

**EXPLORING THE IMPLICATION OF ARTICLE 12 OF THE  
UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD  
FOR LEGAL PRACTICE AND LEGAL PROCESS:  
THE CHILD'S RIGHT TO PARTICIPATE IN LEGAL PROCEEDINGS**

## **1 INTRODUCTION**

Article 12 of the United Nations Convention on the Rights of the Child<sup>1</sup> (1989)<sup>2</sup> obliges State Parties to ensure that a child has the right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.<sup>3</sup> For this purpose, the child could either participate and thus be heard directly or through a representative or an appropriate body.<sup>4</sup> Article 12 has been identified as one of the four core articles providing the Convention with a "soul",<sup>5</sup> since it recognises that the child's interests and the adult's interests may not always intersect, and that a need exists for separate representation of the child's views.<sup>6</sup> In divorce proceedings, for instance, we all too often see how the children's voices seem faint or even absolutely silent as the decisions regarding their future

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<sup>1</sup> Hereafter referred to as UNCRC.

<sup>2</sup> UN Doc A/44/49, adopted by the General Assembly of the United Nations on 20 November 1989 and ratified by South Africa on 16 June 1995.

<sup>3</sup> Art 12(1): "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." See Van Bueren "The international protection of family members' rights as the 21st century approaches" 1995 *Human Rights Quarterly* 732 742.

<sup>4</sup> Art 12(2): "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

<sup>5</sup> Sloth-Nielson "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 1995 *SAJHR* 401 410-411; Sloth-Nielsen and Van Heerden "New child care and protection legislation for South Africa? Lessons from Africa" 1997 *Stell LR* 261 273. De Villiers called it a "cornerstone": "The rights of children in international law: Guidelines for South Africa" 1993 *Stell LR* 289 298.

<sup>6</sup> Sloth-Nielsen and Van Heerden "Proposed amendments to the Child Care Act and Regulations in the context of constitutional and international law developments in South Africa" 1996 *SAJHR* 247 250.

become part of a package deal to secure a settlement or are torn apart in an acrimonious battle between parents seeking revenge to quench their own fury.<sup>7</sup>

## 2 ARTICLE 12 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Time constraints will not allow an in-depth analysis of the status of the United Nations Convention on the Rights of the Child or a detailed discussion of its content and cohesion with other articles of that Convention. A few remarks will suffice in order to throw some light on the South African Constitution<sup>8</sup> and recent case law in this regard.

On ratification of the Convention on the Rights of the Child the South African government assumed the obligation to give effect to that treaty's provisions in domestic law.<sup>9</sup> Once the Children's Bill<sup>10</sup> has been made part of our law, South Africa will have met this obligation.<sup>11</sup> In the meantime it can be argued that there is insufficient provision.<sup>12</sup> It has also been established that neither article 12 nor any other provision of the Convention on the Rights of the Child is self-executing.<sup>13</sup>

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<sup>7</sup> Zaal and Skelton "Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts" 1998 *SAJHR* 539 540. Also see *Van den Berg v Le Roux* 2003 3 All SA 599 (NC) 613 par 36 that "the child was knocked about between the parents like a football". It is believed that s 8A of the Child Care Act 74 of 1983, promulgated on 22 November 1996 in terms of the Child Care Amendment Act 96 of 1996, was an attempt to bring the Child Care Act in line with art 12 of the UNCRC: Zaal and Skelton 1998 *SAJHR* 541. However, s 8A was meant to provide children with legal representation in proceedings under the Child Care Act and this had only limited scope and furthermore it never came into operation. See also Sloth-Nielsen and Van Heerden 1996 *SAJHR* 649-651, 1997 *Stell LR* 362-363; Zaal 1997 *SALJ* 334 335-336.

<sup>8</sup> S 28(1)(h) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>9</sup> Dugard *International Law* (1994) 53.

<sup>10</sup> 70 of 2003 (reintroduced).

<sup>11</sup> S 10 read with ss 11(1)(h), 14, 55 and 61.

<sup>12</sup> Cf *infra* par 6 where subs 6(4) of the Divorce Act 70 of 1979 is being dealt with.

<sup>13</sup> Van der Vyver in Robinson *The Law of Children and Young Persons in South Africa* (1997) 318; Robinson and Ferreira "Die reg van die kind om gehoor te word: Enkele verkennende perspektiewe op die VN Konvensie oor die regte van die Kind (1989)" 2000 *De Jure* 54 58-67. South Africa follows a dualist system and s 231(4) of the Constitution provides that "[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation: but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic of South Africa unless it is inconsistent with the Constitution or an Act of Parliament": Sloth-Nielsen "Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child" 2002 *Int Journal of Children's Rights* (10) 137 153 n 8. Cf Van der Vyver in Robinson *The Law of Children and Young Persons in South Africa* 318 that this 'self-executing provision' can be ignored.

However, the Convention on the Rights of the Child enjoys a heightened status in the South African legal framework due to specific provisions of the Constitution itself:<sup>14</sup> A South African court, tribunal or forum “must consider international law” when interpreting the Bill of Rights.<sup>15</sup> Furthermore section 233 instructs every court to “prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.<sup>16</sup> The most powerful argument would be that the most important features of the Convention have been granted particular prominence in section 28 of the South African Constitution. Section 28<sup>17</sup> gives guarantees and specific rights to children and in the implementation of these rights the courts have frequently referred to the Convention on the Rights of the Child.<sup>18</sup> Although still a far cry from the direct participation envisaged in article 12, section 28(1)(h) states that a child has a right to legal representation in civil proceedings

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- <sup>14</sup> Sloth-Nielsen "Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child" 2002 *Int Journal of Children's Rights* 137 139.
- <sup>15</sup> S 39(1)(b). Also see s 39(2): “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” Seeing that the spirit, purport and objects of the Bill of Rights include principles common to international law such as equality, freedom and human dignity, it opens the door to consider international law in this way.
- <sup>16</sup> S 233.
- <sup>17</sup> S 28(1): Every child has the right -
- (a) to a name and a nationality from birth;
  - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) not to be required or permitted to perform work or provide services that -
    - (i) are inappropriate for a person of that child's age; or
    - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
  - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -
    - (i) kept separately from detained persons over the age of 18 years; and
    - (ii) treated in a manner and kept in conditions that take account of the child's age;
  - (h) to have a legal representative assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;
  - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
  - (2) A child's best interests are of paramount importance in every matter concerning the child.”
- <sup>18</sup> *S v Williams* 1995 3 SA 391 (CC); *Howells v S* 1999 2 All SA 233 (C); *Kirsch v Kirsch* 1999 4 SA 691 (C); *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC); *Jooste v Botha* 2000 2 BCLR 187 (SCA); *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) par 17; *Christian Education South Africa v Minister of Education* 2000 10 BCLR 105 (CC).

affecting him or her if substantial injustice would otherwise result. Furthermore the legal practitioner has to be assigned to the child by the state at state expense.<sup>19</sup>

Returning to article 12 it should be mentioned that this article emphasizes that children must be regarded as active subjects of rights - the bearers of fundamental human rights with views and feelings of their own.<sup>20</sup> There are two different ways in which children can be allowed, in the words of the Convention, to "express their views freely" in matters that affect them, namely by means of participation and representation. Participation would cover all the rules that allow the child to be heard directly, without intermediary. It includes rules that demand that children be consulted about their opinion, or which enable children to become parties to legal actions, so that they have the right to interact with the proceedings and/or demand a certain remedy.<sup>21</sup> Representation is used to indicate the rules that allow children to instruct solicitors, seek legal advice or have other kinds of adult representation in legal proceedings.<sup>22</sup>

Article 12 is clear on a number of interesting issues:

- It concerns a child who is "capable of forming his or her own views". No lower age limit is set on children's right to express their views freely.
- The child has the "right to express these views freely" implies that there are no boundaries or areas in which children's views have no place.
- The right is to be assured in relation to "all matters affecting the child". It should thus apply in all matters, even those that might not be specifically covered by the Convention, whenever those matters have a particular interest for the child or may affect his or her life.

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<sup>19</sup> It will be indicated below that until very recently there has been little precedent and no guidelines to determine the exact content of this right.

<sup>20</sup> Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (1998) 145 147-148.

<sup>21</sup> Edwards "Hearing the voice of the child: notes from the Scottish experience" in Davel (ed) *Children's Rights in a Transitional Society* 37 39.

<sup>22</sup> *Ibid.*

- The views of the child must be given “due weight in accordance with the age and maturity of the child”, which means that there is a positive obligation to listen to and take the views of children seriously.<sup>23</sup> In deciding how much weight should be given to a child’s view in any particular matter, the twin criteria of age and maturity must be considered. Once again the Convention rejects specific age barriers because age per se is not the criterion.
- Children should be heard in a very broad scope of decisions: “any judicial and administrative proceedings affecting the child”. There is an increasingly recognized need to adapt courts and other formal decision-making bodies to enable children to participate.<sup>24</sup> This could include innovations such as more informality in the physical design of courtrooms, the clothing of the judges and lawyers, separate waiting rooms, the video-taping of evidence and the special preparation of child witnesses.<sup>25</sup>
- States are left with discretion as to how the child’s views should be heard, but where procedural rules suggest that this be done through a representative or an appropriate body, the obligation is to transmit the views of the child. This principle should not be confused with the obligation in article 3 to ensure that the best interests of the child are a primary consideration in all actions concerning that child.<sup>26</sup>

### **3 ARTICLE 4 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD**

The African Charter on the Rights and Welfare of the Child<sup>27</sup> is perhaps a less well-known international treaty with mere regional application, but nevertheless a supra-

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<sup>23</sup> In accordance with the concept of the evolving capacities of the child, see also art 5 of the UNCRC.

<sup>24</sup> Zaal and Skelton 1998 *SAJHR* 543 *et seq.*

<sup>25</sup> The Committee on the Rights of the Child has emphasized that implementation of the general principles of the Convention, including art 12, “cannot be dependent upon budgetary resources”: Hogdkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* 152.

<sup>26</sup> Hogdkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* 151.

<sup>27</sup> OAU Doc CAB/LEG/24.9/49 (1990) and entered into force on 29 November 1999. The treaty came into operation after its ratification by the 15th member state, just before the 10th anniversary of the UNCRC, see Madotyeni “A Charter for Africa’s children: States must give

national document aimed at reconciling Western juristic thought and African traditional values.<sup>28</sup> Article 4(2) of the African Charter on the Rights and Welfare of the Child also entrenches the right of the child to be heard directly or through a representative.<sup>29</sup> Article 4(2) states that:

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

It should be noted that the right to be heard provided for in terms of the African Charter on the Rights and Welfare of the Child is more restricted than the similar right as endorsed by the Convention on the Rights of the Child:

- The African Children’s Charter only provides for the voice of the child to be heard in “all judicial or administrative proceedings” affecting the child. There is no counterpart for article 12(1) of the Convention in the African Children’s Charter where States have to assure that children express their own views “in all matters affecting the child”. The opportunity of hearing the child is therefore much more restricted in its scope.<sup>30</sup>
- The Charter states that a child will be heard “as a party to the proceedings”. This implies that a child has to be a party to given proceedings for him or her to be heard.<sup>31</sup>
- Article 12(2) of the Convention mentions a “representative” whereas article 4(2) of the African Children’s Charter requires an “impartial representative” through which the views of the child can be heard.

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meaning to treaty” April/May 2000 *ChildrenFIRST* 30. South Africa ratified the Charter on 7 July 2000.

<sup>28</sup> Davel “The African Charter on the rights and welfare of the child, family law and children’s rights” 2002 *De Jure* 281 282.

<sup>29</sup> Thompson “Africa’s Charter on children’s rights: A normative break with cultural traditionalism” 1992 *Int and Comp Law Quarterly* 432 435.

<sup>30</sup> Chirwa “The merits and demerits of the African Charter on the Rights and Welfare of the Child” 2002 *Int Jour of Children’s Rights* 157 161.

<sup>31</sup> *Ibid.*

- The only children whose voices will be heard in terms of the African Children's Charter are those "capable of communicating his/her views". This capability may relate to the child's age, but also to the level of education and articulateness of the child.<sup>32</sup>
- The Charter states that the views of the child must be taken into consideration "in accordance with the provisions of appropriate law". This is less favourable than giving "due weight in accordance with the age and maturity of the child".<sup>33</sup>
- In the African Charter on the Rights and Welfare of the Child the best interests principle<sup>34</sup> appears in the same article as the principle that the child's voice should be heard.<sup>35</sup> This could also relate to the more restricted application of the notion that children should have a separate voice.

#### **4 SECTION 28(1)(h) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 108 OF 1996**

Of particular importance to the right to be heard, is section 28(1)(h) which reads as follows:

"Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."

This subsection is an extension of the right of an accused person in criminal matters to legal representation at state expense if substantial injustice would otherwise result,<sup>36</sup> to cases of civil litigation affecting children. This potentially far-reaching

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<sup>32</sup> Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 214 221; Chirwa 2002 *Int Journal of Children's Rights* 161.

<sup>33</sup> Chirwa 2002 *Int Journal of Children's Rights* 161.

<sup>34</sup> Art 4(1).

<sup>35</sup> Art 4(2).

<sup>36</sup> S 35(3)(g) of the Constitution provides the right to legal representation in criminal matters and applies equality to children and adults: Bekink and Brand "Constitutional protection of

right is therefore applicable to a whole range of proceedings affecting children, including custody and access disputes in divorce cases.<sup>37</sup> It is furthermore available to *every* child and not limited to children capable of forming and expressing his or her own views.<sup>38</sup> In terms of section 28(1)(h) child participation will have to be accomplished by (legal) representation.

Although this provision has been on the statute books for nearly a decade, the nature and content of this right is still clouded with uncertainty and a torrent of questions challenge practitioners, the courts and academics alike.<sup>39</sup> The two main issues that need to be addressed are:

- What is the correct procedure relating to the assignment of a legal representative?
  - Which body should make the assignment, for instance, is it the State Attorney or the Legal Aid Board?
  - Can a legal representative be assigned by the High Court?
- What will constitute “substantial injustice”?
  - Who will decide whether “substantial injustice” will otherwise result?
  - According to which principles will this decision be made?

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children” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 169 193; De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 466.

<sup>37</sup> Davis, Cheadle and Haysom *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 275.

<sup>38</sup> Compare to art 12(1) of the UNCRC and 4(2) of the African Charter on the Rights and Welfare of the Child. Also note that the child must be assisted by a “legal practitioner” and not any other “representative” as was envisaged by the UNCRC and the African Children’s Charter: Kassan “The voice of the child in family law proceedings” 2003 *De Jure* 164 167.

<sup>39</sup> De Villiers indicated in 1993 that an infrastructure needs to be developed to ensure that children are afforded the opportunity to express their views: 1993 *Stell LR* 299. The Chief Litigator in the Centre for Child Law, adv Ann Skelton, wrote a letter to the Minister of Justice on 18 February 2004 posing some of these questions. The Centre was invited to a meeting during September 2004. This meeting was also attended by the Legal Aid Board and State Attorney. The Centre proposed guidelines on this issue and the matter is still being discussed. See also Sloth-Nielsen and Van Heerden 1996 *SAJHR* 264 that appropriate structures and mechanisms should be set up to ensure that children’s views are heard.

## 5 RECENT CASE LAW

The first reported case<sup>40</sup> that deals with the interpretation of section 28(1)(h) was *Soller v G*.<sup>41</sup> The facts of the *Soller* case concerned the custody of a fifteen-year-old boy, one K, who sought a variation of his custody order on the ground that he wanted custody to be awarded to his father. The application was initially brought in terms of section 28(1)(h) of the Constitution on his behalf by one S (the applicant), an attorney who turned out to have been struck from the roll.<sup>42</sup> The presiding judge, Satchwell, decided that although that attorney was obviously unsuitable to represent K, the matter did require the assignment of a legal representative under section 28(1)(h) of the Constitution.<sup>43</sup> She accordingly assigned an extremely well-reputed attorney<sup>44</sup> after she had contacted him telephonically and he had agreed to act as legal representative for the child on a *pro bono* basis.<sup>45</sup> The case revealed a family that has been exposed to unceasing litigation with resulting emotional distress, family animosity and expenditure of scarce resources.<sup>46</sup> K clearly expressed the wish to reside with his father and even ran away from home to demonstrate his determination in this regard. Unfortunately K suffered from parental alienation syndrome, the victim of his obsessive and manipulating father.<sup>47</sup> While establishing the best interests of a child, the child's express wish to live with a particular parent would normally only be a persuasive factor.<sup>48</sup> In the present case it became the determinate factor because the mother, despite her suitability as a role model, was incapable of enforcing the existing arrangements on K.<sup>49</sup> On the other hand, despite

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<sup>40</sup> An unreported case of the Cape Provincial Division, *Fitschen v Fitschen* case 9564/1995 (C), also involved an application brought in terms of section 28(1)(h) of the Constitution, but the application failed on the basis that substantial injustice would not result due to the fact that the children's views were taken account of in reports by the psychologist and the Family Advocate. Also see Kassan 2003 *De Jure* 170-171 on this case. An *obiter* remark was also made mentioning s 28(1)(h) in the judgment of *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) 201-202: Skweyiya AJ said that where there is a risk of substantial injustice to children a *court* is obliged to appoint a *curator ad litem* to represent the interests of children, and that this obligation follows from the provisions of s 28(1)(h). Note that this was the approach in *Ex parte Centre for Child Law* case no 34054/2003 (TPD) discussed below.

<sup>41</sup> 2003 5 SA 430 (WLD).

<sup>42</sup> See par 16 of the judgment for the reasons why the applicant was struck from the roll.

<sup>43</sup> Par 1-17.

<sup>44</sup> Par 18.

<sup>45</sup> Par 19.

<sup>46</sup> Par 11.

<sup>47</sup> Par 52.

<sup>48</sup> Par 55. See also *McCall v McCall* 1994 3 SA 201 (C).

<sup>49</sup> Par 58.

the father's unsuitability as a role model, there were obvious ties of love and affection between him and K.<sup>50</sup>

The Family Advocate recommended that K's wishes should be respected and that he should be permitted to live with his father rather than to be forced back into a home that he is not happy with.<sup>51</sup> The legal representative recommended that the child be put in the care of the father with immediate effect. He also suggested that the arrangement should be an interim one in order that it is possible to monitor the situation. He further recommended that arrangements be made for K to be counselled on a regular basis to ensure supervision or monitoring.<sup>52</sup> It is obvious from the order made by Satchwell J that she trusted and relied on the recommendation made by the child's legal representative: She left the child in the custody of the mother while allowing him to reside with the father in order to control the parenting of the father as far as possible.<sup>53</sup>

The *Soller* case also clarify the distinction between the respective roles and functions of the Family Advocate and a legal representative assigned in terms of section 28(1)(h).<sup>54</sup> Numerous articles<sup>55</sup> have been written on the role of the Office of the Family Advocate since its establishment in 1990 in terms of the Mediation in Certain Divorce Matters Act.<sup>56</sup> The office has three main functions. The first is to monitor all court documentation and settlement agreements to ensure that the agreements are *prima facie* in the best interests of the child. The second function

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<sup>50</sup> Par 62.

<sup>51</sup> Par 70.

<sup>52</sup> Par 71.

<sup>53</sup> Par 72 and compare par 75.

<sup>54</sup> Par 20.

<sup>55</sup> Van Zyl L "Whitehead v Whitehead: fair comment on the Family Advocate?" June 1994 *De Rebus* 469-470; Burman and McLennan "Providing for Children? The Family Advocate and the legal profession" 1996 *Acta Juridica* 69-81; Burman, Derman and Swanepoel "Only for the wealthy? Assessing the future for children of divorce" 2000 *SAJHR* 535; Van Zyl G J "The Family Advocate: 10 years later" 2000 *Obiter* 372-389; Kassan "The voice of the child in family proceedings" 2003 *De Jure* 164-179; Glasser "Taking children's rights seriously" 2002 *De Jure* 223-235, "Can the Family Advocate adequately safeguard our children's best interests?" 2002 *THRHR* 74-86, "Custody on divorce: assessing the role of the Family Advocate" in Burman (ed) *The Fate of the Child* (2003) 108-121; Barratt "The child's right to be heard in custody and access determinations" 2002 *THRHR* 556 571-573, "The best interest of the child: where is the child's voice?" in Burman (ed) *The Fate of the Child* 145-157; Africa, Dawes, Swartz and Brandt "Criteria used by family counsellors in child custody cases: a psychological viewpoint" in Burman (ed) *The Fate of the Child* 122-144.

<sup>56</sup> 24 of 1987.

is to mediate between the parties.<sup>57</sup> Lastly, the office carries out full evaluations in cases where this is required, culminating in a report<sup>58</sup> which sets out the findings and recommendation to the court.<sup>59</sup> Satchwell J emphasizes the fact that the Family Advocate is *not* appointed to represent any party to a dispute, but rather required to be neutral and assist the court by considering all the relevant facts to make a balanced recommendation.<sup>60</sup> Furthermore, the legislature created section 28(1)(h) in the Constitution with full knowledge that the Office of the Family Advocate had been established nearly a decade ago and has been functioning in all High Court jurisdictions over that period of time.<sup>61</sup> Judge Satchwell reaches the following conclusion:<sup>62</sup>

“On this analysis, it would seem that the Family Advocate and the s 28 legal practitioner occupy dissimilar positions. The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child. This task is not without certain inbuilt limitation. The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child’s perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece.”

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<sup>57</sup> *Soller* par 22. Mediation is not defined in the Act, but is described by Van Zyl, a former Family Advocate, as being an alternative dispute resolution mechanism used by the Family Advocate to actively encourage the parties to participate in a discussion seeking a mutually acceptable solution in regard to matters pertaining to children: 2000 *Obiter* 372 377-378.

<sup>58</sup> *Soller* par 21. The Family Advocate can also appear in court when requested by the court or *mero motu* in cases where he or she deems it to be in the best interests of any child: s 4(3) of the Mediation in Certain Divorce Matters Act 24 of 1987. Cf *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T) 166.

<sup>59</sup> See *Van den Berg v Le Roux* 2003 3 All SA 599 (NC) 606-610 indicating that these functions and powers could be somewhat contradictory. Also compare *R v M* (initials is used to protect the identity of the minor involved) unreported case no 5493/2002 (D) par 16 where Govindasamy AJ found that there are many complex cases where the Office of the Family Advocate cannot contribute sufficiently. He reached the conclusion that the Family Advocate could not play an effective role in that particular case. However, the same Govindasamy AJ sat aside that judgment that was made on 27 February 2004 on 15 September 2004. The court can also choose not to follow the recommendations of the Family Advocate: *Whitehead v Whitehead* 1993 3 SA 72 (E).

<sup>60</sup> Par 23 and 24.

<sup>61</sup> Par 25.

<sup>62</sup> Par 27.

Applied to the facts of the present case it meant the following:<sup>63</sup>

“[T]he legal practitioner assigned to K in terms of s 28, ably and concisely summarised his role as follows: Firstly, it is to ‘put K’s case in respect of his wishes to stay with his dad’. Secondly, ‘it is to make sure that he is under no duress of any sort. He is, after all a minor under disability.’ Thirdly, ‘there are consequences I can foresee which may not be foreseen by the child and I should report on these and alert the Court to them’.”

In another attempt to establish the content of children’s rights to legal representation in terms of section 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 twelve and thirteen during December 2003.<sup>64</sup> This arose from an application by the father of the children for his access rights to be reinstated by the High Court after the operation of the rights he obtained through the divorce agreement was interrupted by the mother of the children obtaining a domestic violence interdict. During the course of the application for reinstatement of access the children frequently expressed their wish to speak to the judge or to the court but this was never granted to them. Furthermore, the girls complained that the family advocate, who was requested by their father to investigate, had only spent ten minutes with each of them and had not taken cognisance of their very strong views about their father’s behaviour. In spite of this the final order required the girls as well as their parents to go for counselling with a view to phasing in contact with their father. The children refused to go for counselling.

The case presented some procedural difficulties. Both the girls and their mother, as custodian parent, were at risk of being in contempt of court. The complexity of the case validated the assistance of an experienced High Court litigator and therefore an agreement was reached securing the services of senior counsel on a *pro bono* basis.

There were two possible forms in which legal representation for the children could be secured; firstly by means of the common law option, that is appointing a

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<sup>63</sup> Par 28.

<sup>64</sup> More information on this case is available on the Centre for Child Law website: < [www.childlawsa.com](http://www.childlawsa.com) >.

*curator ad litem*, or secondly, the assignment of a legal representative in terms of section 28(1)(h) of the Constitution.

In South African law there are four established grounds for the appointment of a *curator ad litem* for a child,<sup>65</sup> namely where -

- the minor is without parents or a guardian; or
- a parent or guardian cannot be found or is not available (eg due to an accident or absence, etc); or
- the interests of the minor are in conflict with those of the parent or guardian, or there is a possibility of such a conflict; or
- the parent or guardian unreasonably refuses to assist the minor.

The only one of these grounds that could have been applicable to the facts of *Ex parte Centre for Child Law* was the third one, namely that the interests of the children might possibly be in conflict with those of the mother because she as custodian parent was expected to abide by the order to take the children for counselling and their refusal could cause her to be in contempt of court.<sup>66</sup>

A stronger basis seemed to be to request assignment of a legal representative in terms of section 28(1)(h) of the Constitution but it was eventually decided to leave the options open, requesting appointment of either a *curator ad litem* or a legal representative.<sup>67</sup> The judge before whom the matter appeared in unopposed motion court agreed that the children needed legal assistance, but favoured the assignment of a legal representative in terms of section 28(1)(h) of the

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<sup>65</sup> De Groot 1 4 1, 1 8 4; Voet 5 1 11; Van Leeuwen *CF* 2 1 10 8; Spiro *Law of Parent and Child* (1985) 200; Van Heerden, Cockrell and Keightley *Boberg's Law of Persons and the Family* (1999) 902; Davel *Introduction to Child Law in South Africa* 29.

<sup>66</sup> This ground for appointing a *curator ad litem* was utilized in *Wolman v Wolman* 1963 2 SA 452 (A) 459 but in that case a father was representing his son in an application to have his father's (the grandfather's) will set aside. The potential conflict of interests arose from the fact that if the will was to be set aside the minor's rights would obviously be prejudiced. The potential conflict in *Ex parte Centre for Child Law* was not as clear.

<sup>67</sup> The application was brought in the name of the Centre for Child Law and the attorneys were Lawyers for Human Rights: case no 34054/2003 (TPD).

Constitution.<sup>68</sup> However, he raised a technical point related to the wording of the section, namely that the legal representative has to be assigned by the state. The judge stood the matter down and the Centre for Child Law approached both the Legal Aid Board and the State Attorney on behalf of the children requesting such assignment. The State Attorney agreed to assign the senior counsel identified by the Centre for Child Law in terms of section 28(1)(h) and that assignment was noted by Van der Merwe J in unopposed motion court on 10 February 2004.<sup>69</sup> Although the application was successful it unfortunately does not establish a viable model for the future, because the State Attorney, unlike the Legal Aid Board, is not readily accessible to the public.

## 6 SUBSTANTIAL INJUSTICE

Another question that arises, is the issue of the test built into section 28(1)(h) which limits a child's right to legal representation to those cases in which "substantial injustice" would otherwise occur. In *Soller*, Satchwell J found that any decision made by the court in divorce proceedings would impact heavily on the child. She said that "the civil proceedings concerned are of crucial importance to his current life and future developments".<sup>70</sup> At this stage it is also important to note that section 6(4) of the Divorce Act<sup>71</sup> provides for legal representation for children in divorce proceedings. Section 6(4) states the following:

"For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation."

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<sup>68</sup> De Villiers J was of the view that the case was not an appropriate one in which to appoint a *curator ad litem*, because the mother of the children was available and willing to assist them. He had no desire to usurp her functions and was not persuaded by arguments regarding a potential conflict of interests. See fn 66 above.

<sup>69</sup> The Legal Aid Board declined to assign counsel because the Centre was not seeking an assignment at state expense. They did indicate, however, that in other circumstances they may have been prepared to do so. See the unreported judgment in *R v M* case no 54932/2002 (DCLD) par 49 where the Legal Aid Board was willing to cooperate in a similar matter but the Minister of Justice and Constitutional Development was in the end directed to take the necessary steps to ensure the assignment. Also note that the judgment has been set aside: fn 59 above.

<sup>70</sup> Par 10 435D.

<sup>71</sup> 70 of 1979.

The courts very seldom use this power to appoint a legal representative,<sup>72</sup> probably due to the expense that would result to the parties.<sup>73</sup> The conclusion could thus be drawn that section 6(4) was meant for the children of the wealthy, seeing that the Constitution provides for representation at state expense.<sup>74</sup> Kassan's view that section 6(4) incorporates the Convention into municipal law except that it is not done at state expense and further fails to provide guidelines regarding the "substantial injustice" test can unfortunately not be endorsed.<sup>75</sup> Section 6(4), as opposed to article 12, leaves court with a discretion when to and when not to appoint legal representation. The Convention and the Constitution provide it to children as of right.

The *Soller* and *Ex parte Centre for Child Law* cases indicate that legal representation in terms of section 28(1)(h) is called for if the child feels that his or her opinion has not been properly considered by the Family Advocate, or if the Family Advocate makes a recommendation which is contrary to the wishes of the child. It has also been suggested that the level of acrimony between the parents<sup>76</sup> or a conflict of interests between the child and at least one of the parents<sup>77</sup> could indicate the appropriateness of legal representation in terms of section 28(1)(h). The complexity of a case and/or a plethora of expert witnesses could also indicate that legal representation is appropriate.<sup>78</sup> Finally, it has been suggested that the injustice has to result in the erosion or negation of a child's right that cannot be countenanced by one's sense of justice.<sup>79</sup> The wording of section 28(1)(h) required that substantial injustice *would* result, but it could be impossible to decide unequivocally that substantial injustice *would* result. Therefore, in order to give the right a meaningful content it could be proper in making the decision to find that in the absence of legal representation substantial injustice *would probably* result.<sup>80</sup>

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<sup>72</sup> Kassan reports that the instances where this section is mostly used, is when a curator is appointed on behalf of a child to look after the child's interests where the child was a beneficiary to a trust or when paternity was at issue: 2003 *De Jure* 170.

<sup>73</sup> Palmer "The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985-1995" in Keightley (ed) *Children's Rights* (1996) 98 112.

<sup>74</sup> Kassan 2003 *De Jure* 168.

<sup>75</sup> 2003 *De Jure* 171.

<sup>76</sup> Kassan 2003 *De Jure* 178.

<sup>77</sup> *Ibid.*

<sup>78</sup> Par 6 and 16.

<sup>79</sup> Par 14.

<sup>80</sup> Par 23.

## 7 CONCLUSION

The wording of section 28(1)(h) of the Constitution unfortunately fails to separate the right for children to have legal representation in civil matters from the assignment of the right by the state and at state expense. In this regard it differs from the right to legal representation in criminal matters provided for in section 35 of the Constitution, which establishes firstly, the right to have legal representation and secondly to have a legal representative assigned by the state and at state expense.

In the *Soller* case Satchwell did not explain her rationale in assigning a legal practitioner from the bench. She presumably considered the involvement of the state unnecessary due to the fact that the selected legal practitioner had agreed to act *pro bono*. She appeared to have acted within the inherent powers of the High Court as the upper guardian of all minors and appointed the legal practitioner in much the same way that the court appoints *curators ad litem*.

In *Ex parte Centre for Child Law* the more cumbersome route had to be followed as a lawyer had to be asked to ask for a lawyer. In the end the children were entered as parties and their parents were ordered to pay their costs.<sup>81</sup> The children were thus given twenty days within which to file affidavits before the court.

It should also be possible for a child to apply directly to the Legal Aid Board for a legal representative to be appointed for that child in terms of section 28(1)(h). In these cases the child will not have the opportunity to choose any particular lawyer. It could also happen that neither of the parents of the child is willing for the child to bring such an application. This option also calls for enormous efforts in education and advocacy of the right of children to participate.

It still remains to be seen how the legal profession is going to manage this challenge. A judge is in a very strong position to assess whether substantial injustice would or would probably result and assign a legal practitioner to that child. Recent case law proves that legal practitioners, both attorneys and counsel, are in

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<sup>81</sup> This order granted on 22 June 2004 has been widely reported in the media as "ground-breaking".

the position to give guidance in the whole process. Only our combined effort will make children's voices be heard.