

# THE RIGHT TO LEGAL REPRESENTATION AT STATE EXPENSE FOR CHILDREN IN CARE AND CONTACT DISPUTES – A DISCUSSION OF THE SOUTH AFRICAN LEGAL POSITION WITH LESSONS FROM AUSTRALIA

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## SUMMARY

The article discusses the right of children to legal representation at state expense in family disputes in South Africa as provided for in section 10 of the Children's Act 38 of 2005 and section 28(2)(h) of the Constitution. Certain aspects are highlighted: the applicant applying for legal representation; the requirements for an appointee; the appointment criteria; duties and responsibilities of the appointee as well as the funding for such appointment. The South African legal principles are compared with the equivalent Australian provisions relating to the Independent Children's Lawyer. The article concludes with some recommendations for *lacunae* identified in the South African system in light of the Australian experience.

## 1 INTRODUCTION

Section 10 of the Children's Act<sup>1</sup> provides that in all civil matters, every child of a certain age, maturity or stage of development<sup>2</sup> has the right to participate, in an appropriate way, in any matter concerning the child, to have his views expressed, and have due consideration be given to his views.<sup>3</sup> One of the "appropriate ways" that a child can be heard, is for his views to be presented by a legal representative appointed for the child. In this regard, section 10 should be read with section 28(1)(h) of the Constitution which provides that every child has the right to have a legal

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<sup>1</sup> 38 of 2005.

<sup>2</sup> For a discussion of s 10, see 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* 57-58.

<sup>3</sup> Unless otherwise stated, whenever the masculine gender is used in this paper, both boys and girls or men and women (as the case may be) are included.

practitioner assigned to that child by the state, at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.<sup>4</sup>

The aim of this article is not to discuss the right of a child to be heard *per se*,<sup>5</sup> but to focus on a small corner of that right, namely the right to the appointment of legal representation for children in family disputes, specifically in care and contact proceedings<sup>6</sup> in both South Africa and Australia. Notwithstanding the two South African provisions referred to above, the appointment of a legal representative for children remains problematic and there has been little guidance from the legislature or the judiciary on the issue.

The first part of the article sets out the current South African legal situation and highlights the available jurisprudence, but also identifies certain *lacunae* that have not yet been addressed. Attention is given to the following aspects: the possible applicant and the timing of an application for a legal representative for a child; the requirements for a possible appointee; the situations where an appointment would be appropriate (appointment criteria); the duties and responsibilities of the appointee once appointed; and the funding of the appointee.

In the second part of the article, the equivalent Australian provisions relating to the Independent Children's Lawyer (ICL) are discussed. The Australian jurisdiction has been chosen as the underlying legal principles relating to the appointment of a legal representative for a child in family proceedings are similar to that in South Africa.<sup>7</sup> However, the mechanics of such appointments have been fine-tuned through an extensive set of published guidelines endorsed by the courts as well as through judicial precedent. The issue has also been included in several reviews of the general family law.<sup>8</sup> It is submitted that, in light of the Australian experience

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<sup>4</sup> S 28(1)(h). Du Toit "Legal Representation of Children" in Boezaart (ed) *Child Law in South Africa* (2009) 93-11; Bekink and Brand "Constitutional protection of children" in Davel (ed) *Introduction to Child Law* (2000) 193; Cockrell "The Law of Persons and the Bill of Rights" in Mokgoro and Tlakula (consulting eds) *Bill of Rights Compendium* (1998) Service 21 (October 2007) 3E-18; and Davel and Skelton *Commentary on the Children's Act* (2007) 2-12.

<sup>5</sup> See Robinson and Ferreira 2000 *De Jure* 57-58 for a general discussion of the child's right to be heard.

<sup>6</sup> Prior to the adoption of the Children's Act, the terms used for "care" and "contact" were "custody" and "access", respectively. The legal representation of children in criminal and child protection matters are specifically excluded from the scope of this article (see in this regard s 55 of the Children's Act and *inter alia* Zaal "When Should Children be Legally Represented in Care Proceedings? An Application of S 28(1)(h) of the 1996 Constitution" 1997 *SALJ* 334; Sloth-Nielsen and Van Heerden "The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?" 1996 *SAJHR* 649; and Davel and Skelton 4-21).

<sup>7</sup> See discussion par 41 below. The similarities will become clearer later, but relate to both countries being signatories of the Convention on the Rights of the Child specifically as it relates to the right to be heard even though the views of the child are most often heard indirectly through experts and that the view of the child is only one aspect the court would consider; the fact that disputed family law cases in the final instance rely on the courts for a decision; and that the decision must be made in light of the best interests of the child.

<sup>8</sup> The Guidelines and court decisions are discussed in detail in par 4 below. The reviews include the Family Law Council *Pathways for Children – A Review of Children's Representation in Family Law* (2004); McIntosh *Final Report to the Family Court of Australia*,

on the subject matter, there are some lessons for the South African legal system to be learnt from researching their processes. The article concludes with some recommendations for the South African legal system in light of the Australian experience.

## 2 BACKGROUND TO THE VOICE OF THE CHILD IN CARE AND CONTACT DISPUTES IN SOUTH AFRICA

In South African care and contact litigation, children are not generally parties to the proceedings, even though the decisions emanating from such cases have a fundamental impact on their lives, and even in instances where children hold strong views about their preference.<sup>9</sup> So although there might be a theoretical right to be heard, this is not always realized in practice. Where the parents are in agreement about care and custody arrangements, they make the decision. Although it is theoretically possible for the family advocate to investigate the arrangement and make a recommendation to the contrary, it is seldom done in practice, especially where the arrangement is *prima facie* satisfactory.<sup>10</sup> Without a recommendation by the family advocate to the contrary, the court will generally confirm the parental arrangement as an order of the court.<sup>11</sup>

In instances where the parents disagree on the issues of care and contact, the decision will ultimately be made by the court. The court will base its decision on the best interests of the child<sup>12</sup> after considering the family

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*The Children's Cases Pilot Project* (2006); Family Court of Australia *Finding a Better Way. A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (2007); and Kaspiew, Grey, Weston, Moloney, Hand, Qu and the Family Law Evaluation Team *Evaluation of the 2006 Family Law Reforms* (November 2009) 310 which note that an ICL was involved in about 30% of all the judicial determined family law cases port 1 July 2006. There has been an increase in the proportion of cases with orders made for an ICL to be involved in the proceedings from 3392 in 2005-2006 to 4458 in 2008-2009 (308-309).

<sup>9</sup> *Greenshields v Wyllie* 1989 4 SA 898 (W) 899A; Kassan "Children's Right to Legal Representation in Divorce Proceedings: Proposed Guidelines Concerning When a S 28(1)(h) Legal Practitioner Might be Deemed Necessary or Appropriate" in 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; Kassan "The Voice of the Child in Family Law Proceedings" 2003 *De Jure* 164.

<sup>10</sup> In general, see Clark "A 'Golden Thread'? Some Aspects of the Application of the Standard of Best Interest of the Child in South African Family Law" 2000 *Stell LR* 3; Robinson "The Right of the Child to be Heard at the Divorce of Their Parents: Reflections on the Legal Position in South Africa" 2007 *THRHR* 265; and Barratt "The Child's Right to be Heard in Custody and Access Determinations" 2002 *THRHR* 556 and 571.

<sup>11</sup> The court may postpone the granting of a decree of divorce where the court is not satisfied that the provisions made or contemplated regarding the welfare of any minors or dependent children of the marriage are satisfactory, or are the best that can be effected in the circumstances (s 6(1) of the Divorce Act 79 of 1979; *Schwartz v Schwartz* 1984 4 467 (A) 475A-B); or where the report and recommendations of the family advocate are still pending in instances where an enquiry has been conducted in terms of the Mediation in Certain Divorce Matters Act (s 4 of the Divorce Act).

<sup>12</sup> Constitution s 28(2); Children's Act s 9 as read with s 7. See in general the discussion of Clark 2000 *Stell LR* 3.

advocate's report and recommendations.<sup>13</sup> Even so, the court's investigations are often superficial and inadequate.<sup>14</sup> The best-interests principle plays an important role in the judicial decision-making process in care and contact proceedings. However, the *determination* of what exactly would be in the best interests of a particular child is fraught with difficulty.<sup>15</sup> Of interest here is the possible role that the voice of the child, as presented by an independent legal representative, can play in assisting the court to determine what is in the best interests of the child.<sup>16</sup>

Before the adoption of sections 10 and 28(1)(h),<sup>17</sup> the courts were inconsistent about hearing the voice of the child.<sup>18</sup> The attitude of the courts ranged from express consideration of the child's views,<sup>19</sup> to instances where the views of the child were deliberately not considered. The reasons for non-consideration included insufficient or contradictory evidence,<sup>20</sup> the immaturity of the child resulting in little or no weight being attached to the views,<sup>21</sup> or undue parental influence.<sup>22</sup> In most cases the preference of the child was not referred to in the court reports.<sup>23</sup>

The views of the child in pre-divorce settlement negotiations, and in the court itself, are still generally only heard indirectly, normally through the report of the family advocate and sometimes through the legal representatives of the parties (parents).<sup>24</sup> In disputed family matters, the

<sup>13</sup> The court is not obliged to accept the recommendations of the family advocate (Cronje and Heaton *The South African Family Law* (2004) 167). Robinson refers to the approach as paternalistic (Robinson 2007 *THRHR* 269).

<sup>14</sup> Clark 2000 *Stell LR* 7.

<sup>15</sup> Clark 2000 *Stell LR* 3; Anderson and Spijker "Considering the View of the Child When Determining her Interests" 2002 *Obiter* 365; Robinson and Wessels "Die Rol van die Geslag van die Ouer by Beheer en Toesig Bevele – *Van der Linde v Van der Linde* 1996 3 SA 509 (O)" 1998 *Obiter* 187; and Davel and De Kock "In die Kind se Beste Belang" 2001 *De Jure* 272.

<sup>16</sup> One factor that the court may consider when determining the best interests of the child is the preference expressed by the child (*Ford v Ford* [2006] JOL 16676 (W) par 81).

<sup>17</sup> Children's Act and Constitution respectively.

<sup>18</sup> Barratt 560; Kassin 2003 *De Jure* 173; Anderson and Spijker 2002 *Obiter* 367; Robinson 2007 *THRHR* 267; and Cronje and Heaton 166 fn 67.

<sup>19</sup> Barratt 560-561; *French v French* 1971 4 SA 298 (W) 299G-H; *Manning v Manning* 1975 4 SA 659 (T) 661G-H; *Matthews v Matthews* 1983 4 SA 136 (SE) 141B; *Greenshields v Wyllie supra* 899G-H; *Märtens v Märtens* 1991 4 SA 287 (T) 294C-D; *McCall v McCall* 1994 3 SA 201 (C) 205F; *Meyer v Gerber* 1999 3 SA 650 (O) 656D; *I v S* 2000 2 SA 993 (C) 997D-E; *Lubbe v Du Plessis* 2001 4 SA 57 (C) 73E-I; *Prins v Claassen* [2008] JOL 21693 (SE) 6-7; *Potgieter v Potgieter* (SCA) unreported case number 215/2006 dated 30 March 2007 par 20; *Blumenow v Blumenow* (WLD) unreported case number 2007/5408 dated 18 December 2007 par 28.

<sup>20</sup> Barratt 562; *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 441B-C; *Stock v Stock* 1981 3 SA 1280 (A); *Van der Linde v Van der Linde* 1996 3 SA 509 (O) 513H-I. In *B v P* 1991 4 SA 113 (T) 119C-D, however, the court postponed the matter for investigation and evidence about the views of the child.

<sup>21</sup> Barratt 562-5; *Matthews v Matthews supra* 141B; *Greenshields v Wyllie supra* 899E-F; *Germani v Herf* 1975 4 SA 887(A) 899E-F; *Van Rooyen v Van Rooyen supra* 439I-440A; and *Ford v Ford supra* par 85.

<sup>22</sup> Barratt 565; *Hlope v Mahlalela* 1998 1 SA 449 (T) 461 G-H; *Evans v Evans* 1982 1 SA 371 (T); *H v R* 2000 3 SA 623 (C) 628I-J; and *Ford v Ford supra* par 84.

<sup>23</sup> Barrett 561-562 and the cases referred to.

<sup>24</sup> Sloth-Nielsen "Realising Children's Rights to Legal Representation and to be Heard in Judicial Proceedings: An Update" 2008 *SAJHR* 503; *Blumenow v Blumenow supra* par 27;

evidence of expert witnesses contributes to this debate, although not always conclusively.<sup>25</sup> The Supreme Court of Appeal has noted its preference for the wishes of the child to be placed before the court indirectly, *via* expert evidence.<sup>26</sup> Only in exceptional cases is the child heard directly by the judge in chambers,<sup>27</sup> or as a witness,<sup>28</sup> or through legal representation as a party to the dispute.<sup>29</sup>

Focusing on the child's right to legal representation in family disputes it is noteworthy that prior to the Constitution, the appointment of a legal representative for the child was limited to section 6(4) of the Divorce Act.<sup>30</sup> In terms of section 6(4) a court may appoint legal representation for children at the cost of parties to divorce proceedings. This section is seldom used in practice, the explanation being that the family advocate's report notionally represents the interests and views of the children in divorce matters, making direct representation unnecessary.<sup>31</sup> There are some problems with the provision, not least of all that it is only available to parents who are able to meet such costs. In this regard the section does not meet the requirements of section 28(1)(h) of the Constitution, since only wealthy parents can make use of it.<sup>32</sup> No provision is made for the costs to be at state expense, even in instances where "substantial injustice" would otherwise result (as required by the constitutional provision). In terms of Legal Aid South Africa Guide of 2009, children are only entitled to legal representation at state expense in exceptional circumstances and with the consent of a regional manager.<sup>33</sup> The Children's Act contains a similar section, section 29(6)(a)-(b), although

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Kassan 2003 *De Jure* 171; Barratt 572 notes that the family advocate places little importance on the views of the child.

<sup>25</sup> Often each of the litigant-parents would present expert evidence directly opposing the conclusion of the other. See *eg*, *Van Pletzen v Van Pletzen* 1998 4 SA 95 (O) 97 D-E; *Ex parte Crichfield* 1999 3 SA 132 (W) 137I-J (see discussion of Van Schalkwyk "Bewaring- en Toesigbevele van Minderjarige Kinders by Egskeiding: Faktore" 2000 *THRHR* 295). For unimpressive evidence, see *Potgieter v Potgieter supra* par 10.

<sup>26</sup> *F v F* 2006 3 SA 42 (SCA) par 25-26.

<sup>27</sup> This possibility is controversial. See *inter alia* *Märtens v Märtens supra* 294D-F; *Chodree v Vally* 1996 2 SA 28 (W) 35 E-F, where the court noted the reasons why this practice should not be used; *Meyer v Gerber supra* 656A-C; Barratt 569; *Soller NO v G* 2003 5 SA 430 (W) par 33; Stilwell *Report on the case of MMKS v GLMS* (Durban and Coast Local Division) unreported case number 5565/2005 (15 November 2006) 9 (on file with author).

<sup>28</sup> *Hlope v Mahlalela supra* 461G-H. Although the evidence of the child was led, the court refused to take the views of the child into consideration; Robinson and Ferreira 2000 *De Jure* 58 argue that leading evidence from the child in court is not a sensible option and that it is generally better to present the views of children *via* experts. Barrat also regards the option of the child being a witness as "inappropriate" (569).

<sup>29</sup> See discussion below.

<sup>30</sup> 79 of 1979.

<sup>31</sup> Sloth-Nielsen 2008 *SAJHR* 495 and 503; and Kassan 232.

<sup>32</sup> Sloth-Nielsen 2008 *SAJHR* 502; and Kassan 232.

<sup>33</sup> See discussion below. See also Mungar "Practical Implementation of Representation of Children" 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) 244; and Sloth-Nielsen 2008 *SAJHR* 502 and 514 argues that where a child is a party to the dispute and the parent has legal representation, the child should be granted legal representation.

provision is made for payment by either the parties or the state if substantial injustice would otherwise result.<sup>34</sup>

During the past two decades the right of children to be represented in family disputes has gained more prominence in South Africa.<sup>35</sup> The reasons for this development can be found in international law and constitutional developments.<sup>36</sup> Internationally the Convention on the Rights of the Child<sup>37</sup> (CRC) is noteworthy.<sup>38</sup> The adoption of this instrument shifted the focus of the courts in so far as children are now regarded as active legal subjects and the bearers of human rights in matters that affect them directly.<sup>39</sup> This aspect, although relevant, has already been the focus of scholarly writing and it would be unnecessary to repeat herein.<sup>40</sup> As far as the Constitution is concerned, section 28(1)(h) as read with section 28(2), that the best-interests principle,<sup>41</sup> added to the prominence. It is submitted that in light of section 10 of the Children's Act, the opinion of the child is one aspect in the determination of the child's best interests that can no longer be ignored.<sup>42</sup> Although it is unfortunate that the views of the child were not expressly listed in section 7 of the Children's Act as factors to be considered when determining his best interests,<sup>43</sup> section 31 obliges the holder of parental responsibilities and rights to consider the wishes of the child when making

<sup>34</sup> See also Du Toit 106.

<sup>35</sup> See in general *inter alia* Du Toit 97 and 100-121; Sloth-Nielsen 2008 *SAJHR* 495 and 496; Kassan 227; Robinson 2007 *THRHR* 263; Davel and Skelton 2-12; Mungar 240; 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; Schafer "Children's Rights" in Clark (ed) *Family Law Service* (2008 edition) E72; Cronje and Heaton 260; Bekink and Brand 193; Cockrell 3E-18; Barratt 556; Kassan 2003 *De Jure* 164; Zaal and Skelton "Providing Effective Representation for Children in the New Constitutional Era: Lawyers in the Criminal and Children's Courts" 1998 *SAJHR* 539; Zaal 1997 *SALJ* 334; Mosikatsane "Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution" 1998 *Michigan Journal of Race and Law* 341 364; De Villiers "The Rights of Children in International Law" 1993 *Stell LR* 298; Robinson "Beste Belang van die Kind by Egskeiding" 1995 *THRHR* 472; and Davel and De Kock 2001 *De Jure* 275 in 14.

<sup>36</sup> S 39(1)(b) of the Constitution provides that international law must be considered by the courts when interpreting the Bill of Rights. See discussion by Robinson and Ferreira 2000 *De Jure* 47.

<sup>37</sup> Art 12(1) as read with art 12(2). See Robinson and Ferreira 2000 *De Jure* 54 and 55-58; Anderson and Spijker 2002 *Obiter* 267-270; Davel and Skelton 2-12 to 2-14; Kassan 2003 *De Jure* 165-67; and Du Toit 94-95.

<sup>38</sup> South Africa ratified the obligations of the CRC on 16 June 1995 and incorporated the provisions in s 10 of the Children's Act 38 of 2005. See discussion below. For the sake of completeness it should be noted that South Africa also signed the African Charter on the Rights and Welfare of the Child (ACRWC) with a similar clause (art 4(2) read with art 7). A discussion hereof falls outside the scope of this article. In this regard, see Du Toit 95.

<sup>39</sup> Kassan 227.

<sup>40</sup> See Robinson and Ferreira 2000 *De Jure* 54 and 55-58; Anderson and Spijker 2002 *Obiter* 267-270; Davel and Skelton 2-12 – 2-14; and Kassan 2003 *De Jure* 165-167.

<sup>41</sup> As read with s 6(2)(a) and s 7 of the Children's Act.

<sup>42</sup> Kassan 227.

<sup>43</sup> The "preference of the child, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration" was listed as a factor in the case of *McCall v McCall supra* 205E-G (number "k").

certain decisions regarding the child, including where it might affect the contact or care of the child.<sup>44</sup>

The child's right to be heard and the right to legal representation for children in family disputes should not be equated. The right to legal representation is merely a small section within the broader right to be heard. Although children have the right to be heard and have their expressed views considered if they are of a suitable age, maturity and stage of development,<sup>45</sup> it is submitted that not all children (even those of a suitable age, maturity and stage of development) would require, desire or be entitled to separate legal representation at state expense.

Concerns have been rightly expressed about direct legal representation for children: one, that it places the child in a difficult position in direct conflict with the parents or at least one of the parents; two, that it could lead to a further protraction of litigation and costs; and three, that for the child to be interviewed by yet another person is not in the best interests of the child.<sup>46</sup>

Bearing these concerns in mind, a "one-size-fits-all" approach – that is, to insist for or against legal representation for children in all cases of family disputes – is not possible. The circumstances of each case should dictate the solution, with due regard given to the age of the child, the nature of the decision being made, the forum, the type and quality of the representation available, and the available state resources.<sup>47</sup> It is submitted, however, that in a small number of cases, legal representation for the child could be essential in order to allow the child a "proper opportunity to express and explain [his] views".<sup>48</sup> It is on this aspect that this article is focussed. One of the main problems is that there are no official guidelines to the appointment of a legal representation for children. Although there is a rough draft document compiled by the Centre for Child Law in consultation with Legal Aid South Africa, no official document has been made available.<sup>49</sup> Although this document is referred to, most of the guidance is sought from the judiciary.

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<sup>44</sup> S 31(1)(b)(ii)-(iv); and see also Du Toit 98.

<sup>45</sup> Determining whether a child falls within this category is problematic and often controversial. See discussion below.

<sup>46</sup> Sloth-Nielsen 2008 *SAJHR* 507.

<sup>47</sup> Sloth-Nielsen 2008 *SAJHR* 495.

<sup>48</sup> Van Heerden *Boberg's Law of Persons and the Family* (1999) 542 fn 165; and Barratt 569.

<sup>49</sup> Although Skelton in her presentation "Introduction to Legal Representation for Children. Why and how?" at the 2010 University of the Western Cape and Miller Du Toit Cloete Inc International Family Law Conference <http://www.millerdutoitcloeteinc.co.za/conference/papers/skelton.ppt> (accessed 2010-05-18), noted the need for guidelines and the fact that a first draft of such guidelines has been work-shopped, no final document has been made available. The draft document *Draft Guidelines for Legal Representatives of Children in Civil Matters* is a result of a colloquium held in Braamfontein 10-11 March 2010 and available from the Centre for Child Law. It seems as if much of the contents of the document is based on the Australian *Guidelines*. See discussion below.

### 3 THE APPOINTMENT OF A LEGAL REPRESENTATIVE FOR THE CHILD AS VIEWED THROUGH EXISTING SOUTH AFRICAN JUDICIAL PRECEDENT

Not surprisingly, in light of the discussion above, there has been a slight shift in the South African courts' attitude towards the appointment of legal representatives for children in recent years.<sup>50</sup> It is, however, still uncommon practice.<sup>51</sup> The judgments to date have been useful in defining what such a legal representative is not. It has been found that the function of a legal representative for a child is neither the same as a *curator ad litem*,<sup>52</sup> nor a family advocate;<sup>53</sup> yet, he is also not the standard legal representative.<sup>54</sup> These aspects have been discussed in previous legal materials and not repeated herein.<sup>55</sup> A few judgments, in particular *LAB v R*,<sup>56</sup> the courts have addressed some questions relating to the mechanism of achieving the appointment of a legal representative for the child.

In the next section the available guiding principles are extracted from these cases to answer the following basic questions applicable to the appointment of a legal representative for a child: One, who may apply for the appointment of a legal representative for the child? Two, which persons would qualify for such an appointment? Three, under what circumstances would it be necessary to appoint a legal representative (appointment criteria); Four, what are the duties and responsibilities of such a person once appointed? And lastly, who would be responsible for funding the appointment? Each of these questions is discussed in detail hereunder.

#### 3.1 Application

Who may bring the application for the appointment of a legal representative and when must the application be brought? Because the right to a legal representative is a right contained within the Bill of Rights, the following

<sup>50</sup> Barratt 566.

<sup>51</sup> Du Toit 101.

<sup>52</sup> Sloth-Nielsen 2008 *SAJHR* 500-501; Skelton 219. A *curator* is appointed to investigate the circumstances surrounding the child (or children) in a particular situation, *inter alia* to determine whether it is necessary for a legal representative to be appointed for the child (*Centre of Child Law (CCL) v Minister of Home Affairs* 2005 6 SA 50 (T) par 23; *Du Toit v Minister of Welfare and Population Development* (Lesbian and Gay Equality Project as *amicus curiae*) 2003 2 SA 198 (CC) par 3; *S v M* (Centre for Child Law as *amicus curiae*) 2007 2 SACR 539 (CC); and *AD v DW* (Centre for Child Law as *amicus curiae*) 2008 3 SA 183 (CC). The court thus appoints a *curator ad litem* where there is a risk of injustice in general. A legal representative deals with a specific child in a particular matter.

<sup>53</sup> *Soller NO v G supra* par 27; Skelton 218; 221-222; and Kassan 232-235. The family advocate is a professional, independent and neutral person who creates a communication channel between the family and the court. It is his role to monitor settlement agreements, mediate and settle disputes if possible, and evaluate the best interests of the child. A legal representative, on the other hand, represents the child personally and acts in the best interests of the child at all times.

<sup>54</sup> See discussion below.

<sup>55</sup> See in general Skelton 218-222; Kassan 232-235; and Sloth-Nielsen 2008 *SAJHR* 500-501.

<sup>56</sup> 2009 2 SA 262 (D) par 1.



persons may approach a competent court for appropriate relief in terms of the Constitution: anyone acting in their own interests; anyone acting on behalf of a child who cannot act in its own name; anyone acting as a member of, or in the interests of, a group or class of persons; anyone acting in the public interest; or an association acting in the interest of its members.<sup>57</sup> This means that the initiative may come from *inter alia* the child,<sup>58</sup> the parent-litigants,<sup>59</sup> a *curator ad litem*,<sup>60</sup> the family advocate,<sup>61</sup> the Legal Aid South Africa,<sup>62</sup> the Centre for Child Law,<sup>63</sup> or the court.<sup>64</sup>

Assignment of a legal representative does not have to be through a high court appointment<sup>65</sup> and a court order is not required prior to the appointment of the representative. Although the parents may be consulted in most cases, Legal Aid South Africa<sup>66</sup> is not obliged to do so prior to the appointment of the legal representative.<sup>67</sup> In *LAB v R* the mother of the child objected to the appointment and argued that Legal Aid South Africa had no authority to appoint him, alternatively arguing that her consent, as guardian, was required for the appointment. The court overruled her objections and found that he was properly appointed.<sup>68</sup> It concluded that a litigant-parent was not entitled to intervene or influence the decision by Legal Aid South Africa to appoint a legal representative to act for a child in a civil matter.<sup>69</sup>

None of the cases specifically deals with the issue of timing, although *LAB v R* indicates that a legal representative can be appointed at any time during the proceedings.<sup>70</sup>

### 3 2 Appointee

Who may be appointed as the legal representative of the child? The appointee must be a legal<sup>71</sup> representative, in other words a qualified and practising attorney or advocate. In *LAB v R*, the court preferred counsel with

<sup>57</sup> S 38 of the Constitution.

<sup>58</sup> *LAB v R supra* par 21; Kassan 2003 *De Jure* 178. See also Stilwell 2.

<sup>59</sup> In *LAB v R supra*, the Legal Aid South Africa applicant was supported in the application by one of the parents (par 2).

<sup>60</sup> *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* 2005 JOL 14218 (T) par 5 (the Pretoria Law Clinic acting as *curator ad litem* on behalf of the child).

<sup>61</sup> S 4 of the Mediation in Certain Divorce Matters Act.

<sup>62</sup> *LAB v R supra* par 2.

<sup>63</sup> *Ibid.*

<sup>64</sup> *R v M* as referred to in Kassan 236); and *R v H* par 6.

<sup>65</sup> A provision to the effect that all appointments should be made by the courts in South Africa would be impractical, expensive and in contravention of the spirit of s 14 of the Children's Act that provides for a child's access to the courts (Du Toit 104).

<sup>66</sup> As discussed under 3.5, state funding of legal representatives would mostly be through Legal Aid South Africa.

<sup>67</sup> *LAB v R supra* par 4-6.

<sup>68</sup> Par 5.

<sup>69</sup> Par 6. The objections against the Stilwell appointment was based on the mother's adverse view formed of Stilwell's approach to his task, specifically that he did not adhere to the constraints she wished him to adhere to (par 23).

<sup>70</sup> In *LAB v R supra* the appointment was made even though the divorce has already been partly heard (par 8).

<sup>71</sup> S 28(1)(h) only makes provision for legal representation.

a person of suitable seniority and the necessary skill and expertise in matrimonial law.<sup>72</sup> In *Soller*, a senior attorney was appointed with the necessary personal attributes, professional expertise and life experience: A person in the “best tradition” of his profession and highly regarded by his peers, the judiciary and the office of the family advocate, who was involved in organizations concerned with family life and divorce counselling and mediation, and who was regarded as a practical professional with compassion and a reputation for fair-mindedness.<sup>73</sup>

Dealing with children in adversarial family matters creates unique and specialized problems that should be approached with sensitivity in order to protect the short- and long-term relationships between parties. It seems as if the appointee should not simply be a practising attorney or advocate, but he should possess additional skills, including the ability to communicate effectively with the child and to build a relationship of trust with the child.<sup>74</sup> He must have the ability to communicate with the child and to understand and interpret the views of the child within the broader context of the child’s age, maturity, development, background and social environment.<sup>75</sup> He should also be able to liaise effectively with role-players in other disciplines, such as psychologists and social workers.<sup>76</sup> It is important that the legal representative of the child is above reproach, so that neither parent would have reason to believe that he unduly or improperly influenced the child in any way.<sup>77</sup>

Although not dealt with in the draft guidelines, it is submitted that the qualifications and experience for possible appointees should be included in the guidelines.

As the representation under discussion is at state expense, it is presumed that most of these appointments would be made by Legal Aid South Africa.<sup>78</sup> The policy of Legal Aid South Africa is to use in-house legal practitioners in Children’s Units in Justice Centres and thus it is foreseen that most of the representatives of children would come from these centres.<sup>79</sup> As mentioned, legal representatives of children require additional, sometimes delicate, skills, and to this end Legal Aid South Africa aims to recruit and train senior specialists in *inter alia* civil representation.<sup>80</sup> It is currently unclear, however, whether it has the capacity to achieve this aim.

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<sup>72</sup> Par 9; 11.

<sup>73</sup> Par 18.

<sup>74</sup> Barratt 570; Stilwell 3; and *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 11).

<sup>75</sup> Barratt 570.

<sup>76</sup> *Ibid.*

<sup>77</sup> Stilwell 4.

<sup>78</sup> See discussion below.

<sup>79</sup> Sloth-Nielsen 2008 *SAJHR* 510.

<sup>80</sup> *Ibid.*

### 3 3 Appointment criteria

Under which circumstances would an appointment be necessary or appropriate? A definitive list of circumstances is not available.<sup>81</sup> Each case must be considered on its merits.<sup>82</sup> It is important to reiterate that a legal representative will not always be required for the child at state expense,<sup>83</sup> but only when substantial injustice would occur if he were not appointed.<sup>84</sup> Where no substantial injustice would occur, the court could theoretically make an appointment, but it would not be at state expense.<sup>85</sup>

A definition of “substantial injustice”, although important, remains elusive.<sup>86</sup> There must be compelling circumstances before the right to legal representation is invoked at state expense.<sup>87</sup> These circumstances may include instances where there is an enduring conflict between the parents and the child’s voice is “drowned out by the warring voices of the parents”,<sup>88</sup> or where neither of the parents is able to represent the child’s interests.<sup>89</sup> An appointment may be made in order to directly protect the child’s interests in cases where the relief sought is dramatic and has serious implications for the child, for example, where sole guardianship or sole custody is sought<sup>90</sup> or one of the parties seeks to remove the child permanently from the jurisdiction of the court and instances of child abduction.<sup>91</sup> Similarly, an appointment would be appropriate where the interests of the child may not be compatible with one or both parents; where the court finds it necessary to articulate the views of the child; or where an appointment would serve the best interests of the child.<sup>92</sup> In addition, the Draft Guidelines note that children would require representation where the child is of sufficient age and maturity and is strongly expressing a view and a desire to participate; where there are allegations of physical, sexual or psychological abuse; an apparent intractable conflict between the parents; there are real issues relating to cultural and religious differences that are affecting the child; there are issues

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<sup>81</sup> Skelton 224; and Du Toit 101.

<sup>82</sup> *R v M* (Kassan 236), who argues that the requirement that each case should be considered “on its merits” is not particularly helpful in practice.

<sup>83</sup> Sloth-Nielsen 2008 SAJHR 507. *Eg*, in *Ford v Ford supra* par 85, the court found that even though, in principle, a child of ten years has the right to be heard, evidence was led that the demands of appearing in court would be stressful for the child.

<sup>84</sup> *LAB v R supra* par 37.

<sup>85</sup> In *Fitchen v Fitchen* (CPD) unreported but referred to in *Soller NO v G supra* par 3, the court rejected the application to appoint a legal representative for the child as it was of the opinion that a substantial injustice would not result due to the non-appointment because the views of the child were already known *via* the family advocate and psychologist reports.

<sup>86</sup> S 28(1)(h) of the Constitution. It is still unclear when this would be the case (Kassan 237).

<sup>87</sup> *R v M* (Kassan 237).

<sup>88</sup> *LAB v R supra* par 20.

<sup>89</sup> *Soller NO v G supra* par 12.

<sup>90</sup> *Rosen v Havenga* 2005 6 SA 535 (C); 2006 4 All SA 199 (C) par 6.

<sup>91</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 7. Where the matter deals with child abduction, s 279 of the Children’s Act provides that a legal representative must be appointed for such a child.

<sup>92</sup> *Rosen v Havenga supra* par 6.

of sexual orientation of either or both of the parents that are likely to deepen the conflict; instances of significant physical or mental health problems.<sup>93</sup>

Some factors to take into account when determining whether the appointment would be appropriate or not are:<sup>94</sup> the facts and the complexity of the case;<sup>95</sup> the length of the trial; the age of the child and his ability to express himself; the impact of an acrimonious dispute on the child; the likely impact of the decision on the existing care and contact arrangements; the possibility that a party or witness will give false evidence or withhold truth; whether the child will substantially benefit from having legal representation; and whether substantial injustice will otherwise result.<sup>96</sup>

Kassan suggests that a legal representative for the child should be appointed in the following additional circumstances:<sup>97</sup> one, where the child holds a view contrary to that recommended by the family advocate;<sup>98</sup> two, where the family advocate did not consider the child's view; and three, where the family advocate recommends the appointment of a legal representative.<sup>99</sup> She raises the concern that allowing for the appointment of a legal representative for the child too freely, raises the possibility that litigating parents who are unhappy with the family advocate's report and recommendations may exploit the situation and thus get the proverbial second bite at the cherry, leading to a duplication of state resources.<sup>100</sup>

It is submitted that these criteria in general are helpful, but it would be more useful if an officially sanctioned comprehensive set of guidelines is made available to the legal profession as a whole.

### 3 4 Duties and responsibilities of the appointee

The material at hand does not elucidate the particular duties and responsibilities of the appointee once he has been appointed as legal representative of the child. It is submitted that this responsibility would remain the same whether it is during the negotiations prior to the hearing, or during the court proceedings themselves.

Fundamental to the duties and responsibilities of the appointee is the capacity of the child to give instructions. Skelton rightly argues that as childhood is a gradual process, incrementally moving from a lack of capacity to the attainment of capacity and autonomy, the philosophy and guidelines

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<sup>93</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 7.

<sup>94</sup> Kassan 237.

<sup>95</sup> *Ibid*; and see also Sloth-Nielsen 2008 *SAJHR* 526.

<sup>96</sup> Kassan 238.

<sup>97</sup> Kassan 235-236.

<sup>98</sup> Skelton 220. See *Van der Berg v Le Roux* [2003] JOL 11154 (NC) par 28, where the unsuccessful application applied for the removal of the family advocate on the basis of bias. The court found that it would not be unconstitutional to stop the cross-examination of a party by the family advocate as the court was not bound by the views of the family advocate, but free to accept or reject the opinion of the family advocate.

<sup>99</sup> Kassan 236.

<sup>100</sup> *Ibid*.

must be flexible enough to allow for this process and for children at both ends of the scale.<sup>101</sup>

It has been argued that this flexibility should result in two possible models of legal representation for children: client-directed legal representation as opposed to best-interest legal representation,<sup>102</sup> and that the determining factor in the choice of model should be the capacity of the child and not the type of case.<sup>103</sup> Furthermore, it is argued that as the role of the legal representative differs between the two models, the appointee must be clear about his or her role.<sup>104</sup> It is argued that with client-directed legal representation the normal attorney-client relationship applies and the child is allowed to direct the litigation with the representative having to advocate the position of the child.<sup>105</sup> This model would only be suitable for children of sufficient age and maturity.<sup>106</sup>

It is submitted that this distinction is fallacious as the constitutional best-interests principle would be applicable to, and the paramount consideration in, all matters relating to a child. The child can never totally direct the litigation as the client remains a child. The *Soller* matter is an example. Even though the child was older and adamant about his preference, the court nevertheless made its own decision based on what it regarded as in the best interests of the child. It is submitted that there are only one model for legal representation of children and that is the best-interest legal representation.

With a best-interest legal representative, the child's interests are paramount in the representation and the child does not give instructions, either because the child is too young, immature, unwilling or unable to participate.<sup>107</sup> The legal representative is in a unique position. He is not merely a mouthpiece for the child, but must bring adult insight into the views, perspective and circumstances of the child.<sup>108</sup> The aim is that he should exercise independent judgment on what would be in the best interests of the child.<sup>109</sup> He should present the case for the child independently and unfettered.<sup>110</sup> He has the duty to inform the court of the wishes of the child<sup>111</sup>

<sup>101</sup> Skelton (2010) 2.

<sup>102</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 4.

<sup>103</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 6. Du Toit argues that the capacity of the child should be determined by expert evidence (Du Toit 110 with reference to *BS v AVR* unreported case 7180 2008 (South Gauteng High Court) 26 June 2008).

<sup>104</sup> As the role of the legal representative differs between the two models, it is important that the appointee is clear about his or her role (*Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 4).

<sup>105</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 4-5.

<sup>106</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 4.

<sup>107</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 4 and 9.

<sup>108</sup> *Soller NO v G supra* par 26-27. Stilwell argues that the case should be conducted according to the wishes of the child, even if it might be contrary to the personal views of the representative (4). It is submitted that this can only be the case with a client-directed legal representative. In the case of a best-interest legal representative this cannot be correct, as the aim of the appointment is to involve a mature and experienced practitioner so that the views of the child can be independently placed in a broader context.

<sup>109</sup> Par 23.

<sup>110</sup> *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk supra* par 8. See also the *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 5.

– even if it conflicts with his own sentiment<sup>112</sup> – but he must do so within the context of the child's age, maturity and background.<sup>113</sup> It is ultimately for the court to decide on the weight to be placed on the child's views or preferences.<sup>114</sup> The reason for this approach is again the fact that youth has a major influence on a person's powers of judgment, with a younger person's opinion being easily swayed.<sup>115</sup> It would appear that the legal representative is expected to assess critically the soundness of the judgment of the child-client and to be appropriately protective of the child's views.<sup>116</sup>

The representative has the right to consult regularly with his child-client and any other person he may deem fit, including expert witnesses.<sup>117</sup> He does not require consent or permission from the parents to consult with his client and he may remove the child from school attendance to facilitate such consultation.<sup>118</sup> He has to take all the necessary steps which he deems appropriate in order to represent the interests of the child, freely and without hindrance.<sup>119</sup> One of his duties is to educate the child fully on the role of the legal representative, the legal process<sup>120</sup> as well as the availability of alternative forms of dispute resolution.<sup>121</sup> The child's legal representative has a duty to place before the court any information that he regards of importance to assist the court to come to the best possible decision, including information that would assist the court in cross-examining witnesses.<sup>122</sup> The representative should explain the outcome of the case to the child and also prepare the child for the end of the case and the relationship with the legal representative.<sup>123</sup>

Once a legal representative has been appointed, one of the first decisions to be made is whether the child, or children, should be joined as parties, as was done in *R v H*<sup>124</sup> and the *Van Niekerk* saga.<sup>125</sup> Stilwell argues that it would be preferable for children in these instances to be joined as parties to the proceedings.<sup>126</sup> Although this might theoretically lead to the possibility of a cost order against the child, Stilwell regards this as highly unlikely, and

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<sup>111</sup> *Soller NO v G supra* par 48.

<sup>112</sup> Stilwell 4-5.

<sup>113</sup> *Soller NO v G supra* par 67. *Eg.*, whether he is of the opinion that the views of the child were expressed under duress or not (*Soller NO v G supra* par 67).

<sup>114</sup> See below.

<sup>115</sup> Heaton *The South African Law of Persons* 3ed (2008) 85.

<sup>116</sup> *Soller NO v G supra* par 67.

<sup>117</sup> *LAB v R supra* par 9.

<sup>118</sup> Par 9. The *Draft Guidelines for Legal Representatives of Children in Civil Matters* ((2010) 10) rightly suggests that the child's education and extramural programme should be considered when arranging for consultations.

<sup>119</sup> Par 9.

<sup>120</sup> Stilwell 3-4.

<sup>121</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 12.

<sup>122</sup> Stilwell 8; *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 5.

<sup>123</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 17.

<sup>124</sup> Par 40.

<sup>125</sup> Par 8. In following Canadian law, the court found that the minors should become parties to the dispute to have a right to appeal the decision of the court. In this way the child's interests can be directly protected.

<sup>126</sup> Stilwell 6. He argues that the court might not permit the joinder of a very young child that is incapable of holding an opinion or giving instructions (6).

such joinder would provide the necessary jurisprudence in this uncertain area of the law.<sup>127</sup> Joining the child as a party to proceedings would allow this representative to call and cross-examine witnesses.<sup>128</sup> If the child or children are parties, they would then have the right to receive and file pleadings and seek relief in their own right as well as have a right to appeal.<sup>129</sup> In addition, it would not be possible for the parents to settle the matter without the wishes of the child or children being considered.<sup>130</sup>

As a general rule any legal representative owes a duty of confidentiality to the child. There is no clarity whether the legal representative has such a duty. The *Draft Guidelines for Legal Representatives of Children in Civil Matters* proposes that child in a client-directed legal representation is owed the same duty of confidentiality as any other adult client. Again, it is submitted that this should not be possible in light of the constitutional best-interests principle that applies to all children. In all matters there has to be some relaxation of the duty of confidentiality, at least to the extent that it is necessary for the representative to consult with other parties and experts or where he/she is obliged to disclose personal information in accordance with the law.<sup>131</sup> It is submitted that section 28(2) of the Constitution should almost always trump the confidentiality duty between the legal representative of the child and the child itself.

In conclusion it should be noted that even if the voice of the child is heard,<sup>132</sup> directly or indirectly, it does not mean that the child's wishes are decisive. They are only one of the factors that the court has to consider.<sup>133</sup> It does, however, mean that there is a responsibility on the court and the parties to listen to and consider the views of the child. In some instances the views of the child may well be decisive in the settlement of the matter.<sup>134</sup>

### 3 5 Funding

Who must fund the child's legal representative? If the representative is appointed in terms of section 6(4) of the Divorce Act or section 29(6)(a)-(b) of the Children's Act, the costs are for the parties to the dispute.<sup>135</sup> For an appointment at state expense, the legal representative would have to look elsewhere. In the cases of *Soller* and *Rosen v Havenga*, the legal representatives acted *pro amico*.<sup>136</sup> In *Ex parte Van Niekerk*, the state attorney was appointed.<sup>137</sup> But as the state attorney is not generally

<sup>127</sup> Stilwell 6.

<sup>128</sup> Stilwell 7.

<sup>129</sup> *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk supra* par 8.

<sup>130</sup> Stilwell 5-6.

<sup>131</sup> *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 15-16 as it refers to the best interests legal representative.

<sup>132</sup> As required by s 10 of the Children's Act.

<sup>133</sup> *Soller NO v G supra* par 56. The weight that the court attaches to the views of the child would depend on the circumstances.

<sup>134</sup> Stilwell 7.

<sup>135</sup> S 6(4).

<sup>136</sup> *Soller NO v G supra* par 19; and *Rosen v Havenga supra* par 8.

<sup>137</sup> See discussion by Skelton 218.

accessible to the public, this option cannot be considered a universal solution.<sup>138</sup>

The situation in *LAB v R*<sup>139</sup> is preferable. In this case the court confirmed the power of Legal Aid South Africa to render assistance to a minor in instances where section 28(1)(h) of the Constitution applies.<sup>140</sup>

As Legal Aid South Africa holds the purse strings, a brief discussion of the 2009 Legal Aid South Africa Guide is expedient.<sup>141</sup> The Regional Operations Executive must give prior written consent for a child to receive legal representation to intervene in divorce, custody or maintenance proceedings between the parents of the child, if this is needed to protect the best interests of a child, and if substantial injustice would otherwise result.<sup>142</sup> The means test will be applied to determine if a person is indigent according to the Legal Aid provisions.<sup>143</sup> For the purposes of such an application it is not essential that the child be assisted.<sup>144</sup>

Legal aid unfortunately brings with it particular concerns: budgetary constraints;<sup>145</sup> the possible appointment of junior, inexperienced representatives that could defeat the purpose of the appointment;<sup>146</sup> and the

<sup>138</sup> Sloth-Nielsen 2008 *SAJHR* 504-505; and Skelton 222.

<sup>139</sup> Par 3.

<sup>140</sup> Par 5-6. This judgment was one in a series of judgments. The saga commenced with *R v M* (case number 5493/02 Durban and Coast Local Division (unreported); Sloth-Nielsen 2008 *SAJHR* 505; Kassan 234; and Skelton 222) where the judge requested legal representation for the child. The parties agreed and requested the appointment of senior counsel at the expense of Legal Aid South Africa. Legal Aid South Africa argued that they had sole discretion in making the appointment but the parties disagreed. The court, after considering the duties of Legal Aid South Africa in terms of the legislation and the constitution, made an order directing the Minister of Justice and Constitutional Development to ensure that a legal representative was appointed. This was done. Subsequent to making the order, however, the appointment made by Legal Aid South Africa was set aside (*LAB v R supra* par 12; Kassan 235; Skelton 223 fn 3). The court in *LAB v R* found that the original appointment was incorrectly set aside based on an erroneous interpretation of the Interpretation Act 33 of 1957 (par 32)). In *LAB v R*, the child contacted Childline directly, *via* sms, for assistance, who in turn contacted the Centre for Child Law. A senior attorney was appointed by Legal Aid South Africa.

<sup>141</sup> 2009 Legal Aid Guide 4.11.4 <http://www.legal-aid.co.za/images/legal-services/Guide/laguide.pdf> (accessed 2010-01-12).

<sup>142</sup> 2009 Legal Aid Guide 4.18.7; *LAB v R supra* par 37. The following criteria determine if a child has a right to legal aid in civil cases at state expense: one, the seriousness of the issue for the child; two, the complexity of the relevant law and procedure; three, the ability of the child to represent himself effectively without representation; four, the financial situation of the child or the child's parents or guardians; five, the child's chances of success in the case; and six, whether the child has a substantial disadvantage compared with the other party in the case. The awarding of legal aid is dependent also on the resources of Legal Aid South Africa (Guide 4.18.1).

<sup>143</sup> Guide 4.18. Where the child is not assisted by his parents, the child's means will be considered. Where the child is assisted by his parents, their means will be considered. If the child is assisted by his parents, who exceed the means test and can afford to provide legal representation for the child, yet fail, refuse or neglect to do so, then legal aid will be provided to the child if substantial injustice would otherwise result. In certain of these instances, Legal Aid South Africa may institute proceedings against the parents to recover these costs (Guide 4.18.3).

<sup>144</sup> Guide 4.18.2.

<sup>145</sup> Sloth-Nielsen 2008 *SAJHR* 506.

<sup>146</sup> *Ibid.* See discussion above.



possibility that wealthy parents could frustrate the appointment of the representative for the child.<sup>147</sup>

### 3 6 Conclusion

The appointment of a legal representative at state expense, although legally available and sanctioned by the Constitution, the courts, and international law, is still in its infancy in South Africa. These developments “should be seen as creating opportunities for the child to participate in litigation in a manner equal to adult parties.”<sup>148</sup> While some guidance has been given by the courts, it has been in a piece-meal fashion and many aspects have not yet been considered and are still in need of clarification. Because of the unconventional nature of the representation in certain instances, this uncertainty impacts on litigants, their legal representatives, as well as the judiciary.

It is submitted that to leave the matter to the judiciary for clarification seems unnecessary. Comprehensive guidelines, endorsed by the role-players are urgently required. The *Draft Guidelines for Legal Representatives of Children in Civil Matters*, although helpful, lack finality and the distinction therein between the two models of legal representation is lamented. Specific issues that require clarification and that should be included is the preferred timing of the application as well as detail regarding the role, duties and responsibilities of the representative *vis-à-vis* the child and other role-players during the pre-trial negotiation phase as well as during the trial itself. It is with these uncertainties in mind that the position in the Australian legal system is discussed.

## 4 AUSTRALIA

### 4 1 Introduction

The basic legal principles dealing with care and contact arrangements in Australia are similar to that of South Africa. The dispute is generally regarded as a parental dispute and the children are not parties to the negotiations or the litigation.<sup>149</sup> Although parents are encouraged to reach a settlement agreement,<sup>150</sup> the Family Law Act of 1975 entitles the court to make parenting orders where such an agreement cannot be reached.<sup>151</sup> The

<sup>147</sup> Sloth-Nielsen 2008 *SAJHR* 506.

<sup>148</sup> Du Toit 111.

<sup>149</sup> Ross “Legal Representation of Children” in Monahan and Young (eds) *Children and the Law in Australia* 7ed (2008) 546.

<sup>150</sup> S 63B. The agreement is referred to as a parenting plan (s 63C). The Act also provides for family dispute resolution procedures prior to approaching the courts for an order (s 60I-J). Research has shown that around 35% of children and family law cases are settled outside the court by mediators and lawyers, while approximately 65% are still settled by a judge (McIntosh 13).

<sup>151</sup> It is interesting to note that in New Zealand, the premise is the opposite. In terms of s 30 of the Guardianship Act 1968, in all custody and access matters which are likely to proceed to a hearing, the court shall appoint a representative for the child unless the court is satisfied that the appointment would serve no useful purpose (Cochrane “The Team Approach to

order may include the living arrangements of the child and the amount of time spent with each parent.<sup>152</sup> As in South Africa, the child's best interests are paramount when making a parenting order.<sup>153</sup> One factor that plays a role in the determination of the best interests, and which has become particularly important during the last 15 years, is the views of the child.<sup>154</sup>

With regard to the views of the child,<sup>155</sup> the Act makes provision for when<sup>156</sup> and how the views of the child can be expressed.<sup>157</sup> Children's views are generally expressed to the court indirectly<sup>158</sup> via expert reports such as a family report<sup>159</sup> or an Order 30A Report,<sup>160</sup> although interviews by judges<sup>161</sup> and the giving of evidence by the children personally are possible, if rarely used.<sup>162</sup> However, the view of the child is expressed, it is not necessarily decisive, but only one factor that the court will take into account before making its decision.<sup>163</sup> The legal system in Australia, as in South

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Separate Representation – The New Zealand Perspective” 1996 *Family Court of Australia Second National Conference Papers* 1996 345.

<sup>152</sup> S 65C-65LB.

<sup>153</sup> S 65AA. See discussion by Van Krieken “The ‘Best Interests of the Child’ and Parental Separation: On the ‘Civilizing of Parents’” 2005 *Modern Law Review* 25.

<sup>154</sup> The adoption of the participation principle is a result of adherence to international instruments, particularly the UN Convention on the Rights of the Child (Ross 544 and 548). See also Guidelines par 3; 5.3. The momentum increased after the case of *Re K* [1994] 117 FLR 63 (Parkinson *Australian Family Law in Context. Commentary and Materials* 4ed (2009) 22.402).

<sup>155</sup> Fehlberg and Behrens *Australian Family Law. A Contemporary Context. Teaching Materials* (2009) par 6.7.4.5 on the importance of the views of the child. Graham and Fitzgerald note that their research has shown that children in general “welcome limits imposed on their decision making, whilst simultaneously wanting recognition of their identity and capacity to act in the processes occurring around them” (Graham and Fitzgerald “Taking Account of the ‘To and Fro’ of Children’s Experiences in Family Law” 2006 *Children Australia* 30-36).

<sup>156</sup> Children are not required to express their views (s 60CE). Chisholm lists the reasons why the participation of a child might be useful in proceedings and also why, on the other hand, it might be undesirable (Chisholm “Children’s participation in Family Court Litigation” 2000 Paper delivered at the International Society of Family Law, 10<sup>th</sup> World Conference, Brisbane, Australia 21-22).

<sup>157</sup> S 60CD. For an example of how the court deals with the views of the child, see *Hale v Hale* [2009] FMCAfam 873 2009 WL 2757233 par 481-493. In the matter of *Litchfield and Litchfield* [1997] FLC 91-840, the court reluctantly concluded that the strong views of the child against access made any order to the contrary the cause of deep distress to the child (Parkinson “Decision-making About the Interests of the Child: The Impact of Two Tiers” 2006 *Australian Journal of Family Law* 179 and 192).

<sup>158</sup> The degree of involvement of a child is determined on a case by case basis. The decision depends on the wishes and needs of the child (Chisholm 23). Where an Independent Children’s Lawyer (ICL) has been appointed, it is the ICL that determines the involvement of the child (see discussion below).

<sup>159</sup> Parkinson 22.420.

<sup>160</sup> Ross 545; and Chisholm 7.

<sup>161</sup> Rule 15.02. See the Family Court of Australia *Finding a Better Way. A bold departure from the traditional common law approach to the conduct of legal proceedings* (2007) 50. The Report notes that the reasons for the reluctance to judge interviews are that the judges are inadequately trained; concerns about the confidentiality of the information provided by the child and the possible intimidation of the children even though such an interview is only possible with the permission of the child (50). See also Parkinson, Cashmore and Single “Parents and Children’s Views on Talking to Judges in Parenting Disputes in Australia” 2007 *International Journal of Law, Policy and the Family* 84; and Chisholm 7.

<sup>162</sup> Chisholm 8 and 13; and Family Court of Australia Report 50.

<sup>163</sup> *Stoney v Terry* [2010] FMCAfam 258 par 63.

Africa, thus seems to favour a more protected stance by trying to limit exposing children directly to the litigation between their parents.

The appointment of legal representatives for children in custody and care proceedings, although still controversial to some extent,<sup>164</sup> is established in practice and quite common.<sup>165</sup> The relevant statutory provisions are found in sections 68L-M of the Family Law Act. These sections provide for the appointment of an independent representative for the child, an Independent Children's Lawyer (ICL).<sup>166</sup> These sections must be read with the 2007 Guidelines for Independent Children's Lawyers.<sup>167</sup>

## 4 2 Applicant

An ICL is always appointed by the court.<sup>168</sup> The ICL appointment may be on the court's own initiative or on application by the child, an organization concerned with the welfare of children, or any other person.<sup>169</sup> It has been suggested that the appointment be made as early as possible in the process, but at least before the hearing as to give the ICL the opportunity to discharge his duties.<sup>170</sup>

## 4 3 Appointee

In evaluations of the ICL, the appointments have been described as challenging to the representatives, in that the representative requires additional knowledge and special skills and expertise that they do not always have, including being able to communicate with children as clients as well as with legal and non-legal professionals involved in the process.<sup>171</sup>

The appointee is usually a family lawyer, a solicitor, of considerable experience.<sup>172</sup> The exact requirements of the position are dependent on the regulations in each state. For example, in Western Australia, the appointee must be on the Independent Children's Lawyer/Child Representative Panel

<sup>164</sup> Some lawyers stress the harm that can be done to children through contact with legal proceedings (Ross 547).

<sup>165</sup> In 2005-2006 3392 appointments were made and in 2008-2009 4458 (Kaspiew, Grey, Weston, Moloney, Hand, Qu and the Family Law Evaluation Team 309). This is more than double the 2500 appointments made in Australia in 1995-6 (Chisholm 7).

<sup>166</sup> S 68L(2); *Re K 74*; *Kendall v Chandler* [2009] FMCAfam 527 par 7. The ICL can be appointed even though the child is not a party to the litigation (*Re K 76*); *Twan v Twan* [2009] FMCAfam 72 par 9. Previously, the ICL was referred to as the "child representative" (Young and Monahan *Family Law in Australia* 7ed (2009) 7.78). The change in terminology occurred after the 2004 report by the Family Law Council in fn 8 above (Parkinson 22.405).

<sup>167</sup> These Guidelines have been endorsed by the Chief Justice of the Family Court of Australia and by the Federal Magistrates Court of Australia (Preamble in the Guidelines). These Guidelines settled conflicting interpretations by the various courts of the role of the ICL (Young and Monahan 7.80 – 7.88). See also *Lancet v Lancet* [2008] 218 FLR 36 par 15-18; and the New South Wales Legal Aid *Practice Standards for Independent Children's Lawyers in Family Matters* (Nov 2007) which contains similar provisions.

<sup>168</sup> S 68L.

<sup>169</sup> S 68L(4).

<sup>170</sup> Altobelli and Serisier *Practising Family Law* 2ed (2009) 5.9.

<sup>171</sup> Ross 547; Guidelines par 4; and see discussion in *T v T* [2008] 216 FLR 365 par 11.

<sup>172</sup> Altobelli and Serisier 7.41.

to be assigned as an ICL by Legal Aid. In order to be included on the Panel, the ICL must have: an unrestricted practice certificate; 5 years' post admission practice in family law and child welfare jurisdiction; completed a course required by Legal Aid that includes specialized ICL training; extensive knowledge of family law practice and procedures, child welfare issues and relevant case law; sound knowledge and understanding of the role of an ICL; well-developed communication skills; and experience in advocacy skills and mediation.<sup>173</sup>

#### 4 4 Appointment criteria

The appointment of an ICL is made in instances where the court is of the view that the child's interests in the proceedings ought to be independently represented by a lawyer.<sup>174</sup>

The case of *Re K*<sup>175</sup> is the *locus classicus* for the appointment criteria for an ICL. The court listed several specific practical instances in which it would consider making an ICL appointment:<sup>176</sup> one, cases involving allegations of child abuse, whether physical, sexual or psychological; two, cases where there is an intractable conflict between parents; three, cases where the child is apparently alienated from one or both parents; four, where there are real issues of cultural or religious differences affecting the child; five, where the sexual preference of one or both parents<sup>177</sup> is likely to impinge upon the child's welfare; six, where the conduct of one or both parents<sup>178</sup> is alleged to be anti-social to the extent that it is likely to impinge seriously upon the child's welfare; seven, where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either or both parents or some other person having significant contact with the child; eight, where, on the material filed by the parents, neither parent would appear to be a suitable custodian; nine, where the child is of mature years and expresses strong views, the giving effect to of which would involve changing a long-standing custodial arrangement or a complete denial of access to one parent; ten, where one of the parties proposes that the child be either permanently removed from the court's jurisdiction or permanently removed to a place within the jurisdiction of the court that would greatly restrict (or for all practical purposes exclude) the other party from gaining access to the child; eleven, where it is proposed that siblings be separated; twelve, where none of the parties is legally represented; and lastly, where in applications to the court's welfare jurisdiction relating in particular to the medical treatment of children, the child's interests are not adequately represented by one of the parties.

<sup>173</sup> Legal Aid Western Australia *Specialised Family Law Panels* (2009). <http://www.legalaid.wa.gov.au/InfoLawyers/asp/default.aspx?Page=Grants/FamilyLawSpecialised.xml> (accessed 2010-01-12).

<sup>174</sup> S 68L(2).

<sup>175</sup> [1994] 117 FLR 63. This case was referred to with approval in *Brock v Brock* [2009] 224 FLR 398 par 25. See also *P and P* 1995 (FLC) 92-615. See the discussion of *Re K* in Parkinson 22.400; Altobelli and Serisier 4.21 and 15.10; and Young and Monahan 7.81.

<sup>176</sup> 82-84. The court made it clear that it was not an exhaustive list (79).

<sup>177</sup> Or another person having significant contact with the child.

<sup>178</sup> *Ibid.*

## 4 5 Duties and responsibilities of the appointee

The purpose of the appointment is to assist the court in determining the best interests of the child, *inter alia* to ascertain the views of the child depending on the age or maturity of the child or other circumstances.<sup>179</sup> It is the ICL that determines the involvement of the child in the proceedings.<sup>180</sup> The Family Court has no capacity to appoint a legal representative for a child who acts solely on the child's instructions.<sup>181</sup>

The role of the ICL is set out in the Act.<sup>182</sup> The ICL is generally required to meet with the child,<sup>183</sup> establish a professional relationship with him and to explain the role and duties of the ICL.<sup>184</sup> Relevant parties should be advised about the ICL appointment.<sup>185</sup>

The ICL is expected to devise a case plan,<sup>186</sup> develop a strategy for the involvement of the child, and to provide the child with information, support and assistance as and when required during the process.<sup>187</sup> The ICL is thus very much part of the earlier pre-hearing settlement negotiations.

The lawyer must form an independent view of what is in the best interests of the child and act in line with those beliefs.<sup>188</sup> His stance should be independent of the parties and the court.<sup>189</sup> He is not the child's legal representative in the traditional sense and is not obliged to act on the child's instructions in relation to the proceedings.<sup>190</sup> He must act impartially and without constraint when dealing with the parties to the proceedings.<sup>191</sup> He may present evidence<sup>192</sup> and must ensure that the views of the child are put fully before the court.<sup>193</sup> He must analyze all reports relating to the child and

<sup>179</sup> S 68L(5)-(6); *Re K* 1994 Fam LR 537 555-8. See also Ross 553; Guidelines par 4.

<sup>180</sup> Guidelines par 4.

<sup>181</sup> Tobin "Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?" (2009) *Melbourne Law Review* 579 and 608. Tobin finds this problematic from the perspective of a substantive-rights approach as it does not ensure that a child will have their views expressed to the court in a truly independent way with reference to *Re Alex: Hormonal Treatment for Gender Dysphoria* (2004) 32 Fam LR 503 (608 fn 179).

<sup>182</sup> Not only is the role set out, but also the limitations to his role as ICL (Guidelines par 5.2).

<sup>183</sup> The court may make an order that the child be made available for examination for the purposes of preparing a report for use by the independent children's lawyer (s 68M(1)-(2)). The order may be directed to various persons, including parents (s 68M(3)).

<sup>184</sup> Guidelines par 5. There are three exceptions to the guideline that the ICL must meet with the child in limited instances (Guidelines par 6.2. See also *MacKillop v Jell* [2009] FMCAfam 191 par 4; 280). The duty to explain issues to the child extends also to the conclusion of the matter (Guidelines par 6.10).

<sup>185</sup> Guidelines par 6.1.

<sup>186</sup> Par 6.5. Where appropriate, the plan must be drawn up in consultation with any Family Consultant or other expert involved in the case (par 6.5).

<sup>187</sup> Par 6.5.

<sup>188</sup> S 68LA(2)(a)-(b); and Guidelines par 4.

<sup>189</sup> Guidelines par 4.

<sup>190</sup> S 68LA(4).

<sup>191</sup> S 68LA(5)(a); and Guidelines par 4; 6.4.

<sup>192</sup> Young and Monahan 299.

<sup>193</sup> S 68LA(5)(b); and Guidelines par 4;6.5.

ensure that all important issues are brought to the attention of the court.<sup>194</sup> The ICL must also keep to the prescribed court procedures and deadlines and be proactive in providing and evaluation evidence.<sup>195</sup> He may introduce evidence<sup>196</sup> and make submissions suggesting a specific course of action to the court.<sup>197</sup> Although the child is not a party to the dispute, the ICL is entitled to be given all the documents and evidence that any of the parties plans to rely upon.<sup>198</sup> During the hearing he has the right to cross-examine the witnesses and he has the right to appeal.<sup>199</sup> The ICL may be assisted by counsel.<sup>200</sup>

It is important that the ICL endeavours to minimize the trauma to the child as a result of the proceedings<sup>201</sup> and, to the extent that it is in the best interests of the child, to facilitate a speedy resolution to the dispute.<sup>202</sup> He has a duty to work together with the role-players and experts<sup>203</sup> in the matter and is expected to seek peer and professional support should it be required.<sup>204</sup>

Furthermore, the Act makes provision for certain information to be privileged. There is no duty on the ICL to disclose information that the child has given him, to the court.<sup>205</sup> The information may, however, be disclosed if, in the view of the ICL, it would be in the best interests of the child even if it against the wishes of the child.<sup>206</sup>

## 4 6 Funding

The funding of the ICL is generally done through the relevant local legal aid centre,<sup>207</sup> either through in-house practitioners or by private practitioners with specialist accreditation by legal aid,<sup>208</sup> resulting in financial implications for the centre as the instances of ICL appointments increase.<sup>209</sup> The court,

<sup>194</sup> S 68LA(5)(c). The ICL may support the view of a particular party (*Falun v Dale-Falun* [2009] FMCAfam 540; *Whitman v Burr* [2009] FMCAfam 233); and see also Altobelli and Serisier 7.40.

<sup>195</sup> Guidelines par 6.9.

<sup>196</sup> *Gleeson v Osborne* [2009] FMCAfam 894 par 38-40.

<sup>197</sup> S 68LA(3); Guidelines para 5.4; 6.5; and see also *Helmick v Jameson* [2010] FMCAfam 60 par 39. However, the court is not bound by the submissions of the ICL (*Cage v Cage* [2009] Fam CA 719 par 176). See also *M v W* [2008] 217 FLR 10 par 47; *Bartlett v Farley* [2009] FMCAfam 1237 par 140; and *Emrich v Emrich* [2009] FMCAfam 74 par 240.

<sup>198</sup> *Lindrum v Marsden* [2009] FMCAfam 134 par 15.

<sup>199</sup> Guidelines par 6.9 and 6.11.

<sup>200</sup> *Clayton v Hacker* [2009] FMCAfam 114 par 12; and *Rees v Shaw* [2009] FMCAfam 178.

<sup>201</sup> S 68LA(5)(d); and Guidelines par 6.5.

<sup>202</sup> S 68LA(5)(e); Guidelines par 4; 6.4; 6.9; and *Fisk v Raby* [2009] FMCAfam 438 par 64.

<sup>203</sup> The Guidelines refer to the following persons: any family consultant, relevant government departments, contact centres, schools and agencies (par 6.5).

<sup>204</sup> Guidelines par 4 and 6.5.

<sup>205</sup> S 68LA(6). It should be noted that the communications between the ICL and the other role players and experts are not privileged.

<sup>206</sup> S 68LA(7)-(8).

<sup>207</sup> *Lancet v Lancet* [2008] 218 FLR 36 para 21; *Summberby v Cadogen (No 2)* [2009] FMCAfam 1018; *Roberts v Roberts* [2009] FMCAfam 912; and *Bancroft v Grattan* [2009] FMCAfam 504.

<sup>208</sup> Kaspiew, Grey, Weston, Moloney, Hand, Qu and the Family Law Evaluation Team 7.

<sup>209</sup> Young and Monahan 7.83.

however, has no power to order Legal Aid to make funding available to a party where an application for funding was refused.<sup>210</sup> Where appropriate, the cost of the ICL may be sought from the parties themselves.<sup>211</sup>

## 4 7 Conclusion

From the 2009 Review Report it is evident that the participation of the ICL in the legal process has been successfully incorporated into the legal process in Australia, which is well regulated and used in approximately a third of all cases to be decided by the courts.<sup>212</sup> The Guidelines are not only comprehensive, but have been endorsed by the Chief Justice of the Family Court of Australia as well as the Federal Magistrates Court of Australia. This provides certainty for all the role-players in how to deal with the appointment of the ICL and what the duties and responsibilities of the ICL are.

## 5 CONCLUSION

The impact of the United Nations Convention on the Rights of the Child has had a similar effect on the legal developments regarding the rights of the child to be heard, also through legal representation, in South Africa and Australia. As mentioned above, research in Australia has shown that an ICL acting for a child generally better enables the voice of the child to be heard, especially in highly disputed cases, as it ensures that the child's views will be considered and the principle of the best interests of the child will be applied, both in the pre-trial negotiation phase and during the trial. It is submitted that this should be the same in South Africa.

Not all aspects of the Australian ICL would be relevant to, or should be made applicable to South Africa. In particular, the Australian legislation only makes provision for the appointment of an ICL by the courts. Because of the fact that our courts system is different in that there are no Family Courts countrywide, and in light of legal costs, the possibility that a legal representative can be appointed by Legal Aid South Africa without a court order should remain.

The remaining uncertainties in the South African legal system about the appointment and role of a legal representative for a child in family matters can easily be resolved by the adoption of specific guidelines, as has been done in Australia as it can fill the current *lacunae* identified above. Aspects that could be adopted to create legal certainty in this new and developing area of the law are the following: one, the specification of the qualifications and experience of a person that can be appointed as a legal representative for a child as well as the possible accreditation of such legal practitioners; and two, a comprehensive and official set of guidelines with one model of

<sup>210</sup> *Ibid*, with reference to *Heard & De Laing; Crown Solicitor for the State of South Australia (Intervening)* [1996] Fam LR 315. In *Herbst v Wadsworth* [2010] FMCAfam 164 par 229-230 the court lamented that the absence of an ICL greatly hampered the finalization of the matter. However, due to the lengthy history of the case there was no funding for an ICL.

<sup>211</sup> S 117(3). In such cases the court must disregard legal aid funding (s 117(5)). See in general Young and Monahan 7.83.

<sup>212</sup> Kaspiw, Grey, Weston, Moloney, Hand, Qu and the Family Law Evaluation Team 302.

legal representation (the best-interest legal representative) that includes all the duties and responsibilities set out in paragraph 3 4 above, as well as additional duties such as a case strategy plan; earlier involvement in the pre-trial and settlement negotiations; and clarity as to the fact that the legal representative is regarded as a full participant to the proceedings with all privileges regarding documentation and witnesses.

Ross puts it succinctly:

“Legal representation for children is now understood as an important means for children to participate in legal decisions, even if it is not yet a right which has been realised for all children in all jurisdictions. There is now evidence from research with children that reflects that lawyers can make a significant difference, facilitating children’s voices in legal processes in a way that makes them feel that they have been heard. The challenge is for lawyers *and those who make policy ... to refine the organisation and practice of legal representation in a way that supports children’s participation to a greater extent.*”<sup>213</sup>

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<sup>213</sup> Ross 572 (author’s own emphasis).