) practitioner, the role of a Family Advocate has already been discovered and serves as a different purpose to that of section 28(1)(h) legal representative. This shows that the intention of introducing the legal practitioner in terms of section 28(1)(h) was to be distinct from that of a Family Advocate.

Judge Satchwell determined that K's preference was driven by 'desire' to live with his father, which was evident when he ran away to live with him.<sup>192</sup> It could be implied that he wanted to express those views, and the only option available to him was to run away. The Family Advocate had made a recommendation that 'K should be permitted to live with his father rather than be forced back into a home situation which he is not happy or comfortable with'.<sup>193</sup> The psychologist had made a recommendation, that the 'minor child, with immediate effect, should be permitted to live with his father, and the arrangements

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<sup>188</sup> *Soller N.O. v G and Another* para 22. See also Skelton (2008) 221.

<sup>189</sup> *Soller N.O v G and Another* F-H & para 26.

<sup>190</sup> Skelton (2008) 221.

<sup>191</sup> *Soller N.O. v G and Another* para 26 - 27.

<sup>192</sup> *Soller N.O. v G and Another* para 57.

<sup>193</sup> *Soller N.O. v G and Another* para 70.





should be interim, to monitor the situation and address issues that could have arose whilst living with his father'.<sup>194</sup> This resulted in the court ordering provisional living arrangements for K, to have his desires met by living with his father. The court took this decision because he was sufficiently mature to be granted his wishes.<sup>195</sup> The order was on the condition that he had to participate in counseling with the psychologist.

The court determined the significance of appointing a legal representative to K in terms of section 28(1)(h) by focusing on the fact that the interest of the parent and the child may not always be aligned with one another<sup>196</sup> Further, it was determined that if the court will have to pass judgment on a child's family life, under whose authority he should live, and how he should exercise the opportunity to enjoy and continue to develop a relationship with both living parents, it would be possible for the court to consider the appointment of a legal representative under section 28(1)(h), for the child.<sup>197</sup> Additionally, the appointed legal representative, would not only present the opinions of the child but also afford the child an opportunity to express his or her views through an adult representative.

### **3 3 Ex parte Van Niekerk & another: In re Van Niekerk v Van Niekerk**

Reported in the year following *Soller NO*, is the case of *Ex parte Van Niekerk*.<sup>198</sup> The matter was an application made by a father seeking to re-establish his rights of access to his two daughters. This case dealt with the issues of the children's right to be heard and, in particular, what it means 'to have a legal practitioner assigned to the child by the state' in terms of section 28(1)(h). This is the first reported case where a legal representative was assigned for children.<sup>199</sup>

In the divorce order, that had been finalized in 2001, the mother of the children was awarded custody, and the father was granted the reasonable right of access to the children. Subsequently, however, a conflict arose because, according to the court, 'the mother refused the father's access to the children due to allegations that the children did

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<sup>194</sup> *Soller N.O. v G and Another* para 71.

<sup>195</sup> *Soller N.O. v G and Another* para 73.

<sup>196</sup> *Soller N.O. v G and Another* 434–435 and paras [7]– [8].

<sup>197</sup> *Soller N.O. v G and Another* 443 para-D-J.

<sup>198</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T)

<sup>199</sup> Du Toit (2017) 123.



not want to visit their father, fearing his violent behavior'.<sup>200</sup> The father alleged that it was the mother who was actively alienating the daughters against him.<sup>201</sup> The mother asserted that the father was a 'violent person with a sick mind'. The Family Advocate, who was requested by the father to evaluate the different reports and circumstances of both parties, had consultations with the parties and the children.<sup>202</sup> The Family Advocate reported that the mother was unnecessarily negative about the father and that the parties were to submit to therapy to try and normalize the family situation.<sup>203</sup>

In 2003, Judge Preller together with the Family Advocates' recommendation, made an order that the parties should agree to consult with a clinical psychologist, for necessary 'treatment and therapy, to restore the relationship between them, under the supervision of the Family Advocate'<sup>204</sup>. During the hearing of the application that was brought by the father, the girls became 'frustrated' that no one was hearing them.<sup>205</sup> Even though the court ordered the mother to persuade to girls to go to therapy, they refused to do so. The mother, fearing that she would be charged with contempt of court, approached the Centre for Child Law for assistance. Skelton explained that the Centre for Child Law's strategy to intervene on behalf of the children was hinged on the court's actions being in breach of Article 12 of the UNCRC.<sup>206</sup> Skelton stressed that 'in international law, the children are guaranteed a right to express their views and have such views taken seriously.'<sup>207</sup> Furthermore, she pointed out that the South African courts are obliged to take into consideration international law when interpreting the Bill of Rights in terms of section 39(1)(b) and section 233 of the Constitution.<sup>208</sup>

An *ex parte* application was made on 2 December 2003, by Lawyers for Human Rights acting on behalf of the Centre for Child Law. The application was for the court to appoint

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<sup>200</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 3.

<sup>201</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 3.

<sup>202</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 4.

<sup>203</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 4.

<sup>204</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 4.

<sup>205</sup> Skelton (2008) 218.

<sup>206</sup> Skelton (2008) 218. See also Guidelines for legal representatives of children in civil matters PULP, Centre for Child Law, 2016 <https://www.pulp.up.ac.za/guidelines-for-legal-representatives-of-children-in-civil-matters> Accessed on 3 January 2021

<sup>207</sup> Skelton (2008) 218. See also United Nations Convention on the Rights of Children.

<sup>208</sup> Skelton Law (2008) 218. See also Constitution, 1996.



Adv WPN Scales SC as *curator ad litem* to present the viewpoints of the children and also to protect their interests.<sup>209</sup> According to the Centre for Child Law and Lawyers for Human Rights, one out of four common law grounds was advanced to justify the appointment of a *curator ad litem*. These grounds were when a minor does not have a parent or guardian, the parent or guardian of the child cannot be found, the interest of the minor and the parent/guardian are conflicting and lastly, the parent/guardian of the child unnecessarily refuses to help the minor.<sup>210</sup> In looking to appoint a legal representative in this case the court assessed a relatable ground to the case on the basis that the interest of the minor might contradict the interest of the parent, mainly the father's interests.<sup>211</sup> The conflict of interest was evident in the children's refusal to go to therapy as ordered by the courts, the reason being that they felt that their views were not considered during the hearing and that the court only focused mainly on the views of the parents and that of the Family Advocate.<sup>212</sup> On the 20<sup>th</sup> January 2004, the matter was heard unopposed before Judge De Villers, who indicated that instead of appointing Adv Scales SC as *curator ad litem* for the two children, he should rather be appointed as a legal representative in terms of section 28(1)(h) of the Constitution, who is authorised to take instructions from the child. Following this decision, Skelton reasoned that it could be that 'a legal representative was appointed because the mother was present and was of assistance to the children and *curator ad litem* would not be necessary'.<sup>213</sup> The judge held that even though Lawyers for Human Rights, had the correct intention of helping present the views of the children on a pro bono basis, it was fit and correct that such an appointment should be made by the State and at its expense. The court thus ordered that such an appointment should be made by the State Attorney. This was despite there being uncertainty as to which state organ should appoint such representative.<sup>214</sup> This led to the State Attorney appointing Adv WPN Scales SC as the legal representative, in terms of

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<sup>209</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 5.

<sup>210</sup> Boezaart "The role of a curator ad litem and children's access to the courts" 2013 *De Jure* 707, 709.

<sup>211</sup> Skelton (2008) 218.

<sup>212</sup> Skelton (2008) 219.

<sup>213</sup> Skelton (2008) 219.

<sup>214</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 5.



a letter sent on 30<sup>th</sup> January 2004.<sup>215</sup> Judge De Villers, assessed the wording of the section read in section 28(1)(h), being that an appointment of a legal representative that is assigned to a child should be appointed at state expense when there is substantial injustice.

The approach taken by the court in this instance is somewhat flawed according to Du Toit's analysis of the case.<sup>216</sup> In her opinion the court's approach in selecting the State Attorney to appoint the legal representation was incorrect.<sup>217</sup> If State Attorney was responsible to appoint a legal representative, it would not be easily accessible to the public.<sup>218</sup> The powers of State Attorney and that of Legal Aid are different, in that the State Attorney represents and acts for the benefit of the state in all claims and transactions involving government, whereas the role of Legal Aid is to provide legal services available to people who cannot afford legal services. It provides such legal representation at the cost of the state. Bekink and Bekink take the same view stating in their discussion of the judgment that the correct entity to appoint such a legal representative for a child in civil matters, at state expense is Legal Aid.<sup>219</sup> This approach was taken in a subsequent matter to be discussed in more detail below, where it was held that Legal Aid is the correct institution to give effect to legal representation at state expense for minor children in terms of section 28(1)(h). This is because Legal Aid provides its services primarily to members of society, in civil and criminal matters.<sup>220</sup>

The development of this right has made it plain that the right of children to legal representation does not only apply when a legal representative is appointed at state expense. It also applies when private practitioners are appointed to represent a child in court proceedings. In this regard, Du Toit opined that the correct interpretation of this right is that a child has an automatic right to legal representation and that should a child wish

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<sup>215</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 5.

<sup>216</sup> Du Toit (2017) 123.

<sup>217</sup> Du Toit (2017) 123.

<sup>218</sup> Skelton (2008) 218- 219.

<sup>219</sup> Bekink and Bekink 2009 *Speculum Juris* 87, 94.

<sup>220</sup> *Legal Aid Board V R and Another* 2009 (2) SA 262 (D) para 24.



to have a legal representative appointed at state expense, such a representative should be appointed if substantial injustice would otherwise occur.<sup>221</sup>

An important factor in this decision for the court to appoint a legal representative lay with the contradictory issues that all parties raised, where the

‘father needed the court to discover that the mother is unreasonable and influences the children against him, while the mother needs the court to discover the father a violent and was not psychologically sound.’<sup>222</sup>

The two parties could be wrong in their analysis of each other, and for this reason, it would be correct for the court to consider the children’s views to ‘balance of presentation of the situation.’<sup>223</sup> *Adv WPN Scales SC* was seen to be competent to present the views of the children.<sup>224</sup> In unpacking this issue the Judge Hartzenberg posed the question as to whether the children could be joined as parties to the proceedings. He noted that the court was competent to join the minors as parties on the basis that this would protect their best interests. <sup>225</sup> The Judge allowed this specifically to ensure that the children could appeal against the judgment granted by the court if the outcome adversely affected them. In implementing section 28(1)(h) of the Constitution, the children needed to be joined as parties to the proceedings for them to participate in this matter. This allowed them to express their views and opinions through a representative in court.<sup>226</sup>

### **3 4 *Centre for Child Law and Another v Minister of Home Affairs and Others.***

This case related to the rights and welfare of unaccompanied minors who did not have the assistance of a parent or guardian. This increased their inherent vulnerability.<sup>227</sup> It was viewed as important to appoint a legal representative for the children to protect their interests and welfare. This was the first case heard in a civil matter distinct from family law where s 28(1)(h) was utilised.

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<sup>221</sup> Du Toit in *Boezaart* (2017) 126- 127.

<sup>222</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 7.

<sup>223</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 7.

<sup>224</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 8.

<sup>225</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 8.

<sup>226</sup> Du Toit (2017) 123.

<sup>227</sup> Du Toit (2017) 118.



On 3 March 2004, the Centre for Child Law brought an urgent application on behalf of several unaccompanied foreign children who were detained at Lindela, a detention center for migrants who were unlawfully in the country. The application aimed to provide legal representation for the children concerned. At the time of the main application, the detained children were not given separate accommodation from the adults also being detained at Lindela. They were also facing imminent and unlawful deportation.<sup>228</sup> Evidence before the court revealed that children who were deported from Lindela back to their countries of origin were loaded into trucks and taken to the train station.<sup>229</sup> There, they were transferred onto the train, transported to their country's border, loaded onto a truck, and taken to the nearest police station within that country.<sup>230</sup> The Court granted an interdict preventing the Minister of Home Affairs, the Director-General of Home Affairs, and Bosasa, a company established to render services to the South African government prisons<sup>231</sup>, from proceeding with the deportation of the children and also appointed Advocate Isabelle Ellis as curator *ad litem* for them.<sup>232</sup> The curator's powers and duties included, amongst others, investigating the circumstances of the children in detention, making recommendations to the Court regarding their future treatment, and instituting legal proceedings in the enforcement of their rights.<sup>233</sup>

The court considered the case of *S v Thomas*<sup>234</sup>, in which 'right to legal representation appointed by the State in respect of foreign citizens has been confirmed'.<sup>235</sup> Judge De Vos reiterated that, within the circumstances of this case, all unaccompanied children involved in legal proceedings should have a legal representative appointed to them by the state.<sup>236</sup> She then appointed a legal representative at state expense for the children. Du Toit illustrated that 'for children's interest to be shielded and protected, the court needed to appoint a legal representation so that if there was a possibility of their rights

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<sup>228</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* 2005 (6) SA 50 (T) 4.

<sup>229</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 5.

<sup>230</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 6.

<sup>231</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 6.

<sup>232</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 6.

<sup>233</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 6.

<sup>234</sup> *S v Thomas* 2001 (2) SACR 608 (W).

<sup>235</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 28.

<sup>236</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 29.



under section 28 of the Constitution are been infringed then the appointed representative would protect them'.<sup>237</sup>

To define the role of a legal representative assisted under section 28(1)(h) and a curator *ad litem* appointed by the High Court. A legal representative assigned under section 28(1)(h), is a legal representative who takes and acts upon instruction from the child who is of such an age and stage of maturity. By acting squarely in the corner of the child and providing adult insight and legal knowledge to the views of the child.<sup>238</sup> A section 28(1)(h) legal representative takes a client-directed representation for the child who could give clear and concise instruction.<sup>239</sup> In the case of a curator *ad litem*, who is appointed to safeguard and represent the best interest of the child as deemed fit based on conducting an investigation on the circumstances of the child and presenting recommendations to the court.<sup>240</sup> An appointment of a curator *ad litem* is based on 4 common law grounds namely when a minor does not have a parent or guardian, the parent or guardian of the child cannot be found, the interest of the minor and the parent/guardian are conflicting and lastly, the parent/guardian of the child unnecessarily refuses to help the minor.<sup>241</sup> A curator *ad litem*, even though a representative of a child, only has the “power to institute legal proceedings on behalf of the child, by advancing argument on behalf of the child”<sup>242</sup> and not to represent by arguing the views of a child in court proceedings. Distinctly, a legal representative appointed in term of section 28(1)(h) would not only protect the interest of the child and take instruction from the child but also litigate based on the child’s views by professionally presenting to the court, whereas a curator *ad litem* is duty-bound to conduct an investigation and make a recommendation to the court as to the best interest of the child, this is done to assist the court and the child to enhance the best interest of the child.<sup>243</sup>

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<sup>237</sup> Du Toit (2017) 118.

<sup>238</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 27.

<sup>239</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 27.

<sup>240</sup> Boezaart 2013 *De Jure* 707, 712.

<sup>241</sup> Boezaart 2013 *De Jure* 707, 709.

<sup>242</sup> *Du Plessis NO v Strauss* 1988 2 SA 105 (A) 146B para 35.

<sup>243</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 23.



It was highlighted in this case that the best interests of these vulnerable foreign children were of paramount importance and that a curator *ad litem* should be appointed. The curator was then required to investigate the children's circumstances and to submit a report to the court which would assist it in reaching a precise and just conclusion. The curator's report was submitted which was not enough for the protection of the children's interest whereafter the court deemed it fit to appoint a legal representative under section 28(1)(h) to represent the children in ongoing proceedings. The roles and duties of a legal representative and a curator were distinctly noted.<sup>244</sup> The legal representative was appointed by the state to safeguard the interest of the unaccompanied minors as there was a risk of their rights being violated if not represented.<sup>245</sup> The state has to protect the interests of unaccompanied children, provide security to their interests, and protect their wellbeing. In this case, the court's appointment of a legal representative was not only to safeguard their interest but also to present their views to the court and other parties involved. The court determined that, where the minor does not have any parent or guardian to assist them in protecting their interest or rights, then the court has a common law duty to protect the child's interest, by appointing either a curator or a legal representative. The legal representative appointed would assist not only in protecting the child's rights but also in presenting their views in court. In the appointment of a legal representative under section 28(1)(h), De Vos J reiterated the importance of unaccompanied children to have someone with legal insight and knowledge to help with making their views and opinions known and by also providing adult insight to those views. Considering *Soller N.O. v G*, the definition of the duties and responsibilities of a legal representative appointed under section 28(1)(h) were taken into account. This case emphasises the difference between a curator *ad litem* appointed by a court and a legal representative assigned by the court at state expense.<sup>246</sup>

### **35 R v M**

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<sup>244</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 30-31.

<sup>245</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 29.

<sup>246</sup> *Centre For Child Law and Another V Minister of Home Affairs and Others* para 20.





This case involved a 12-year-old girl who was caught in her parents 'acrimonious' custody dispute.<sup>247</sup> The child's mother alleged that the father had sexually abused the child and the father alleged that the mother was too emotionally unstable to have custody of the child. After hearing expert evidence, and when the plaintiff was close to closing his case, Acting Judge Govindsamy, decided that the child had shown emotional instability and that a legal representative should be assigned to her. Invitations were sent to appropriate bodies.<sup>248</sup> Representatives from the Legal Aid Board and the State Attorney in Kwa-Zulu Natal presented themselves to make submissions. The parties to the proceedings agreed that the child needed a separate legal representative and that it should be at state expense. It was also agreed that considering the nature and complexity of the case, the appointed counsel should have 'sufficient knowledge and experience in matrimonial matters to effectively represent the minor child.'<sup>249</sup>

Despite this, the parties were at odds as to how such an appointment would be carried out. This was because it is a standard procedure that appointment in Legal Aid is facilitated by the Legal Aid Board (as it was then called), 'who have a sole discretion to select the legal representative and not at liberty to agree to the request for a specific counsel which was made by the court'<sup>250</sup>. Judge Govindsamy examined the Legal Aid Act 22 of 1969 and the Legal Aid Guide (10<sup>th</sup> ed 2002) in great detail and found that the Act does not specify that the Legal Aid Board has to provide legal assistance in terms of section 28(1)(h). He assessed the circumstances in which the child could have a legal representative appointed under section 28(1)(h), execution of the right under section 28(1)(h) together with the function and scope of a legal representative assigned under this section.

In his judgment, Govindsamy J made it clear that in addition to the common law protection that children may have in terms of the curator *ad litem* being appointed for them, drafters of the Constitution may have foreseen that there was a need for additional legal assistance for children. This would be specifically realised through the appointment of a

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<sup>247</sup> *R v M and Others* (unreported) DCLD 5493/02.

<sup>248</sup> Kassan (2008) 234.

<sup>249</sup> Kassan (2008) 234.

<sup>250</sup> Skelton (2008) 222.



legal representative as envisaged in section 28(1)(h). This practitioner has a different role to that of curator *ad litem* appointed for a child, being that the legal representative appointed under section 28(1)(h) would take instruction from the child and advise the child in terms of law and a curator *ad litem* would assist the court and the child in enhancing what is best for the child's interest.<sup>251</sup> Govindsamy J stated further that, the appointment of a legal representative in terms of section 28(1)(h) would be necessary for matters dealing with infringement of any section 28 rights under the Constitution.<sup>252</sup> In this case, there is a need for a court to appoint a legal representative for the child. He further considered that the need to have a legal representative should be distinguished from the substantial injustice test.

In dealing with the interpretation of section 28(1)(h), Govindsamy J focused on the then-prevailing view surrounding the substantial injustice aspect, that is, an emphasis on the literal meaning of this right. He referred specifically to the idea that the state organ responsible to appoint a legal representative should be in a position to determine in advance that substantial injustice would occur in the absence of such representation.<sup>253</sup> In his interpretation, he opined that it would render the right difficult to execute. Rather, he recommended that a proper understanding of this right is that if a legal representative is not appointed then substantial injustice would occur.<sup>254</sup> He, therefore, indicated that the absence of a legal representative appointed for the girl rendered the situation substantially unjust. The appointment of a legal representative, in this case, could be based on the complexity of the matter, the excessive evaluation on part of the expert witness, the animosity between the disputing parents, and the allegations of sexual abuse.<sup>255</sup> According to Govindsamy J, the instances listed above rendered it necessary to appoint a legal representative for the child. The judge had tried to take into account the circumstances, in this case, to determine if substantial injustice would occur, but although had failed to determine in great detail the reasons for taking these requirements into

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<sup>251</sup> *Centre for Child Law v Minister of Home Affairs and Others* para 23.

<sup>252</sup> *Legal Aid Board V R and Another* para 12.

<sup>253</sup> *R v M and Others* (unreported) para-D.

<sup>254</sup> *Legal Aid Board V R and Another* para 22-23.

<sup>255</sup> Skelton (2008) 224.



account for the appointment of a legal representative at state expense and it was not clear in its judgment.

In implementing the right, Govindsamy J realised that Legal Aid does not have the capacity under the Legal Aid Act to appoint a legal representative to a child under section 28(1)(h), meaning that the court could not refer the order to the Legal Aid Board to do so. This resulted in the Judge directing an order to the Minister of Justice and Constitutional Development to make the necessary assignment of a legal representative through the Legal Aid Board.<sup>256</sup> The State Attorney was responsible- on the direction of the Minister- to make this order, but according to Du Toit the court's approach on this aspect was flawed<sup>257</sup>, the reason being the State Attorney represents the matters of the Government and not that of the general public.<sup>258</sup>

Govindsamy J considered also the functions of a legal representative assigned under section 28(1)(h). He did so by referring to the *Soller* case, which emphasized the duties of a legal representative appointed to a child, being that they 'par-take in the litigation process.'<sup>259</sup> In considering this, he emphasized that the case before him required a legal representative to litigate the views of the child, as opposed to someone providing advice to the court as curator ad litem would do.

### **3 6 Legal Aid Board v R and Another**

This case is based on the same facts as above and could be regarded as an incidental case to the *R v M and Others*<sup>260</sup>. This case focussed on whether the appointment of a legal representative by the State, at State expense should be made only when the court has ordered such an appointment, or if permitted by a legal guardian of the child was necessarily required before such appointment to be made.

In this case the Legal Aid Board brought an urgent application against the parties to divorce proceedings where parental rights and responsibilities over a child were

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<sup>256</sup> *R v M and Others* (unreported) para-D.

<sup>257</sup> Du Toit (2017) 123. See also *Ex Parte Van Niekerk : In re Van Niekerk v Van Niekerk* para 5.

<sup>258</sup> Skelton (2008) 218.

<sup>259</sup> *R v M and Others* (unreported) para-G.

<sup>260</sup> *Legal Aid Board V R and Another* 2009 (2) SA 262 (D).



contested. This application was for an order declaring an attorney had to be assigned in terms of section 28(1)(h) of the Constitution for the applicant to represent the minor, SR, in the proceedings by appointing Mr. Patrick Stilwell as her attorney.<sup>261</sup> The application was initiated on behalf of the Child because the child called Childline and asked for assistance in the proceedings. The first respondent, the father, supported the application but the second respondent, the mother, opposed it. She reasoned that “the applicant, had no power in law to appoint a person to represent a child in legal proceedings; such an appointment could only be made at the instance of the child's lawful guardian or a person exercising parental responsibilities and rights about the child, or by a court on application”.<sup>262</sup> The mother further argued that in the circumstances of the present case, it was inappropriate and unnecessary to make such an appointment and there was a substantial and undesirable risk of further delaying already protracted litigation as a result of such an appointment.<sup>263</sup>

The Durban Local Division held that the applicant had powers to render legal assistance to the minor in terms of section 4 of Legal Aid Act 22 of 1969. In deciding to represent a child in court proceedings, the applicant did not have the constraints of having to obtain the consent of a parent or guardian or an order of the court.<sup>264</sup> ‘It was a matter within the discretion of the applicant whether to seek such consent or an order in any particular case.’<sup>265</sup> A legal representative was assigned by the Legal Aid Board to the child in this instance because substantial injustice would result if such representation was not assigned.

Wallis AJ supported the view that the child should have a legal representative assigned to her. His reasons were similar to those of Judge Govindsamy in *R v M* as well as on account of the evidence that Mr. Stilwell's appointment arose from the child calling Childline for assistance<sup>266</sup>. The child's mother, who opposed the application, believed that the appointment of the legal representative would unduly delay the divorce

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<sup>261</sup> *Legal Aid Board V R and Another* para 40.

<sup>262</sup> *Legal Aid Board V R and Another* para 40.

<sup>263</sup> *Legal Aid Board V R and Another* para 40.

<sup>264</sup> *Legal Aid Board V R and Another* para 4.

<sup>265</sup> *Legal Aid Board V R and Another* para 4.

<sup>266</sup> *Legal Aid Board V R and Another* para 6.



proceedings.<sup>267</sup> Despite the opposing party's disagreement, Wallis AJ ordered that a legal representative should be appointed for the minor child in terms of section 28(1)(h) of the Constitution. It was held that the legal representative would be able to consult with the child without undue influence or the parents taking any steps to hinder the legal representative from conducting his duties and that the second respondent should ensure the child is present at the court hearing, that was held on 31 March 2008.<sup>268</sup> Wallis AJ pointed out that when it is clear that the views of the child are been disregarded by fighting parents, substantial injustice would occur.<sup>269</sup>

According to the court, the purpose of appointing a legal representative for the child is for the legal representative to exercise her or his independent judgment in the particular circumstances of the case and to place material before the court as she or he deems appropriate. This is to assist the court in reaching the best possible decision in the circumstances.<sup>270</sup> According to the court's observation, the development of the interpretation of this right has helped to clarify the 'question being whether the Legal Aid Board may permissibly provide that legal representation'<sup>271</sup>. This means that if a legal representative is 'deemed' to be appointed, then such an appointment should be made through court order or 'to be made with the permission of the child's lawful guardian or a person exercising parental responsibilities and rights concerning the child'.<sup>272</sup> The Legal Aid Board is seen to assist anyone who cannot afford to pay legal costs and needs any legal assistance, in this instance, it would be when substantial injustice would otherwise result. Wallis AJ made it clear that the Legal Aid Board was authorized by section 3 of the Legal Aid Act to provide legal assistance to children in circumstances where section 28(1)(h) would prevail if substantial injustice would occur.<sup>273</sup>

As to the issue, if there is a need for the Legal Aid Board to seek permission from the child's parent or guardian, it could be argued by Wallis AJ that 'in the Legal Aid Act that

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<sup>267</sup> *Legal Aid Board V R and Another* para 8.

<sup>268</sup> *Legal Aid Board V R and Another* para 8.

<sup>269</sup> *Legal Aid Board V R and Another* para 269G.

<sup>270</sup> *Legal Aid Board V R and Another* para 23.

<sup>271</sup> *Legal Aid Board V R and Another* para 24.

<sup>272</sup> *Legal Aid Board V R and Another* para 24.

<sup>273</sup> *Legal Aid Board V R and Another* para 32.



does not impose a limitation on the Legal Aid Board's power to grant legal assistance to a child in terms of s 28(1)(h).<sup>274</sup> This suggests it is not required to obtain permission from any third parties to provide legal assistance.

According to Du Toit, the appointment of a legal representative was not only helpful but also promoted child participation in proceedings that affect the child.<sup>275</sup> This case is one of the most groundbreaking cases that has developed the operational understanding of section 28(1)(h) of the Constitution. This is because the child's intentional steps taken to seek assistance showed that she, herself, sought a representative separate from her parents and that it was her right under the Constitution that had to be upheld. This case was also important because it provides a clear analysis as to the application of the right to a legal representation awarded to children by Legal Aid. This is seen in terms of section 3 of the Legal Aid Act, which is the appropriate statute to consider in matters of legal representation of children in civil matters concerning them.<sup>276</sup>

### **3.7 *FB v MB***

This case focussed on section 14 of the Children's Act, which sets out a child's right to be assisted in bringing a specific matter to court. In this case, an urgent application was brought by the child's father, FB (the first applicant), on behalf of his son, who was at that time 16 years of age (the second applicant). The child wanted to relocate with his father to Portugal.<sup>277</sup> The respondent in this matter was the mother of the child, MB, who opposed the application because she believed that the first applicant was influencing the second applicant. She also averred that the second applicant did not have *locus standi* to bring the application.<sup>278</sup> The first applicant and the respondent had settled their divorce, in which the court ordered that the second applicant would be primarily cared for by the respondent and the first applicant had rights of access to the second applicant. Both of the applicants sought a court order changing the terms of the settlement agreement,

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<sup>274</sup> *Legal Aid Board V R and Another* para 34.

<sup>275</sup> Du Toit (2017) 124.

<sup>276</sup> Legal Aid Act 22 of 1969, also consider s 15 of the Legal Aid South Africa Act 39 Of 2014. See also Bekink and Bekink 2009 *Speculum Juris* 87, 108, where he considers children to be indigent people, since they cannot afford to pay legal cost on their own.

<sup>277</sup> *FB and Another v MB* 2012(2) SA 394 (GSJ).

<sup>278</sup> *FB and Another v MB* paras 5 - 7.



permitting the second applicant to relocate with his father to Portugal. They also sought that the court appoints a member of Johannesburg Bar to be a legal representative for the second applicant.<sup>279</sup>

Meyer J noted that the applicants were not seeking legal representation for the child at state expense, but rather an appointment of a legal representative they had approached of their own accord. Judge Meyer J, stated that, unlike section 28(1)(h) of the Constitution, section 14 of the Children's Act does not impose a limitation on the child's access to a legal representative. This section does not make any suggestions as to how a child is entitled to bring a matter to court or how he or she is entitled to be assisted.<sup>280</sup> The foremost consideration in deciding such issues is the best interests of the child concerned. Section 14 provides no direction on how a child may bring a matter to court, nor does it prescribe how a child ought to be assisted. This section does not put any limitations on the court as to how to decide how a child may bring a matter to court, nor how the child may be assisted.<sup>281</sup>

Boezaart articulated that section 14 and section 10 of the Children's Act should be read together to give effect to child participation in matters concerning them.<sup>282</sup> the main focus of these rights is to involve children in matters concerning them, whether it be directly or through a legal representative.<sup>283</sup> She illustrated that there is a link between the sections, that 'section 14 thus provides an opportunity to realize section 10 as it links a child's right to participation with his or her right of access to a court'<sup>284</sup>

Meyer J concluded that a child's request for separate legal representation should be refused only in exceptional circumstances,

'particularly where he or she is a party to the proceedings, will otherwise be placed in a worse position than all other natural or legal personae that enjoy such right'.<sup>285</sup>

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<sup>279</sup> *FB and Another v MB* para 10.

<sup>280</sup> Du Toit (2017) 125.

<sup>281</sup> Du Toit (2017) 125.

<sup>282</sup> Boezaart and De Bruin *Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate* 2011 *De Jure* 416, 419.

<sup>283</sup> Boezaart and De Bruin 2011 *De Jure* 416, 419.

<sup>284</sup> Boezaart and De Bruin 2011 *De Jure* 416, 419.

<sup>285</sup> *FB and Another v MB* para 13.



The court then appointed the advocate as a legal representative of the child, on the basis that it would be in the best interests of the child to do so because the child was already a party to the proceedings and because of the age of the child.<sup>286</sup>

According to Du Toit, development and interpretation of the right to legal representation has been widened by the 'courts acknowledgment that a state-funded service must be available to allow children access to legal representation<sup>287</sup>. She further emphasised that this would ordinarily be done by Legal Aid.<sup>288</sup> She stated, however, that 'restricting children to the legal representation only by the state would be untenable, as it limits children's access to justice.'<sup>289</sup> She recommended rather that the right should be interpreted to say that a child has a separate right to legal representation.<sup>290</sup> Should the child require a legal representative at state expense, then the test of substantial injustice should be considered.<sup>291</sup> Meyer J favoured this approach, by connecting the right to acquiring legal representation at state expense with the substantial injustice test considered. He added that if a legal representative is not assigned by the state at state expense, then substantial injustice would have occurred.<sup>292</sup>

Du Toit emphasised an important concern, with relation to a parent being responsible for paying a child's legal costs as seen in this case. She highlighted that there could be bias on part of the appointed representative in favour of the commissioning parent.<sup>293</sup> This is as opposed to a legal representative assigned by Legal Aid, who provides a neutral and impartial position in the proceedings.<sup>294</sup> Du Toit observed that section 14 of the Children's Act does not have a limit as to who could assist the child in bringing a matter before the court.

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<sup>286</sup> *FB and Another v MB* para 14. See also Du Toit (2017) 126.

<sup>287</sup> Du Toit (2017) 126.

<sup>288</sup> Du Toit (2017) 126.

<sup>289</sup> Du Toit (2017) 126.

<sup>290</sup> Du Toit (2017) 126.

<sup>291</sup> Du Toit (2017) 126- 7.

<sup>292</sup> *FB and Another v MB* para 17.

<sup>293</sup> Du Toit (2017) 127.

<sup>294</sup> Du Toit (2017) 127.





### **3 7 Centre for Child Law v Governing Body of Hoërskool Fochville**

This was an appeal against an order of the Gauteng Local Division High Court, Johannesburg, to compel the production of certain documents relating to attorney discussions with child clients. This is another case where the proceedings were not related to family law matters and the proceedings affected a group of children collectively.<sup>295</sup> Again, the children were represented by the Centre for Child Law, who acted on their behalf, and who were, in turn, represented by the Legal Resources Centre. In this matter, the Provincial Department of Basic Education ('DBE') had decided that Hoërskool Fochville should admit certain children for grade 8 in the 2012 intake. On 11 December 2011, the school and its governing body filed an urgent application seeking to interdict the decision made by the Department. The school stated that there was no capacity to accommodate additional learners for the 2012 academic year. The urgent application failed, and the school enrolled the learners for that year.<sup>296</sup> The learners who were enrolled were grade 8 English-medium class and the school was an Afrikaans-medium school.<sup>297</sup> During the same year on 14 December, the DBE launched a counter-application that the school's language system should be changed to dual-medium language.<sup>298</sup>

It was on 19 December 2011 the Centre for Child Law applied to intervene, as a third party, in the main application, for the learners to have separate legal representation from their parents and as a group.<sup>299</sup> The Centre was acting on behalf of the children who were in the grade 8 English medium group. It sought to do so by presenting their views and opinions to the court and also by establishing their best interests.<sup>300</sup> In an affidavit written by the Centre, it summarised the children's experiences This was gleaned from questionnaires completed by the children.<sup>301</sup> The school notified the Centre that it would oppose its application to intervene and served them with a notice under the 35(12) of the

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<sup>295</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] 4 All SA 571 (SCA).

<sup>296</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 3.

<sup>297</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 3.

<sup>298</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 3.

<sup>299</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 3.

<sup>300</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 3.

<sup>301</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 3.



Uniform Rules of Court to produce the questionnaires for inspection.<sup>302</sup> The Centre for Child Law refused to produce the questionnaires, arguing that the documents were attorney and client communications and thus were privileged.<sup>303</sup> The school then applied for an order under rule 30A for the court to compel the Centre to produce the questionnaires, but the Centre opposed the matter arguing that the views and opinions of the learners will be exposed and their identities revealed if the questionnaires are produced to the opposing parties, which will be a breach on their part on the agreement of confidential with the children and according to Ponnan J such would 'result in prejudice on their views and identities'.<sup>304</sup> On 19 November 2013, Sutherland J ordered the Centre to produce the questionnaires in terms of Rule 35(12).<sup>305</sup> He then granted the Centre leave to appeal to the SCA.<sup>306</sup>

In July 2014 a settlement was reached in the main application. This entailed that at the commencement of the academic year 2015 the school would follow an English medium language system for the learners who had been enrolled. These learners would then complete their education at the school.<sup>307</sup>

In the SCA, Judge Ponnan's approach in overturning the order of the High Court was rooted in the idea that the court should give adequate weight to the best interests of the children. He reasoned that the children's right to a separate legal representative flows from the rights, in terms of the CRC article 12(2) and Article 4(2) of the ACRWC of children to participate in matters affecting them.<sup>308</sup> As illustrated in Chapter 2, these international instruments are binding in South Africa because courts are obliged to interpret these laws in such a way that it aligns with international law, when enforcing the rights in the Bill of Rights.<sup>309</sup> Du Toit acknowledged an important principle in terms of Article 4(2) of the ACRWC, being that 'the child must participate through an impartial representative'.<sup>310</sup>

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<sup>302</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 4.

<sup>303</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 5.

<sup>304</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 27. See also Du Toit (2017) 122.

<sup>305</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para8.

<sup>306</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para8.

<sup>307</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para8.

<sup>308</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para19.

<sup>309</sup> Section 39 and Section 233 of the Constitution.

<sup>310</sup> Du Toit (2017) 129.



This type of “impartial representative” is not expressed clearly in the CRC as in the ACRWC, but it could be said that when the CRC describes participation to be direct or indirect, it could be understood to mean through a legal representative.<sup>311</sup> Although the meaning of “impartial” has sometimes been unclear, it is considered to mean “that the child’s representative should not be a representative of any one of the other parties to the proceedings.”<sup>312</sup> That is to say that, the representative should be on the side of the child and should consider their best interests by presenting them to court accordingly. In this instance, the children needed a neutral third party to present their views fully.

The judge considered the contents of the right enshrined in section 28(1)(h) of the Constitution as well as section 28(2). Section 28(2) of the Constitution contains the paramount principle surrounding the best interests of children and should be interpreted to give effect to the principles of human dignity, integrity, equality, and freedom.<sup>313</sup> By taking into account, *S v M (Centre for Child Law as Amicus Curiae)*,<sup>314</sup> the court considered that when interpreting this right, the court should be gender-sensitive and child-sensitive in promoting and advancing the interest of the child. It noted further that the courts must respect the rights of the children.<sup>315</sup> The case articulated the need for child involvement in any matter which concerns children as well as the need to protect and respect the best interests of the children involved. The voice of the child, as spoken to by a separate legal representative can play a critical part in helping the court to decide what would be in the best interests of the child.<sup>316</sup>

Ponnan AJ suggested that the insertion of section 28(1)(h) implies that children would require additional assistance besides their parents and a lawyer in the form of a curator *ad litem*.<sup>317</sup> This right should also be read with sections 10 and 14 of the Children’s Act. According to Du Toit, these sections ‘create a wide and generous *locus standi* to enable

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<sup>311</sup> Du Toit (2017) 111.

<sup>312</sup> Du Toit (2017) 129

<sup>313</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para24.

<sup>314</sup> 2008 (3) SA 232 (CC). See also *B v B* (602/11) [2012] ZASCA (28 September 2012).

<sup>315</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para24.

<sup>316</sup> Carnelley” *The Right to Legal Representation at State Expense for Children in Care and Contact Disputes - A Discussion of the South African Legal Position with Lessons from Australia* 2010 *Obiter* 641.

<sup>317</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 22.



the protection and enforcement of children's rights beyond that available to them at common law'.<sup>318</sup> The court connected these principles with section 28(2) of the Constitution.<sup>319</sup>

The Fochville judgment also reveals that when the Centre of Child Law consulted with the children, they intended to represent the children as a group and in the public interest. This was based on the views that the children expressed freely with their lawyers and were reluctant to express with their parents. The Centre's aim was for such views to be presented before a court and promoted children's rights culture in the court proceedings that affect the children.<sup>320</sup>

Ponnan JA assessed that 'certainly the children would be prejudiced should their identities be disclosed as the markers of the questionnaire' and thus the disclosure of the questionnaires would not be in the best interests of the children.<sup>321</sup> The School failed to provide convincing arguments as to why its interests would outweigh those of the children.<sup>322</sup> The Appeal Court ruled that the Uniform Rule 30A application should not have succeeded in the High Court and ordered that the High Court order be set aside.<sup>323</sup>

The development of the interpretation of the right to legal representation under section 28(1)(h), has been given further meaning in this case. This is because if any court ruling is made on matters that would affect the children's lives, the children should be given a chance to participate in such proceedings and that children could join as parties in matters where a judgment would affect their daily living. The CCL joined in to assist the children who were the subject of the matter in the initial proceedings on the basis that their views and opinions should be heard, and ultimately those views are important in the conclusion of the judgment. Kilkelly and Liefwaard pointed out an important deficiency to the South African Constitution, that it does not have a separate section that recognises a child's

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<sup>318</sup> Du Toit (2017) 122

<sup>319</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para23. See also Du Toit (2017) 122.

<sup>320</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para25 & 30.

<sup>321</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 27.

<sup>322</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para28.

<sup>323</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para30.



right to participate in matters affecting them, as seen in the CRC.<sup>324</sup> The absence of the right of children to participate in the Constitution requires courts to consider international law in interpreting a right in the Bill of Rights and this makes up for the lack of participation rights being enshrined in the Constitution.<sup>325</sup> According to Killkelly and Liefwaard, this is a poor substitution to consider the right to participate.<sup>326</sup> However, the insertion of the right to participation in the Children's Act has closed this gap within the South African legislation.<sup>327</sup> This case makes clear the connection between child participation and the right for a child to be legally represented.<sup>328</sup> In terms of this case, the importance of section 28(1)(h) is that it is seen as a form of participation, where the children concerned could acquire additional assistance to access the court and have their views considered. The significance of this case is that a child's right to a legal representative under the Constitution originates from the child's right to be heard in terms of the CRC. In addition, it illustrates that a child can be represented separately from their parents.

### **3 8 Case law influence the development of the right to a separate legal representation for children under section 28(1)(h).**

Du Toit has pointed out that, the right for a child to be heard in South Africa, has advanced very slowly as courts have incrementally accepted that they are obliged to consider the views of the child.<sup>329</sup> The right to have a legal representative assigned to the child, in civil matters affecting the child, is a right that could be implemented broadly. International law can be used to give proper interpretation and meaning to the child's right to participation. Through the development of the meaning of section 28(1)(h), it could be seen that the right of a child to have legal representation could be considered as a separate, automatic, and absolute right<sup>330</sup>. An appointment or assignment of a legal representative could be defined as a form of participation in the decision-making process, for a child to have their

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<sup>324</sup> Killkelly and Liefwaard 2019 *De Jure* 521, 528.

<sup>325</sup> Section 39(1)(b) of Constitution.

<sup>326</sup> Killkelly and Liefwaard 2019 *De Jure* 521, 528.

<sup>327</sup> Cleophas & Assim, Child Participation in Family Law Matters affecting Children in South Africa, 17 *EUR. J.L. REFORM* 294 (2015) 299. Place in bibliography See also Du Toit (2017) 113.

<sup>328</sup> Du Toit (2017) 113.

<sup>329</sup> Du Toit (2017) 115.

<sup>330</sup> Du Toit (2017) 126.



views and expressions heard.<sup>331</sup> Below is a discussion of how this development of this right can be broken down following how it is structured in the Constitution.

### **3 8 1 Every child has the right to a legal practitioner.**

The first part of the right under section 28(1)(h) provides that every child has an absolute right to a legal representative.<sup>332</sup> Development through the cases has shown that this right is an assurance that a child can appoint a legal representative of their choice and be assisted in bringing a matter that concerns them before a court.<sup>333</sup> In applying the law and giving effect to this right, the court must consider the international law in terms of section 39(1)(b) and section 233 of the Constitution. It must also apply other domestic legislation governing the right being enforced. In the *FB v MB*, Meyer J illustrated that the right under section 14 of the Children's Act, advances the section 28(1)(h) right which provides that the children do have the right to access court and also to be assisted in accessing courts by having their legal representative appointed or assigned to them. Meyer J's judgment has made it easier to understand the right in a broader sense. Meyer J indicated that there is a difference between the assignment and the appointment of a legal representative. The state has a responsibility to assign a legal representative but appointing a legal representative can also be done privately where the cost would be borne by the child's parents by choice. Boezaart has observed that there is a link between section 14 and section 10 of the Children's Act as they both promote child participation, whether it be directly or through a legal representative.<sup>334</sup> The *Soller* case made the roles and functions of a legal representative assigned or appointed in terms of section 28(1)(h) clearer. This, the court illustrated that the role of a legal practitioner is different from the Family Advocate, who provides a professional and neutral channel of communication between conflicting parents (and perhaps the child) and the Court.<sup>335</sup> Also, the Minister of Home Affairs case pointed out the distinct roles and functions of a curator *ad litem* appointed under common law versus those of a legal representative. This made the

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<sup>331</sup> Du Toit (2017) 111.

<sup>332</sup> Absolute right means a right that could be enforce through action or refrainment to act at the discretion of the holder of the right.

<sup>333</sup> Section 14 of the Children's Act 38 of 2005.

<sup>334</sup> Boezaart and De Bruin 2011 *De Jure* 416, 419.

<sup>335</sup> *Soller N.O. v G and Another* para 27.



expected functions of a legal representative clearer.<sup>336</sup> Even though this right applies to all children, it could be said that a legal representative may not always be appointed for a child in all proceedings brought before a court that involves the child.<sup>337</sup> The evolving capacity of the child is important in this instance to determine if the child can form or communicate a clear view and if such a view will be taken into consideration.

### **3 8 2 Assigned to the child by the State, at State expense.**

The second aspect that is important under section 28(1)(h) is the assignment by the state and at state expense. In applying and interpreting these provisions courts have tried to determine which state organ would be responsible for assigning a legal representative for a child at state expense. Du Toit outlined that, the substantial injustice requirement is only applicable when a legal representative is assigned by the state (Legal Aid) at state expense.<sup>338</sup> In the *Ex parte van Niekerk*, after the court ordered that a legal representative should be appointed for the children, there were uncertainties as to which body is the correct body to appoint a legal representative for the child. In this case, the court referred the matter to the State Attorney, which was the incorrect organ to appoint a legal representative. Sloth-Nielsen pointed out that ‘the main role player designed to provide legal representation to children in South Africa is the Legal Aid Board.<sup>339</sup> In the *R v M* case, two representatives, one from the Legal Aid and the other from the State Attorney’s office presented their cases, and Govindsamy J had to decide which organ is appropriate to appoint a legal representative for the child.<sup>340</sup> In the *Legal Aid Board v R* case, the court was in agreement with the applicant that the Legal Aid Board is the correct organ of the State or body to appoint a legal representative for the child at State expense. Additionally, the appointment of a legal representative under section 28(1)(h) of the Constitution by the Legal Aid Board does not require permission from the child’s parent or court order, as long as there is an intention from the child to have a separate legal representative, in

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<sup>336</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 29- 30.

<sup>337</sup> Du Toit (2017) 120.

<sup>338</sup> Du Toit (2017) 126- 127.

<sup>339</sup> Sloth Nieslen “Realising Children’s Rights to Legal Representation and to be heard in judicial proceedings” (2008) *SAJHR* 495, 496.

<sup>340</sup> *R v M and Others* (unreported) para-D.



interpreting and giving effect to this right through case law, the courts have therefore illustrated which organ of state should represent children at state expense.

### 3 8 3 In civil matters affecting the child.

This right has started off being enforced in divorce matters, where it involved matrimonial issues such as care and custody proceedings concerning the child.<sup>341</sup> These instances have developed on a broader scale to include, according to by Sloth-Nielsen, civil proceedings in a children's court, removal of a child from a family, variation of the custody agreement, acrimonious litigation, adoption proceedings, and disputes concerning inheritance.<sup>342</sup> Additionally, this right is applicable when a child's views are in contradiction with those of the parents or the Family Advocate, in situations where there is a need to safeguard the interest of unrepresented children, where the children dispute the views of another party, and also where the child is reaching out by requesting for a legal representative in situations where they feel that their voice is drowned by the quarrel between their parents. For the court to consider the appointment of a legal representative in *Soller No v G* the court considered that 'when the interest of adults and that of the child may not intersect, then a separate legal representative may be appointed for the child.'<sup>343</sup> Additionally, a representative should be appointed in circumstances where the court has to determine the place of residence, under 'whose authority the child should live, and how the child should exercise and develop a relationship with the parents'. In the *Hoërskool Fochville* case, the appointed legal representative was acting in the interest of the learners as a group, to ensure that their views and experience were made known in court. In this matter, the Centre for Child Law also promoted a children's rights culture in the court proceedings.<sup>344</sup> In the CRC, it is indicated that there should be child participation in judicial and administrative proceedings about the children. The development of the right to a separate legal representative has made it easy to link child participation to the right to have a legal representative assigned or appointed to a child. Child participation will be discussed in great detail in chapter 4.

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<sup>341</sup> Section 6(4) Divorce Act 70 of 1979.

<sup>342</sup> Sloth-Nielsen 2009 *Speculum Juris* 1, 25.

<sup>343</sup> *Soller N.O. v G and Another* para [7]– [8].

<sup>344</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para 30.





### **3 8 4 If substantial injustice would otherwise occur.**

The substantial injustice test has not been thoroughly defined in law but the courts have given it meaning by applying it to proceedings. According to Du Toit, this requirement is determined by Legal Aid, who is responsible to provide a legal representative, at state expense.<sup>345</sup> Substantial injustice test could be determined on a case-by-case scenario, where the party may request a legal representative at Legal Aid. In the case of *Centre for Child Law and Another v Minister of Home Affairs and Others*, the appointment of a legal representative by the State at state expense was to safeguard the interest and to protect the rights of the unaccompanied minors which would be infringed if the children were not represented.<sup>346</sup> The substantial injustice, in this case, focus on the children not having parent's/guardian's parents to protect their interests and rights. This meant that the children could not rely on anyone to help them in protecting their rights against infringement and also had no other means of presenting their views to court, it was held that a State assigned representative would be in a proper position to prevent substantial injustice from occurring.

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<sup>345</sup> Du Toit (2017) 127.

<sup>346</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para29.



## **CHAPTER FOUR: DEVELOPMENT OF THE RIGHT TO THE LEGAL REPRESENTATION SINCE THE ENACTMENT OF THE CHILDREN'S ACT THROUGH AN ANALYSIS OF THE RELEVANT PROVISIONS.**

The Children's Act was enacted to give effect to the Constitution, the CRC, and ACRWC. The Act focuses on the care and protection of and contact with children. The Act regulates Children's Court proceedings. The Constitutional dispensation together with international law has paved a way to respect, recognise and protect a new culture of children's rights. Children are seen to be bearers of rights and may have a say in matters that would affect their well-being relative to their capacity.<sup>347</sup> This chapter aims to unpack how children's right to legal representation has developed since it has been inserted in the Children's Act. It also elaborates on other concepts relevant to the legal representation of children in civil matters.

### **4 1 International law's influence on the Children's Act.**

The CRC is the 'foremost' legal 'international instrument that recognises the human rights of children, based on their legal and social position, across all areas of their lives.'<sup>348</sup> The CRC does not necessarily bind individuals such as parents or family members but rather vests State Parties with the responsibility to ensure that families should participate in upholding the rights of the children under the law. The rights therein acknowledge children as bearers of rights where previously they were not accorded such status. Additionally, it provides for instances where children can enforce these rights against the state and their parents. South Africa's new democratic system and the ratification of the CRC aims to eliminate the preconceived idea that children are seen to be immature and incapable of making radical decisions concerning their lives. It aims to create a culture where children's views are taken seriously.

The South African courts must consider international law when interpreting the Bill of Rights. This is to bring about a broader understanding of how the rights that children have should be considered in our country. Child Participation is one of the core principles in the CRC, which articulates a child's right to express themselves freely in matters affecting

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<sup>347</sup> Du Toit (2017) 109.

<sup>348</sup> Kilkelly and Liefwaard 2019 *De Jure Law Journal* 521, 521.



them if the child can form a view. Their views are to then be given due weight with regards to their age and maturity.<sup>349</sup> General Comment 12 to the CRC defines participation as,

‘a constant process where information is shared and there is a discussion between adults and children-based respect for one another, where child learn how their views are taken into account in the decision-making process.’<sup>350</sup>

The right of the child to participate in all matters affecting him is considered to be one of the basic standards that direct the understanding, translation, and application of all children's rights.<sup>351</sup>

The right of a child to be heard together with the right to participate in all matters affecting them, as seen in the CRC, is also established in the Children’s Act. The latter takes the same form, implementation, and interpretation. Cleophas and Assim affirmed that section 10 incorporates Article 12, in that the same considerations used to interpret the under Article 12 should also be applied for in section 10 of the Children’s Act.<sup>352</sup> The CRC limits participation rights under Article 12(1) to a child capable of forming their views and expressing those views freely. The degree of weight which shall be given to those views depends on the “twin criteria” that is, age and maturity.<sup>353</sup> In terms of the General Comment 12 to the CRC, the right should not be interpreted in a limiting way but rather for the state to be able to assess the capacity of the child to participate in matters concerning him or her.<sup>354</sup> Additionally, the ACRWC promotes the right of a child to participate to a child who can communicate his or her views in all administrative and judicial proceedings affecting the child, either through an impartial representative or by the child directly, which promotes child participation and representation under Article 4(2).<sup>355</sup> The ACRWC has a similar qualifier to the right, that a child capable of communicating their view, then an opportunity shall be provided for their view to be

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<sup>349</sup> CRC/C/GC/12 2009 3.

<sup>350</sup> CRC/C/GC/12 2009 5.

<sup>351</sup> KilKelly and Liefwaard 2019 *De Jure* Law Journal 521, 525.

<sup>352</sup> Cleophas & Assim Child Participation in Family Law Matters affecting Children in South Africa” 2015 *EUR. J.L. REFORM* 294, 299.

<sup>353</sup> Davel & Skelton, Commentary on the Children's Act, 2007, pp. 2-13.

<sup>354</sup> CRC/C/GC/12 2009 6.

<sup>355</sup> Article 4(2) of the ACRWC.



heard.<sup>356</sup> Under the ACRWC, instances, where a child be deemed able to participate, are in a more limited context than the UNCRC, according to Cleophas and Assism. This is because there could be instances where a child could be able to form a view but not able to express it.<sup>357</sup> They further argued that even though the Charter does not speak on the age, maturity, and stage of development of the child as in the CRC, the qualifier in this instance is seen in the phrase ‘capable of communicating their view.’<sup>358</sup> Although section 10 of the Children’s Act does not use similar qualifiers to the right to participate, Cleophas and Assim have asserted that section 10 is more liberal than international law.<sup>359</sup> Where section 10 is applied, the court will consider factors such as age and capacity of the child to give due weight and consideration to the child’s views. They articulated that the right to participation should not be read narrowly and should include the right of a child to have a legal representative appointed for them under section 28(1)(h) of the Constitution.<sup>360</sup> Implementation of section 28(1)(h) is more extensive and much more comprehensive compared to section 10, however, as it applies to all children rather than to a child of ‘such an age, maturity and stage of development.’<sup>361</sup>

## 4 2 Child Participation in matters affecting the child.

Hart highlighted in his article that ‘from a rights-based perspective, participation is not only a right in itself but also a vital means to the realization of children's other rights’.<sup>362</sup> Lansdown defined participation to be ‘an ongoing process of children’s expression and active involvement in decision-making at different levels in matters that concern them’.<sup>363</sup> Lansdown further stated that participation

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<sup>356</sup> Article 4 of the ACRWC.

<sup>357</sup> Cleophas & Assim 2015 *EUR. J.L. REFORM* 294, 296.

<sup>358</sup> Cleophas & Assim 2015 *EUR. J.L. REFORM* 294, 296.

<sup>359</sup> Cleophas & Assim 2015 *EUR. J.L. REFORM* 294, 296.

<sup>360</sup> Cleophas & Assim 2015 *EUR. J.L. REFORM* 294, 299.

<sup>361</sup> Boezaart & De Bruin, “Section 14 of the Children’s Act 38 of 2005 and the Child’s Capacity to Litigate” 2011 *De Jure* 416, 417.

<sup>362</sup> Hart “Children’s Participation and International Development: Attending to the Political” 2008 *INT’L J. CHILD. Rts.*) 408

<sup>363</sup> Lansdown “Every child right to be heard. A resource guide on the UN Committee on the right of the child General Comment no 12” 2011 3

[https://www.unicef.org/files/Every\\_Childs\\_Right\\_to\\_be\\_Heard.pdf](https://www.unicef.org/files/Every_Childs_Right_to_be_Heard.pdf) accessed on 9 December 2020.



‘requires information-sharing and dialogue between children and adults based on mutual respect, and requires that full consideration of their views be given, taking into account according to the child’s age and maturity’.<sup>364</sup>

In the *B v B* case, Van Heerden J pointed out that participation is a wide concept that may include participation in several ways, for example participating in mediation proceedings or the drafting of a parenting plan. A child’s right to participate does not necessarily mean that a child must be legally represented in every matter.<sup>365</sup>

Lansdown highlights that while young children can form views and opinions, how they participate and the extent to which their views are taken into account will increase as they mature and as their capacities evolve.<sup>366</sup> A child’s life is influenced by the societal and social surroundings that they encounter. Instances of child participation around the world demonstrate a developing body of evidence on the subject. They also show that not only are concerns around the practice of allowing children to participate unfounded, but that participation has a widespread positive impact.<sup>367</sup> Lansdown observes that there has been a huge impact that child participation has on the child’s wellbeing. Where she highlights that:

1. “Participation contributes to the child’s personal development: realising the child’s views and opinions advances a child’s competency, it helps enhance the child’s self-confidence, interpersonal skills, communication with others, learn negotiation skills, and also courtesy for others.
2. Participation leads to better decision-making and outcome: when the views and thoughts of the child are taken into consideration it promotes reasonable and fair decisions that will be reached for their best interest. Most of the time, children are better informed of their lives, needs and concerns.
3. Participation can protect children: this normally happens when the child is abused or assaulted, in promoting involvement where their views and opinions are heard, such could ‘provide necessary mechanisms through which they can raise

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<sup>364</sup> Lansdown 2011 1, 3. See also the General Comments of the CRC Comment 12 2009 5.

<sup>365</sup> *B v B* (602/11) [2012] ZASCA 151 para 18. See also Du Toit (2017) 120.

<sup>366</sup> Lansdown 2011 1, 3

<sup>367</sup> Lansdown 2011 1, 5.



concerns, and it will be much easier for violations of their rights to be exposed'<sup>368</sup>. Such protection that is awarded by an adult could be possible if children disclose the issues and struggles to effectively offer adequate protection."<sup>369</sup>

Hart has introduced a concept concerning child participation referred to as “the ladder of child participation,” which he emphasised as a fundamental right of citizenship.<sup>370</sup> In his opinion participation is ‘the process of sharing decisions that affect one's life and the lives of the community in which one lives.’<sup>371</sup> According to Hart, the right to participation goes alongside the idea that children need to learn responsibilities. This means that for them to learn, they need to ‘collaboratively engage with others’.<sup>372</sup> Hart views child participation as a metaphorical “ladder”, in which each step represents a child's maturity, control, or power.<sup>373</sup> The metaphor that Hart uses is a borrowed one from an article written by Arsntein, on adult participation.<sup>374</sup> There are 8 steps or rungs that Hart describes, divided into 2 categories. The first to the third rung is categorized as the non-participation then from the fourth to the eighth it is genuine participation. The first rung is ‘manipulation.’ This refers to instances where children do not understand their roles and there is an attempt to influence them in some way in a decision with which that they might be faced.<sup>375</sup> The second rung is ‘decoration.’ This step includes, for example, where an adult hands children T-shirts relating to a cause but the children have very little knowledge and understanding of what their participation in the matter means and have no say in such participation.<sup>376</sup> The third rung is ‘tokenism.’ In this instance, children are given a voice, but have little or no choice on the subject or style of communication, and are rarely allowed to formulate their own opinions. The fourth includes ‘assigned but not informed.’ This includes children understanding several requirements involved in projects and thus

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<sup>368</sup> Lansdown 2011 7.

<sup>369</sup> Lansdown 2011 1, 7.

<sup>370</sup> Hart Children's participation: From tokenism to citizenship. Florence, Italy: United Nations Children's Fund International Child Development Centre (1992) 5.

<sup>371</sup> Hart (1992) 1, 5.

<sup>372</sup> Hart (1992) 1, 7.

<sup>373</sup> Hart (1992) 1, 8. See also Ochaita & Espinosa “Children's Participation in Family and School Life: A Psychological and Developmental Approach” 1997 *Int J of Children's Rights* 279, 2 284–288.

<sup>374</sup> Hart (1992) 1, 8.

<sup>375</sup> Hart (1992) 1, 8.

<sup>376</sup> Hart (1992) 1,10.



the intention.<sup>377</sup> The fifth rung is ‘consulted and informed.’ Children act as consultants for adults in adult-run projects where the children’s opinions are taken seriously and they understand the process. Some children represent other children in this rung the issues that they might face.<sup>378</sup> The sixth rung is, adult-initiated and involves shared decisions with children. This is seen as participation. The adult initiates the projects and the decision-making is shared with the children concerned.<sup>379</sup> The seventh rung is ‘child-initiated and directed.’ Here the projects are initiated and led by the children, without adult interference.<sup>380</sup> The eighth and final rung, ‘child-initiated,’ entails shared decisions with adults. Hart stated that this is rare and more likely occurs with teenagers who incorporate adults in their projects or designs.<sup>381</sup>

Hart’s observation on child participation is inclusive of instances involving all of a child’s lived experiences. In his observation, he has emphasised the involvement of children in their growing stages of life. Hart stipulated that even though children may not be able to communicate in the same way as adults, this does not mean that the information acquired from them is invalid.<sup>382</sup>

In General Comment 12 to the CRC, children’s involvement in matters that affect them is considered to be read in line with the right of a child to be heard. This includes all matters and not only selected instances. Article 12(2) emphasises in ‘all matters affecting the child opportunities have to be created so that the views of the children are heard’.<sup>383</sup> This includes all judicial and administrative proceedings that influence the child’s life.<sup>384</sup> Accordingly, the Committee highlights that a child has the right to be heard in matters concerning the separation of parents, care and custody proceedings, adoption, where a child has committed an offense, a child subject to abuse, or unaccompanied children.<sup>385</sup>

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<sup>377</sup> Hart (1992) 1, 12.  
<sup>378</sup> Hart (1992) 1, 13- 14.  
<sup>379</sup> Hart (1992) 1, 14.  
<sup>380</sup> Hart (1992) 1, 15.  
<sup>381</sup> Hart (1992) 1, 16.  
<sup>382</sup> Hart (1992) 1, 17.  
<sup>383</sup> CRC/C/GC/12 2009 8 - 9.  
<sup>384</sup> CRC/C/GC/12 2009 9.  
<sup>385</sup> CRC/C/GC/12 2009 9.



Additionally, that they have the right to be heard in administrative proceedings that include discussion on the child's education, health, environment, living condition, or protection.<sup>386</sup>

Taking into account the imperatives of the CRC, section 55 of the Children's Act s provides for assignment of legal representation in Children's Court proceedings. This occurs when the presiding officer believes that it would be in the best interest of the child to be legally represented.<sup>387</sup> If the presiding officer believes that a legal representative should be assigned, and where the child is not represented, then they will refer the matter to the Legal Aid Board in terms of section 2 of the Legal Aid Act.<sup>388</sup> This right only pertains to Children's Court proceedings and not to High Court matters involving civil matters such as divorce matters.<sup>389</sup> The right under section 55, is enforceable in Children's Court proceedings. Matters that are dealt with in the Children's Court include care and protection hearings and also care and contact applications under section 61(1) of the Children's Act. This section places a clear duty on a presiding officer to allow the child to express his or her views and preferences where the child is of such an age, maturity, and stage of development to participate in the proceedings and if the child chooses to do so.<sup>390</sup> The presiding officer is to determine if the child can participate and if not must record the reasons why the child cannot participate.<sup>391</sup>

Section 29(6) of the Children's Act read with section 55, authorises that a judge in the High Court may grant an order for the appointment of a legal representative for a child in matters brought before the court, such as divorce matters dealing with the parental responsibilities in respect of children or variation of a custody order. Furthermore, the court can order the parents of the child to pay the legal costs or order that a legal representative is appointed by the State only when substantial injustice would otherwise occur.<sup>392</sup>

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<sup>386</sup> CRC/C/GC/12 2009 9.

<sup>387</sup> Children's Act 38 of 2005. See also Boezaart 2018 2-23

<sup>388</sup> Children's Act 38 of 2005. See also Legal Aid Act 22 of 1969.

<sup>389</sup> Guidelines for legal representatives of children in civil matters 2016 7 – 8.

<sup>390</sup> Du Toit (2017)114.

<sup>391</sup> Du Toit (2017)114.

<sup>392</sup> Children's Act 38 of 2005. See also Guidelines for legal representatives of children in civil matters 2016 8.





There are also other provisions of the Children's Act that promote child participation in matters that would affect them. These include. section 31 of the Act obliges any holder of parental responsibilities and rights to consider the views and wishes of the child when making any decision:

- '(a) whether the child may marry, the adoption of the child, the removal or departure of the child from South Africa, obtaining a passport for the child and the alienation or encumbrance of immovable property which belongs to the child;
- (b) [in matters] affecting the contact between the child and a co-holder of parental responsibilities and rights;
- (c) regarding the assignment of a testamentary guardian or caregiver under section 27; or
- (d) [ in instances] which [are] likely to significantly change or impact the child's living conditions, education, health, personal relations with the child's parents or family members, or generally the child's wellbeing.'<sup>393</sup>

In the *AB v Pridwin Preparatory School* Khampepe J focused her judgment on the importance of child participation in matters affecting the child, in their school career where the court has to determine the best interest of the child. It was held that the views of the child should always be considered with weight being given to the views in accordance with the age and maturity of the child.<sup>394</sup> In this case, the contract between which the parent and the school had entered when the 2 boys were admitted at Pridwin Preparatory School, was terminated due to the numerous reckless acts of the boy's father.<sup>395</sup> Such termination resulted in the boys aged 6 years and 10 years being removed from the school. It was held that the termination of the parent contract between the children and the school not only had an impact on the parents but also that the children's wellbeing was of great importance.<sup>396</sup> In contrast, the court *a quo* in this matter focussed more on the procedural fairness of the termination of the contract and overlooked the impact the

<sup>393</sup> Section 31(1)(a), (b) & 18(3) of the Children's Act 38 of 2008. See also Du Toit (2017) 114.

<sup>394</sup> *A B v Pridwin Preparatory School* 2020 (9) BCLR 1029 (CC) para 232.

<sup>395</sup> *A B v Pridwin Preparatory School* para 221.

<sup>396</sup> *A B v Pridwin Preparatory School* para 223.



outcome would have on the children.<sup>397</sup> Khampepe J focused on the interest that when a decision is heard that would affect the child, the child's views should be taken into consideration and participation should be promoted in this instance. In promoting this, it could be said that she believed more in what is incorporated in section 10 of the Children's Act.

Du Toit stated that 'a decision that would affect a child would be where the child has to relocate and move to another city in the republic or another country'.<sup>398</sup> Additionally, Section 233(1)(c) confirms that a child above the age of 10 must consent to his or her adoption, this could be seen as participation.<sup>399</sup> Du Toit added that 'if a child is below the age of 10 but understands the implication of adoption, then he or she must also consent to the adoption'.<sup>400</sup>

According to section 279 of the Children's Act, subject to the provisions of section 55, a child must always be assigned a legal representative in applications concerning the Hague Convention on Civil Aspects of International Child Abduction.

The Guidelines drafted by the Centre for Child Law in partnership with Leal Aid South Africa, observe that 'there is also an ongoing practice in the High Court to appoint a legal representative for a child in Hague Abduction matters where an application for the return of the child is launched'.<sup>401</sup>

#### **4 3 Aspects of child participation and when the right is to be enforced.**

Child participation rights symbolise the separate personhood of the child and the need to take the views expressed by the child seriously.<sup>402</sup> The rights under the Act are important as they give children a platform to express and engage in matters that would impact their wellbeing. According to Du Toit, 'the right to participate, and therefore the choice, belongs

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<sup>397</sup> *A B v Pridwin Preparatory School* para 220.

<sup>398</sup> *HG v CG* 2010 (3) SA 352 (ECP) 14. Du Toit (2017) 114.

<sup>399</sup> Children's Act 38 of 2008. See also Du Toit (2017) 115.

<sup>400</sup> Du Toit (2017) 115. See also Boezaart 20182-25

<sup>401</sup> Guidelines for legal representatives of children in civil matters 2016 8. See also *Central Authority v JW and HW* (Unreported case number 34008/2012, delivered on 6 May 2013)

<sup>402</sup> Moyo "Child Participation Under South African Law: Beyond the Convention on the Rights of the Child?" 2015 *South African Journal on Human Rights*, 173-184.



to the child and the duty is on the court to ensure that they are allowed to proceed if the child wishes to do so'.<sup>403</sup>

To this right there are two qualifiers contained in General Comment 12 to the CRC. These are that a child should be capable of forming a view and secondly that a child is to be heard in matters affecting them.<sup>404</sup> The courts have to assess the capacity of the child to form a self-directed opinion and must also determine how much weight should be given to the views of the child.<sup>405</sup> Additionally, although there has been a misunderstanding, such as in the *Van Niekerk* case, on the execution of section 28(1)(h) of the Constitution. Du Toit assessed section 28(1)(h) that does substantial injustice qualifies the whole section or only the part where it is funded by the State.<sup>406</sup> In her observation, it appears that the right arises automatically in that a child has a right to a legal representative of his or her own choice. It is apparent that the part in section 28(1)(h) that deals with the substantial injustice test is when the right would be awarded through Legal Aid (State-funded).<sup>407</sup>

Child participation is made up of numerous important concepts. These will be analysed below.

### **4 3 1 The right to express views freely.**

In terms of the CRC, States Parties have a strict duty to include children who are willing to participate in matters that affect them. Article 12 of this instrument obliges states that have ratified it to guarantee that children who wish to express their views have the right to do so without any form of coercion.<sup>408</sup> General Comment 12 to the CRC defines 'freely to mean without duress or pressure,' voluntarily by the choice of the child.<sup>409</sup> The right provided by the CRC amounts to a choice for children to express their views or not. It is an obligation on States Parties to protect and uphold this right by giving the children a

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<sup>403</sup> Du Toit (2017)115.

<sup>404</sup> CRC/C/GC/12 2009 9 - 10.

<sup>405</sup> C/GC/12 2009 6. See also Du Toit in Boezaart (2017) 114.

<sup>406</sup> Du Toit (2017) 118.

<sup>407</sup> Du Toit (2017) 118.

<sup>408</sup> Bessner "The Voice of the Child in Divorce, Custody and Access Proceedings" 2002 *Report commissioned by the Department of Justice Canada* 1, 7. See also Moyo (2015) 173, 175.

<sup>409</sup> CRC/C/GC/12 2009 10.



platform and an opportunity to participate in matters affecting them. If a child's views are expressed through a representative, the representative must make sure that the views of the child are not influenced by third parties but rather should be conveyed correctly to the person responsible for deciding the matter. The views of the child should be expressed by the child openly and freely. According to Wasak,

'freedom of expression imposes a duty on the authorities to provide and develop the conditions for the free exercise of this right, whether in terms of competence, professional ethics and appropriate places for the child to be heard'.<sup>410</sup>

The legal representative must present the views and interests of the child and not their own opinions as though they belonged to their client. Such representation must be facilitative of the child expressing him or herself. In that, the legal representative must not put forward their views in place of the child. Moyo remarked that it is perhaps a downfall of the Children's Act that it does not tie the right to participate and freedom of expression together because it creates the danger that children may 'become mouthpieces of others'.<sup>411</sup> The inclusion of the right to freedom of expression in the Constitution, however, is potentially redemptive in this instance.<sup>412</sup> According to Barratt a 'child's competence to form and express a view may depend on the procedural participation opportunities provided'.<sup>413</sup> 'The available procedural participation could enhance or inhibit the child's ability to form and express their views'.<sup>414</sup> It is important that before the proceedings commence children are informed of this right to participate in any proceeding, whether Children Court proceedings or High Court civil matters. The children concerned must be given suitable information around the method of adjudication and be informed about what to expect.<sup>415</sup>

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<sup>410</sup> Washak 'Payoffs and Pitfalls of Listening to Children' (2003) 52 Family Relations 373, 375.

<sup>411</sup> Moyo (2015) 175.

<sup>412</sup> Section 16 of the Constitution.

<sup>413</sup> Barratt, "The Best Interest of the Child -Where Is the Child's Voice?", in S. Burman (Ed.), *The Fate of the Child: Legal Decisions on Children in the New South Africa*, Cape Town, Juta & Co. Ltd. 2003:153.

<sup>414</sup> Cleophas & Assim 2015 *EUR. J.L. REFORM* 294, 303.

<sup>415</sup> Cashmore & Parkinson, 'What Responsibility Do Courts Have to Hear Children's Voices?' 2007 *International Journal of Children's Rights* 5.



### **4 3 2 Evolving capacity influences child participation.**

Moyo emphasised that the concept of ‘age, maturity, and stage of development’ of children in South African describes the notion of evolving capacity.<sup>416</sup> According to him, ‘this phrase justifies autonomous decision-making by the child provided the child has competencies to decide.’<sup>417</sup> General Comment 12 states that ‘all children capable of self-expression, regardless of their age, should be given the platform to air their views through verbal and non-verbal means’.<sup>418</sup> It does not place a lower age limit upon which children can express their views in matters that affect them. Moyo elaborated further to say,

‘the child’s preference should be given systematic pre-eminence, but that such views should be considered in light of the nature of the problem and the child’s developing maturity’.<sup>419</sup>

The CRC and Children’s Act have developed an ‘individualized approach’ in distinguishing a child’s capacity, meaning that the Children’s Act has focused on the child’s ‘stage of development’.<sup>420</sup> According to Moyo, the incorporation of this phrase may have been done in light of the common law constructs of ‘infancy, childhood, and adolescence.’<sup>421</sup> He states that the most notable shortcoming of the Children’s Act’s section 10 is that it only provides that ‘children who are of such an age, maturity and stage of development as to be able to participate are entitled to participate’.<sup>422</sup> In the CRC the age and maturity are only considered when determining how much weight should be placed on the child’s views. This suggests that the child’s stage of development is not a primary consideration.

### **4 3 3 Methods of child participation.**

A child may participate directly or through a representative.

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<sup>416</sup> Moyo (2015) *South African Journal on Human Rights* 173, 175.

<sup>417</sup> Moyo (2015) *South African Journal on Human Rights* 173, 175.

<sup>418</sup> CRC/C/GC/12 20 July 7. See also Moyo (2015) *South African Journal on Human Rights* 173, 175.

<sup>419</sup> Moyo (2015) *South African Journal on Human Rights* 173, 176.

<sup>420</sup> Moyo (2015) *South African Journal on Human Rights* 173, 176.

<sup>421</sup> Moyo (2015) *South African Journal on Human Rights* 173, 176.

<sup>422</sup> Moyo (2015) *South African Journal on Human Rights* 173, 176.



‘Depending on the nature of the proceedings and the child’s level of maturity, the child may decide to be heard through a representative who can be a parent, lawyer, social worker or another person of their choice’.<sup>423</sup>

The type of participation chosen should be determined by the child personally or by the court. This must be done by evaluating the circumstances and the maturity of the child. This is seen in section 28(1)(h) of the Constitution, and sections 10, 29(6), 54, and 55 of the Children’s Act. Together these provisions establish a child’s right to legal representation as a form of participation as envisaged by Article 12 of the CRC. According to Friedman, Pantazis, and Skelton, section 28(1)(h) ‘provides a platform for children to be directly involved in civil litigation and for legal representatives to place the views of the children before the court.’<sup>424</sup> Although the upside of this section 28(1)(h) is that it does not limit a child who is unable to form their views or opinions, but rather should a child want a legal representative appointed by the State, at State expense, the test substantial injustice should be satisfied. This is the case whether through the court’s assessment or the child personally requesting such assistance from Legal Aid. Moyo confirmed that ‘the role played by the appointed legal representative depends on the nature of the proceedings and the age, maturity, and stage of development of the child’.<sup>425</sup>

#### **4 4 Conclusion.**

This chapter has unpacked how the right to legal representation has developed in South Africa, with the stem of this right coming from Article 12 of the CRC. The South African government has successfully incorporated the right for a child to participate in the legislation that governs the country.

A child’s competence to form a view is greatly affected by the type of opportunities they are participating in, where such advances the child’s self-confidence and capacity to form

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<sup>423</sup> Davidson “The Child’s Right to be Heard and Represented” in CP Cohen & H Davidson (eds) *Children’s Rights in America: UN Convention on the Rights of the Child Compared with United States Law* (1990) 151. See also Moyo (2015) *South African Journal on Human Rights* 173, 177.

<sup>424</sup> Friedman, Pantazis & Skelton “Children’s Rights” in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (RS1 07-08) 47-37.

<sup>425</sup> Moyo (2015) *South African Journal on Human Rights* 173, 178.



clear and concise views. Children should be informed of the method of participating available to them in matters that affect them.

In answering the legal questions outlined in the previous chapters, it appears that a child having legal representation in matters affecting the child could be seen as a form of participation. In addition, the child has an automatic right to a legal representative in civil matters affecting them, although this should be read with section 10 qualifies which include that the child should be of such an age, stage of development, and maturity. The views and opinions of the child are expressed through the representative and put to the court to determine the precise best interests of the child.

Participation should not be seen unilaterally. As highlighted by Moyo,

‘genuine participation takes place, not in the Constitution or the relevant statutes, but in the families, communities, schools, hospitals, and courts in which children live, learn, seek treatment and appear to give evidence’.<sup>426</sup>

This shows that participation should be upheld in the child’s environment because many decisions to the child’s life are concluded by parents without considering the best interests of the child. Participation of a child should be initiated both inside and outside the courtroom

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<sup>426</sup> Moyo (2015) *South African Journal on Human Rights* 173, 184.



## CHAPTER 5: CONCLUSION AND RECOMMENDATION.

The right to legal representation for children in civil matters that concern them is a right that gives effect to a child's right to participate.<sup>427</sup> The right to participation is one of the four core principles that are contained in the CRC. General Comment 12 to the CRC sets out that for children to express themselves and to have the right to be heard demonstrates the child's right to participate.<sup>428</sup> The right to a legal representative as set forth in section 28(1)(h) of the Constitution should be read with international law and the Children's Act to give effect to this right and to properly interpret it. The right for a child to have a legal representative appointed to them in civil matters under section 28(1)(h) of the Constitution, should be read in the affirmative to promote children's engagement or participation in civil matters where decisions are made that concern them.

This chapter aims to look back and reflect on how the right under section 28(1)(h) should be understood and also how the right has developed in South Africa. This involves an evaluation of what is meant by the right to a legal representative appointed at state expense when substantive injustice would otherwise occur.

### 5 1 The development of the right in section 28 (1)(h) and the Children's Act.

The initial introduction of the right of legal representation for children in civil matters concerning them occurred before the ratification of the CRC. The right first appeared in section 6(4) of the Divorce Act 70 of 1979. Under this provision, a legal representative could be appointed for a child in divorce matters with the parent bearing the legal costs. According to Du Toit, this right was rarely if ever used.<sup>429</sup> After this right was inserted into the text of the Bill of Rights, done so with the influence of international law, the scope of its application began to develop.

The insertion of the right to legal representation in the Constitution has led the legislature to enact other statutes that promote children's right to legal representation in civil matters. Parts of the Child Care Act were enacted for this purpose but it never came into force.

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<sup>427</sup> Davidson (1990) 151. See also Du Toit (2017) 111.

<sup>428</sup> Du Toit (2017) 115.

<sup>429</sup> Du Toit (2017) 108.





These provisions indicated that a legal representative may be appointed in care proceedings, at any stage of the proceedings and that such an appointment could be provided at private or state expense should the commissioner see that it was in the best interest of the child.<sup>430</sup> Zaal commented on section 8A of the Child Care Act where he questioned when his right could be enforced by a child who may seek an appointment of a legal representative. He noted that it would lack meaning for a child to request a legal representative because the commissioner may reject the request.<sup>431</sup> Zaal pointed out that children, under this Act, had to be provided legal representation in care proceedings, because, this way, they would receive proper representation and legal advice.<sup>432</sup>

Zaal and Skelton pointed out, that the right under section 28(1)(h) of the Constitution does not allow anyone other than a legal representative, who is legally trained and has the relevant experience to represent a child in civil proceedings concerning the child. In the *Soller No*, the first case which dealt with the issue of a separate legal representation for a child in civil proceedings, the court considered the distinct difference between the role and duties of a legal representative acting on behalf of the child and a family advocate who is a neutral person.<sup>433</sup> The court highlighted that a legal representative appointed under section 28(1)(h) stands squarely in the corner of the child.<sup>434</sup> Understanding the distinct role of a legal representative appointed for a child as opposed to other legal representatives that could be appointed to safeguard or protect the interest of the child, such as a curator *ad litem*, has shown a proper application of this right in the Constitution.<sup>435</sup>

Even though the right under section 28(1)(h) does not limit the right for a child to acquire legal representation at state expense, the need for a clear understanding as to which body of the state would be liable to appoint a legal representative was made clear in the Van Niekerk case. In this instance Judge De Villers erred by indicating that it was the

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<sup>430</sup> Section 8A Child Care Act 74 of 1983.

<sup>431</sup> Zaal 1997 SA LJ 334, 336.

<sup>432</sup> Zaal 1997 S LJ 334, 344. This observation is also supported by Zaal & Skelton 1998. SAJHR 539, 542.

<sup>433</sup> *Soller NO v G and Another para 20 & 21.*

<sup>434</sup> *Soller NO v G and Another para 27.*

<sup>435</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk para 29.*



State Attorney who ought to take up the cudgels and represent the children.<sup>436</sup> Du Toit and Bekink modified this approach to emphasise that the exact body to appoint a legal representative for a child would be Legal Aid, which provides legal services to people who cannot afford legal costs.<sup>437</sup> Legal Aid provides services as it deems fit and is responsible for determining if whether substantial injustice would otherwise result should a legal representative not be appointed. Legal Aid may appoint a legal representative for a child or anyone who approaches for their service in terms of s 4 of the Legal Aid Act, without acquiring permission from the child's guardian or parent.<sup>438</sup> Regarding Article 12 of the CRC, Du Toit stated that a legal representative appointed for a child could be seen as a form of child participation in matters affecting them.<sup>439</sup> Section 10 of the Children's Act- the right to participate- in one of the important child rights. The right to participation can be revealed in numerous ways through examination of the Children's Act, such as the child's right to express themselves and for them to be heard, their views and opinions been taken seriously, and to be legally represented. In short, these rights go back to the provisions of Article 12. The Children's Act provides for child participation and legal representation.<sup>440</sup> *Locus standi* is created in the Children's Act for children to be assisted in bringing a matter before a court.<sup>441</sup> This particular kind of assistance would be through a legal representative who has been approached by the child individually, with the support of their parent/parents, or assigned by the state.

The right to legal representation of children in civil matters has not only developed in its interpretation but also in circumstances and situations where it could be enforced. It started as being a right in divorce matters and evolved into many more types of civil matters that can affect a child's life. In giving effect to the CRC the approach that the court has taken to this right is that it includes all matters-judicial or administrative-such as school settings as evident in the *Hoërskool Fochville* case<sup>442</sup>.

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<sup>436</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para para 5. See also Du Toit (2017) 123.

<sup>437</sup> Du Toit (2017) 123. See also Bekink and Bekink 2009 *Speculum Juris* 94.

<sup>438</sup> *Another* 2009 (2) SA 262 (D) para 4.

<sup>439</sup> Du Toit (2017) 124.

<sup>440</sup> Section 14, 54,55 &279 of the Children's Act 38 of 2005.

<sup>441</sup> Section 14 of the Children's Act 38 of 2005.

<sup>442</sup> *Centre for Child Law v Governing Body of Hoërskool Fochville* para 23.



## **5 2 Understanding the right for a child to be awarded legal representation in terms of section 28(1)(h) with international law.**

Even though participation is not articulated in Article 12 of the CRC, according to General Comment 12 to this instrument, the right to legal representation could be conceived as participation as the meaning of the word has advanced.<sup>443</sup> Expression of a child's views in matters that would affect them, whether it be directly or indirectly through a representative is a form of participation. Under the UNCRC, the right to participate is given to children who can form their views. The right to express those views and the weight accorded to them shall be granted according to age and maturity.<sup>444</sup> In terms of the ACRWC, a child who is capable of communicating their view shall be granted the right to express that view. This instrument does not say anything about the age and maturity of the child.<sup>445</sup> As considered by Cleophas & Usang, section 10 of the Children's Act is more liberal than the international instruments as the only consideration is the age, maturity, and stage of development of the child.<sup>446</sup>

As Cleophas and Assism stressed, the right to participation is a gateway to the right for a child to have a legal representative assigned to them. This is even though section 28(1)(h) applies to all children as does the Children's Act together with international law. These instruments recognise that the age, maturity, and a child capable of forming or communicating their views are necessary for participation.<sup>447</sup> There is a strong connection that section 28(1)(h) has with the rights under Article 12 of the CRC and Article 4 of the ACRWC, and when implemented these rights should be read together, to take into account the views of the child during the decision-making process in matters affecting them.<sup>448</sup>

## **5 3 Right to legal representation under section 28(1)(h).**

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<sup>443</sup> CRC/C/GC/12 20 2009 9.

<sup>444</sup> Article 12 of UNCRC.

<sup>445</sup> ACRWC. See also Cleophas & Assim 2015 *EUR. J.L. REFORM* 296.

<sup>446</sup> Cleophas & Assim 2015 *EUR. J.L. REFORM* 294, 296.

<sup>447</sup> Cleophas & Assim 2015 *EUR. J.L. REFORM* 294, 296.

<sup>448</sup> Cleophas & Assim 2015 *EUR. J.L. REFORM* 294, 299.



In considering if a legal representative should be appointed for a child, Du Toit stated that it is imperative that the court or the child's parents, should consider the nature of the proceedings and not the forum in which the proceeding would be held. This means that this right could be considered in matters such as divorce, care and contact, care and protection, and also adoption.<sup>449</sup> There have been difficulties in understanding the implementation and intended connotation of this right, where questions such as whether substantial injustice test applies to the whole right or only to the part where legal representation would be awarded at state expense.

A legal representative is not only considered where the court deems fit, but also when a child reaches out for assistance from a practitioner.<sup>450</sup> Just as Du Toit reiterated, South African law recognises that legal standing and capacity that affords a child to be assisted in bringing a matter before a court or to enforce certain children's rights.<sup>451</sup> Previous case law has made clear certain instances where a court may make an order for a child to have a separate legal representative and also as to how substantial injustice was considered. These instances include where the children are unaccompanied and have no legal assistance to help protect their interest,<sup>452</sup> the relief sought by either party that would influence the contact the child, or any other parent,<sup>453</sup> a conflict between the interest of the parent's and of the child, which may not always connect,<sup>454</sup> variation of the custody order.<sup>455</sup> conflicting parental interest and the need to hear the child's views would balance the interest,<sup>456</sup> complexity of the matter, allegations of abuse of the child, where a parent might conceal information from a court and separate representation from the parents<sup>457</sup>. These instances are not exhaustive and the applicability of section 28(1)(h) of the Constitution can be determined on a case-by-case basis. Separate legal representation

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<sup>449</sup> Du Toit (2017) 118.

<sup>450</sup> *Legal Aid Board V R and Another* para 4.

<sup>451</sup> Du Toit (2017) 127.

<sup>452</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 29.

<sup>453</sup> *R v M and Others* para 6.

<sup>454</sup> *R v M and Others* para 6. See also *Soller NO v G* para 9.

<sup>455</sup> *Soller NO v G* para 3.

<sup>456</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 5.

<sup>457</sup> *Centre for Child Law v The Governing Body of Hoërskool Fochville* para.



in these instances was not merely considered at the state expense, but rather if there was a need for the children to have legal representation in those matters.

As the right to legal representation for children progressed in its application, it became simple for the courts to implement the right and to promote this right in all matters that affect a child that came before them. One of the issues that were fixed during the developmental stage of the right was the issue regarding which state would be liable to appoint a legal representative for a child at state expense.<sup>458</sup> It was determined Legal Aid was the correct body of state to appoint a representative for a child.<sup>459</sup> Section 3(b) of the Legal Aid Act governs the Legal Aid Board to provide a legal representative for persons who cannot afford the legal cost, at state expense.<sup>460</sup> It appears that a child may also approach Legal Aid independently for assistance or could reach out to organisations that could help by referring them to Legal Aid.<sup>461</sup>

The correct application of the right is that the right to legal representation in civil matters stands on its own as a right. The opportunity to be afforded that right at state expenses is a separate aspect, but should not undermine the child's right to have legal representation.<sup>462</sup> The substantial injustice qualifier<sup>463</sup> to the right is relevant only when a legal representative is assigned at state expense.<sup>463</sup> Read with this right is section 14 of the Children's Act, which provides that a child could be assisted in bringing a matter before the court, with no constraint on how the child could bring the matter before the court or a manner in which the child could be assisted.<sup>464</sup>

Du Toit suggested that 'sometimes when the right to legal representation is commissioned by a parent, who pays the legal cost for the child, it could raise issues such as partiality on part of the legal representative appointed, to be in favour of such a parent'.<sup>465</sup> She emphasized that this 'could be contrary to the principle that a representative should be

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<sup>458</sup> *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* para 5.

<sup>459</sup> *Legal Aid Board v R and Another* para 23. See also Du Toit (2017) 123

<sup>460</sup> Section 3(b) & 4(1)(f) Legal Aid Act No. 39 of 2014.

<sup>461</sup> *Legal Aid Board v R* 274G–275F.

<sup>462</sup> Du Toit (2017) 126.

<sup>463</sup> Du Toit (2017) 126.

<sup>464</sup> *FB and Another v MB* paras 5 - 7. See also Du Toit (2017) 127.

<sup>465</sup> Du Toit (2017) 127.



neutral and for the child'.<sup>466</sup> Section 14 does not limit persons who could assist the child in the litigation processes.<sup>467</sup>

#### **5 4 Issues and recommendations to the right for a child to have a legal representative assigned to them.**

The issues associated with the right for a child to have a legal representation in matters affecting them include factors such as age, maturity, ability to form an opinion, ability to communicate those views without influence, and also the stage of development of the child.<sup>468</sup> This shows that our law should be read to give meaning to the international rules and statutes that influence the development of children's rights in the South African legal system. This goes further with the right having been interpreted in cases where the judge or presiding officer would give meaning, effect, and content to the right. In light of the problem questions posed in chapter 1, it would be recommended that the clarity and certainty of these issues be understood as follows:

The merging of two rights in section 28(1)(h) has caused great confusion- these being the right of a child to have a legal representative assigned to them or appointed for them and the right for a representative to be awarded at state expense should substantial injustice otherwise occur. As explained above, the right should not be read in a limited way to mean that a legal representation would only be awarded to children when substantial injustice would occur. It is relevant and important to say that, substantial injustice should only be considered by the Legal Aid Board, who has full discretion in appointing a legal representation for anyone according to their guidelines and the Legal Aid Act.<sup>469</sup> Not only is legal representation for children granted at state expense, but the implementation of this right can also be enforced regarding section 14 of the Children's Act, which allows children to have access to the courts with the assistance of adults or assigned representatives.<sup>470</sup> This clarification has made it easier for the right to be understood and broadly applied.

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<sup>466</sup> Du Toit (2017) 127.

<sup>467</sup> Du Toit (2017) 127.

<sup>468</sup> Article 12(2) UNCRC and Article 4 ACRWC.

<sup>469</sup> Du Toit (2017) 124.

<sup>470</sup> Children's Act 38 of 2005.



In the South African legal framework, the right to a legal representative which was first envisioned in terms of the Divorce Act has become more progressive and easier for implementation in a modern-day context. The content of the right has become easier to understand and apply in issues and situations that could affect a child. In giving context to the right, international law should be considered as well as previously executed case law. 'The -CRC and the ACRWC should be the primary reference on how this right should be read and executed'.<sup>471</sup> This means that child participation should be upheld just as in international instruments, by giving effect to the child's views and also allowing them to partake in all administrative and judicial matters affecting them.

Du Toit observed that the 'application of this right, in children's court matters, could be easily understood if presiding officers dealing with divorces or adoption proceedings had a set of guidelines to assist them in fairly and equally applying the section 55 right'.<sup>472</sup> The reason for this, according to Du Toit, is that:

'In section 55 a presiding officer has a full discretion to appoint a legal representative, and without any guidelines from statute this could pose problems where discrepancies would be created, meaning that some presiding officer may see a need to appoint a legal representative for a child and some presiding officer may not see the need'.<sup>473</sup>

In keeping with Du Toit's approach, guidelines would also make it easier for the application of this right to appoint a legal representative in Children's Court matters, and the application would be just and equal in most circumstances.

Children who are of age and maturity to participate and who are involved in a rancorous dispute where their interests are in contradiction to those of the adults involved should be informed about the right under section 28(1)(h) together with section 10 of the Children's Act. Most of the time when rights are not enforced or implemented, it is because people are not informed about those rights. The right of a child to have a legal representative in civil matters concerning them is not a well-known right and the enforcers of law must

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<sup>471</sup> KilKelly and Liefgaard 2019 *De Jure* 521, 523.

<sup>472</sup> Du Toit (2017) 128.

<sup>473</sup> Du Toit (2017) 128.



make such rights known to children who may want to participate in matters that affect them.

This thesis has discovered the right associated with child participation in matters affecting them- specifically- to have a legal representative appointed to present the views and opinions of the child in matters affecting them. In understanding this right, it was determined that there are two rights in section 28(1)(h) of the Constitution. These are that a child has an automatic right to a legal representative in matters affecting them and that they may also acquire such a legal representation at state expense when substantial injustice would otherwise occur. Many misconceptions and misunderstandings about this right occurred due to a lack of guidelines for presiding officers. The Constitution read with international law instruments has made clearer the correct way to interpret this right to give effect to a child rights culture in South Africa.

This thesis has attempted to unpack how the right to legal representation has developed in South Africa since the limited provisions of the Divorce Act by considering precedents that sought to give proper effect to this right. It also considered how international law has influenced this right as it exists in South Africa in terms of the child's right to be heard and for their views and opinions to be taken into account according to the twin criteria of age and maturity.

Suggestions have been posed in this dissertation as to how substantial injustice should be considered to give a broad meaning and application to the right, without undermining its implementation. This has been done through considering factors such as the right being granted at state expense. The South African government has met all the requirements under the ratified treaties to include children's rights, although giving effect to this right would mean that the decision-makers should inform children who are of such an age and maturity of this right to realise it fully.





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