

# Seen and Heard? New Frontiers in Child Participation in Family Law Proceedings in South Africa

Julia Sloth-Nielsen\*

*Professor, Faculty of Law, University of the Western Cape\*\**

## 1 INTRODUCTION

Child participation is, to be blunt, somewhat of a fashion item on the agenda of children's rights programming currently. There are few policy initiatives or strategic projects in the children's rights field which do not include an element of child participation. These endeavours range from the tokenistic to the truly consultative, with a whole gamut of examples in between these two poles.<sup>1</sup> In the context of child participation in family law proceedings concerning children, there is arguably no room for tokenism or symbolic gestures, as the views of the child are sought precisely because they have the potential to materially affect the outcome of the decision at hand. Therefore, it can be deduced that in this sphere, child participation is more often than not of direct, immediate and long-term significance to the life and upbringing of the child concerned. Moreover, child participation in family law proceedings has become a topic of international interest amongst academics and practitioners alike, giving rise to a number of recent publications and ongoing research projects.<sup>2</sup>

As a principle which lies at the root of a rights-based approach, the participation of children in general in matters affecting them is enshrined in art 12 of the Convention on the Rights of the Child (hereafter "CRC"). This single article is alleged to have given the treaty a "soul" and to have distinguished the rights-based approach firmly from a welfarist or protectionist approach.<sup>3</sup> Another way

---

\* BA LLB (Stel) LLM (Cape Town) LLD (Western Cape).

\*\* The author would like to thank Benyam Mezmur, Nicola Taylor and Belinda van Heerden for their insightful comments on an earlier draft of this article.

1 For a general overview, see Franks and Ehlers "Child Participation" in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008).

2 See, for example, Parkinson and Cashmore *Child Participation in Family Law Proceedings* (2008). A multi-country study on child participation in family law proceedings is currently being coordinated by a study group under the auspices of Childwatch International.

3 See in general Kassan "Children's Rights to Legal Representation in Divorce Proceedings: Proposed Guidelines Concerning when a Section 28(1)(h) Legal Practitioner Might be Deemed Necessary or Appropriate" in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 227; Skelton "Special Assignment: Interpreting the Right to Legal Representation in terms of Section 28(1)(h) of the Constitution of South Africa" in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 217; Sloth-Nielsen "Realising children's rights to legal representation and to be heard in judicial proceedings: an update" 2008 *SAJHR* 495.

of looking at the principle lies in its bottom-up advocacy of respect for the views of the child, who, as a central actor in his or her own life, is presumed to have a perspective that is material to his or her interests. This principle is opposed to a top-down approach, which proceeds from the premise that adults know what is right or better for the child's short and/or long-term interests.<sup>4</sup>

At the outset it must be noted that art 12 does not require the voice of the child to be heard directly in family law proceedings: the explicit reference is to the expression of the child's views "either directly or through a representative or an appropriate body".<sup>5</sup> The manner of implementation of this provision is left for domestic law to regulate.<sup>6</sup>

This article examines the principle of child participation in a legal context, focusing first on the international and constitutional law framework, and thereafter on the principle as it has permeated the South African Children's Act.<sup>7</sup> Next, a brief examination of the application of the principle in practice and case law is provided, with the focus on family law and related proceedings. The concluding section of the article assesses the new challenges and potential changes posed by the increasing acceptance of the principle that children be allowed to express their views in matters affecting their interests in family law proceedings.

## 2 INTERNATIONAL LAW FRAMEWORK

As indicated above, the basis for child participation in matters affecting the child is set out in art 12 of the CRC, an international law provision which is not only without precedent in any other international law text, but also is regarded as one of the four cardinal principles of the CRC around which all other rights are to be interpreted.<sup>8</sup> Article 12, and indeed the CRC as a whole, is silent on the term "child participation". Instead, the text in question refers to the "right of the child 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>9</sup> Whereas child participation as a general concept constitutes a broad

---

4 For an insightful discussion of the interplay between the short-term and long-term "best interests of the child", see Freeman "Article 3: The Best Interests of the Child" in Alen *et al* (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2007).

5 Article 4(2) of the African Charter on the Rights and Welfare of the Child (1990) refers with more specificity to an "impartial representative". See Davel "General Principles" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 2-14 for a discussion of the distinction between the wording of the CRC provision and its African Charter equivalent.

6 Note too, for European jurisdictions, the binding art 11(2) of the Brussels Regulation Coordinating European Approaches to Family Law (reg (EC) no 2201/2003) which requires an opportunity for the child's views to be heard. Again, the regulation does not specify the manner in which this must occur under national law. See in general Boele-Woelki *et al* *Principles of European Family Law Regarding Parental Responsibility* (2007) 49-55.

7 Act 38 of 2005.

8 The other three being the right against discrimination (art 2), the supremacy of the best interests of the child principle (art 3), and the right to life, survival and development (art 6). See Sloth-Nielsen "Ratification of the UN Convention on the Rights of the Child (1989): some implications for South Africa" 1995 *SAJHR* 401.

9 Children's participation rights are a "cluster of rights" of which "the core seems to consist of the respect for the views of the child (article 12), the right to freedom of expression (article 13), the right to freedom of thought, conscience and religion (article 14), the right

*continued on next page*

injunction for children to have some sort of a role assigned to them in the course of particular proceedings or a course of action – which can range from sitting in on an interview or consultation with adults, to playing a far more active role in the relevant proceedings – creating a space for the child’s expression of his or her views is both narrower and wider than child participation. It is narrower in that it delimits a specific form of participation (namely, an opportunity to express views), and wider insofar as it conceives of the possibility of the expression of views being indirect (the child need not participate directly in proceedings in order to have his or her views heard, but may provide them through indirect means, such as through a representative, guardian *ad litem*, special agent or the like).<sup>10</sup>

The child’s right to participate has been the subject of intensive academic interest, particularly since the turn of the millennium.<sup>11</sup> For one, the release in 2009 of a General Comment dedicated to this topic by the CRC Committee<sup>12</sup> has catapulted the importance of child participation as a cardinal feature of children’s rights to a new level. Constituting at minimum “soft law” in the area under discussion,<sup>13</sup> the General Comment can be highlighted for its depth and reach, comprised as it is of more than 130 substantive paragraphs. Principal areas worthy of study for the purposes of the field under discussion, namely the right of the child to participate in family law proceedings, can be found in paras 51 and 52 of the General Comment.

Moreover, it has become increasingly clear that the subject is no longer a topic of mere academic interest, but that it has permeated practice developments in a range of spheres. In the international arena, possibly the most comprehensive recent articulation of children’s views on a matter relevant to their interests is to be found in the child participation study conducted as part of the United Nations Special Rapporteur’s study on violence against children. The report on the child participation study was released in 2006.<sup>14</sup> It is arguable that children’s contribution to this particular study confirmed authoritatively and irreversibly the value of listening to children in matters that concern them.<sup>15</sup>

---

to freedom of association and peaceful assembly (article 15), and the evolving capacities as legitimate limitation ground for parental guidance (article 5)”: Ang *et al* “Participation Rights in the UN Convention on the Rights of the Child” in Ang *et al* *Participation Rights of Children* (2006) 9.

10 This distinction, fine though it may seem, has assumed special relevance in the South African family law context, because the Office of the Family Advocate has from time to time regarded its role as being the vehicle for the transmission of the child’s views, with an apparent institutional sanction to do just that. The specific difference between the role of the Family Advocate and that of the legal representative arose for discussion in *Soller v G* 2003 5 SA 430 (W). The issue of direct contact between the child and the court has already surfaced in some cases. This discussion is developed further below.

11 A theme issue of the *International Journal on Children’s Rights* was devoted to this topic in 2008.

12 General Comment no 12 (2009) “The Right of the Child to be Heard” CRC/C/GC/12 01-07-2009.

13 In contrast to being binding norms of international law, such as those found in treaties which have been ratified by a state party.

14 UN Doc A/61/299 and Pinheiro “Report of the UN Secretary General’s study on violence against children” [www.violencestudy.org](http://www.violencestudy.org) (accessed 24-04-2010). See further Mezmur and Sloth-Nielsen “‘Listen to us’: arguing the case for child participation in NEPAD” 2009 *African Journal of International and Comparative Law* 1–28.

15 “The best interests of the child principle also demands that children have some control and say in areas that affect their own lives and futures, reinforcing the related principle of child

*continued on next page*

Child participation in family law proceedings generally can rightly be said to post-date the adoption of the CRC.<sup>16</sup> In South African law too there are few, if any, reported cases in which the views of the child played any significant role before ratification of the CRC in 1995. Indeed, one of the first major references to the need to hear the child's views on a matter affecting the child (albeit not in family law proceedings as such) came about – as an endnote – in *Christian Education South Africa v Minister of Education*.<sup>17</sup> In this case, Sachs J famously asked why, on an issue as important as a child's right to freedom from violence (in the context of a bid to reintroduce school-based corporal punishment) the views of the children liable to be so punished were the application to be successful had *not* been sought and placed before the court.<sup>18</sup>

Since then, the manner in which children's views should be presented to courts, or in court, in proceedings relating to family law, have surfaced on a number of occasions. They can be summarised as falling into three categories:

1. Cases giving guidance as to when children's views should be elicited and presented to court.<sup>19</sup>
2. Cases giving guidance about the role of the Family Advocate in representing children's views.<sup>20</sup>
3. Cases dealing with the question of who is to act as spokesperson for the child and how this appointment or delegation is supposed to occur.<sup>21</sup>

A brief overview of current jurisprudence on children's right to legal representation in civil proceedings is provided in part 4 of this article. Cases dealing

participation": Mezmur and Sloth-Nielsen 2009 *African Journal of International and Comparative Law* 12. In this article, Mezmur and Sloth-Nielsen cite a range of cogent reasons why child participation in social and political life in general is regarded as being worthy.

16 If one accepts that the age of the end of childhood is now reasonably firmly established at 18 years in accordance with art 1 of the CRC, then an earlier exception is possibly found in the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which provides for the "upper age" of childhood at 16 years, thereby allowing the exercise of choice of jurisdiction by children of 16 and 17 years in the context of parental child abduction. Regard must also be had to the so-called "child objection defence" provided for directly under art 13 of this Convention.

17 2000 10 BCLR 1051 (CC).

18 For a brief account of the significance of this intervention, see Sloth-Nielsen and Mezmur "2+2=5? Exploring the domestication of the CRC in South African jurisprudence (2002–2006)" 2008 *International Journal of Children's Rights* 1–28.

19 *Rosen v Havenga* 2006 4 All SA 199 (C), referred to in Sloth-Nielsen and Mezmur 2008 *International Journal of Children's Rights* 1, where a high court raised on own initiative the question as to whether a child whose parents were divorcing should not enjoy separate legal representation. The parties and the Family Advocate raised no objection to this, resulting in the appointment of a legal representative for the child. This legal representative then successfully applied to be admitted as a party to the proceedings.

20 Notably *Soller v G* 2003 5 SA 430 (W), discussed by Skelton in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations* 217.

21 *R v M* (DCLD) case no 5493/02, unreported, discussed by Skelton in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations* 222 and Kassan in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations* 234. Du Toit "Legal Representation of Children" in Boezaart (ed) *Child Law in South Africa* (2009) 102–107 gives a slightly different breakdown of issues, namely circumstances in which a minor is entitled to legal representation under s 28(1)(h), implementation of the right envisaged under s 28(1)(h), and the scope and function of a legal representative appointed under s 28(1)(h).

with the less procedural and more substantive issues relating to the views of the child (such as how evolving age and maturity are to be taken into account in practice in specific cases or in relation to specific issues, or when direct communication between the judicial officer and the child is apposite) are, however, only now emerging for consideration. This aspect and other likely areas of development within the broad parameters of child participation in family law proceedings will be discussed further in the final part of this article, where the new frontiers of child participation in family law proceedings are elucidated.

### 3 CHILD PARTICIPATION UNDER THE CHILDREN'S ACT

#### 3.1 The right to participate and to express views in section 10

The solicitation of children's views runs like a golden thread through the Children's Act, thereby rendering the Act a thoroughly modern text. In addition, the applicable provisions are not only confined to explicit injunctions to hear the voice of the child, as any number of indirect references to children's decision-making powers and abilities will illustrate.

First, child participation features as an overarching principle in s 10 of the Act, which provides that:

“[e]very child that [*sic*] is of such an age, maturity and stage of development as to be able to participate in any manner concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

It is interesting to note that, in contradistinction to the international law wording of this right in the CRC,<sup>22</sup> the South African equivalent has used the “colloquial” terminology of child participation directly. It thus presupposes involvement, broadly speaking, of children in matters affecting them. Transposed to the family law context, in which this principle must play as much a role as in any other, this entails that, even where children are not represented in such proceedings, or where their views are not communicated directly, their participation along the way, or in the process of reaching decisions, must be sought by all involved in the eventual settlement of any dispute or arrival at any post-marital or family-oriented arrangement.<sup>23</sup> Interesting questions arise as to whether the division of matrimonial assets, in the absence of a dispute about contact, care, or maintenance,

---

22 As pointed out in General Comment no 12 para 3.

23 The Children's Act uniquely makes provision, generally, for the applicability of these general principles, ie. those contained in ch 2, to the implementation of all legislation applicable to children, including this Act (s 6(1)(a)). Section 6(2)(b) requires that the principle guide “all proceedings, actions, and decisions by any organ of state ...”. Questions may arise as to whether private practitioners, eg. divorce attorneys, are bound to give effect to the principles of the Act, such as the instant principle of child participation. While the general feeling may be that private actors such as those involved in divorce litigation should be bound to give effect to the participation rights of children affected by divorce, it is sadly not easy to justify this on the text of the Act as it stands. General Comment no 12 para 33 confirms that the principle of child participation “applies where proceedings are initiated by others and affect the child, such as parental separation, and advocates that state parties introduce legislative measures requiring decision makers in judicial or administrative proceedings to explain the extent of consideration given to the views of the child and the consequences for the child.”

is a matter affecting a child born of the union, for if it is, the child's participation must be sought.<sup>24</sup>

The second aspect of the principle contained in s 10, namely that views expressed must be given due consideration, relates to the obligation to take account, in a serious way, of the child's expressed sentiments. It neglects the usual rider, namely that the weight attached to the child's views during the course of their consideration must accord with the child's age and maturity. This "omission" is probably deliberate, given that the evolving-capacity criterion features prominently in other unrelated parts of the Children's Act.<sup>25</sup> Moreover, this aspect of the section (regarding views expressed by the child) is so widely formulated that any conceivable form of communication of a child's views would suffice, including non-verbal forms (screaming, crying, becoming withdrawn and all of their emotional antitheses).

### 3 2 Other sections of the Children's Act implicating children's participation in family law matters

There are a number of provisions to be found in the Act itself and the draft regulations<sup>26</sup> # which suggest, permit or mandate child participation. Notably, children have standing to bring certain applications relevant to their status in their families of their own accord and in their own name, thereby expressly granting children the fullest form of participation.<sup>27</sup> Subsections 22(6)(a)(ii) and (b)(ii) grant children independent *locus standi* to approach a court for the amendment or termination of a parental responsibilities and rights agreement. Section 28(3)(c) mandates a child to apply (with the leave of the court, as above) for an order

---

24 See in general the scope of application of "all matters affecting the child" outlined in paras 26 and 27 of General Comment no 12.

25 See, for instance, ss 31(1)(a), 129(2)(b) and (2)(c), and 133(2)(b)(ii).

26 At the time of writing, the full set of regulations to the Children's Act have been drafted and submitted for consideration to both the Department of Social Development and the state law adviser, and have been amended and redrafted by the Department. The latest version (October 2009) is expected to be placed before Parliament for ratification in early 2010, which in turn will then permit full implementation of the Act to occur. The author led the team which drafted the regulations for the Department of Social Development.

# **Editorial note:** The regulations drafted by the Department of Social Development were gazetted on 01-04-2010 (GN R261 in GG 33076 of 01-04-2010). The regulations regarding children's courts, contribution orders and international child abduction, which were the responsibility of the Department of Justice and Constitutional Development, were gazetted on 31-03-2010 (GN R250 in GG 33067 of 31-03-2010).

27 The definition of "party" in s 1 provides that a child "involved in a matter" is regarded as having party status in a matter before the children's court. This definition obviously does not include matters in courts other than children's courts – such as the high court, divorce court, regional court or any magistrate's court other than a children's court (for instance, a maintenance court). Section 53, too, confirms that a child who is affected by or involved in a matter to be adjudicated upon may bring a matter which falls within the jurisdiction of the children's court to the attention of the clerk of the children's court for referral to that court. Section 58 grants a child involved in the matter the right to adduce evidence in a matter before the children's court, or, with the permission of the court, to question or cross-examine a witness or to address the court in argument. In turn, s 60 permits (to the extent necessary to resolve any factual dispute which is directly relevant in the matter), any person called by the court to be cross-examined or questioned by the child involved in the matter (s 60(1)(c)(i)).

terminating, restricting or suspending the exercise of parental responsibilities and rights, or for an order extending or circumscribing the exercise of the responsibilities and rights the holder or co-holder has in respect of a child. This ability to participate arguably provides the space for children, in suitable circumstances, to liberate themselves altogether from the strictures of parental exercise of responsibilities and rights, otherwise and formerly conceived of as emancipation.

The draft regulations, supplemented as they are by the Forms, insinuate rather than require directly the opportunity for the child to participate in family law arrangements brought about by parental responsibilities and rights agreements<sup>28</sup> or the development of parenting plans.<sup>29</sup> Thus the certificate of a Family Advocate confirming that the agreement or plan has been prepared with such an advocate's assistance contains specific blocks to be filled in concerning the child's views:

"I confirm that information about the contents of this parental responsibilities and rights agreement [or parenting plan] have been furnished to the child or children, bearing in mind the child/children's age, maturity and stage of development . . . and I confirm that the child or children [*sic*] been given an opportunity to express their views, and that these views have been given due consideration".<sup>30</sup>

Child participation in children's court proceedings is mandated directly by s 61 of the Children's Act. This section requires a presiding officer in a matter before the children's court to allow a child involved in that matter to express not only a view but also a preference in the matter if the court finds that, given the child's age, maturity and stage of development and any special needs a child might have, the child is able to participate in the proceedings and the child chooses to do so.

This section differs from and is more elaborate than the abovementioned versions of the child's right to express views (elaborated as a general principle in s 10) in three respects, all of which may be regarded as material. First, the child is accorded the mandate to express a preference. This may of course be a reflection of the child's views, but again, it may be wider, so as to encompass situations where the child does not have a view until confronted with one or more possible outcomes or placements options, in which case the child's preference might come to the fore. Second, it appears that the court must make a finding as to the child's capacity to participate in the proceedings. The section does not specify any level of maturity or stage of development that must be reached before such a finding is mandated, nor is there an explicit requirement that the stage of maturity, age or developmental status of the child must be such as to render any such participation useful to the adjudication of the matter or meaningful to the result. It is submitted that in the absence of such qualification, the threshold required for the finding that a child possesses sufficient maturity is the simple matter of the child being able to express a view on the matter at hand. Third, the element of recognition of the child's choice as to whether to participate or not attracts an important *caveat*, one which in turn raises a range of issues which relate to aspects of the theory of child participation. For instance, what level of witness preparation must occur before it can be said that the child,

---

28 Section 22 of the Act.

29 Section 33 of the Act.

30 Form 5 based on reg 7 (parental responsibilities and rights agreements), and Form 9 derived from reg 10 (parenting plans).

cognisant of all the implications of the decision whether to participate or not, had exercised the right of choice with full understanding?<sup>31</sup>

It is further unclear how the child's participation provided for in s 61 might be exercised when the child is legally represented. As will be shown, the right to legal representation in civil proceedings, more particularly in children's court proceedings involving the child as a subject of the inquiry, has been controversial and much discussed in academic writing.<sup>32</sup> The latest formulation of the right of the child to legal representation is to be found in s 55 of the Children's Act. This provision requires the court to refer a matter to the Legal Aid Board<sup>33</sup> to be dealt with in terms of the Legal Aid Act,<sup>34</sup> where a child is not legally represented and a court "is of the opinion that it would be in the best interests of the child to have legal representation". Criteria or guidelines assisting the formation of such an opinion are not provided, as they were in earlier formulations of the right to legal representation.<sup>35</sup> Since the regulations<sup>36</sup> shed no further light on the role to be played by a child's legal representative during the course of his or her representation of the child,<sup>37</sup> and given the peremptory nature of the

31 For guidance on the preparation of children prior to their participation, see General Comment no 12 paras 33 and 34, and again at paras 40, 41, 45, 48, and 63.

32 See, for instance, Kassan in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations* 227; Skelton in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations* 217; Gallinetti "The Children's Court" in Davel and Skelton (eds) *Commentary on the Children's Act (2007)* 4-20; Sloth-Nielsen and Van Heerden "The Child Care Amendment Act 1996: does it improve children's rights in South Africa?" 1996 *SAJHR* 649; Zaal "When should children be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution" 1997 *SALJ* 334; Zaal and Skelton "Providing effective representation for children in a new constitutional era: lawyers in the criminal and children's courts" 1998 *SAJHR* 539.

33 Recently renamed Legal Aid South Africa, but referred to in this article for convenience as the Legal Aid Board.

34 Act 22 of 1969.

35 Section 8A of the Child Care Act 74 of 1983 referred to *inter alia* by Kassan in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations* 227 and Gallinetti in Davel and Skelton (eds) *Commentary on the Children's Act* 4-20. Earlier drafts of the relevant provision in the Children's Act contained a variety of criteria directing the attention of the presiding officer to the question of whether or not to request legal representation for the child. Some of the criteria, as originally proposed in the unpromulgated s 8A, have subsequently informed judicial interpretation to become law, such as the fact that the child's parents enjoy legal representation, and the complexity of the case.

36 This chapter of the regulations was prepared by the Department of Justice and Constitutional Development, since "Courts" and the proceedings associated therewith fall under the jurisdiction of that Minister.

37 This differs from the more directive formulation in s 80 of the Child Justice Act 75 of 2008 which requires a legal representative to allow, where practicable, the child to give independent instructions concerning the case, enjoins that legal representative to explain the child's rights and duties in relation to proceedings under the Act in a manner appropriate to the age and intellectual development of the child, and requests the legal representative to promote diversion without unduly influencing the child to acknowledge responsibility for the commission of the alleged offence. The "sanction" for transgression by any legal representative is a record of displeasure that the presiding officer may make, in addition to any remedial action or sanction which may be brought to the attention of the relevant law society, Legal Aid Board or body controlling the ethical behavior of advocates, as the case may be (s 80(2)(a) and (b)).

wording of s 61, it must be assumed that the child's right to express views and preferences in any matter is additional to, or supplements, the child's views or interests as expressed by a legal representative. This interpretation would accord well with the inquisitorial nature of children's court procedures,<sup>38</sup> and would be a bulwark against instances where a legal representative leans towards presenting the child's best interests, rather than expressing the child's views.<sup>39</sup>

Finally, the concept of self-determination and autonomy in the participation of children in matters affecting them is most evident in the new sections and their accompanying regulations dealing with child-headed households. Strictly speaking, the enabling and protective measures that the Act heralds in relation to child-headed households do not yet fall under what could traditionally be conceived of as family law. However, it is trite that the legal recognition of child-headed households does in fact give rise to a unique new family structure in the same way as the legal recognition of same-sex unions does. It is simply that child-headed households would normally not fall within the purview of family law practitioners or private-law experts. But s 137, which defines a child-headed household comprehensively,<sup>40</sup> reflects an approach to child autonomy which may be unparalleled even in contemporary child legislation internationally:

- “137. (6) The adult referred to in subsection (2) may not take any decisions concerning such household and the children in the household without consulting—
- (a) the child heading the household; and
  - (b) given the age, maturity and stage of development of the other children, also those other children.
- (7) The child heading the household may take all day-to-day decisions relating to the household and the children in the household.”

The above sections, read together with the draft regulations<sup>41</sup> mandate a child-centred approach premised on the independence and decision-making capacity of

38 See s 60 in particular. It provides for a non-adversarial, relaxed and informal atmosphere in the children's court, as well as a direct role for the presiding officer in calling witnesses and protecting the child from untoward questioning or cross-examination where this is not in the best interests of the child (s 61(1)(c)). In this way, the provision articulates in practical terms the more judge-led orientation of the children's court proceedings.

39 This tension is inherent in many children's court inquiries. With all the goodwill in the world, a legal representative of a child may find it difficult to give effect to the views of the child when they are demonstrably contrary to the child's interests, such as where a child desires a continuation of the *status quo* where a care-giver poses a serious risk to the child's physical well-being. This tension is discussed further below in relation to the *Soller* case.

40 Section 137 describes a child-headed household as a household in which the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household; in which no adult family member is available to provide care for the children in the household; and in respect of which a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household.

41 For instance, draft reg 51(1) providing that “an adult designated in terms of section 137(2) of the Act must, for purposes of accountability –

- (a) in consultation with the members of such household, bearing in mind the varying financial needs of different members of such household, develop a monthly expenditure plan reflecting available financial resources and payment;
- (b) ensure that the monthly expenditure plan is signed by the child at the head of such household”

*continued on next page*

the child heading the household in the best interests of the members of that household.

In sum, it can be deduced from the examples provided above that the Children's Act not only pays attention to the right of children to express views and have them considered in matters affecting their interests, but that the intention to have the expressed views play a meaningful role in adult decision-making, including in the family law sphere, is concretised in a number of legislative provisions.<sup>42</sup>

#### 4 REPRESENTATION OF THE CHILD IN FAMILY LAW PROCEEDINGS: THE CONSTITUTIONAL PROVISION IN S 28(1)(H) AND THE FUTURE ROLE OF THE CHILDREN'S COURT

Representation of the views of the child in civil proceedings, including those in the family law sphere, by indirect means via a legal or other representative, has been fairly well traversed in South African literature as a consequence of the insertion of s 28(1)(h) into the Constitution. Section 28(1)(h) unexpectedly constitutionalised<sup>43</sup> the child's right to legal representation in civil cases if substantial injustice would otherwise result. As has been recorded elsewhere, the application of this constitutional provision has created more than the usual implementation problems in the absence of domestic legislation with clear directions to judicial officers as to when, and how, to fulfill this right. In the context of the Child Care Act, the original s 8A and its accompanying regulations were never operationalised, though the Legal Aid Board started to roll out legal representation for children in civil matters by establishing Children's Units in 2006.<sup>44</sup> The impetus for such roll-out was the obvious acknowledgement of state liability for the costs of representation of children in civil litigation which the Children's Act heralded.<sup>45</sup> ## As mentioned, the applicable section in 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. 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

---

thus reinforcing the child-centred approach to family organisation that the Act, seen as a whole, promotes.

42 It can be mentioned here that it appears that under the CRC, an obligation exists to give feedback to the child about the meaning or weight attached to his or her expressed views: General Comment no 12 suggests that "[t]he feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint" (para 45).

43 This right did not appear in the interim Constitution of the Republic of South Africa Act 200 of 1993 or in any subsequent drafts, and was not a feature of any advocacy efforts around the rights that should be contemplated by the constitutional drafters.

44 Sloth-Nielsen 2008 *SAJHR* 495.

45 Albeit that the portions of the Act which came into operation on 01-07-2007 did not include the chapter relating to children's courts, in which the issue of children's legal representation falls.

## **Editorial note:** The sections of the Children's Act which did not come into operation on 01-07-2007 were brought into operation on 01-04-2010 (Proclamation R12 in GG 33076 of 01-04-2010).

such as the Legal Aid Board, acting in terms of the policy directives and guidelines developed administratively for their use.<sup>46</sup> Interestingly, the Children's Act makes no mention of the constitutional "substantial injustice test", although it can be argued that the best interests of the child demand inevitably that no substantial injustice takes place. It is still a moot point whether the opposite holds true, *viz.* that there may be instances where substantial injustice might ultimately have occurred (in relation to the child, that is), but the child's best interests did not presuppose the need for the appointment of a legal representative at the commencement of the proceedings. Hence, it is not self-evident that the substantial injustice test and the best interests of the child criterion laid down to trigger the state-sponsored appointment of legal representation always coincide.

A central question, for the purposes of this article, concerns the extent to which the child participation provisions elucidated above govern family law proceedings in a more general sense. The answer to this requires a brief examination of the role of children's courts in family law matters as envisaged in the Children's Act.<sup>47</sup> The formerly exclusive jurisdiction of the high courts in divorce cases (and applications for the award of access, custody and guardianship to unmarried fathers under the now-repealed Natural Fathers of Children Born out of Wedlock Act<sup>48</sup>) has been whittled away with the recognition of the general divorce jurisdiction of the former "black" divorce courts since the mid-1990s. However, the high court has held parallel jurisdiction, and has continued to serve the legal needs of those able to afford access to the high court.

As was the case before the Children's Act, the primary role of the children's court relates to what is broadly termed child protection, *ie.* inquiries and determinations as to when children may be found to be in need of care and protection. However, in accordance with the original vision of the South African Law Reform Commission which led the consultation process and the subsequent development of the Children's Act, a much wider role for the children's court is contemplated, including quite a significant potential role in family law matters.

For instance, a parental responsibilities and rights agreement<sup>49</sup> which has been made an order of court – even a high court – can be amended or terminated by an

---

46 In contrast to earlier attempts to draft guiding criteria into legal provisions, via s 8A of the Child Care Amendment Act 96 of 1996 and reg 4B issued thereunder, neither of which was brought into effect. See Kassan in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations* 227 for the text of the relevant section and its accompanying regulation. Kassan also mentions that earlier versions of the Children's Act contained detailed criteria to guide the appointment of legal representatives in civil proceedings affecting children, which were excised from the Bill finally presented to the National Assembly for consideration.

47 Although high courts are, equally, bound by the provisions of the Children's Act, it is unlikely that the high court Rules as presently drafted will be facilitative of the new notions of child participation, hence the assertion that the role of the children's court, a creature of statute (in this case the Children's Act itself) is likely to assume a larger place in family law proceedings than hitherto, as the jurisdiction of the children's court was previously extremely narrow (Gallinetti "Children's Courts" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 4-4). The pending extension of civil jurisdiction, including family law jurisdiction, to the (intermediate) regional courts, which until now have enjoyed only criminal jurisdiction, must also be borne in mind.

48 Act 86 of 1997.

49 See s 33 of the Children's Act.

order of the children's court (save where the agreement relates to the guardianship of a child, in which case only the high court, at present, has jurisdiction); so too, can an application for the assignment of care and contact be brought in a children's court (or divorce court or high court).<sup>50</sup> According to s 28 of the Children's Act,<sup>51</sup> applications for the suspension, extension or restriction of parental responsibilities and rights are also the preserve of the children's court. Section 33 (entitled "[c]ontents of parenting plans") further confirms the power of a children's court to amend orders made by any other court (eg. a high court) in that it requires co-holders of parental responsibilities and rights who experience difficulties in exercising their rights and responsibilities to attempt to reach agreement on a parenting plan before seeking judicial intervention. Section 46 renders the potential for jurisdiction of the children's court in family law matters patent, insofar as it explicitly permits adjudication in "any matter" involving care of or contact with a child, paternity of a child, support of a child and adoption, including inter-country adoption. It can be concluded that, save for the reservation of the exclusive jurisdiction of the high court for matters pertaining to guardianship, the children's court is destined to play a significant role in family law proceedings henceforth. By analogy, the Children's Act, both substantively and procedurally, will have application in far more family law type proceedings than its predecessor, the Child Care Act, could ever have had.

## 5 REPRESENTATION OF CHILDREN'S VIEWS: A SUMMARY OF APPLICABLE JUDGE-MADE LAW

The proposition was made above that case law on child participation via a legal representative has, in South African jurisprudence thus far, focused chiefly on the procedural aspects of the appointment process and the manner of solicitation of the child's views or presentation of the child's interests.<sup>52</sup> The actual weight to be accorded to these views, and their evidential place in the final outcome of a dispute, have enjoyed less judicial attention.<sup>53</sup>

The leading case on child legal representation, *Soller v G*,<sup>54</sup> is of most value in confirming the relative role of the Family Advocate *vis-à-vis* the child's legal representative. *Soller's* most cited *dictum* is that:

"The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child."<sup>55</sup>

50 Section 23(1) of the Children's Act.

51 Notably a child, acting with the leave of the court, may apply for such an order, according to s 28(3)(c).

52 See Du Toit in Boezaart (ed) *Child Law in South Africa* 102 for a comprehensive overview of developments relating to legal representation of children generally since the 1990s.

53 Judicial *dicta* about the weight to be accorded children's views are to be found in *Soller v G* 2003 5 SA 430 (W) (referencing the import to the child's life of the decision as to where he is to live), *Legal Aid Board v R* 2009 2 SA 262 (D) (where a similar indication of the importance of the decision to be made for the life of the child was made), *J v J* 2008 6 SA 30 (C) and *Van Coeverden de Groot v Van Coeverden de Groot* 2009 JOL 24230 (ECP), referred to by Du Toit in Boezaart (ed) *Child Law in South Africa* 102.

54 2003 5 SA 430 (W).

55 *Soller* 438E.

In addition, the judge pointed out that the legislature inserted s 28(1)(h) into the Constitution with the full knowledge that the Office of the Family Advocate already existed. Therefore it could not be assumed that the legislature intended the legal practitioner assigned to the child in civil proceedings in terms of s 28(1)(h) to appropriate the role and usurp the functions of the Family Advocate. Commenting further on the more contentious role of the Family Advocate in giving effect to the views of the child, the court opined that a Family Advocate reports to the court on the facts which were found to exist and makes recommendations based on professional experience.

“In doing so the family advocate acts as an advisor to the court and perhaps as a mediator between the family who has been investigated and the court. The family advocate is not appointed the representative of any party to a dispute – neither the mother, father or any child. In a sense the family advocate is required to be neutral in approach in order that the wishes and desires of the disputing parties can be more closely examined and the true facts and circumstances ascertained.”<sup>56</sup>

However, in the view of Satchwell J, the legal representative of the child is no mere conduit for the expression of the child’s views in court-appropriate language:

“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.”<sup>57</sup>

Skelton<sup>58</sup> points out, and many South African family lawyers would at that stage have agreed,<sup>59</sup> that:

“in matters where the family advocate investigates and makes a recommendation factoring in the views of the child (presuming the child is mature enough to express their views) there will be many instances where this will suffice, and the child’s interests will be properly taken care of. However, this is not always the case; family advocates work under heavy case loads and . . . they have a statutory role in relation to mediation which does not always allow them to represent the interests of the child in an adequate manner.”<sup>60</sup>

More recently, and for the first time, *Legal Aid Board v R*<sup>61</sup> dealt with the authority of the Legal Aid Board (hereafter “LAB”) to appoint a separate legal representative when approached by a child for such assistance (and not as a consequence of an order by a presiding judge). The court delivered a groundbreaking judgment setting out that when the LAB appoints a legal representative

56 437F–H.

57 438F.

58 Skelton in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations* 217. See, too, Du Toit in Boezaart (ed) *Child Law in South Africa* 99–100 for a similar view: “[I]t is generally accepted that the views of the child is [*sic*] sufficiently canvassed by psychological or social work experts involved in the case or by the Office of the Family Advocate.”

59 The paper on which that publication was based was written in 2004, prior to the adoption of the Children’s Act, and prior to practitioners’ exposure to more international discussion and debate around the issue.

60 The statute in question is the Mediation in Certain Divorce Matters Act 24 of 1987, which sets up the Office of the Family Advocate with the broad brief to safeguard and protect the welfare and interests of all minor and dependent children involved in divorce proceedings and other disputes concerning guardianship, custody or access (now guardianship, care or contact).

61 2009 2 SA 262 (D).

for a child it gives effect to s 28(1)(h) of the Constitution, which contains the normative state obligation in this regard. Moreover, the LAB is not required to obtain permission from a parent or guardian when making such an appointment.<sup>62</sup>

The reasoning of the judgment started with an examination of s 28(1)(h) of the Constitution and found that the key test is whether “substantial injustice” would result if a separate legal representative was not appointed for the child. Willis AJ held that questions about where a child is to live and which parent will be making the most important decisions in the child’s life are of crucial importance for a child. Pointing out that it is the child who would be the subject of the decision and who would have to live with the consequences, the court emphasised the crucial need to take the child’s views into consideration. When it was evident that the child’s views were being smothered by the parents’ conflict, it was likely that substantial injustice would result if a separate legal representative was not appointed for the child.<sup>63</sup>

In particular in this case, the appointment of a legal representative for the child would not only be helpful, it would also allow the child to participate in the proceedings. The child had indicated to experts and to the attorney appointed for her by the LAB that she wished to express her own opinions. A previous judge had already pronounced on the need to appoint a separate legal representative for the child due to the level of acrimony in the litigation between the parents. It was therefore clear that in this matter there was a need for the child to be heard independently from her parents.<sup>64</sup> It is perhaps anecdotally worth noting that after more than 7 years of the litigation, the appointment of a legal representative for the child brought the parental dispute in this case to an end within days.<sup>65</sup>

Our courts have yet to contend with the full gamut of possibilities attendant on the procedural ramifications of hearing the views of the child under the existing patchy legal framework (hitherto mention has been made of the Mediation in Certain Divorce Matters Act, the Constitution, and the Children’s Act – reference to other relevant legislation in family law matters such as the Divorce Act<sup>66</sup> and the Legal Aid Act have been, for the purposes of the present discussion, left out of the reckoning). Judges are for some time going to struggle to give effect to the different possibilities that prevail, as the following *dictum* in *Legal Aid Board v R* confirms:

“How is the child to approach the court if she or he does not already have legal assistance? Is the Legal Aid Board entitled to provide legal assistance to the child for the limited purpose of seeking court authority to be given legal assistance in the

62 The context was an ongoing and bitter care dispute in which separate legal representation for the child concerned had been approved some years earlier. However, this order, too, had been the subject of further parental wrangling insofar as the parents severally objected to the individuals appointed. See Kassan in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations* 227, Du Toit in Boezaart (ed) *Child Law in South Africa* 102 and Sloth-Nielsen 2008 *SAJHR* 495 for a further description of this saga.

63 *Legal Aid Board* para 20. It is perhaps worth noting that the African Charter on the Rights and Welfare of the Child (art 4(2)) explicitly requires an “impartial representative” (suggesting someone who is answerable to neither parent) “as a party to the proceedings” (confirming the independent status in the litigation process of such representative).

64 Para 21.

65 *Legal Aid Board* para 10.

66 Act 70 of 1979.

related civil proceedings? Why should the child not be entitled, with the assistance of suitable agencies specialising in helping children with their problems, as in the present case, to approach the Legal Aid Board directly for assistance?<sup>67</sup>

These types of questions may well arise in the context of family law proceedings broadly speaking (maintenance matters, domestic violence, and the like). But the procedural routes to possible appointment notwithstanding, it stands to reason that the real proof of the pudding, so to speak, lies in the substantive nature of the contribution of children's participation to the resolution or settlement of family law disputes. It is to some of these challenges that the final part of this article now turns.

## 6 NEW FRONTIERS IN CHILD PARTICIPATION IN FAMILY LAW PROCEEDINGS IN SOUTH AFRICA

### 6.1 Direct communication with children

Some attention has been paid in the aforementioned sections to the child's constitutional right to legal representation and the likely mechanism(s) for the fulfillment of this right. It must be noted that both the criterion of the best interest of the child and current practice suggest that legal representation of children in parental divorce cases will be the exception rather than the rule for some time to come. The reasons for this, historical precedents aside, are manifold and need only be summarised. First, the efforts of the LAB to establish Children's Units notwithstanding, there can be no doubt that the available staffing resources will not, for some time to come, stretch to legal representation for children affected by divorce in all but the most unusual and needy cases. This is recognised by the LAB in their criteria for determining which cases will pass the qualifying threshold for allocation of legal representation at state expense.<sup>68</sup> Second, it is widely expected that the services of the Family Advocate reporting to courts on the best interests of affected children in divorce cases will obviate (or at least reduce) the need for independent legal representation of children in the vast majority of cases. Third, there is still an overwhelming feeling that

---

<sup>67</sup> *Legal Aid Board* para 36.

<sup>68</sup> See Sloth-Nielsen 2008 *SAJHR* 514, citing documentation from the LAB illustrating that while the justiciable needs of children include legal representation in Hague Convention matters (ie. matters relating to parental child abduction), the appointment of curators, emancipation applications, intervention in applications for care and contact by biological fathers who do not enjoy automatic parental responsibilities and rights, matters relating to orphans, and matters aimed at protecting the rights and interests of disabled children, to name a few examples, a separate paragraph indicates that legal aid will also be available for children to intervene in divorce proceedings between the child's parents *only* when authorised at a senior level. A similar injunction prevails with respect to legal representation for children to intervene in maintenance proceedings, which too can only be authorised on an individual basis by the chief executive officer of the LAB. Hard though it may be to accept from a rights stance, the LAB model for rolling out legal representation for children in civil proceedings has, of necessity, to take account of the available resources, and competing needs, eg. for state sponsored defences in criminal matters. Moreover, the role of the Office of the Family Advocate in confirming that the best interests of any children have been accommodated in divorce settlements offers some solace. As for maintenance cases, were legal representation routinely to be provided in these cases, the entire legal aid system would be consumed by this mammoth undertaking.

“children should not be drawn unnecessarily into the fray” and involved in potentially acrimonious and damaging litigation concerning their parents’ split where this can be avoided.<sup>69</sup> Hence, for some decades, internationally the practice has been to hear the voice of the child through one or another expert report.<sup>70</sup>

Nevertheless, there is much interest in, and increasing experience of, direct communication by judicial officers with children affected by the disputes of their parents, if only to assure the child that he or she has a voice in the proceedings, and to allay potential judicial concern that the child may have been sidelined or his or her real concerns overlooked by the disputing parties or their legal representatives. As Taylor *et al* quote:

“[it] is inappropriate for the Court to use [the report writer] solely as a method of obtaining the wishes of the children involved. The wishes of the children should be ascertained by counsel for the children or through an interview of the child by the judge.”<sup>71</sup>

Moreover, citing Tapp,<sup>72</sup> the authors note that the emphasis on children’s rights has led to day-to-day practices which orient the proceedings towards the participation – which, as can now be seen, goes further than giving the child a voice – of children involved:

“Many lawyers ask the child if they would like to speak with the judge. Children are also being asked to put their proposals to the Court, and these are frequently included verbatim in the judgment. A number of judges are writing their decisions to the children, and delivering them orally in Court with the children seated at the front. It is thus becoming more common for judges personally to explain their decision to the child(ren).”<sup>73</sup>

Although direct communications with the judge (eg. in chambers) constitutes an authentic form of child participation, it is largely an “extra-legal” phenomenon for South Africans, at least insofar as the Children’s Act is concerned, not to mention the usual conventions of our evidence and procedure, which do not provide easy mechanisms for facilitating such face-to-face communication.<sup>74</sup>

69 South African practitioners and judges are all too familiar with the possibilities of children’s wishes or views being tainted by prior coaching, parental alienation syndrome, or children’s desire to please their parent(s) (see, for instance, *Van Niekerk v Van Niekerk* 2005 JOL 14218 (T)).

70 Taylor *et al* “Respecting children’s participation in family law proceedings” 2007 *International Journal of Children’s Rights* 61 72. See too Parkinson, Cashmore and Single “Parents and children’s views on talking to judges in parenting disputes in Australia” 2007 *International Journal on Law, Policy and the Family* 84 who proffer the opinion that hearing the views of the child through the medium of trained experts is accepted practice in common-law jurisdictions.

71 Taylor *et al* 2007 *International Journal of Children’s Rights* 61 quoting from the New Zealand case of *K v K* 2004 23 FRNZ 534.

72 Tapp “Judges are human too: conversations between the judge and the child as a means of giving effect to section 6 of the Care of Children Act 2004” 2006 *New Zealand Law Review* 35.

73 In a comment on an earlier draft of this article, Taylor *et al* 2007 *International Journal of Children’s Rights* 61 note that the practice of judges explaining the import of their decision to the child is becoming less common, as this task is increasingly being undertaken by the lawyer for the child.

74 An interesting gloss on this aspect came about in *Ford v Ford* 2006 3 SA 42 (SCA), involving a relocation application. On appeal, the respondent applied for the appeal judges to be afforded an opportunity to hear the views of the child, since almost 3 years had

*continued on next page*

Nevertheless, the fast encroaching globalisation of family law through conferences, cross-border family law litigation and international family practices suggest that the practice of hearing children's views directly will soon become entrenched here too. This growing international practice is further likely to be bolstered by the increased application of the principle of hearing the voice of the child in s 10 of the Children's Act, as previously mentioned, coupled with a large number of cases in which a legal representative will not be provided to the child in civil proceedings (such as divorce). Hence, it is posited that hearing the voice of the child directly will, for many cases in which an expert view is not available or forthcoming, be the only way in which the judicial officer will be able to satisfy himself or herself that the right in s 10 has been given effect to.

The experience of Scotland<sup>75</sup> suggests that the development of practice guidelines for legal counsel instructed by children involved in civil proceedings is a matter of immediate concern for our Law Societies and Bar Council (if only to explain to their members whether or not the taking of instructions by MXit, facebook or short message service (ie. sms) is professionally acceptable in the circumstances!).<sup>76</sup> We can, in fact, commence with the valuable suggestions provided by Wallis AJ in the *Legal Aid Board* case referred to earlier,<sup>77</sup> which form at least the nucleus of some suggested possible guidelines.

---

elapsed since the launch of the original application, and the child was now 10 years old. Maya AJA (as she then was) agreed that the court should take the child's wishes into account where she is old enough to express a preference, but noted that the available evidence pointed to the fact that the ongoing litigation was causing her trauma and stress, and that she was unhappy at having been subjected to continuous interviews by experts. Difficulties were also raised about hearing her views at the appeal stage. It was asked: how was this to be effected, how was the court supposed to record its impressions, and were these views then to constitute evidence? Would the case then be re-opened, on appeal, for rebuttal evidence? I initially (Sloth-Nielsen 2008 *SAJHR* 506) supported the finding of the court on this point but have since reconsidered, and now believe that the overwhelming impetus towards hearing the views of the child that has developed internationally, supported by strong evidence of the effectiveness of child participation for a variety of reasons, should dictate that ways be sought to hear the child's views at all stages of a legal process, if needs be even on appeal. This is the case more especially where the child has reached a different stage of maturity and development and may well be able to articulate stronger or different views by comparison to those of an earlier phase of his or her childhood.

75 To give but one example of the many jurisdictions in which such Practice Rules have been drafted. Canada provides another example.

76 For an immensely practical account of representing children in the Scottish legal system over a number of years, see Kelsey "How children's voices are heard: the Scottish experience" [www.onefamily.ie/userfiles/file/Rachael%20Kelseyspeech.pdf](http://www.onefamily.ie/userfiles/file/Rachael%20Kelseyspeech.pdf) (accessed 15-01-2010). A Practice Note has also been issued by the family court of New Zealand (Taylor *et al* 2007 *International Journal of Children's Rights* 61).

77 "I would not wish it to be thought that a legal representative appointed to assist a child in this type of delicate situation should not listen to the views of the parents as to the best way in which he or she should go about their task. However, if the legal representative is to perform that task appropriately and adequately, they must ultimately decide the best way in which to proceed. The fact that one or other parent disagrees with them is a risk inherent in the situation. The whole point of appointing a legal representative for the child is for that legal representative to exercise her or his independent judgment as to the best interests of the child in the particular circumstances of the case and to place material before the court as she or he deems appropriate, to assist the court in reaching the best possible decision in

*continued on next page*

## 6.2 The right to choose and the right to refute

General Comment no 12, para 22 highlights that the child has the right “to express those views freely” which means without pressure and subject to the choice whether or not he or she wants to express those views. The text continues to warn that “freely” also means that the child “must not be manipulated or subject to undue influence of pressure”.

Hence, the right to express views not only includes the obverse proposition, namely the right not to express views,<sup>78</sup> but the issue of affording children an opportunity to express their views must also encompass all the conceivable dimensions of the participation right. This might include informing a child of the role he or she is being asked to play in the process, the possible consequences of expressing a view or a preference, the role of the court and other players, and the overall context within which the child’s views would be weighed.<sup>79</sup> Questions arise about the procedure for sharing the views of the child with other relevant parties, whether or not these views are ascertained by an expert, the Office of the Family Advocate, a legal representative or the presiding judicial officer.

Section 10 of the Children’s Act, while stating a broad principle, is short on procedural details, leaving them wholly to the judges and the profession to flesh out. A crucial assumption, based on our constitutional framework, is that a mechanism for conveying the views of the child to relevant parties is a *sine qua non* of due process if any court is to take account of the views of the child. However, Taylor *et al* quote an Australian research study conducted recently which indicated that some children preferred their views to be communicated to the judge without their parents knowing – illustrating the tension between protection of children from involvement in the pressures of parental conflict, and their right to participate. Again, legal resolution of this dilemma lies some way ahead in the future.<sup>80</sup>

---

the circumstances. Naturally, there is a risk that the decisions taken by such a legal representative may, with the benefit of hindsight, turn out to be wrong. However, the mere fact that one of the parents disagrees, however strongly, with the approach adopted by the appointed legal representative, will not ordinarily provide a basis for that legal representative not to be appointed or to be removed from discharging their functions” (*Legal Aid Board* para 23).

78 Or the right not to be subjected like a “lab rat” to further expert assessments and investigations: *J v J* 2008 6 SA 30 (C). See Du Toit in Boezaart (ed) *Child Law in South Africa* 100. Paragraph 24 of General Comment no 12 cautions that “a child should not be interviewed more often than necessary, in particular when harmful events are explored. The ‘hearing’ of a child is a difficult process that can have a traumatic impact on the child.”

79 See in general Taylor *et al* 2007 *International Journal of Children’s Rights* 74–77.

80 A legal solution, ie. in judicial directives, guidelines, regulations, amendments to the rules of court, or the like, may be seen as separate from “non-legal solutions”. These could include providing or requiring special training of lawyers involved in child representation (an issue which was mooted by the South African Law Commission Project Committee on Juvenile Justice and encapsulated in early proposals for legal representation of children in criminal law proceedings, but which was subsequently left out of the reckoning in the Child Justice Act 75 of 2008).

### 6.3 Children's participation in mediation and alternative forms of dispute resolution

Although the Children's Act has a strong focus on mediation,<sup>81</sup> on the resolution of disputes without resorting to court proceedings where children are concerned, and on referrals to "lay forum hearings" and other forms of traditional dispute resolution, the question of children's participation in these non-judicial alternatives is one on which an academic silence has prevailed until the present.<sup>82</sup> This is despite predictions that mediation is on the rise in family law practice. Nor can it be established other than anecdotally whether, and how, children are involved in these processes. Again, child participation in mediation and procedures relating to alternative dispute is a frontier still to be reached in South African family law.<sup>83</sup>

## 7 CONCLUSION

This article, with international law and constitutional imperatives as a backdrop, has explored the current state of play regarding children's participation in family law proceedings in South Africa. As a new terrain, with local case law only emerging in the last decade to underpin some jurisprudential interpretation, the issues and themes highlighted herein are focused to a great extent on the future.

It is apparent that whilst a modest foundation in law for hearing children's views has been established through s 10 of the Children's Act, seen alongside several further sections and provisions of that Act, much more work remains to be done to articulate the manner in which the judicial system will hear children's voices. There is considerable scope for the development of practice guidelines, professional rules of conduct, standards and special skills training of a multi-disciplinary nature. Ultimately, enhancing child participation in South African law and practice rests undeniably on the shoulders of adults!

---

81 See, for instance, Sukhraj-Ely "The Development of Family/Divorce Mediation in South Africa" in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 261; see too De Jong, "Giving children a voice in family separation issues: a case for mediation" 2008 *TSAR* 785; De Jong "Opportunities for mediation in the new Children's Act" 2008 *THRHR* 630.

82 Article 12 of the CRC and art 4(2) of the African Charter on the Rights and Welfare of the Child refer to "administrative proceedings" for the purposes of hearing the voice of the child. They refer at minimum to formal, court ordered processes, such as the lay forum hearing contemplated in the Children's Act.

83 In New Zealand, the Family Court Matters Bill of 2009 will enable children's participation in counselling and mediation services through the family court. The implementation of the Bill has reportedly been delayed due to fiscal constraints, but training of counselors and mediators in child-inclusive practice is underway (personal communication, Dr N Taylor, Centre for Research on Children and Families, University of Otago).