

**SOUTH AFRICAN COURTS' DIFFERING APPROACHES TO DETERMINING  
CHILDREN'S VIEWS IN FAMILY LAW MATTERS**

by

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## **Summary**

This dissertation analyses thirteen South African judgments to establish how courts determine children's views and wishes in legal proceedings. The judgments selected relate to child participation in divorce and care, relocation, and child abduction proceedings. The analysis finds that South African courts determine children's views and wishes in legal proceedings in diverging ways. Various role-players are involved in assessing children in legal proceedings, and are requested to report their findings to courts. To ensure compliance with the UNCRC, ACRWC and the Children's Act 38 of 2005, it is important that the respective role-players involved in determining children's views in legal proceedings base their assessment and findings on the proposed prescribed measures and undergo additional, relatively simple training in respect of such measures. Prescribed measures to determine children's views and wishes will result in a less diverging, more consistent approach to child participation.

## **Key terms**

African Charter on the Rights and Welfare of the Child; United Nations Convention on the Rights of the Child; Child's Views; Children's Act; Divorce Cases; Relocation Cases; Custody Cases; Child's Wishes; Child Participation; Child Legal Representation.

## **List of abbreviations**

ACRWC – African Charter on the Rights and Welfare of the Child 1990

SALRC – South African Law Reform Commission

UNCRC – United Nations Convention on the Rights of the Child 1989

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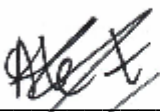
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## CHAPTER 1: INTRODUCTION

### 1.1 Introduction

South African legislation<sup>1</sup> and two prominent treaties<sup>2</sup> require South African courts to allow child<sup>3</sup> participation in legal matters where the outcome may affect a child, provided that the child is of an age, level of maturity and stage of development to participate. Participation has occurred when courts allow children to express their views, adults listen to such views and courts give due weight to the children's views, interests and goals.<sup>4</sup>

A child's right to voice his/her views in legal proceedings is not novel. In the South African context, this right was laid down well in advance of the Children's Act and even prior to its forerunner, the Child Care Act 74 of 1983. In the 1971 case of *French v*

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<sup>1</sup> See section 6(5) of the Children's Act 38 of 2005 (hereinafter referred to as the Children's Act), which provides: "A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child." Also see section 10 of the Children's Act: "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration. Also see section 31(1)(a) of the Children's Act, which states: "Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development."

<sup>2</sup> See article 4 of the African Charter for the Rights and Welfare of the Child, 1990 (hereinafter referred to as the ACRWC) which provides: "In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law."

Also see article 12 of the United Nations Convention for the Rights of the Child, 1989 (hereinafter referred to as the UNCRC): "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

<sup>3</sup> According to section 1 of the Children's Act, child means "a person under the age of 18 years". According to article 2 of the ACRWC, a child means "every human being below the age of 18 years". According to article 1 of the UNCRC a child means "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

<sup>4</sup> Krappman L "The weight of the child's view (Article 12 of the Convention on the Rights of the Child)" 2010 *International journal on children's rights* 502.

*French*<sup>5</sup> the court already expressly stated that a child's views had to be considered in disputes between parents involving parental responsibilities and rights.

Legal systems' acceptance of the notion that children are human beings with a right to be heard is a fundamental shift.<sup>6</sup> Instead of assigning certain identities to a child, adults should treat a child as an individual in his/her own right as this is beneficial for a child's welfare and from a legal perspective.<sup>7</sup>

According to the author Mol, child participation in family law matters usually takes one or more of the following forms: i) expert reports; ii) children litigating on their own behalf; iii) judges hearing children directly; iv) legal representation for a child; and v) best-interests representation.<sup>8</sup>

Legal representation of a child entails the appointment of a legal practitioner to represent the child by acting on the child's instructions.<sup>9</sup> Legal representation for a child further entails an appointed legal representative to be client-directed.<sup>10</sup> Best-interests representation is another form of legal representation where the legal representative appointed for a child represents the child by advancing the child's best interests.<sup>11</sup> In the South African context, best-interests representation usually entails the appointment of a curator *ad litem* to represent very young children that are unable to articulate their views in a legal matter.<sup>12</sup>

### 1.1.1 *Child participation in terms of treaties and domestic legislation*

The two most prominent treaties to consider in the context of child participation in family law matters are the UNCRC and the ACRWC. South Africa has ratified both treaties.<sup>13</sup>

The ACRWC in article 4 provides as follows:

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<sup>5</sup> *French v French* 1971 4 SA 298 (W).

<sup>6</sup> Krappmann 2010 *International journal on children's rights* 505.

<sup>7</sup> Hemrica J and Heyting F 2004 "Tacit notions of childhood: An analysis of discourse about child participation in decision-making regarding arrangements in case of parental divorce" *Childhood* 464.

<sup>8</sup> Mol C 2019 "Children's representation in family law proceedings" *International journal on children's rights* 27 67.

<sup>9</sup> Mol 2019 *International journal on children's rights* 73.

<sup>10</sup> Mol 2019 *International journal on children's rights* 73.

<sup>11</sup> Mol 2019 *International journal on children's rights* 73.

<sup>12</sup> Mol 2019 *International journal on children's rights* 74.

<sup>13</sup> South Africa ratified the UNCRC on 16 June 1995 and the ACRWC on 07 January 2000.



1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

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

The UNCRC in article 12 provides as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Section 6(5) of the Children's Act stipulates as follows:

A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning a child which significantly affects the child.

Section 10 of the Children's Act stipulates as follows:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

Section 31(1)(a) of the Children's Act provides as follows:

Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b)<sup>14</sup> involving the child, that person

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<sup>14</sup> Section 31(1)(b): "A decision referred to in para (a) is any decision - (i) in connection with a matter listed in section 18(3)(c); (ii) affecting contact between the child and a co-holder of parental responsibilities and rights; (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a person or family member or, generally, the child's well-being."

must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

The UNCRC does not state when a child is able to formulate his/her views in legal proceedings. The UNCRC Committee, however, explains that child participation does not require a child to understand all aspects of legal proceedings in order to be allowed to participate in such legal proceedings.<sup>15</sup> Instead, the UNCRC considers children to be sufficiently able to express their views if they are capable of forming their own feelings, insights and concerns.<sup>16</sup> The UNCRC gives state parties the discretion to decide how child participation takes place domestically.<sup>17</sup>

It is said that the child's voice has become increasingly prominent around the world since the enactment of the UNCRC.<sup>18</sup> In practice, adults are entrusted to implement article 12 of the UNCRC and the reality is that an adult's cooperation in child participation will depend on his/her commitment thereto and him/her possibly having a vested interest in stifling child participation.<sup>19</sup>

The author Krappmann explains that article 12 of the UNCRC gives state parties freedom in respect of their implementation of the treaty:

The right in article 12 is formulated in a way that its implementation in the practice [sic] leaves room for adaptation to diverse contexts as long as the child is recognized as a human being who has a personal perspective on matters of shared concern and whose best interests have to be taken account of in a changing social world.<sup>20</sup>

According to Krappmann<sup>21</sup> the essence of article 12 of the UNCRC is as follows:

Although the child and children cannot make decisions for themselves on many issues, they have the right that they are heard and that their views are seriously considered when decisions are taken. Their evolving capacities have to be

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<sup>15</sup> UN Committee on the Rights of the Child General Comment No. 12 (2009): "The right of the child to be heard" [21] <https://www.refworld.org/docid/4ae562c52.html> (date of use: 30 July 2021).

<sup>16</sup> Mol 2019 International journal on children's rights 85; Lansdown G Every child's right to be heard: A resource guide on the UN Committee on the Rights of the Comment No. 12 (Save the Children Fund London 2011).

<sup>17</sup> Mol 2019 International journal on children's rights 67.

<sup>18</sup> Lundy L 2007 "'Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child" *British educational research journal* 927.

<sup>19</sup> Lundy 2007 British educational research journal 929.

<sup>20</sup> Krappmann 2010 "The weight of the child's view (Article 12 of the Convention on the Rights of the Child)" *International journal on children's rights* 510.

<sup>21</sup> Krappmann 2010 International journal on children's rights 512.

considered to the extent that in some areas children's own responsibilities are guaranteed.

Authors Erikssen and Näsman<sup>22</sup> also comment on the fact that the UNCRC changed the way legal systems around the world view children:

Notions of the child and the social position of children have changed a lot during the last century. While the first statements on children's rights in the global community only constructed the child as an object in care, protection and control, the UNCRC combines a developmental perspective on the child with that of the child as an actor.

Kassan,<sup>23</sup> in her 2004 dissertation, argues that the ACRWC has a benefit the UNCRC lacks. Article 4(2) of the ACRWC describes a child's participatory right as the right "to be heard", whereas article 12 of the UNCRC describes a child's participatory right as the right to "express himself/herself". Kassan explains that by describing a child's right as the "right to be heard", the ACRWC implies that a child's views should not only be ascertained but also considered.<sup>24</sup>

Krappmann<sup>25</sup> makes the following observations in respect of article 4 of the ACRWC:

[It] does not include an article on respect for the views of the child in general, but entitles the child to the right to be heard in judicial and administrative procedures only (article 4(2)). Also the African Charter on the rights and welfare of the child depicts the child as a human being endowed with dignity and an active participant of family and community, but avoids explicitly stipulating a right to be heard in all matters affecting the child.

According to Lundy, only the second part of article 12 of the UNCRC, which pertains to how to weigh children's views, requires a court to consider the child's age and level of maturity.<sup>26</sup> Lundy explains that the UNCRC does not subject a child's right to participate in legal proceedings to his/her ability to express mature views.<sup>27</sup>

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<sup>22</sup> Eriksson M and Näsman E 2008 "Participation in family law proceedings for children whose father is violent to their mother" *Childhood - a global journal of child research* 262.

<sup>23</sup> Kassan DG *How can the voice of the child be adequately heard in family law proceedings?* (LLM dissertation University of the Western Cape 2004) 21.

<sup>24</sup> Kassan *How can the voice of the child be adequately heard* 21.

<sup>25</sup> Krappmann 2010 *International journal on children's rights* 510.

<sup>26</sup> Lundy 2007 *British educational research journal* 935.

<sup>27</sup> Lundy 2007 *British educational research journal* 935.

Erikssen and Näsman<sup>28</sup> also weigh in on the UNCRC pertaining to a child's age and maturity level:

The qualification made with reference to both age and maturity creates an opacity that is likely to be of importance in the different contexts where the law is supposed to be implemented. Chronological age does not have a meaning in itself, but can be regarded as a practically useful indicator of the level of maturity, which is also mentioned as a factor.

The UN Committee on the Rights of the Child in its General Comment No. 12 of 2009 addresses the consideration of a child's age in paragraph 21 as follows:

The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:

First, in its recommendations following the day of general discussion on implementing child rights in early childhood in 2004, the Committee underlined that the concept of the child as rights holder is "... anchored in the child's daily life from the earliest stage". Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences;

Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter;

Third, States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language;

Lastly, States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.

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<sup>28</sup> Eriksson and Näsman 2008 *Childhood - a global journal of child research* 262.

Paragraph 21 quoted above seems detailed on how state parties should consider a child's age in relation to child participation in legal proceedings but clearly leaves implementation to the respective state parties.

Although the African Committee of Experts on the Rights and Welfare of the Child has published General Comments concerning several articles of the Charter – on article 6 and article 30 of the ACRWC, for example – it has not published a document dealing with article 4. Reference to the ACRWC or its Expert Committee on what is expected of a court when considering a child's age and level of maturity, also does not provide answers in this regard.

Since a child's age and level of maturity seem instructive for participation in terms of section 6(5), section 10 and section 31(1)(a) of the Children's Act, one would have expected the Children's Act itself to provide proper and thorough guidelines in respect of such considerations. Erikssen and Näsman (in the passage quoted above) submit that it is up to the respective UNCRC state parties, including South Africa, to apply a child's age and maturity level relative to the particular context within the state.

Section 10 of the Children's Act applies to all matters regarding the child, including divorce and care disputes, relocation disputes as well as international child abduction matters. Section 31 applies to disputes concerning children in divorce and care matters and to relocation disputes but does not apply to international child abduction matters. In international child abduction matters the court makes the decision, not a co-holder of parental responsibilities and rights.

As will be explored in this dissertation, the Children's Act and its regulations are unfortunately at present devoid of any further explanation or indicators pertaining to a child's age and level of maturity.

In the next section the various role-players involved in assessing children and different courts' jurisdiction to hear matters involving children will be discussed.

### *1.1.2 Child participation via legal representation*

According to Mol, child participation in legal proceedings may take the form of i) expert reports; ii) children litigating on their own behalf; iii) judges hearing children directly; iv) legal representation for a child; and v) best-interests representation.<sup>29</sup>

As will be discussed in chapter 2 of this dissertation, legal representation for a child in South Africa seems to take the form of any one or a combination of four of the five forms of child participation that Mol describes. The case law analysed in this dissertation does not discuss any instances where a child litigates on his/her own behalf (the second instantiation Mol mentions). In the next section each of the four forms of legal representation relevant in South Africa is briefly introduced.

#### *1.1.2.1 Legal representation at state expense*

Where a court finds that the outcome of the proceedings between parties may not only affect a child but may result in substantial injustice for a child, the court will, in terms of section 28(1)(h) of the Constitution<sup>30</sup> and at state expense, appoint a legal representative for the child.<sup>31</sup> Section 28(1)(h) provides as follows:

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

The selected judgments to be discussed in chapter 2, include cases where courts appointed legal representatives for children at state expense in terms of section 28(1)(h).

#### *1.1.2.2 Curator ad litem for the child: Best-interests representation*

The appointment of a curator *ad litem* for a child is another form of child participation and chapter 2 will show that South African courts are inclined to appoint curators *ad litem*, usually a legal practitioner, to determine and report on the views of the child. From the cases to be discussed in chapter 2, one may comfortably submit that the most popular form of child participation in South Africa is the appointment of curators *ad litem* for children.

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<sup>29</sup> Mol 2019 International journal on children's rights 67.

<sup>30</sup> Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

<sup>31</sup> Boezaart T and De Bruin D 2011 "Section 14 of the Children's Act and the child's capacity to litigate" *De Jure* 416.

Kassan<sup>32</sup> submits that appointing a legal practitioner as curator *ad litem* for a child is the most suitable way to ensure that a child's voice is heard as a legal practitioner is trained in court procedure, drafting court documents and bringing across a client's views in a court.

In an international comparative study dealing with child participation, Mol<sup>33</sup> found that the appointment of a legal representative at state expense and the appointment of a curator *ad litem* are the two most prominent forms of child participation in South Africa. Furthermore, Mol found that South African courts will only appoint a legal representative for a child at state expense in exceptional circumstances.<sup>34</sup> It must be borne in mind that in cases where a child is able to direct instructions to his/her legal representative, the legal representative will represent the child in accordance with such instructions.<sup>35</sup> If a child is unable to formulate direct instructions to his/her legal representative but is still considered sufficiently able to formulate views in relation to the legal proceedings, a curator *ad litem* may be regarded as the most suitable representative.<sup>36</sup> Best-interests representation of a child entails that a curator *ad litem* should be appointed to put the child's best interests before the court. It is not intended that a curator *ad litem* acts in accordance with the child's direct instructions.<sup>37</sup>

Another form of child participation is to involve one or more experts to evaluate a child and to report to court in respect of his/her findings. The analyses of case law in chapter 2 reveals that experts are often role-players in legal proceedings where children are involved.

### 1.1.3 Expert reports

One of the forms of child participation Mol refers to is child participation via expert reports. Author Meintjes-van der Walt describes courts' assessment of expert evidence to be inherently two-fold:

Fact-finders, in the context of expert evidence, are not only faced with the task of determining which elements of expert evidence must be disregarded as irrelevant or unimportant, but must also find means of determining the significance or weight that should be attached to expert evidence in any given case. Barnes and Edge

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<sup>32</sup> Kassan How can the voice of the child be adequately heard 13.

<sup>33</sup> Mol 2019 International journal on children's rights 66 – 98.

<sup>34</sup> Mol 2019 International journal on children's rights 72 & 74.

<sup>35</sup> Mol 2019 International journal on children's rights 74.

<sup>36</sup> Mol 2019 International journal on children's rights 73 – 74.

<sup>37</sup> Mol 2019 International journal on children's rights 67.

describe the dilemma: "The normative question of how expert knowledge is best assessed, and how experts themselves are best evaluated and kept under a modicum of control, raises such intractable and viciously circular problems as to strangle speech."<sup>38</sup>

Meintjes-van der Walt further refers to the matter of *Holtzhausen v Roodt*<sup>39</sup> to explain that courts are reliant on experts to assist them in making sense of certain specialised concepts but, ironically, the same knowledge gap that causes courts to seek the assistance of experts may also result in courts making findings based on evidence that the judicial officer did not himself/herself fully understand.<sup>40</sup>

The good news, as Meintjes-van der Walt explains, is that judicial officers in South Africa are capable of being trained to receive and rely on certain expert evidence:

South Africa is in the privileged position that its presiding officers are professionally educated judges and magistrates, a fact which enhances the scope for educating fact-finders in the skills of understanding and evaluating expert evidence.<sup>41</sup>

It is trite that academic qualifications on their own are not a sufficient gauge of expertise and to this extent Meintjes-van der Walt<sup>42</sup> refers to the 1976 case of *Menday v Protea Assurance*:<sup>43</sup>

The danger of holding otherwise – of being overawed by a recital of degrees and diplomas – are [sic] obvious; the Court has then no way of being satisfied that it is not being blinded by pure “theory” untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on knowledge or experience of experts other than themselves who are shown to be acceptable experts in that field.

Expert reports, whether in relation to children or otherwise, are regulated by ordinary evidentiary rules. Courts make use of the law of evidence for guidance on how parties prove facts and, in this instance, the main function is to ascertain which facts are

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<sup>38</sup> Meintjes-van der Walt L 2003 “The proof of the pudding: The presentation and proof of expert evidence in South Africa” *Journal of African law* 88.

<sup>39</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W).

<sup>40</sup> Meintjes-van der Walt 2003 *Journal of African law* 89.

<sup>41</sup> Meintjes-van der Walt 2003 *Journal of African law* 91.

<sup>42</sup> Meintjes-van der Walt 2003 *Journal of African law* 94.

<sup>43</sup> *Menday v Protea Assurance Company (Pty) Ltd* 1976 1 SA 565 (ECD).



admissible to prove the facts in issue.<sup>44</sup> Expert findings in relation to children's views and wishes do not enjoy unique regulation that could assist courts to decide to which extent it should rely on such findings.<sup>45</sup>

#### 1.1.4 Judges hearing children directly

Section 42 of the Children's Act sets out how a Children's Court may become an environment helpful to children. In terms of section 42(8),

[t]he children's court hearings must, as far as is practicable, be held in a room which– (a) is furnished and designed in a manner aimed at putting children at ease; (b) is conducive to the informality of the proceedings; (c) is not ordinarily used for the adjudication of criminal trials; and (d) is accessible to disabled persons and persons with special needs.

Section 42 would also apply to a situation where a child offers his/her views and wishes directly to a judge.

In the case of *Soller v G*,<sup>46</sup> to be discussed in chapter 2, a presiding officer referred to a conversation he has had with a fifteen-year-old child where the child clearly expressed his preference in a primary residence and care dispute. The judge explained that although he (the judge) was neither a social worker nor a psychologist, the Court found the child was able to express himself articulately and was very clear in his personal views regarding his parents' dispute.<sup>47</sup>

#### 1.1.5 Courts' jurisdiction in divorce and care, relocation, and child abduction matters

One of the forms of child participation Mol outlines is where "judges directly interview children".<sup>48</sup> It is submitted that in referring to judges, Mol may have meant presiding officers, which would include judges in the High Court as well as magistrates in the Children's Court or Regional Divorce Court. At this juncture, it would be useful to discuss the issue of jurisdiction of courts in matters involving children.

##### 1.1.5.1 Divorce cases where the primary care and residence of a child is in dispute

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<sup>44</sup> Schwikkard PJ and Van der Merwe SE (eds) *Principles of Evidence* 4<sup>th</sup> ed (Juta Cape Town 2016) 2.

<sup>45</sup> Sloth-Nielsen J "Child participation in family law proceedings – South Africa" in Schrama *et al* (eds) *International handbook of child participation* (Intersentia Belgium 2021) 307.

<sup>46</sup> *Soller v G* 2003 5 SA 430 (W) (hereinafter the *Soller* case).

<sup>47</sup> *Soller* [33].

<sup>48</sup> Mol 2019 *International journal on children's rights* 67.

A High Court has jurisdiction to hear a divorce matter if one or both parties are domiciled in the area of jurisdiction of the Court on the date when the action is instituted or if one or both parties have been ordinarily residing continuously in the Court's jurisdictional area for at least a year before the divorce action.<sup>49</sup>

Note that since 2008 and in terms of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, Regional Courts also have the jurisdiction to hear divorce matters. In a Regional Court divorce, one or both parties must also have been domiciled in the jurisdictional area of the court on the date when the action is instituted or be ordinarily residing continuously for at least one year prior to the divorce action.<sup>50</sup>

#### *1.1.5.2 Primary care and residence disputes, outside divorce actions*

A party may approach a court to vary, rescind or suspend an existing court order.<sup>51</sup> Where no court order as to parental responsibilities and rights exists and the parties were not married to one another, a party may also approach a court to seek an order regarding parental responsibilities and rights.<sup>52</sup>

A Children's Court<sup>53</sup> or a High Court<sup>54</sup> may hear an application to vary, rescind or suspend existing court orders or to grant court orders in respect of parental responsibilities and rights where no such order exists yet.

Furthermore, it is worth noting that a presiding officer in a Children's Court is also granted the following powers in terms of section 61 of the Children's Act:

1. The presiding officer in a matter before the children's court must – (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings, and the child chooses to do so;
2. A child who is a party or witness in a matter before a children's court must be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act 51 of 1977 if the court finds that it would be in the best interests of the child.

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<sup>49</sup> Section 2 of the Divorce Act 70 of 1979 (hereinafter referred to as the Divorce Act).

<sup>50</sup> According to section 10(2) of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, section 1 of the Divorce Act is amended to include regional courts.

<sup>51</sup> Section 28(1) read with section 23 of the Children's Act apply to situations where a party wishes to vary, suspend, rescind, or terminate parental responsibilities and rights.

<sup>52</sup> Section 23 of the Children's Act makes provision for the assignment of parental responsibilities and rights. For more on this aspect of parental responsibilities and rights, see chapter 2.

<sup>53</sup> Section 45(1)(b) of the Children's Act.

<sup>54</sup> The High Court has inherent jurisdiction under common law to hear all matters concerning children and is also regarded as upper guardian of all children in South Africa.

Subsection 170A(1) seems most relevant to this dissertation. It allows a court to appoint a competent person as intermediary for a child that is under the mental or biological age of eighteen.

#### *1.1.5.3 Relocation disputes*

A co-holder of parental responsibilities and rights must in terms of section 18(3)(iii) request the consent of the other co-holder of parental responsibilities and rights before removing a child from the Republic of South Africa.

In terms of section 45(3)(d) of the Children's Act, a relocation dispute may be heard by a High Court or Divorce Court.<sup>55</sup>

#### *1.1.5.4 Child abduction cases*

In terms of section 45(3)(d) of the Children's Act, a child abduction dispute may be heard by a High Court or Divorce Court.

Chapter 17 of the Children's Act aims to give effect to the Hague Convention on International Child Abduction (hereinafter referred to as the Hague Convention) which is *inter alia* intended to combat parental child abduction.<sup>56</sup>

#### *1.1.6 Considerations in all forms of child participation*

Irrespective of whether a child voices his/her views via an expert report, speaks to a judge directly, does so via a section 28(1)(h) appointed representative or expresses himself/herself via a curator *ad litem*, a court is in all instances obliged to consider section 6(5), section 10 and section 31(1)(a) of the Children's Act. According to these sections, a court must consider a child's age, stage of development and level of maturity in the context of child participation.

Besides considerations contained in the three sections of the Children's Act referred to above, no guidelines or factors are available to assist courts in effecting child participation in legal proceedings.

South African courts' recent interpretation and implementation of aforesaid sections of the Children's Act will be discussed in chapter 2 of this dissertation.

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<sup>55</sup> See 1.1.5.1 for a more extensive discussion regarding jurisdiction.

<sup>56</sup> Section 294 of the Children's Act.

### 1.1.7 Family advocates

The Mediation in Certain Divorce Matters Act 24 of 1987 (hereinafter referred to as the Mediation Act) allows for the creation of the Office of the Family Advocate and such Office was clearly created with minor and dependent children in divorce matters in mind.<sup>57</sup> The word “divorce” in the title of the Act makes it clear that it is primarily focused on the welfare of children in divorce matters.

The Act, however, also provides for situations where family advocates may affect investigations in respect of minor or dependent children in court applications where a party seeks to vary, suspend or rescind guardianship or custody (or primary residence and care, in current terminology).<sup>58</sup>

In her 2004 dissertation, Williams<sup>59</sup> described the role of family advocates as follows:

The establishment of the Office of the Family Advocate has assisted in addressing some of the difficulties and limitations associated with the adversarial process. It aims to mediate contentious issues regarding the children by making the process of divorce more participatory for all the role-players and encouraging a more child-centred approach and focus to custody and access disputes.

According to section 3 of the Act, a family counsellor (a social worker that becomes involved in an enquiry on request of a family advocate) and a family advocate may work together in an enquiry lodged by either party or a request for an enquiry directed by a court in terms of the Mediation Act.<sup>60</sup> Courts expect family advocates to conduct an enquiry in respect of the welfare of minor and dependent children involved in a matter and to put their findings and balanced recommendations before the court free of bias.<sup>61</sup>

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<sup>57</sup> See the preamble of the Mediation of Certain Divorce Matters Act.

<sup>58</sup> Section 4(1) of the Mediation of Certain Divorce Matters Act provides as follows: “1. The family advocate shall a) after the institution of a divorce action; or b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979), if so requested by any party to the proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor child or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.”

<sup>59</sup> Williams GF *Children’s participation and procedures at the office of the Family Advocate* (LLM dissertation University of Kwa-Zulu Natal 2004) 24.

<sup>60</sup> See section 4(1) and 4(2) for the duties a family advocate has in terms of the Mediation in Certain Divorce Matters Act.

<sup>61</sup> *Van den Berg v Le Roux* 2003 3 All SA 599 (NC).

In addition to having to conduct investigations of minor or dependent children in divorces and in court applications regarding guardianship and primary care and residence of a child, the Office of the Family Advocate is also the central authority in South Africa in all child abduction matters.<sup>62</sup> The role of the family advocate in child abduction matters will be discussed in more detail in chapter 2 of this dissertation.

## 1.2 Problem statement

The UNCRC, ACRWC and the Children's Act oblige South African courts to allow child participation in cases where a child can participate and where the outcome of the matter before the court may affect a child. Therefore, in our current legal dispensation, the question is not whether courts entertain child participation but how courts allow for child participation. In addition, how do courts determine children's views and wishes? This question is neither new nor unique to the South African legal dispensation. In 2004, the Canadian author Davies<sup>63</sup> raised the same problem along the following lines:

The question '*should* a child's voice be heard in custody/access decisions'? has now largely given away to '*how* should that voice be heard?'

As explained in the section directly above, a court's jurisdiction to hear a matter depends on the type of dispute.<sup>64</sup>

This dissertation will not focus on the nature of cases that may be said to cause substantial injustice to children and will not embark on an analysis of the application of section 28(1)(h). Instead, the focus falls on how children's views and wishes are determined, also, to some extent, in relation to cases where section 28(1)(h) appointments were made.

On the one hand, South African courts are clearly obliged to allow child participation in legal proceedings where the outcome of the proceedings may affect a child. *Prima facie* almost all types of disputes in relation to parental responsibilities and rights lead to an outcome that may affect a child. Therefore, almost all disputes revolving around parental responsibilities and rights will trigger a court's duty to consider allowing a child

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<sup>62</sup> The role of the Office of the Family Advocate as central authority is provided for in section 3 of the Mediation in Certain Divorce Matters Act read with article 6 of the Hague Convention on International Child Abduction.

<sup>63</sup> Davies CD 2004 "Access to justice for children: The voice of the child in custody and access disputes" *Canadian family law quarterly* 153.

<sup>64</sup> See para 1.5.1.1 for a more extensive discussion regarding jurisdiction.

to participate in such proceedings, subject to the child's ability to participate. On the other, South African courts are not equipped to determine a child's views and wishes. The considerations provided for in sections 6(5), 10 and 31(1)(a) do not prescribe how a court should go about ascertaining a child's views. In matters involving children, the adults remain responsible for the juridical consequences, also if a matter has been wrongly decided.<sup>65</sup>

In a case where a child is allowed to participate, a court may rely on inputs from child representatives such as a curator *ad litem*, legal practitioners or experts but ultimately it makes its own findings to determine the child's views and to determine to what extent the child may have been influenced by his/her parents.<sup>66</sup> It may therefore be said that courts assess children's ability to participate in legal proceedings on a case-by-case basis.<sup>67</sup>

In order to provide courts and persons in other forums (such as facilitators<sup>68</sup>) with proper guidance when determining children's views and wishes, clear guidelines are required. The proposed guidelines may entail amending sections 6(5), 10 and 31(1)(a) or promulgating a new regulation setting out clear child participation guidelines.

This dissertation will analyse how South African courts (High Courts, Divorce Courts and Children's Courts) have gone about determining children's views in certain family law proceedings.

All except two of the judgments selected were handed down after the Children's Act came into operation.<sup>69</sup> The exceptions *Soller* and *Ex parte van Niekerk: Ex parte van Niekerk v van Niekerk*<sup>70</sup> were selected for the following reasons:

- The judgments were handed down after the Constitution came into operation;
- The judgments were handed down after the UNCRC and the ACRWC came into operation; and

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<sup>65</sup> Krappman 2010 International journal on children's rights 502.

<sup>66</sup> Sloth-Nielsen *Child participation* 307.

<sup>67</sup> Sloth-Nielsen *Child participation* 307.

<sup>68</sup> Martalas A "Child participation in post-divorce or - separation dispute resolution" in Liefgaard T and Sloth-Nielsen J (eds) *United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (Brill/Nijhoff Leiden 2016) 901.

<sup>69</sup> Some parts of the Children's Act came into force on 11 July 2007 while the rest of the Act became effective on 1 April 2010.

<sup>70</sup> *Ex parte van Niekerk: In re van Niekerk v van Niekerk* 2005 JOL 14218 (T), hereinafter the *Ex parte Van Niekerk* case.

- The judgments dealt with and discussed child participation, which is directly relevant to the problem statement of this dissertation.

The selected judgments are considered recent since they were handed down between 2003 and 2020.

The types of family law proceedings this dissertation will focus on are:

- Divorce and care (primary residence and care) disputes;
- Relocation disputes; and
- Child abduction disputes.

Seeing that courts determine (and weigh) children's views on a case-by-case basis and because courts do not have the benefit of guidelines in relation to such determination, an in-depth inquiry into how courts have dealt with this aspect in the past is relevant and important.

If the analysis of case law indicates that courts apply a similar approach (or approaches) to child participation, there would be no problem. Chapter 2's analysis will make it clear, however, that there is cause for concern since South African courts determine children's views in legal proceedings in diverging ways.

After an analysis of how courts have determined children's views and wishes in certain judgments, chapter 3 will set out findings.

In an attempt to find solutions and make recommendations, sources other than case law are also consulted. In this respect, regard will be given to a prominent psychological study<sup>71</sup> and academic writings.

This dissertation will conclude by making certain recommendations in relation to prescribed measures for determining children's views. The recommendations are intended to assist courts in their future determination of children's views and wishes. Regardless of whether sections 6(5), 10 and 31(1)(a) are amended or a new Regulation to the Children's Act is enacted, there is clearly a need for the creation of guidelines for determining the child's voice in family legal proceedings.

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<sup>71</sup> Robinson T, Ryke E and Wessels C "Professional views of mental health and legal professionals relating to the divorcing family and parenting plans" 2018 *Child abuse research: A South African journal* 14 – 26.

### 1.3 Scope and structure of the study

This dissertation consists of five chapters. Chapter 1 is a general introduction and sets out the international and domestic context of this dissertation, an overview of the forms of child participation prevalent in South Africa as well as courts' jurisdiction.

Chapter 2 delves into particular family law judgments handed down by South African courts to ascertain how courts go about determining children's views and wishes. The judgments chosen for analysis are in the legal areas of divorce and care,<sup>72</sup> relocation, and international child abduction. The family law proceedings were chosen as the reported and unreported case law on these issues are plentiful. Judgments in these areas of family law seem clearly formulated in relation to child participation.

Note that some alternative dispute resolution processes,<sup>73</sup> not categorised as formal litigation between parties, also allow for child participation. Such alternative dispute resolution processes and how children's views were determined during such processes will not be discussed in this dissertation. Part 3 (sections 69 to 73) of the Children's Act sets out the various types of alternative dispute resolution processes parties may use in relation to children.

In chapter 3 findings are made in relation to how courts, from the judgments selected for this dissertation, determine children's views. After findings, the focus will shift to recommendations.

In chapter 4 five recommendations are made on how existing legislation, namely the Children's Act, may be amended to provide courts with guidelines to ensure child participation in legal proceedings.

Chapter 5 concludes this dissertation.

### 1.4 Research methodology

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<sup>72</sup> Prior to the enactment of the Children's Act the term "custody" was used. It has been replaced by "primary residence and care". Where regard is given to judgments handed down before the enactment of the Children's Act, the word "custody" may be used by a particular court. Such references to custody should be understood to be the same as the current "primary care and residence". For a comparison between the two terms, see Heaton J and Kruger H *South African family law* 4<sup>th</sup> ed (LexisNexis Durban 2017) 180.

<sup>73</sup> The opportunity granted to children to express their views is not limited to court cases. Alternative dispute resolution processes such as parenting coordination or facilitation also allow child participation: Martalas *Child participation* 901.



The research in this dissertation will be conducted via a literature review involving data found in legislation, textbooks, journal articles, case law, and internet sources. The research in this dissertation excludes a discussion or analysis of the constitutional principle that a child's best interests are of paramount importance. The principle underlying a child's right to participation, namely child autonomy, is also excluded from this dissertation. Although these principles are closely related to children's right to participate in legal proceedings, an extensive discussion of these principles will not be undertaken because these issues are not at the heart of the problem statement.

Further, this dissertation will only refer to foreign jurisdictions insofar as certain South African authors and academics refer to foreign jurisdictions for guidelines or considerations applicable to the South African context. The court judgments and literature considered is limited to South African literature and case law.

This dissertation will not contain a comparison between South Africa and other jurisdictions for the sake of doing a comparison. As stated, it will only make reference to foreign jurisdictions insofar as recommendations may be gathered from abroad to be applied in South Africa.

A comparison between the wording of article 12 of the UNCRC, article 4 of the ACRWV and sections 6(5), 10 and 31(1)(b) the Children's Act is an entirely separate discussion and an in-depth comparison in this regard is not undertaken in this dissertation. For purposes of this dissertation, the premise is that the ACRWC, the UNCRC and the Children's Act share a common vision in at least one respect: A child has the right to participate in legal proceedings of which the outcome may affect the child, on condition that the child is sufficiently able to express his/her views.

## CHAPTER 2: HOW SOUTH AFRICAN COURTS DETERMINE CHILDREN'S VIEWS AND WISHES IN DIVORCE AND CARE, RELOCATION AND CHILD ABDUCTION CASES

### 2.1 Introduction

Judge Pretorius described the untenable position of a child when his/her parents are involved in a legal dispute as follows:

Children cannot select their parents. They are bound to them through their birth. When parents are together, they take decisions which affect the lives of the children. All of those decisions are not always sound ones... If parents get divorced the taking of decisions is complicated but the fact that decisions have to be made remains.<sup>74</sup>

South African courts<sup>75</sup> hear a variety of family law disputes in relation to children, from child maintenance to child abduction. This section focuses on whether or not the court, in selected cases, allowed for child participation and if the court has, whether children's views were acknowledged and whether or not the court fulfilled its duty to consider them. It also asks how the court went about determining the child's views.

The discussion includes four cases and one psychological study pertaining to divorce and care disputes, four cases concerning relocation disputes and five cases regarding child abduction disputes. The discussion will focus on selected judgments only insofar as they relate to the children's views, including how role-players determined children's views.

Note that section 10 of the Children's Act applies to all matters regarding the child discussed in this dissertation, namely contact and care matters, relocation matters and abduction matters. Section 31 applies to all contact and care matters as well as to relocation matters but does not apply to abduction cases, as the court (not a co-holder of parental responsibilities and rights) makes the decision in the case of abduction.

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<sup>74</sup> *AC v KC* unreported case of 389/08 2008 ZAGPHC 369 (hereafter referred to as the *AC v KC* case [12]).

<sup>75</sup> See 1.1.5 for a more extensive discussion on jurisdiction.

The first sub-section of this discussion delves into children's views in context of divorce and custody disputes by analysing the findings of certain courts and an important psychological study.

## **2.2 Divorce and care disputes**

### *2.2.1 Introduction*

The adversarial nature of South Africa's legal system may exacerbate a situation where children's parents' divorce and care disputes are already highly hazardous to children.<sup>76</sup> One of the most prominent hazards for children is their exposure to their parents' conflict prior to, during and after the divorce.<sup>77</sup> Because divorce attorneys and advocates function within an adversarial legal system, they often assume a competitive attitude aimed towards reorganising the parties' responsibilities and rights, including their parental responsibilities and rights.<sup>78</sup>

Contrary to the commonly held belief that children should be protected from divorce proceedings, some psychologists<sup>79</sup> hold that children learn resilience and coping mechanisms from playing a more active role. It was found that children become more resilient when adults making decisions about their lives consult them as competent and active role-players in the divorce process.<sup>80</sup> Instead of viewing children as incompetent and unable to express themselves in relation to a divorce, parents have an obligation to nurture the children's capacity to make decisions in relation to legal proceedings.<sup>81</sup>

Before proceeding with the discussion of how courts determine children's views and wishes in divorce and/or care disputes, one needs to reflect on the meaning of "divorce" and "care" as envisaged in the legislation that applies at present, namely the Divorce Act<sup>82</sup> and the Children's Act:

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<sup>76</sup> De Jong M 2018 "Suggestions for a divorce process truly in the best interests of children" *THRHR* 49.

<sup>77</sup> South African Law Reform Commission Issue Paper 31 2015 [3.1.1].

<sup>78</sup> Moloney L 2016 "Child-sensitive practices in high conflict parenting disputes: A 30-year road to serious reform" *Journal of family studies* 38.

<sup>79</sup> Butler I *et al.* 2002 "Children's involvement in their parents' divorce: Implications for practice" 16(1) *Children and society* 89–102.

<sup>80</sup> Smith AB, Taylor NJ and Tapp P 2003 "Rethinking children's involvement in decision-making after parental separation" *Childhood* 201.

<sup>81</sup> Thomson R and Holland J 2002 "Young people, social change and the negotiation of moral authority" *Children and society* 114.

<sup>82</sup> Divorce Act 70 of 1979 (hereinafter referred to as the Divorce Act).

Divorce refers to the legal process of dissolving a marriage in terms of the Divorce Act.

Section 1(1) of the Children's Act defines the term "care" and from this definition ten items or elements can be distilled. The ten items making up "care" are set out below. The items below, with the exception of items (1) and (8) constitute the common-law concept "custody". The afore-said ten items were summarised in the textbook "South African family law" (Heaton and Kruger) as follows:

- (1) Within available means, providing the child with a suitable place to live, living conditions that are conducive to the child's health, well-being and development, and the necessary financial support.
- (2) Safeguarding and promoting the child's well-being.
- (3) Protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical and moral harm or hazards.
- (4) Respecting, protecting, promoting or securing the fulfilment of, and guarding against any infringement of the child's constitutional rights and the rights set out in the Children's Act.
- (5) Guiding and directing the child's education and upbringing in a manner which is appropriate to the child's age, maturity and stage of development.
- (6) Guiding, advising, and assisting the child in decisions he or she has to take, bearing in mind the child's age, maturity and stage of development.
- (7) Guiding the child's behaviour in a humane manner.
- (8) Maintaining a sound relationship with the child.
- (9) Accommodating any special needs a child may have.
- (10) Generally ensuring that the child's best interests are the paramount concern in all matters affecting the child.

"Custody" as defined under common law, describes a situation where a parent has a child physically with him/her and supervises and controls the child's daily life.<sup>83</sup> This term is not used in judgments post-Children's Act as the term "care" is the correct term to use in the current legal dispensation.

In the next section the focus is on four judgments in relation to divorce and/or care (often accompanied by contact) disputes to ascertain how courts go about determining children's views and wishes. In addition, a psychological study is discussed that deals with role-players involved if parents wish to resolve their divorce disputes with parenting plans.<sup>84</sup>

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<sup>83</sup> Heaton and Kruger South African family law 180.

<sup>84</sup> Heaton Kruger South African family law 327 explain the origin of a parenting plan as follows: "If co-holders of parental responsibilities and rights experience difficulties in exercising those responsibilities and rights, they may approach the court for an appropriate order, but before doing so they must try agree on a parenting plan. In preparing their parenting plan, they must

## 2.2.2 Legal Aid: In re four children

In *Legal Aid: In re four children*<sup>85</sup> the Supreme Court of Appeal (SCA) explained why certain persons are regarded as suitable to represent children while others are not.<sup>86</sup>

The SCA found that a Justice Centre (as also known as Legal Aid) employee was suitable to represent children in legal proceedings, either as their legal representative or as curator *ad litem*.<sup>87</sup> The SCA stated as follows:<sup>88</sup>

The appointment of an employee of the Legal Aid Board as curator would have met everything that was avowedly required and might have been done by granting the preliminary order in suitably modified form...No more was required for the Justice Centre to achieve its avowed aim than to have one of its employee's appointed curator. Where a curator is not able personally to conduct the litigation then no doubt a child is entitled to have a legal practitioner assigned under that section but that was not the present case.

The SCA further stated:<sup>89</sup>

I have pointed out that there is no bar to an employee of the Justice Centre being appointed curator to a minor. Indeed, employees of the Legal Aid Board will generally be admirably suited to such an appointment. They will seldom have a conflict of interest – as private practitioners might have – and yet they have the qualifications and skills to conduct the litigation without further outside assistance.

In addition, the Court explained that a curator *ad litem* could be appointed without the child's knowledge if a person had applied for the appointment and can show that the appointment is in the child's benefit and interest.<sup>90</sup>

For the sake of completeness, it is worth noting that the preliminary order as referred to in the SCA judgment entailed the appointment of a Justice Centre employee as curator *ad litem* for the four children.<sup>91</sup> In requesting a condonement of the Justice Centre employee's appearance for the four children, the employee assured the Court

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seek the assistance of a Family Advocate, social worker or psychologist, or mediation through a social worker or other suitably qualified person."

<sup>85</sup> *Legal Aid Board: In re four children* 2011 JOL 27159 (SCA) (hereinafter referred to as the *Legal Aid Board* case).

<sup>86</sup> *Legal Aid Board* [12] – [15].

<sup>87</sup> *Legal Aid Board* [22].

<sup>88</sup> *Legal Aid Board* [18] – [19].

<sup>89</sup> *Legal Aid Board* [24].

<sup>90</sup> *Legal Aid Board* [12].

<sup>91</sup> *Legal Aid Board* [16].

that the Justice Centre was only involved to ensure that the voice of the children was heard in the children's parents' primary residence and care dispute.<sup>92</sup> The preliminary order further ordered the mother of the four children to refrain from relocating with the children to another city pending determination of the parties' primary residence and care dispute.

The SCA disagreed with the court of first instance in its findings that someone appointed for children in legal proceedings had to be someone objective and independent.<sup>93</sup> The SCA found that the role of the family advocate was to bring objectivity and independence to a dispute involving children.<sup>94</sup> The children's curator *ad litem* could by implication not be objective, as the person had been appointed to advance the children's case.<sup>95</sup>

Boezaart agrees with the SCA that family advocates<sup>96</sup> are not suitable curators *ad litem* for children.<sup>97</sup> Boezaart is further of the opinion that a family advocate only acts in terms of the powers bestowed upon him/her by the Mediation in Certain Divorce Matters Act.<sup>98</sup> Family advocates' powers as provided for in this Act, do not extend to being appointed as a curator *ad litem*. Boezaart also explains that the inherent nature of a curator *ad litem* may be contrary to what is expected of a family advocate because

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<sup>92</sup> *Legal Aid Board* [17].

<sup>93</sup> *Legal Aid Board* [20] – [21].

<sup>94</sup> *Legal Aid Board* [21].

<sup>95</sup> *Legal Aid Board* [20].

<sup>96</sup> In terms of section 2(1) of the Mediation in Certain Divorce Matters Act, a family advocate is a legal officer appointed by the Department of Justice and Constitutional Development to work at the Family Advocates' Office in terms of the powers conferred upon him/her in terms of the Mediation in Certain Divorce Matters Act.

<sup>97</sup> Boezaart T 2011 "The role of a curator *ad litem* and children's access to the courts" *De Jure* 715.

<sup>98</sup> The powers of the family advocate are set out in section 4 of the Mediation in Certain Divorce Matters Act as follows: "1. The Family Advocate shall a) after the institution of a divorce action; or b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979), if so requested by any party to the proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor child or dependent child of the marriage concerned or regarding such matter as is referred to him by the court. 2. A Family Advocate may a) after the institution of a divorce action; or b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody, guardianship of, or access to, a child, made in terms of the Divorce Act, 1979, if he deems it in the interest of any minor child or dependent child of a marriage concerned, apply to the court concerned for an order authorizing him to institute an enquiry contemplated in subsection (1). 3. Any Family Advocate may, if he deems it in the interest of a minor child or a dependent child of a marriage concerned and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in subsections (1)(b) and (2)(b) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat."

a curator *ad litem* is not meant to act neutrally,<sup>99</sup> while a family advocate is supposed to take a neutral role.<sup>100</sup>

Some authors<sup>101</sup> disagree with Boezaart.<sup>102</sup> and hold that curators *ad litem* ought to be appointed more regularly in matrimonial matters to represent minor children and are completely capable of upholding the best interests of the person they represent.

### 2.2.3 Ex parte van Niekerk: In re van Niekerk v van Niekerk

In the divorce matter of *Ex parte van Niekerk* the children's mother frustrated the parental responsibilities and rights of the children's father by preventing the children from having contact with him.<sup>103</sup> Both parties made use of expert reports to advance arguments of why each of them was more suitable to primarily care for the children.<sup>104</sup> The parties' experts' findings were not discussed in the judgment itself.

The Court found the children (aged twelve and fourteen) had an interest<sup>105</sup> in the outcome of their parents' legal dispute. The Court ordered state-funded legal representation for the children in terms of section 28(1)(h) of the Constitution and briefly discussed the contents and purpose of section 28(1)(h).<sup>106</sup> The Court not only ordered legal representation for the children at state expense, but further decided to join the children as parties to their parents' dispute.<sup>107</sup>

### 2.2.4 Soller v G

This is a case where a child named Kevin sought to vary his parents' divorce order in respect of his primary care and residence.<sup>108</sup> At the outset of its judgment the Court stated that Kevin was central to his parents' disputes and was of a mature age of fifteen years and six months.<sup>109</sup>

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<sup>99</sup> *Du Plessis NO v Strauss* 1988 2 SA 105 (A), hereinafter *Du Plessis NO v Strauss*.

<sup>100</sup> *FB v MB* 2012 2 SA 394 (GSJ).

<sup>101</sup> Letzler M and Vergano V 2014 "Appointing a curator *ad litem* – are we applying the law correctly?" *De Rebus* 30.

<sup>102</sup> Boezaart 2011 *De Jure* 707.

<sup>103</sup> *Ex parte van Niekerk* [1].

<sup>104</sup> *Ex parte van Niekerk* [3].

<sup>105</sup> *Ex parte van Niekerk* [8].

<sup>106</sup> *Ex parte van Niekerk* [5] – [6].

<sup>107</sup> *Ex parte van Niekerk* [8].

<sup>108</sup> *Soller* [1].

<sup>109</sup> *Soller* [4].

The Court was acutely aware of Kevin's right to participate in his parents' legal dispute and said the following:<sup>110</sup>

I can envisage few proceedings of greater import to a child/young adult of Kevin's age than those which determine the circumstances of his residence and family life, under whose authority he should live and how he should exercise the opportunity to enjoy and continue to develop a relationship with both living parents and his sibling.

The Court found Kevin had tried to express his views to various role-players, including the High Court, his parents' legal representatives and the experts mandated by his parents and that Kevin was deserving of legal representation at state expense (a section 28(1)(h) appointment).<sup>111</sup> The court regarded a private attorney, Mr Charles Mendelow, to possess the required personal characteristics, professional experience and life experience to act as legal representative for the child.<sup>112</sup> Mr Mendelow was further described as someone in the "best tradition" of his profession, held in high regard by his peers and family advocates, a practical professional with a fair mind and mediation experience.<sup>113</sup>

Although the Court appointed Kevin his own legal representative, the Court reiterated that he remained a child and was therefore not able to direct the litigation fully.<sup>114</sup> Based on the Court's opinion that a child remained a child and was therefore unable to direct litigation, the Court expected Mr Mendelow not only to take instructions but also to convey Kevin's best interests<sup>115</sup> to the Court. In effect, Mr Mendelow was expected to legally represent Kevin as well as offer best-interests representation that was not necessarily based on Kevin's direct instructions. In this matter the Court expected the attorney to convey the child's best interests by exercising independent judgement on the wishes of the child within the context of the child's age, maturity and background.<sup>116</sup>

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<sup>110</sup> *Soller* [7].

<sup>111</sup> *Soller* [9] – [10].

<sup>112</sup> *Soller* [18].

<sup>113</sup> *Soller* [18].

<sup>114</sup> *Soller* [4].

<sup>115</sup> See 1.1 for what is meant with the best-interests representation as a form of child participation.

<sup>116</sup> *Soller* [48] and [67].



The Court explained that although it (the presiding officer) was neither a psychologist nor a social worker, it was under the impression that Kevin could articulate his views in his parents' dispute clearly.<sup>117</sup>

The Court spoke of Kevin's views as follows:

[44] Kevin has clearly expressed to myself, the Family Advocate, the section 28 legal practitioner and through his behaviour that he wishes to live with his father. He claims that he would wish to spend time with and visit his mother.

[45] Kevin has made his choice quite clear. During 2002 he ran away from mother's home with his mother and went to his father. This resulted in yet another application to court and an order (per Cachalia J) that Kevin would continue to live with Mr Greenberg until the principal of King David High School has certified that Kevin has completed his school exams whereupon Kevin would return to Mrs Greenberg in whom custody remains, subject to Mr Greenberg's reasonable rights of access as earlier specified by Van Oosten J. It was ordered that the Family Advocate should investigate to report on the best interests of Kevin.

[46] Once Kevin had completed his examinations he persisted in his view that he wished to live with Mr Greenberg. *Inter alia*, this Court was presented with a letter emanating from Kevin in which is stated the following:

"26 November 2002

Dear Mom,

I am writing this letter to tell you that I will not come home on Thursday after my exam with you. I have decided on my own will not to come home with you. I will still come and visit you and talk to you on the phone. I still want to live with my Dad and I want you to respect that. It is also not necessary to bring urgent applications or even decide to lock Dad in jail. My mind is made up and this is what I want.

From Kevin"

[47] Most recently, Kevin has met with Mr TD Wilke, a registered psychologist appointed a family counsellor in the office of the Family Advocate. Mr Wilke's report indicates that both Mr and Mrs Greenberg know that Kevin has indicated that he "prefers to live with his father" and Kevin "he has clearly stated that he prefers to live with his father" and "he has the greatest respect for his mother but is clear in his decision that he cannot live with her".

[48] Kevin has met with and spoken to Mr Charles Mendelow, the section 28 legal practitioner on a number of occasions. Mr Mendelow's report and his address from the Bar are to the following effect: "The minor child has, in no uncertain terms, informed me that he wishes to have an amicable and bonded relationship, with both his parents. He wishes to live with his father. He would like to see his mother and/or be with his mother every alternate weekend for the entire weekend and, furthermore, see his mother in the evenings (presumably for supper) once a week."

The Court continued by summarising Kevin's desires and strong will as follows:

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<sup>117</sup> Soller [33].

[57] Kevin has clearly expressed a desire, and more than that, a determination to live with his father. He has acted upon that desire. During 2002 he unilaterally removed himself from his home with his mother and took himself off to live with his father. Mrs Greenberg complains that Kevin disappears from home and fails to return on time or at all. He then re-emerges with his father or at his father's home without any notification to her or any request for approval.

[58] It is clear that Mrs Greenberg, through no fault of her own, is incapable of enforcing the custodial access arrangements upon Kevin. Mrs Greenberg has been frustrated in every direction by Kevin in conjunction with Mr Greenberg and very probably at the instigation of Mr Greenberg.

The Court found Kevin should stay in the primary care of his mother:

[73] I would not wish that these courts and the office of the Family Advocate should be burdened yet again with the affairs of the Greenberg family. Kevin is nearly a man and has made his choice. However, the courts cannot simply waive our responsibilities by reason of the unpleasant nature of the litigation and the onerous burden which has been placed on the courts and the Family Advocate thus far. Accordingly, it is my intention that the new residence arrangement should be seen as provisional only. They are in the nature of a testing period for both Kevin and Mr Greenberg. I have no realistic or optimistic expectations that Mr Greenberg is capable of the self-control, insight and compassion which would enable him to encourage Kevin to maintain a warm and loving and complete relationship with his mother and his brother. However, Kevin may not be beyond such hope. This provisional arrangement is to give Kevin the opportunity to have his desire and live with his father but at the same time to show that he is sufficiently mature to justify this regard given to his wishes. This maturity would be evidenced by his compliance with the order handed down in respect of the time which he is to spend with his mother who remains the custodian parent. I do not seek inflexible compliance with the court order but I seek appreciation of the spirit thereof and as minimal as possible deviation therefrom. Where Kevin is, for good reason, incapable of spending the specified time with his mother and brother then he should ensure that appropriate arrangements are made to rectify the situation and compensate and make up time lost with his mother.

Dr Carr (a psychologist who consulted all members of Kevin's family),<sup>118</sup> sadly, concluded that Kevin's father's influence resulted in him becoming alienated from his mother and that it was a blatant form of abuse.<sup>119</sup> Dr Carr therefore proposed that Kevin attend psychotherapy and, to this extent, the Court ordered that Kevin attend sessions with a counsellor at his school and for the counsellor to report to the family advocate in this regard.<sup>120</sup>

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<sup>118</sup> *Soller* [50].

<sup>119</sup> *Soller* [51].

<sup>120</sup> *Soller* [75].

### 2.2.5 Potgieter v Potgieter

In the case of *Potgieter v Potgieter*,<sup>121</sup> the father of an eleven year old and fifteen year old appealed the court *a quo*'s decision to award custody of the parties' children to their mother.<sup>122</sup> The SCA described the main issue before it to be custody<sup>123</sup> of the two children.<sup>124</sup> Two clinical psychologists and one psychiatrist were asked to assess and provide the court *a quo* with evidence of their findings.<sup>125</sup> The children's mother called upon a psychologist that administered a psychometric test on both parties.<sup>126</sup> The family advocate involved in the matter also requested a clinical psychologist to focus on the parties' parental capacities.<sup>127</sup> This psychologist did not interview the children as he felt "it would traumatise them to be interviewed again".<sup>128</sup>

The SCA found the various experts knowledgeable in their fields but at the same time found their findings wanting as it seemed they accepted the father's version and sources without critical evaluation.<sup>129</sup> The Court levelled criticism against the experts, as they provided poor testimony before the trial court.<sup>130</sup> The SCA found that the trial court was correct in awarding to the mother custody (primary residence of care in current terminology) and in dismissing the experts' findings.<sup>131</sup> The Court referred to the views of the children only insofar as the daughter expressed no real preference as to which parent she wanted to live with after the divorce, while the son had expressed a clear desire to live with his mother.<sup>132</sup>

Worth noting is the SCA's explanation in respect of how a court makes a value judgement in disputes involving the care of children:<sup>133</sup>

Determining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgment [sic], based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children. This being so, an appeal court will not easily second-guess those findings and conclusions. This is especially so in a case like the

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<sup>121</sup> *Potgieter v Potgieter* 2007 SCA 47, hereafter referred to as the *Potgieter* case.

<sup>122</sup> *Potgieter* [3].

<sup>123</sup> See 2.2.1 above for an explanation and further clarity on what is meant by "custody" and "care".

<sup>124</sup> *Potgieter* [1].

<sup>125</sup> *Potgieter* [6] – [9].

<sup>126</sup> *Potgieter* [6].

<sup>127</sup> *Potgieter* [9].

<sup>128</sup> *Potgieter* [9].

<sup>129</sup> *Potgieter* [21].

<sup>130</sup> *Potgieter* [10] – [13].

<sup>131</sup> *Potgieter* [24] and [30].

<sup>132</sup> *Potgieter* [20].

<sup>133</sup> *Potgieter* [14].

present, where the trial court's conclusion – that the best interests of the children “demanded” that custody be awarded to Mrs P – was based to a large extent on favourable credibility findings in favour of Mrs P and adverse credibility findings against Dr P and the expert witnesses.

Note that the SCA's “value judgment” did not make mention of children's views and wishes. The SCA found that, based on favourable credibility findings in favour of the mother and adverse creditability findings against the father, custody of the children should remain with the mother and, accordingly, the father's appeal was dismissed.<sup>134</sup>

#### 2.2.6 *Robinson, Ryke and Wessels study*

In a 2018 study<sup>135</sup> three South African psychologists conducted interviews with six social workers, eight psychologists, eight attorneys and one family advocate involved in drafting parenting plans in divorce matters.<sup>136</sup> All the legal practitioners (all eight attorneys and the family advocate) indicated that they did not interview children when drafting parenting plans in divorce matters.<sup>137</sup> The psychologists found that legal practitioners involved in family law matters do not interview children for the following reasons:<sup>138</sup>

Attorneys and advocates choose not to consult with the children as they often feel uncomfortable to interview the children. Social workers and psychologists are more experienced and trained in interviewing children and often include children when drafting parenting plans. It is essential that the focus of intervention remain on the child's experience and on how to help the child post-divorce with the multi-faceted emotions they have to deal with. Legal professionals should refer children to mental health professionals for interviews unless the legal professionals have received adequate training for this purpose.

Although the psychologists (authors of the study) advised that legal practitioners would be better equipped to interview children if specifically trained to do so, they also cautioned persons involved in drafting a parenting plan against not consulting with children at all. A parenting plan should represent a child's needs as this would help assure children that they are heard by the divorcing adults and make children feel

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<sup>134</sup> *Potgieter* [14].

<sup>135</sup> Robinson, Ryke and Wessels 2018 *Child abuse research* 14 – 26.

<sup>136</sup> Robinson, Ryke and Wessels 2018 *Child abuse research* 15.

<sup>137</sup> Robinson, Ryke and Wessels 2018 *Child abuse research* 19.

<sup>138</sup> Robinson, Ryke and Wessels 2018 *Child abuse research* 19.

more secure, which is conducive to children functioning better after their parents' divorce.<sup>139</sup>

The psychologists further advised that children had to be consulted as it was important to draft a child-centred parenting plan and not a parent-centred one.<sup>140</sup> In a subsequent study<sup>141</sup> by the same authors in 2019, they found that parenting plans should be child-centred<sup>142</sup> and at the same time aim to address the needs of the parents.<sup>143</sup>

In their 2019 study, the authors identified themes reflecting the needs of the divorcing family and categorised needs as either the child's or parents'.<sup>144</sup> By involving children in the parenting plan drafting process this may result in children having: 1) to feel less worried; 2) to not be separated from their parents; 3) to be exposed to limited parental conflict; 4) to feel happy after the divorce; and 5) to restore their parents' marriage.<sup>145</sup> By involving parents in the parenting plan drafting process the consequences may be: 1) for a healthier post-divorce environment for their children; 2) for a more fulfilling life after divorce; 3) for less conflict after divorce; and 4) to have limited contact with their ex-partner after divorce.<sup>146</sup>

From the authors' 2019 study one may conclude that a person involved in drafting a parenting plan should consider the child's voice and needs as well as those of the parents.

In the following section four cases in the context of relocation disputes are discussed to determine if and how courts allowed children to participate in their parents' relocation disputes.

## **2.3 Relocation disputes**

### *2.3.1 Introduction*

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<sup>139</sup> Cleophas K and Assim UM 2015 "Child participation in family law matters affecting children in South Africa" *European journal of law reform* 250.

<sup>140</sup> Robinson, Ryke and Wessels 2018 *Child abuse research* 19.

<sup>141</sup> Robinson T, Ryke E and Wessels C 2019 "Parenting plans attentive to the needs of the divorcing family" *Obiter* 221 – 239.

<sup>142</sup> Robinson, Ryke and Wessels 2019 *Obiter* 226 – 233.

<sup>143</sup> Robinson, Ryke and Wessels 2019 *Obiter* 233 – 238.

<sup>144</sup> Robinson, Ryke and Wessels 2019 *Obiter* 225.

<sup>145</sup> Robinson, Ryke and Wessels 2019 *Obiter* 225.

<sup>146</sup> Robinson, Ryke and Wessels 2019 *Obiter* 225.

In relocation disputes the parent with whom a child primarily resides is often referred to as the “primary caregiver” while the parent with whom the child does not reside but with whom the child has contact is referred to as the “non-primary caregiver”.<sup>147</sup>

In the context of relocation court applications, one must also have regard to section 18(4) of the Children’s Act as this section provides that a co-holder of guardianship over a child can exercise his/her parental responsibilities and rights independently of the other guardian. *Prima facie* this section means a child’s primary caregiver can relocate within South Africa without consulting with the other parent.<sup>148</sup>

Section 18(4) is also subject to section 6(5) and section 31(1)(a) of the Children’s Act. Subject to the child’s ability to participate, the latter two sections allow children to participate in legal proceedings of which the outcome may affect him/her.<sup>149</sup> Child participation in parental relocation disputes requires a court to give a child the opportunity and space to express his/her views and wishes.<sup>150</sup>

The next section will discuss judgments handed down in relocation disputes where a party applied to court to allow him/her to relocate abroad with a child.

### 2.3.2 AC v KC

In the unreported judgment of *AC v KC* the court requested a family advocate to prepare an urgent report in relation to a relocation application concerning a mother who wished to move to Abu Dhabi with her two children of ten and twelve.<sup>151</sup> Based on the urgency, the family advocate did not do an in-depth investigation.<sup>152</sup> The family advocate reported that the older child expressly indicated that she wished to accompany her mother to Abu Dhabi.<sup>153</sup> The family advocate expressed reservations about whether or not the younger child, a boy, should move with his mother to Abu Dhabi.<sup>154</sup>

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<sup>147</sup> Domingo W 2011 “For the sake of the children: South African family relocation disputes” *PELJ* 148.

<sup>148</sup> Domingo 2011 *PELJ* 152.

<sup>149</sup> Domingo 2011 *PELJ* 152.

<sup>150</sup> Marumoagae MC 2020 “What weight (if any) should be attached to children’s wishes and views in child relocation disputes? Lessons from Canada” *The African journal for international and comparative law* 470.

<sup>151</sup> *AC v KC* an unreported case 389/08 2008 ZAGPHC 369 judgment handed down on 13 June 2008 [1], herein after referred to *AC v KC*.

<sup>152</sup> *AC v KC* [8].

<sup>153</sup> *AC v KC* [8].

<sup>154</sup> *AC v KC* [8].

The Court did not focus on the children's views but instead indicated that the final question a court had to answer when approached in a relocation application was whether the applicant, objectively viewed, acted like a reasonable person in the same circumstances would have.<sup>155</sup> In this case the mother was allowed to relocate with the child to Abu Dhabi as the Court found that the mother acted as a reasonable person would have.<sup>156</sup>

The Court concluded that the so-called "final question" in relation to relocation applications had to be answered by considering factors associated with the best interests of a child.<sup>157</sup> The Court was silent on whether or not the child was consulted and whether or not his/her views were considered in the outcome and did not include considering a child's views in the "final question".

### 2.3.3 *HG v CG*

In the relocation matter of *HG v CG*<sup>158</sup> the Court considered a relocation application where a mother applied to court to relocate with her four children from South Africa to Dubai. The eldest, a boy, was aged eleven and his siblings, triplets, were eight.<sup>159</sup>

The Court was cognisant of a child's right to participate in legal proceedings and stated as follows:<sup>160</sup>

The Act has brought about a fundamental shift in the parent/child relationship from that which prevailed in the pre-constitutional era and now not only vests a child with certain rights but moreover gives a child the opportunity to participate in any decision making affecting him or her. Thus section 10 of the Act explicitly recognizes a child's inherent rights in any matter affecting him or her.

The Court also referred to section 31(1)(a) of the Children's Act and stated that this section is "widely framed and there is no doubt that the relief sought by the applicant triggers the operation of the aforesaid section."<sup>161</sup>

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<sup>155</sup> *AC v KC* [15]; Domingo 2011 PELJ 155.

<sup>156</sup> *AC v KC* [15] – [16].

<sup>157</sup> *AC v KC* [13].

<sup>158</sup> *HG v CG* 2010 3 SA 352 (ECP), hereinafter referred to as *HG v CG*.

<sup>159</sup> *HG v CG* [1].

<sup>160</sup> *HG v CG* [6].

<sup>161</sup> *HG v CG* [6].

The father of the children approached an expert to assist him in opposing the mother's relocation application. The father's expert considered ample factors in relation to whether or not the relocation application should be granted, of which the respective children's views were mentioned only briefly:<sup>162</sup>

When Katie was interviewed on the day her father brought her she had completely different opinions from the first session. At this point she stated clearly that she would "miss him (her father) too much" if she stayed with her mother full time. She was worried about upsetting her mother by saying this. Subsequently Mrs. DG in interviews with writer asserted that Katie felt she had not been "heard", was tearful and upset after the second interview. This was in fact the direct opposite of the case. When Katie was later questioned about this she denied ever making such remarks to her mother and seemed mystified by the whole issue.

The expert the father called upon proposed that the primary residence of the children change from their mother to their father based on particular factors the expert deemed relevant to the matter.<sup>163</sup> The Court had the benefit of the opinions of various externally appointed experts as well as the family advocate's findings.<sup>164</sup> The Court vehemently rejected the findings various expert put before it and stated the following in this respect:<sup>165</sup>

By all accounts the children are of an age and maturity to fully comprehend the situation and their voices cannot be stifled but must be heard. The children's point of view is in direct conflict with their [the psychologists'] recommendations and this no doubt actuated them to suggest that they be relieved of the responsibility of deciding with which parent to live.<sup>166</sup>

The Court quoted an expert witness to set out what the Court had found to be the children's views in their parents' relocation dispute:<sup>167</sup>

When I enquired from the children about the important aspects of possibly moving to the Emirates, they all understood the gravity of the situation and made it abundantly clear that they would prefer the situation to remain as it is at the moment. As stated above Michael took on a responsibility as the eldest and voiced his concern about whether the triplets would be able to cope without the Respondent. He stated he doubts they will survive without either parent. He indicated that he has thought about the situation and indicated that he would have to adjust if he had to go and he realises that the Emirates offer better opportunities

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<sup>162</sup> *HG v CG* [15].

<sup>163</sup> *HG v CG* [15].

<sup>164</sup> *HG v CG* [11] – [18].

<sup>165</sup> *HG v CG* [21].

<sup>166</sup> *HG v CG* [17].

<sup>167</sup> *HG v CG* [20].



for his future, but that it would be hard to leave school and his friends as he loves Port Elizabeth and feels settled here. K too stated she has tried to think about it, but she truthfully indicated that she cannot answer me as she could not bear to leave either the Applicant or the Respondent. R said he would really like to stay and that it is difficult to talk to the Applicant as she continually talks about Dubai. He too indicated that he likes Port Elizabeth and his school and friends and that it would be hard to have one parent in Dubai and one in South Africa. M stated that he would prefer if the situation could remain as it currently stands. He likes school and his friends and he specifically mentioned that he loves bible study and would not be able to do it in Dubai. He stated that if the situation had to change his preference would be to stay in South Africa.

The Court rejected all the expert findings but relied on the expert reports insofar as they reported the children to be of an age and with a level of maturity to make an informed decision – such decision being that the children wanted to remain in South Africa.<sup>168</sup> The Court accordingly dismissed the relocation application and ordered each party to pay his and her own costs.<sup>169</sup>

#### 2.3.4 JP v JC

In the relocation case of *JP v JC*<sup>170</sup> the unmarried parties had two boys, a six-year-old and a three-year-old.<sup>171</sup> The children were primarily in the care of their mother.<sup>172</sup> The mother wished to relocate to the United Kingdom with the two minor children.<sup>173</sup>

The Court mentioned the children's wishes only once in its judgment:

[J.....], who is presently five years of age, has expressed his wish to relocate with his maternal grandparents though he wants to maintain contact with his father, the first respondent. However, because of his tender age his wish cannot be said to be an informed one.<sup>174</sup>

The family advocate was requested by the Court to provide evidence in respect of the relocation application and the family advocate involved a family counsellor to assist in

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<sup>168</sup> *HG v CG* [23].

<sup>169</sup> *HG v CG* [24].

<sup>170</sup> *JP v JC* 2016 1 SA 794 (KZN) hereinafter referred to as *JP v JC*.

<sup>171</sup> *JP v JC* [1].

<sup>172</sup> *JP v JC* [5].

<sup>173</sup> *JP v JC* [1].

<sup>174</sup> *JP v JC* [46].

this regard.<sup>175</sup> The Court found the evidence lead by the family advocate and family counsellor to be unhelpful and rejected their evidence based on four grounds.<sup>176</sup>

The children's views were not mentioned in either the Court's summary of its findings or reasons for its findings.<sup>177</sup>

### 2.3.5 *Cunningham v Pretorius*

In the relocation dispute of *Cunningham v Pretorius*<sup>178</sup> parents of a four-year-old boy disagreed about their child's possible relocation to the United States.<sup>179</sup> The child's mother wanted him to reside with her in the United States, while his father wanted him to continue residing in South Africa.<sup>180</sup>

The Court found that the child and his father had a good relationship.<sup>181</sup> Despite his young age, the boy spent extended periods with his father.<sup>182</sup> The boy's parents had diverging opinions about their son's views and wishes on the possibility of the child's relocation to the United States: The father indicated that his son had informed him that he did not wish to return with his mother to the United States and that he was enthusiastic about being in South Africa for the arrival of his soon-to-be-born sibling.<sup>183</sup> The mother submitted that the father did not interpret the son's views correctly and that the child did not mean he preferred to be left behind in South Africa while she relocated to the United States.<sup>184</sup>

The Court mentioned that no less than six experts filed reports in the matter.<sup>185</sup> Three reports dealt with the child's language difficulty.<sup>186</sup> A licensed clinical social worker from the United States and a social worker based in South Africa also presented reports to the Court.<sup>187</sup> The reports from the various social workers and the language therapists were for the most part uncontested.<sup>188</sup> The reports presented to the Court

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<sup>175</sup> *JP v JC* [33] – [34].

<sup>176</sup> *JP v JC* [36] – [37].

<sup>177</sup> *JP v JC* [43] – [48].

<sup>178</sup> *Cunningham v Pretorius* 2008 ZAGPHC 258 hereinafter referred to as the *Cunningham* case.

<sup>179</sup> *Cunningham* [1].

<sup>180</sup> *Cunningham* [3] – [4].

<sup>181</sup> *Cunningham* [22].

<sup>182</sup> *Cunningham* [22].

<sup>183</sup> *Cunningham* [24].

<sup>184</sup> *Cunningham* [24].

<sup>185</sup> *Cunningham* [24].

<sup>186</sup> *Cunningham* [25].

<sup>187</sup> *Cunningham* [25].

<sup>188</sup> *Cunningham* [25].

by the psychologists were, on the other hand, considered to have led to several disputed submissions and contentions in relation to the views and wishes of the child.<sup>189</sup>

The Court ordered the boy to accompany his mother to the United States.<sup>190</sup>

## **2.4 International abduction disputes**

### *2.4.1 Introduction*

Since the Children's Act incorporates the Hague Convention<sup>191</sup>, courts may, before making an order in respect of possible return of an abducted child, request the Office of the Family Advocate (as the central authority in South Africa) to provide a report dealing with a child's personal circumstances before abduction<sup>192</sup>

Article 6 of the Hague Convention compels all state members to designate a central authority. In terms of section 3 of the Mediation in Certain Divorce Matters Act, the Chief Family Advocate is the central authority in the Republic of South Africa.

The neutrality of the Office of the Family Advocate is questioned on the basis of its dual purpose in child abduction matters. On the one hand, a family advocate involved in an abduction matter is required to act as central authority which entails upholding the Hague Convention's objectives, including that a child be returned to the state from which he/she was abducted. On the other, the family advocate may, after investigating the child's personal circumstances, recommend that a child not be returned to the state from which he/she was abducted. The latter situation results in a family advocate acting contrary to the objectives of the Hague Convention insofar as a central authority is required to return an abducted child to the state from which he/she was abducted.<sup>193</sup>

Appointment of a legal representative is one of the forms of child participation in legal proceedings Mol identified.<sup>194</sup> A legal representative<sup>195</sup> appointed for a child in abduction matters will, if the child is very young, act in a way similar to a curator *ad*

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<sup>189</sup> *Cunningham* [25].

<sup>190</sup> *Cunningham* [77].

<sup>191</sup> The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.

<sup>192</sup> Woodrow C and Du Toit C "Child abduction" in Davel CJ and Skelton AM (eds) *Commentary on the Children's Act* (Cape Town Juta 2007) 18.

<sup>193</sup> Woodrow and Du Toit "Child abduction" 18.

<sup>194</sup> Mol 2019 *International journal on children's rights* 67.

<sup>195</sup> Legal representation for a child is discussed in [1.1] of this dissertation.

*litem* appointed for a child whereas a legal representative acting for an older and more mature child in a child abduction matter should take instructions from the child.<sup>196</sup>

Section 278(3) of the Children's Act allows abducted children to object to their return, subject to the child's age and level of maturity. Section 278(3) reads as follows:

The court must, in considering an application in terms of this Chapter [Chapter 17 dealing with child abduction] for the return of a child, afford that child the opportunity to raise an objection to being returned and in doing so must give due weight to the objection, taking into account the age and maturity of the child.

The Hague Convention distinguishes between situations where children were removed *more* than a year before from removals of *less* than a year before. In terms of article 12 of the Hague Convention, a child must be returned immediately if he/she was removed *less* than one year before. If a child was removed *more* than one year before, he/she should be returned unless, in terms of article 13(a), the child is seen to have settled into his/her new environment or, in terms of article 13(b), there is a grave risk that the child's return would cause harm (psychological or otherwise) or returning the child may place the child in an intolerable position. Article 13 of the Hague Convention concludes with the following:

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In addition to the fact that the court is in terms of article 13 obligated to consider a child's views, the court may also benefit from listening to a child's views because these views may assist the court to form a better understanding of parent-child relationships and how each parent affects the child's well-being.<sup>197</sup> To allow for child participation could therefore be said to enhance a court's decision-making.<sup>198</sup>

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<sup>196</sup> Woodrow and Du Toit "Child abduction" 18. Also see section 278(2) of the Children's Act.

<sup>197</sup> Marumoagae 2020 The African journal for international and comparative law 472 – 473.

<sup>198</sup> Marumoagae 2020 The African journal for international and comparative law 475.

As part of determining an abducted child's views and wishes, a court also has to consider the possibility that the child was influenced by the parent with whom the child currently resides.<sup>199</sup>

In the next section certain prominent child abduction judgments are discussed to establish if and how the abducted children's views and wishes were determined.

#### 2.4.2 *WS v LS*

In the case of *WS v LS*<sup>200</sup> the father of two young boys applied for the children to be returned to live with him in the United Kingdom. At the time the Court delivered its judgment (September 1999), the one boy was two years old and his younger brother had just turned one.<sup>201</sup>

No mention was made of the views and wishes of the children, presumably because both children were still very young and therefore unable to express their preference. The children's ages were considered insofar as an expert relied on the children's ages to find that it would be best if they remained primarily in the care of their mother.

The Court concluded the youngest child was too young to return to England and because it is best for children not to be separated from each other, both children should remain in South Africa.<sup>202</sup>

#### 2.4.3 *Central Authority for the Republic of South Africa v LS*

In the recent (2020) matter of *Central Authority for the Republic of South Africa v LS*<sup>203</sup> the father of a four-year-old and a six-year-old sought their return to him in Canada where he alleged the children had been abducted by their mother before being brought with her to South Africa.<sup>204</sup>

At the outset of its judgment, the Court mentioned the children's right to participate in the child abduction proceedings as set out in article 13 of the Hague Convention. The Court quoted the following part from article 13:

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<sup>199</sup> Mahlobogwane FM 2018 "Parental child abduction cases: Prevention is better than cure" *Obiter* 119.

<sup>200</sup> *WS v LS* 2000 (4) SA 104 (C), hereinafter referred to as *WS v LS*.

<sup>201</sup> *WS v LS* 118.

<sup>202</sup> *WS v LS* 116.

<sup>203</sup> *Central Authority for the Republic of South Africa v LS* 2021 (2) SA 471 (GJ) hereinafter referred to as the *Central Authority v LS* case.

<sup>204</sup> *Central Authority v LS* [1].

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.<sup>205</sup>

The mother argued that the six-year-old had been diagnosed with sensory processing disorder and that returning the children would place them in an intolerable position in terms of article 13(b) of the Hague Convention.<sup>206</sup>

On the whole, the Court focused almost entirely on the six-year-old since the six-year-old patently had more challenges than the other child.

The Court explained that Adv. Morgan Courtenay was appointed as legal representative for the children by agreement between the parties and in terms of section 279 of the Children's Act. The Court further explained that Courtenay's representation entailed being appointed as the children's curator *ad litem*.<sup>207</sup> One of his powers as curator *ad litem* was to involve experts to assist him.<sup>208</sup> Adv. Courtenay appointed Ms. Filmer, a social worker, to fulfil a mandate very narrowly defined as:

...to assist him [Adv. Courtenay] in drawing out the actual views and wishes of the children; to, where necessary, offer an explanation for these views and to comment on the potential impact, if any, an order returning the children would have on their emotional and psychological well-being.<sup>209</sup>

The Court commented on the children's objections (views) to their return to Canada initially as follows:<sup>210</sup>

The children raised an objection to returning to Canada. Both categorically indicated that they do not wish to return to Canada. Their explanations were, according to Mr. Courtenay and Ms. Filmer, woefully inadequate and based on immature reasoning. They concluded that the children are anxious about moving back to Canada which is due to the continued uncertainty. They hold the view that the refusal to return has, likely, been spurred on by the respondent or another adult who has actively tried to influence them.

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<sup>205</sup> *Central Authority v LS* [4].

<sup>206</sup> *Central Authority v LS* [8].

<sup>207</sup> *Central Authority v LS* [10].

<sup>208</sup> *Central Authority v LS* [10].

<sup>209</sup> *Central Authority v LS* [11].

<sup>210</sup> *Central Authority v LS* [13.3].

The Court referred to Adv. Courtenay's findings that the six-year-old boy's reasons for objecting to his return to Canada seemed unrelated to the bullying he had suffered at his school in Canada.<sup>211</sup> Adv. Courtenay further explained that the six year old's complaints in respect of the poor weather in Canada were, for instance, more pertinent than being bullied.<sup>212</sup> The Court further commented on the fact that the six year old was also bullied in South Africa and had to move schools as a result .<sup>213</sup> The theme of bullying was therefore not unique to Canada.<sup>214</sup>

The Court also found that the six year old's bond with his dog was not a good enough reason for him not to return to Canada and that the dog could in any case move to Canada with him.<sup>215</sup> The Court added that the six-year-old boy would acclimatise to the weather and that he would ultimately make friends in Canada.<sup>216</sup> The Court did not attach any weight to the child's views (did not refer thereto in its conclusion or reasons for its judgment) and dismissed, with costs, the father's application for the children to be returned to Canada.<sup>217</sup>

#### 2.4.4 Central Authority for the Republic of South Africa v Reynders

In the case of *Central Authority for the Republic of South Africa v Reynders*<sup>218</sup> the Court referred to the considerations a court should take into account in relocation applications and correctly included a child's views as one of the aspects a court is obliged to consider.<sup>219</sup> In this matter the child's father alleged that the parties' daughter, who was eight years old,<sup>220</sup> had been abducted by her mother in Belgium whereafter they returned to live with the maternal grandmother in Hoedspruit, South Africa.<sup>221</sup>

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<sup>211</sup> *Central Authority v LS* [81].

<sup>212</sup> *Central Authority v LS* [81].

<sup>213</sup> *Central Authority v LS* [82].

<sup>214</sup> *Central Authority v LS* [82].

<sup>215</sup> *Central Authority v LS* [88].

<sup>216</sup> *Central Authority v LS* [88].

<sup>217</sup> *Central Authority v LS* [113].

<sup>218</sup> *Central Authority v Reynders for the Republic of South Africa* 2011 2 SA 438 (GNP), hereinafter referred to as *Central Authority v Reynders*.

<sup>219</sup> *Central Authority v Reynders* [26] – [29].

<sup>220</sup> *Central Authority v Reynders* [4].

<sup>221</sup> *Central Authority v Reynders* [2].

In this case the Court acknowledged that it had a duty to consider allowing the child to participate in the proceedings.<sup>222</sup> The Court gave detailed reasons for its decision, which included the child's views:<sup>223</sup>

She obviously has an ambivalent attitude towards her father and his way of life, which view is no doubt less objective than it ought to have been, taking into account the nature of the present proceedings and her participation therein.

The Court found the child should remain in Hoedspruit and not return to her father in Belgium.<sup>224</sup>

#### 2.4.5 *N v Central Authority for the Republic of South Africa*

In the matter of *N v Central Authority for the Republic of South Africa*<sup>225</sup> a girl's mother appealed against the trial court's decision that the child be returned to Northern Ireland to live with her father.<sup>226</sup>

In this regard, the appeal court summarised the trial court's decision and reasons for its decision as follows:<sup>227</sup>

(a) We know from the report of Dr Keen [a social worker who provided evidence to the trial court] that S..... [or Sarah] misses her siblings, and wishes that she could see them.

(b) We also know that S..... did not wish to discuss her father and step-mother with Dr Keen. This was not explored by Dr Keen, and one should not have to speculate as to why that would be. There is no indication in the record of any animosity to her father, and no allegations are made against him by the appellant regarding his mis-treatment of [S.....], or of any fears harboured against Mr [R.....] by [S.....]. Whatever reasons Dr Keen may have had for not exploring these problems (and we are not told of any), it leaves the court in the dark.

The Court criticised both parties in relation to how they approached the litigation – the mother for delaying the proceedings and the father for not commencing with proceedings expeditiously.<sup>228</sup> As a result of the parties' slow pace of litigation, the child

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<sup>222</sup> Paragraph 26.2 of the judgment expressly refers to section 6(5) of the Children's Act and [26.4] refers expressly to section 10 of the Children's Act.

<sup>223</sup> *Central Authority v Reynders* [28.4].

<sup>224</sup> *Central Authority v Reynders* [28].

<sup>225</sup> *N v Central Authority for the Republic of South Africa* (AR571/2015) [2016] ZAKZPHC 43 hereinafter referred to as *N v Central Authority*.

<sup>226</sup> *N v Central Authority* [1].

<sup>227</sup> *N v Central Authority* [15].

<sup>228</sup> *N v Central Authority* [25].



had resided in South Africa for over three years when this court handed down its judgment.<sup>229</sup>

The mother's appeal for the daughter not to be returned to Northern Ireland succeeded but interestingly the mother was also ordered to pay the costs of the other parties because, as the Court expressly reminded the parties, the Office of Family Advocate is a state-funded institution.<sup>230</sup>

#### 2.4.6 KG v CB

In the matter of *KG v CB*<sup>231</sup> the father of a five-year-old girl, together with the Central Authority in the United Kingdom and Wales, applied to a South African court for the return of the child to the United Kingdom.<sup>232</sup> In the initial phase of this child abduction dispute, the trial court appointed a legal representative for the child and explained such appointment as follows:<sup>233</sup>

...the matter was heard on 4 October by Meyer J who *mero motu* raised the issue of legal representation of T, as contemplated in section 279 of the Children's Act 38 of 2005 (the Children's Act). Meyer J ordered that a curator *ad litem* be appointed to represent T's interests and postponed the matter to 11 October 2011 for the curator to be appointed. Mr Johan van Schalkwyk from Legal Aid South Africa was thereafter appointed. In his report dated 17 October 2011, Mr van Schalkwyk recommended that T not be returned to the United Kingdom until such time as the appeal be finalised and "the cloud surrounding the allegations of molestation [be] cleared".

The child's curator *ad litem* reported to the trial court in relation to his findings as follows:<sup>234</sup>

The curator *ad litem* stated that he had been appointed on 11 October 2011 to report on T's personal circumstances; comment on her level of maturity and her ability to comprehend the proceedings; comment on the effect of relocation on T, and on any other factor that should be taken into account. In his report, he mentioned that, because of time and logistical restraints, he had been unable to investigate and report on CB's [ie the father's] circumstances. His report deals with his interview with T, the circumstances of KG [ie the mother] and her immediate family based in Johannesburg, and his conversation with one of T's pre-school teachers. In addition, the report covers his "face value evaluation" of the minor child's views, her immediate circumstances and her day-to-day activities and interactions. From his conversation with T, he concluded that she was not mentally,

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<sup>229</sup> *N v Central Authority* [26].

<sup>230</sup> *N v Central Authority* [31] – [32].

<sup>231</sup> *KG v CB* [2012] JOL 28641 (SCA), hereinafter referred to as *KG v CB*.

<sup>232</sup> *KG v CB* [1].

<sup>233</sup> *KG v CB* [13] – [14].

<sup>234</sup> *KG v CB* [52] – [53].

physically or academically advanced and that she was not yet of an age and maturity that it is appropriate to take accounts of her views.

Noteworthy from the above passage is the submission of the child's curator *ad litem* that his evaluation of the child's views was only a "face-value evaluation". This term was not defined or explained but creates the impression that a child's legal representative may ascertain the child's views via a face-value or a more in-depth evaluation.

The Court further found the following in relation to the child's views:<sup>235</sup>

T is now five years and 10 months old and has spent more than half of her young life in South Africa. As indicated above, according to the report of the curator *ad litem*, T has not attained an age and maturity at which it is appropriate for the court to take account of her views. She is totally unaware of this litigation, for which credit must be given to KG.

The Court dismissed the appeal and maintained the position of the trial court, namely that the parties' daughter must be returned to the United Kingdom.<sup>236</sup> The Court further withdrew the warrant for the arrest of the child's mother upon her arrival in the United Kingdom and ordered the father to pay for suitable accommodation for the child and her mother in the United Kingdom so that the child and the mother could live together in the United Kingdom.<sup>237</sup>

## 2.5 Conclusion

As explained in chapter 1, courts often rely on expert evidence to determine a child's views and wishes. This chapter has shown that experts play a pivotal role in determining children's views and wishes. Curators *ad litem*, private attorneys, advocates, family advocates and Legal Aid attorneys are also important in the determination of the child's voice. Courts also, at times, *mero motu* form an opinion about the child's views in relation to a parental dispute.

Article 12(2) of the UNCRC allows state parties the flexibility and discretion to decide on the measures for determining children's views in legal proceedings as long as such

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<sup>235</sup> *KG v CB* [60].

<sup>236</sup> *KG v CB* [62].

<sup>237</sup> *KG v CB* [62].

measures ensure that the child can participate in the proceedings.<sup>238</sup> If South African courts are determining children's views in ways that are restricting children's views, this would be contrary to the intention of the UNCRC. Seeing that South Africa at present employ diverging methods to determine children's views, it may well be the case that some methods restrict children's right to participate.

From the discussion of thirteen cases and a psychological study, it is clear that courts regard children's views and wishes on a case-by-case basis. In his dissertation, Cleophas<sup>239</sup> explains that determining children's views on a case-by-case basis is consistent with article 12 of the UNCRC. This is, in of itself, therefore not of concern. Studying the selected cases, however, reveals that courts' approaches to the actual determination of children's views diverge. One court may, for instance, only pay attention to a child's age in its determination of a child's views while another court relies heavily on findings of experts.

If role-players in litigation and the courts, which rely on such role-players' findings, approach child participation in diverging ways, the result may be a situation where ultimately the child's views were not considered. Diverging approaches to determining children's views may, as Lundy explains, result in child participation only being tokenistic or decorative,<sup>240</sup> with the child's views ultimately not being considered.

From this discussion, one concludes that it may be necessary for persons involved in the assessment of children to use prescribed and standard tools and methods of measurement, resulting in determining children's views and wishes more consistently. Standard tools and methods of measurement could provide what appears to be much-needed consistency and certainty to the various role-players involved in the burdensome task of having to ascertain children's views.

In the next chapter the focus will shift to findings flowing from this chapter. Reference will also be made to child participation in other countries and how South Africa may learn from other jurisdictions.

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<sup>238</sup> Van Bueren G "The United Nations Convention on the Rights of the Child: An evolutionary revolution" in Davel CJ (eds) *Introduction to Child Law in South Africa* (Juta Pretoria 2000) 203.

<sup>239</sup> Cleophas Child participation 14.

<sup>240</sup> Lundy 2007 British educational research journal 936.

## CHAPTER 3: FINDINGS

### 3.1 Findings

#### 3.1.1 *Children have the right to participate in legal proceedings*

The historical notion that children are incapable of forming their own views in legal proceedings has changed. At present, in many parts of the world, it is believed that children are human beings with a right to be heard in legal proceedings.<sup>241</sup> Granting children the right to participate and express themselves in legal proceedings is a legal right in South Africa. In addition to being a legal right, child participation is also said to benefit states from welfare and legal perspectives.<sup>242</sup>

The UNCRC and ACRWC are two treaties enacted to, amongst others, entrench children's right to participate in legal proceedings in cases where the outcome of such proceedings may affect a child. According to these treaties, and subject to a particular child's ability to participate, a child has a right to participate in legal proceedings. South Africa ratified the UNCRC on 16 June 1995 and the ACRWC on 7 January 2000.

In brief, article 12 of the UNCRC compels state parties to ensure that a child is given an opportunity to express his/her views freely in matters affecting him/her and that the child's views are heard. Article 4 of the ACRWC provides that a child has a right to express himself/herself in proceedings subject to his/her capacity to do so. The aforesaid articles apply in context of child participation in legal proceedings in South Africa.<sup>243</sup> Article 12 of the UNCRC and article 4 of the ACWRC subject a child's right to participate in legal proceedings to his/her age and level of maturity.<sup>244</sup>

The UN Committee on the Rights of the Child in General Comment No. 12 of 2009<sup>245</sup> stipulates that article 12 of the UNCRC does not intend to use a child's age to limit the child's right to participate in legal proceedings. Erikssen and Näsman submit that it is

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<sup>241</sup> Krappmann 2010 (18) International journal of children's rights 505.

<sup>242</sup> Hemrica J and Heyting F 2004 "Tacit notions of childhood: An analysis of discourse about child participation in decision-making regarding arrangements in case of parental divorce" *Childhood* 464.

<sup>243</sup> See 1.1.1 for a discussion on the UNCRC and ACRWC.

<sup>244</sup> See 1.1.1 for the discussion of the UNCRC and the ACRWC.

<sup>245</sup> UN Committee on the Rights of the Child General Comment No. 12 2008 [21].

up to the respective UNCRC state parties (including South Africa) to apply a child's age and maturity level within the context of the particular state.<sup>246</sup>

As noted in Chapter 1, the African Committee of Experts on the Rights and Welfare of the Child has published multiple General Comments in relation to several articles of the Charter – on article 6 and article 30 of the ACRWC, for example – but not yet on article 4.

In General Comment No. 12 of 2009 the UN Committee on the Rights of the Child addresses how a child's age may impact on his/her right to express himself/herself in legal proceedings. It suggested that a child may express his/her views verbally and non-verbally. The General Comment advises that a child participating in legal proceedings must have sufficient knowledge but need not have comprehensive knowledge of the matter. The General Comment requires state parties to enable children who have difficulty expressing themselves to be placed in a position to do so and also to provide children with full protection during their participation, for instance if a child was sexually abused.<sup>247</sup>

In addition to article 12 of the UNCRC and article 4 of the ACRWC, provisions contained in the Children's Act and the Constitution also provide for child participation. The next discussion relates to provisions of the Children's Act and Constitution which are relevant to child participation.

### *3.1.2 South African courts' duty to allow child participation*

Section 6(5) and section 10 of the Children's Act oblige South African courts to allow a child, subject to age, level of maturity and stage of development, to participate in legal proceedings where the outcome may affect him or her.<sup>248</sup> Section 31(1)(a) applies to children affected by divorce and care disputes as well as relocation disputes but does not apply to children affected by child abduction disputes.<sup>249</sup>

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<sup>246</sup> Eriksson and Näsman 2008 Childhood 262.

<sup>247</sup> See 1.1.1 for the discussion of General Comment No. 12 of 2009.

<sup>248</sup> See 1.1.1 for the discussion of section 6(5) and section 10 of the Children's Act.

<sup>249</sup> See 1.1.1 for the discussion of section 31(1)(a) of the Children's Act.

The Children's Act places a two-fold duty on the state. Firstly, the method of child participation must be consistent with the child's age and level of maturity.<sup>250</sup> Secondly, courts and other forums must be made child friendly.<sup>251</sup> In 3.2.4 below the aspect of child-friendly courts is discussed in more detail.

For the most part, the UNCRC and ACRWC leave the implementation of child participation to individual state parties.<sup>252</sup> The Children's Act, which applies in South Africa, is devoid of guidelines that could have assisted courts in complying with their duty to ensure child participation.<sup>253</sup>

In reality, children's right to participate is entrusted to the adults involved in legal proceedings and some adults may either not be committed to ensuring child participation or oppose such participation due to their own vested interest in the matter.<sup>254</sup> In matters involving children, the adults remain responsible for the juridical consequences, also if the decision in a matter is wrong.<sup>255</sup>

As mentioned, Mol explains that child participation in legal proceedings usually takes one or a combination of the following forms: i) expert reports; ii) children litigating on their own behalf; iii) judges hearing children directly; iv) legal representation for a child; and v) best-interests representation.<sup>256</sup> The thirteen judgments discussed in chapter 2 indicate that South African courts effect child participation in legal proceedings by using four of the five forms. In the study, children litigating on their own behalf did not occur.<sup>257</sup>

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<sup>250</sup> Section 69(1)(a) of the Children's Act; Moyo, A 2015 "Child participation under South African law: Beyond the Convention on the Rights of the Child?" 2015 *South African journal for human rights* 178.

<sup>251</sup> Section 48(2) of the Children's Act 38 of 2005. Also see Moyo 2015 *South African journal for human rights* 178.

<sup>252</sup> Krappman 2010 *International journal of children's rights* 510. Also see [21] of the UN Committee on the Rights of the Child in its General Comment No. 12 of 2009 and Eriksson and Näsman 2008 *Childhood* 262.

<sup>253</sup> See 1.2 for how the lack of guidelines in the Children's Act in relation to child participation lead to a problem. The problem statement is described in 1.2.

<sup>254</sup> Lundy 2007 *British educational research journal* 929.

<sup>255</sup> Krappman 2010 *International journal of children's rights* 502.

<sup>256</sup> Mol 2019 *International journal on children's rights* 67.

<sup>257</sup> The case law discussed in chapter 2, read with literature in this regard, reveals that South African courts effect child participation by means of expert reports, judges hearing children directly, legal representation for children and best-interests representation. The cases referred to in this dissertation excluded situations where children litigated on their own behalf.

Below follows a summary of how the respective courts in the thirteen judgments discussed in chapter 2 interpreted and applied child participation in diverging ways.

### 3.1.3 *Forms of child participation in selected case law*

Thirteen cases and one study were selected for purposes of this dissertation. The forms of child participation found in the case law may be summarised as follows:

	<i>Expert reports</i>	<i>Judges directly</i>	<i>Legal representative</i>	<i>Curator ad litem</i>
<b><u>Divorce and care</u></b>				
<i>Legal Aid: Four Children</i>	No	No	Yes: Legal Aid or	Yes: Legal Aid
<i>Ex parte van Niekerk</i>	No	No	Yes: s28(1) attorney	No
<i>Soller v G</i>	No	Yes	Yes: s28(1) attorney	No
<i>Potgieter v Potgieter</i>	Yes: Psychologists Yes: Family adv.	No		No
<b><u>Relocation</u></b>				
<i>AC v KC</i>	Yes: Family adv.	No	No	No
<i>HG v CG</i>	Yes: Psychologists Yes: Family adv.	No	No	No
<i>JP v JC</i>	No	No	No	No
<i>Cunningham v Pretorius</i>	Yes: Psychologists, Social workers, Language experts	No	No	No
<b><u>Child abduction</u></b>				
<i>WS v LS</i>	Yes: Psychologists Yes: Family Adv.	No	No	No
<i>Central Authority v LS</i>	Yes: Social worker Yes: Family Adv.	No	No	Yes: Private adv.
<i>Central Auth. v Reynders</i>	No	No	No	No
<i>N v Central Authority</i>	Yes: Family Adv. Yes: Social worker Yes: Family Adv.	No	No	No
<i>KG v CB</i>	Yes: Social worker	No	No	Yes: Legal Aid

### 3.1.4 *South African courts' application of child participation*

The first observation from the table above is that no two cases show the same approach. Where one court relied on expert opinions to establish a child's views and wishes in a matter, another wholly discarded expert opinions and relied solely on the assistance of a curator *ad litem*. Therefore, one may conclusively state that South African courts have diverging approaches to child participation.

The second observation is that in seven of the thirteen judgments discussed in chapter 2, the assistance of experts was enlisted, making this approach the most popular form of child participation. Although experts are often involved in helping courts determine children's views and wishes in legal proceedings, courts in many instances expressly found against such opinions. The mere fact that an expert is involved in a matter where a child is allowed to participate therefore does not guarantee that the experts' opinion will be valued or at all be relied upon by the court.<sup>258</sup>

Thirdly, one observes that in only three of the thirteen cases discussed, legal representatives were appointed for children in terms of section 28(1)(h) of the Constitution. Carnelley argues that even where the legal representative appointed for a child is considered as client-directed and the client (the child) is mature enough to instruct his/her legal representative, the legal representative is still expected to act in the best interests of the child.<sup>259</sup> For instance, a child's legal representative must disclose information to a court if he/she regards such disclosure to be in the best interests of the child even if the child expressly requested the legal representative not to disclose such information.<sup>260</sup>

In only three of the thirteen cases curators *ad litem* were appointed for children. Of the three cases in which curators *ad litem* were appointed, in two a Legal Aid attorney was appointed and a private attorney in the remaining case.

The fourth observation is that in only one of the thirteen cases discussed the judge spoke with the child directly. The child was almost sixteen years of age, which is relatively mature in age compared to children affected by other judgments.

The observations clearly point to the fact that South African courts have diverging approaches to whether and how they allow child participation. From the thirteen judgments selected for this dissertation, South African courts appear to be inconsistent in how they determine children's views and wishes in legal proceedings.

The fact that in only two of the thirteen judgments a Legal Aid attorney was utilised as curator *ad litem* is concerning. Only in the cases of *Legal Aid: In re four children* and

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<sup>258</sup> See 1.1.3 for a discussion on expert evidence.

<sup>259</sup> Carnelley M 2010 "The right to legal representative at state expense for children in care and contact disputes – a discussion of the South African legal position with lessons from Australia" 2010 *Obiter* 650 – 651.

<sup>260</sup> Australian Family Law Act of 1975 section 68LA(7) - (8).



*KG v CB* did the court appoint Legal Aid attorneys to act as curators *ad litem* for children. In light of the fact that Legal Aid South Africa is state funded, it would be sensible for courts to more regularly utilise Legal Aid attorneys to act as children's legal representatives or curators *ad litem*. This is a form of child participation that should and could be utilised more often.

### **3.2 Tools and measures to assist courts in determining children's views and wishes**

#### *3.2.1 Australian guidelines*

In a 2010 article,<sup>261</sup> Carnelley turned to Australia and established how the courts in that country approach appointment of legal representatives for children (or, as it is called in Australia, Independent Children's Lawyers). Because the South African legislature and judiciary provide little guidance regarding the appointment of children's legal representatives, Carnelley aimed to glean learnings from the approach Australian courts have towards legal representatives for children.<sup>262</sup>

Carnelley chose the Australian jurisdiction because the underlying principles of appointment of children's legal representatives in Australia are similar to principles applied in South Africa.<sup>263</sup> There are further similarities between the jurisdictions, such as a child's views only being considered as one of many aspects to be taken into account when making its decision and not being the decisive factor.<sup>264</sup> Another similarity between South Africa and Australia is that an Independent Children's Lawyer in Australia must be court appointed as is also the case with a legal representative in terms of section 28(1)(h) of the Constitution.<sup>265</sup>

As backdrop, Carnelley also referred to South African legislation such as section 10 of the Children's Act<sup>266</sup> and section 28(1)(h) of the Constitution.<sup>267</sup> Carnelley distinguished between a legal representative that is client-directed and a legal

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<sup>261</sup> Carnelley 2010 Obiter 638 – 661.

<sup>262</sup> Carnelley 2010 Obiter 639.

<sup>263</sup> Carnelley 2010 Obiter 639.

<sup>264</sup> The Family Court of Australia Report 50.

<sup>265</sup> Australian Family Law Act section 68L.

<sup>266</sup> See 1.1.1 for the discussion on section 10 of the Children's Act, which provides that children that are at a certain age, maturity and stage of development may participate in legal proceedings and their views must be regarded.

<sup>267</sup> See 1.1.2.1 for the discussion on section 28(1)(h) of the Constitution, which provides for children to be appointed their own legal representative in civil proceedings at state expense if substantial injustice may result otherwise; Carnelley 2010 Obiter 641.

representative that employs a best-interest representation role.<sup>268</sup> These aspects were also discussed in this dissertation.<sup>269</sup>

The Australian judgment of *Re K*<sup>270</sup> laid down guidelines to be followed by a child's legal representative. The legal representative has to:<sup>271</sup>

- Meet with the child;<sup>272</sup>
- Establish a professional relationship with the child;<sup>273</sup>
- Provide the child with information;<sup>274</sup>
- Explain the role of the legal representative to the child;<sup>275</sup>
- Devise a case plan and where, necessary to do so with an expert;<sup>276</sup>
- Develop a strategy for the involvement of the child;<sup>277</sup>
- Form an independent view of the child;<sup>278</sup>
- Put the views of the child fully to the court;<sup>279</sup>
- Analyse any reports in relation to the child;<sup>280</sup>
- Present evidence to court;<sup>281</sup>
- Cross-examine witnesses;<sup>282</sup>
- Appeal the outcome of a case;<sup>283</sup>
- Minimise the child's trauma;<sup>284</sup> and
- Keep certain information confidential as part of attorney-client privilege.<sup>285</sup>

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<sup>268</sup> See 1.1 for the discussion on client-directed and best-interests legal representation.

<sup>269</sup> See 1.1.1 where section 10 and section 31(1)(a) are quoted and discussed.

<sup>270</sup> *Re K* 1994 117 FLR 63.

<sup>271</sup> Carnelley 2010 Obiter 658 – 659.

<sup>272</sup> Australia's Family Law Act of 1975 guidelines [5.2].

<sup>273</sup> Australia's guidelines [5].

<sup>274</sup> Australia's guidelines [6.5].

<sup>275</sup> Australia's guidelines [5].

<sup>276</sup> Australia's guidelines [6.5].

<sup>277</sup> Australia's guidelines [6.5].

<sup>278</sup> Australia's guidelines [4].

<sup>279</sup> Australia's guidelines [4] and [6.5].

<sup>280</sup> Section 68 of the Australia's Family Law Act of 1975.

<sup>281</sup> Australian case of *Gleeson v Osborne* 2009 FMCAfam 894 par 38 - 40.

<sup>282</sup> Australia's Family Law Act of 1975, guidelines [6.5] and [6.11].

<sup>283</sup> Australia's guidelines [6.5] and [6.11].

<sup>284</sup> Australia's guidelines [6.5].

<sup>285</sup> Australia's Family Law Act of 1975.

In addition to the guidelines laid down in the Australian matter of *Re v K*, Carnelley also referred to a draft document prepared by the Centre for Child Law presented at a family law conference in 2010.<sup>286</sup> In the draft document, Ann Skelton from the University of Pretoria's Centre for Child Law laid down principles to be followed by legal representatives for children. Carnelley emphasised that although not final, the draft document presented by Skelton was the only available document in South Africa containing guidelines in this regard.<sup>287</sup>

The gist of Skelton's presentation is as follows:

- The representative must educate and inform the child of the legal process, the role of a legal representative and of alternative forms of dispute resolution;<sup>288</sup> and
- The representative must place any information relevant to cross-examination of witnesses before the court.<sup>289</sup>

In the next section attachment assessments are discussed as helpful measures within the context of assisting courts to consistently allow child participation in legal proceedings. After that, a so-called Voice of the Child Report is discussed.

### 3.2.2 *Keyser and Ryke's study*

Keyser and Ryke<sup>290</sup> found in a 2020 study that a child's need for security may be revealed by an attachment assessment and that the outcome of such an assessment may provide a court with meaningful information in disputes involving children.<sup>291</sup> The participants were family advocates and family counsellors, but the principles and guidelines that emerged from the study can be applied and transferred equally to legal representatives, experts, judges, and social workers as well as family advocates and family counsellors.

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<sup>286</sup> "Introduction to legal representation for children. Why and how?" unpublished paper presented at 2010 University of Western Cape and Miller du Toit Cloete Inc. International Family Law Conference.

<sup>287</sup> Carnelley 2010 *Obiter* 644.

<sup>288</sup> Skelton AM's presentation of draft guidelines page 12 referred to in the unpublished paper in [47].

<sup>289</sup> Skelton's draft guidelines page 5.

<sup>290</sup> Keyser S and Ryke EH "The perceived utility value of two attachment measures in care and contact recommendations by family counsellors: A pilot study" 2020 21(2) *Child abuse research: A South African journal* 61 – 76.

<sup>291</sup> Keyser 2020 *Child abuse research* 63.

The study submitted that attachment assessments of children usually include the following aspects:<sup>292</sup>

- The child's warmth and supportiveness of his/her relationship with a parent;
- The social and emotional adjustability of the child;
- The child's ability to identify complex emotions in others;
- The child's relationship capacity;
- The communication between the child and a parent; and
- The parent's ability to support the developmental needs of the child.

Keyser and Ryke found that none of their participants made use of standardised tools in child assessments.<sup>293</sup> Instead, the participants used their observations and experience to make assumptions of the parent-child attachment style.<sup>294</sup>

Keyser and Ryke suggest that instead of relying only on observations and experience, persons involved in assessing children make use of either one or both of the following attachment measures when assessing children's views and wishes:<sup>295</sup>

- 1) Parental Bonding Instrument (PBI); and/or
- 2) The Child-Parent Relationship Scale (CPRS).

Keyser and Ryke note that the PBI and the CPRS are freely available in the public domain, are able to measure with reasonable face validity,<sup>296</sup> allow parents to describe the relationship with a child, and enable parents to identify their characteristics within the relationship.<sup>297</sup> The two attachment measures are well established and are considered to be scaled, which makes interpretation of the measured results easy.<sup>298</sup> The scales of the two attachment measures entail an interpretation of factors as well

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<sup>292</sup> Keyser and Ryke 2020 Child abuse research 63.

<sup>293</sup> Keyser and Ryke 2020 Child abuse research 64.

<sup>294</sup> Keyser and Ryke 2020 Child abuse research 67.

<sup>295</sup> Keyser and Ryke 2020 Child abuse research 64.

<sup>296</sup> Face validity entails asking people to rate the validity as it appears to them. Generally, the three categories of raters are: (a) persons who take the test; (b) nonprofessional users who work with the test such as administrators; and (c) the general public. For more detail see Nevo B 1985 "Face validity revisited" *Journal of educational measurement* 287 – 293.

<sup>297</sup> Keyser and Ryke 2020 Child abuse research 64.

<sup>298</sup> Keyser and Ryke 2020 Child abuse research 64.

as items. The term “factor” is used to denote the latent variable, while the term “item” refers to each PBI item.<sup>299</sup>

Uji & Kitamura’s study found that the PBI as a measure was not controversial but clearly displayed a four-factor structure across generations and genders. The study further found that the four factors were not independent but correlated with each other.<sup>300</sup>

The PBI was developed in 1979 by Parker, Tupling and Brown<sup>301</sup> and is aimed at measuring fundamental parenting styles as perceived by children.<sup>302</sup> The PBI elicits memory-based answers to questions about a child’s upbringing in the first sixteen years of life. The PBI contains 25 items that address each parent separately, producing a two-dimensional measure of perceived parental behaviours. These behaviours are plotted with “care” versus “indifference/rejection” on one axis and “overprotection” versus “allowance of autonomy/independence” on the other. Of the 25 total items, twelve evaluate the first dimension (care), while thirteen evaluate the second (overprotection).<sup>303</sup>

Suzuki and Kitamura explain that the PBI may be used to indicate five different types of parenting styles: average; high care and low overprotection conceptualised as optimal parenting; high care and high overprotection conceptualised as affectionate constraint; low care and high overprotection conceptualised as affectionless control; and, low care and low overprotection conceptualized as neglectful parenting.<sup>304</sup> Wilhelm *et al.* conducted a study to demonstrate the stability of the PBI over a twenty-year period and found that the PBI remained relatively stable over two decades.<sup>305</sup> The authors explain that the PBI is designed to measure a person’s subjective experience of parenting until the age of sixteen.<sup>306</sup>

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<sup>299</sup> Uji M and Kitamura T 2006 “Factorial structure of the Parental Bonding Instrument (PBI) in Japan: A study of cultural, developmental, and gender influences” *Child psychiatry and human development* 120.

<sup>300</sup> Uji and Kitamura 2006 *Child psychiatry and human development* 127.

<sup>301</sup> The study was first published as Parker G, Tupling H and Brown LB 1979 “A Parental Bonding Instrument” *British journal of medical psychology* 1 – 10.

<sup>302</sup> Suzuki H and Kitamura T 2011 “The Parental Bonding Instrument: A four factor structure model in a Japanese college sample” *The open families study journal* 89.

<sup>303</sup> Uji and Kitamura 2006 *Child psychiatry and human development* 116.

<sup>304</sup> Suzuki and Kitamura 2011 *The open families study journal* 89.

<sup>305</sup> Wilhelm K *et al.* 2004 “The stability of the Parental Bonding Instrument over a 20-year period” *Psychological medicine* 1 and 5.

<sup>306</sup> Wilhelm *et al.* *Psychological medicine* 1.

The CPRS was developed by Pianta in 1992 and is a self-report instrument measuring a parent's relationship with a child.<sup>307</sup> Of the two attachment measures proposed by Keyser and Ryke, the PBI is suitable to determine children's views and wishes as it focuses on a child's perceptions of his parents' parenting style in the first sixteen years of life. Based on the fact that this instrument focuses on the views of a child, it is suitable to be implemented for purposes of child participation as envisaged by the UNCRC, ACRWC and the Children's Act.

Keyser and Ryke submit that a role-player involved in determining a child's views and wishes in legal proceedings via the PBI should have to undergo training in the application of the use of this validated attachment measure.<sup>308</sup>

### 3.2.3 *Voice of the Child Reports*

Another possible way of determining and putting forward a child's views and wishes is by means of a Voice of the Child Report as found in the jurisdiction of Canada as well as other countries around the world.<sup>309</sup> To compile a Voice of the Child Report, the person conducts one or more interviews with the child to obtain the child's feelings, views and wishes in relation to the child's parents' dispute.<sup>310</sup> A Voice of the Child Report entails one or more interviews with a child and does not intend to reflect expert opinions or parental recommendations.<sup>311</sup>

In a study in which Birnbaum compiled Voice of the Child Reports for 24 children between the ages of six to seventeen, she found that the children were comfortable and wanted to speak with a social worker about their preferences and views. Birnbaum further found that the children observed in the study were able to express themselves reliably and thoughtfully.<sup>312</sup> Birnbaum regards a Voice of the Child Report as one of many tools to determine a child's views and wishes, to be used in conjunction with

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<sup>307</sup> The CPRS is accessed from the Centre for Advanced Study of Teaching and Learning, University of Virginia. There is no charge for using these measures in educational research. No wording or rating scales of any items on the measures should be modified: <https://effectiveservices.force.com/s/measure/a007R00000v8QbbQAE/pianta-childparent-relationship-scale> (date of use: 24 August 2021).

<sup>308</sup> Keyser and Ryke 2020 Child abuse research 72.

<sup>309</sup> Marumoagae 2020 *The African journal for international and comparative law* 467; Birnbaum R 2017 "Views of the Child Reports: Hearing directly from children involved in post-separation disputes" *Social inclusion* 2.

<sup>310</sup> Marumoagae 2020 *The African journal for international and comparative law* 480.

<sup>311</sup> Birnbaum 2017 *Social inclusion* 2.

<sup>312</sup> Birnbaum 2017 *Social inclusion* 5.

legal representatives for children, interviews with children and assessments with children in custody and access (care and contact, in current terminology) disputes.

A Voice of the Child Report brings forward evidence that may meaningfully assist the court in coming to its decision.<sup>313</sup> The procedure involved in compiling a Voice of the Child Report is relatively new and gives children a voice in judicial processes, which children may experience as empowering.<sup>314</sup>

The following guidelines may apply in relation to a Voice of the Child Report:<sup>315</sup>

- The scope and nature of the report will be court directed;
- Appointment and fees of the assessor will be court directed; and
- The assessor's report must be written in plain language and include the following aspects:
  - The age and level of maturity of the child to ascertain the child's ability to participate;
  - The child's willingness to participate;
  - The child's preferences and if some were influenced by a parent;
  - Description of the interview process followed; and
  - Behavioural observations.

In addition to using the PBI as standardised tool in child participation cases, courts hearing matters involving children should also be made more child friendly.<sup>316</sup> Making courts more child friendly is as integral to the state's duties in terms of the Children's Act as is the state's duty to allow children to participate in legal proceedings.<sup>317</sup> Guidelines which may assist courts in becoming more child friendly are set out below.

#### *3.2.4 Child-friendly courts*

In their article,<sup>318</sup> Keyser and Ryke also propose that courts hearing matters involving children be made more child friendly. Five simple factors they list are:

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<sup>313</sup> Birnbaum 2017 Social inclusion 6.

<sup>314</sup> Marumoagae 2020 The African journal for international and comparative law 481.

<sup>315</sup> Marumoagae The African journal for international and comparative law 482.

<sup>316</sup> Section 48(2) of the Children's Act 38 of 2005; Moyo 2015 SAJHR 178.

<sup>317</sup> Moyo 2015 SAJHR 178.

<sup>318</sup> Keyser and Ryke 2020 Child abuse research 61 – 76.

- Language and cultural barriers between children and court staff should be removed;
- Courts and forums should be adapted to be conducive to child participation;
- Court staff should wear less intimidating clothing;
- Courts should make use of closed-circuit television, separate waiting rooms, one-way screens in court rooms and the video-taping of evidence; and
- Child witnesses should receive special preparation.<sup>319</sup>

### **3.3 Conclusion**

Chapter 3 tabled findings to enable one to compare how the respective courts in the case law discussed in chapter 2 effected child participation. Chapter 3 referred to a study by Keyser and Ryke that discussed the PBI as a measure for determining children's views and wishes in legal proceedings. Another tool that may assist in implementing children participation is a Voice of the Child Report as used in Canada and other jurisdictions. The utility of a Voice of the Child Report was also discussed in this chapter. A topic that is important in the context of child participation, namely making courts more child-friendly, was also discussed in chapter 3.

The next chapter contains simple and cost-friendly recommendations for how South African courts may henceforth allow child participation in a consistent manner while making courts more child friendly.

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<sup>319</sup> Moyo 2015 SAJHR 178.



## CHAPTER 4: RECOMMENDATIONS –THE WAY FORWARD

### 4.1 Introduction

The discussion in chapter 3 encompasses Carnelley's reference to child legal representatives in Australia, authors Keyser and Ryke's proposals, Voice of the Child Reports as well as the Centre of Child Law's presentation at a 2010 conference. Based on the discussion in chapter 3, certain recommendations are made below on how South African courts could allow and implement child participation in legal proceedings.

### 4.2 Recommendations

#### 4.2.1 *Suitable persons to act as children's legal representatives*

A court has the discretion to decide on the appointment of a legal representative for a child. If a court finds that a child will be substantially prejudiced if legally unrepresented, the court will appoint a legal representative for the child at state expense in terms of section 28(1)(h) of the Constitution. A child's age is not only important in the context of whether or not a child is able to participate in the proceedings, but courts are also guided by a child's age in deciding who may be most appropriate to act as a legal representative for a child. The discussion below explains how a court may consider a child's age when deciding on an appropriate legal representative for the child.

##### 4.2.1.1 *Very young children*

Where a child is very young, it may be best for a court to appoint a curator *ad litem* to effect best-interests representation for the child.<sup>320</sup> The sources consulted for this dissertation do not define what "very young children" means and what age group this involves.

Kassan<sup>321</sup> submits that appointing a legal practitioner as curator *ad litem* for a child is the most suitable way to ensure a child's voice is heard because a legal practitioner is

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<sup>320</sup> See 1.1.2.2 for a discussion on what is meant by best-interests representation.

<sup>321</sup> Kassan How can the voice of the child be adequately heard 13.

trained in court procedure, draft court documents and bring across a client's views in a court.

As seen from the cases discussed in this dissertation, a curator *ad litem* could be a Legal Aid employee, private attorney or private advocate. It is submitted that courts ought to consider appointing Legal Aid attorneys as curators *ad litem* more often since Legal Aid is a state-funded institution and their appointment makes sense from a cost perspective.<sup>322</sup> .

#### 4.2.1.2 Older, more mature children

Where a child is older and more mature, a court may appoint the child a legal representative that may take instructions directly from the child.<sup>323</sup> Again, the meaning of "older, more mature children" is not defined in the sources consulted for this dissertation. A legal representative appointed for an older child could be a Legal Aid employee, private attorney or private advocate, as is also the case when a curator *ad litem* is appointed for a younger child. It is proposed that a court strongly considers appointing a state-funded Legal Aid attorney in terms of section 28(1) and that such person be specially chosen per his/her expertise and skills in relation to children. Similar to the reason furnished in 4.2.1.1 above, a Legal Aid attorney is state funded and his/her appointment is cost-effective.

#### 4.2.2 Expert reports

In most cases selected for this dissertation the parents of a child, and not the court itself, mandated and funded experts to assess their child and offer expert opinion to the court. The only experts courts called upon to assist in matters where children were involved, were family advocates.

The Office of the Family Advocate may be ordered to furnish a court with a report in relation to a matter involving a child. A family advocate is not a child representative but acts neutrally per his/her mandate provided for in terms of the Mediation in Certain Divorce Matters Act.<sup>324</sup> In the case of child abduction cases, the Office of the Family Advocate must be involved as central authority in South Africa to affect the objectives

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<sup>322</sup> *Legal Aid Board*: See 2.2.2 for a discussion on this judgment.

<sup>323</sup> Woodrow C and Du Toit C "Child abduction" 18.

<sup>324</sup> *Du Plessis NO v Strauss*. Also see section 4 of the Mediation in Certain Divorce Matters Act.

as set out in the Hague Convention<sup>325</sup> as incorporated into the Children's Act.<sup>326</sup> A family advocate also undertakes an investigation relating to minor or dependent children in court applications where a party seeks to vary, suspend or rescind guardianship or custody (or primary residence and care as referred to in current terminology) of children.<sup>327</sup>

In considering and weighing evidence of experts involved in assessing children, courts are guided by the ordinary rules of evidence.<sup>328</sup> The next recommendation relates to making courts more child friendly.

#### *4.2.3 Child-friendly courts*

##### *4.2.3.1 Child friendliness and child participation*

All courts hearing matters in which children are involved should be made child friendly as this obligation is rooted in section 48(2) of the Children's Act.<sup>329</sup> Therefore, the first reason why it should be a priority to make courts more child friendly is rooted in the legislative obligation contained in the Children's Act. Further to this, a child's right to participate in legal proceedings includes his/her right to freely express his views and wishes. The wording of, for instance, article 12 of the UNCRC includes the precise words "to express those views freely". For a child to feel relatively comfortable in legal proceedings is therefore an integral part of a child's right to participate in legal proceedings. By making courts more child friendly, courts are a step closer to fulfilling their duty to allow children the right to participate in legal proceedings.

##### *4.2.3.2 How to make courts child friendly*

The five factors suggested by Keyser and Ryke which could make courts more child-friendly are:

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<sup>325</sup> The Hague Convention on the Civil Aspects of International Child Abduction.

<sup>326</sup> Woodrow C and Du Toit C "Child abduction" 18.

<sup>327</sup> Section 4(1) of the Mediation of Certain Divorce Matters Act provides as follows: "1. The Family Advocate shall a) after the institution of a divorce action; or b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979), if so requested by any party to the proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor child or dependent child of the marriage concerned or regarding such matter as is referred to him by the court."

<sup>328</sup> See Meintjes-van der Walt 2003 Journal of African law 88 – 106 for a discussion on expert evidence.

<sup>329</sup> Section 48(2) of the Children's; Moyo 2015 SAJHR 178.

- Language and cultural barriers between children and court staff should be removed;
- Courts and forums should be adapted to be conducive to child participation;
- Court staff should wear less intimidating clothing;
- Court should make use of closed-circuit television, separate waiting rooms, one-way screens in court rooms and the video-taping of evidence; and
- Child witnesses should receive special preparation.<sup>330</sup>

The five factors proposed by Keyser and Ryke<sup>331</sup> involve little to no cost and yet by implementing these relatively simple factors children could feel considerably more comfortable when participating in legal proceedings. If South African courts are to, in terms of their international and domestic obligations, ensure that children can participate in legal proceedings, the forum in which such participation takes place should be as child-friendly as possible.

#### *4.3 Compulsory measures in child participation*

##### *4.3.1 Consistency in the approach to child participation*

The discussion of selected thirteen cases reveals that South African courts have diverging approaches to determining children's views and wishes in legal proceedings. No two cases allowed child participation in legal proceedings in the same way. By ensuring that courts are made more child friendly (as discussed in 4.2.3.2 above) and by obliging all role-players involved in determining children's views and wishes to make use of compulsory tools in their assessments, courts may become more consistent in how they allow child participation in legal proceedings.

##### *4.3.2 Compulsory PBI*

It is proposed that any person involved in having to report to a court in relation to a child's views and wishes make use of the PBI. The PBI is an attachment measurement freely available in the public domain which has reasonable face validity, allows parents to describe the relationship with a child and that enables parents to identify their

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<sup>330</sup> Moyo 2015 SAJHR 178.

<sup>331</sup> Moyo 2015 SAJHR 178.

characteristics within the relationship.<sup>332</sup> The attachment measure is also well-established and has scales that simplify interpretation.<sup>333</sup>

Regardless of whether a curator *ad litem* or legal representative is appointed for a child, or whether experts are involved or family advocates are tasked with investigations, all role-players assessing children should be obligated to utilise the PBI and to report back to the court in relation thereto.

Obligating role-players to make use of the PBI in matters where children have participatory rights will provide some consistency in how children are assessed. Consistency in method of assessment will inevitably lead to approaching child participation consistently by weighing evidence obtained from the application of a single standardised tool.

The measures proposed are freely available in the public domain, allow parents to describe the relationship with the child and enable parents to identify their characteristics within the relationship.<sup>334</sup> The measures' good psychometric properties coupled with the fact that the measures have already been tested numerous times further show their suitability in court context.<sup>335</sup> Persons making use of the proposed measures, such as private attorneys, advocates, Legal Aid attorneys, family advocates and other experts will require basic training<sup>336</sup> as will be elaborated upon below.

#### **4.4 Proposed changes**

##### *4.4.1 The need for changes*

As discussed at length in this dissertation, the Children's Act currently fails to provide courts with guidelines for child participation. As a result, and as observed from an analysis of thirteen cases, courts currently display diverging approaches to child participation in legal proceedings. To assist courts in applying their duty to allow child participation in legal proceedings more consistently, it is suggested that the recommendations discussed below be enacted as an amendment to the Children's Act or as an additional Regulation thereto.

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<sup>332</sup> Keyser and Ryke 2020 Child abuse research 64.

<sup>333</sup> Keyser and Ryke 2020 Child abuse research 64.

<sup>334</sup> Keyser and Ryke 2020 Child abuse research 64.

<sup>335</sup> Keyser and Ryke 2020 Child abuse research 64.

<sup>336</sup> Keyser and Ryke 2020 Child abuse research 64.

#### 4.4.2 *The labour intensiveness of the changes*

The proposed amendment to the Children's Act or a new Regulation will in all probability not be extensive or labour intensive. By affecting what is considered to be a relatively minor amendment to existing legislation, namely the Children's Act, or by adding a short new Regulation, courts may be provided with much-needed guidance in respect of child participation in civil proceedings (including family law proceedings). It is therefore submitted that the gap in our current legal dispensation may be addressed by a simple, cost-effective amendment or a new Regulation.

#### 4.4.3 *The extent of the changes*

The following recommendations are made in relation to the contents of the amendment or Regulation to the Children's Act:

The first recommendation is that courts more regularly consider appointing Legal Aid attorneys as curators *ad litem* for very young children. The appointment of a curator *ad litem* for a very young child is conducive to child participation in legal proceedings as it entails best-interests representation for the child.

The second recommendation for ensuring child participation is that courts more regularly appoint, at the state's expense, Legal Aid attorneys as legal representatives for older children in terms of section 28(1) of the Constitution. The appointment of legal representatives for older children promotes child participation in legal proceedings as it entails best-interests representation and direct legal representation to voice the views and wishes of the child. Any legal representative appointed to represent a child should follow the guidelines as set down in the Australian judgment of *Re K*.<sup>337</sup>

The third recommendation is to make courts more child friendly by removing language and cultural barriers, adapting courts to be conducive to child participation, have court staff wear less intimidating clothing, make use of technology such as closed-circuit television, and to have child witnesses receive special protection.

The fourth recommendation is to oblige any expert or role-player involved in assessing a child and determining a child's views and wishes, including a family advocate, to make use of the PBI. Any person reporting to a court after assessing a child,

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<sup>337</sup> See para 3.2.1 for a more extensive discussion on *Re K*.

particularly in relation to a child's views and wishes, must provide the court with the outcome of the PBI as applied to the child and his/her parents. Additional training for application of the PBI should preferably be undertaken by a person making use of this attachment measure.

The fifth recommendation is to enable courts to request a role-player involved in assessing a child, particularly in respect of the child's views and wishes, to compile a Voice of the Child Report in addition to applying the PBI in instances where a court finds such additional report to be necessary and useful. Ordering a Voice of the Child Report in addition to a compulsory PBI will be in the particular court's discretion.

## CHAPTER 5: CONCLUSION

### 5.1 International and domestic duty to affect child participation

This dissertation commenced with a discussion of article 4 of the ACRWC, article 12 of the UNCRC and sections 6(5), 10 and 31(1)(a) of the Children's Act.<sup>338</sup> These articles and sections require South African courts to allow children to express their views and wishes in legal proceedings, subject to a particular child's ability to participate in legal proceedings.<sup>339</sup> In terms of the aforementioned treaties and the Children's Act, South African courts must allow children the opportunity to express their views and wishes in proceedings. The principle that children are human beings with the right to be heard therefore applies in South Africa as it does in much of the rest of the world.<sup>340</sup>

A child's age, level of maturity and stage of development are factors a court should consider in determining whether or not a child is able to participate in legal proceedings.<sup>341</sup> Unfortunately, the UNCRC, ACRWC as well as the sections of the Children's Act relevant to child participation, fail to provide guidelines or context of how courts are to consider a child's age, level of maturity and stage of development when determining if the child should be allowed to participate in legal proceedings.<sup>342</sup> These sources are also silent on how courts should allow children who are sufficiently able to participate, the opportunity to express themselves in legal proceedings.

### 5.2 Child participation in practice

In chapter 2, thirteen judgments and a psychological study were identified and discussed to ascertain if and how South African courts allow for child participation in practice.

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<sup>338</sup> See 1.1.1 for a discussion on article 4 of the ACRWC, article 12 of the UNCRC and sections 6(5), 10 and 31(1)(a) of the Children's Act.

<sup>339</sup> A child's ability to participate is also discussed in 1.1.1, with particular reference to the UN Committee's General Comment No. 12 of 2009 as well as views of various authors.

<sup>340</sup> See 1.1 introduction for a discussion on the notion that children have the right to be heard.

<sup>341</sup> See 1.1.1 for a discussion on how the UNCRC, ACRWC and Children's Act point to a child's age, level of maturity and stage of development to decide on the child's ability to participate in legal proceedings.

<sup>342</sup> See 1.1.1 for a discussion on how the sources are silent in respect of how South African courts should determine children's views and wishes. See 1.2 for the dissertation's problem statement in this regard.



Four judgments were discussed in relation to children's views and wishes in their parents' divorce and care disputes. Four judgments were discussed to inquire whether and how children are allowed to participate in their parents' relocation disputes, and another five were analysed to determine whether and how children were allowed to participate in international abduction disputes.

The discussion in chapter 2 revealed that South African courts have diverging approaches towards child participation.<sup>343</sup> The respective judgments discussed in chapter 2 clearly show different approaches to whether and how children's views and wishes must be determined in legal proceedings. The respective courts were also inconsistent in how children's views and wishes, after being determined, were weighed and considered.

The psychological study by Robinson, Ryke and Wessels found that during the consultation process of drafting parenting plans in divorces, children regarded certain themes as important. The study found that during the parenting plan consultation process with parents, certain themes they considered important emerged. The authors found that children should be consulted when drafting parenting plans in divorce matters as parenting plans must be child-centred and sufficiently reflect on children's views and wishes.<sup>344</sup>

### **5.3 Tools and measures available to effect child participation**

In chapter 3 findings were made in relation to the judgments discussed in chapter 2, of which the most important is that South African courts are in dire need of guidelines to assist them in furthering child participation in a manner that is consistent and effective.<sup>345</sup> The problem statement in chapter 1 was confirmed after analysing case law in various areas of family law.

The discussion in chapter 3 turned to how certain measures could be implemented in South Africa to effect child participation more consistently. The discussion included factors which could make courts more child-friendly;<sup>346</sup> how persons involved in

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<sup>343</sup> See 3.1.3 for a summary of the respective courts' judgments and which forms of child participation the respective courts allowed for.

<sup>344</sup> See 2.2.6 for a discussion on the psychological study referred to.

<sup>345</sup> See 3.1.4 for a discussion on the need for guidelines to assist courts in their duty to affect child participation.

<sup>346</sup> See 3.2.4 for factors proposed by Keyser and Ryke to make courts more child-friendly.

assessing children should make use of the Parental Bonding Instrument (PBI);<sup>347</sup> how a child's representative ought to act as his/her attorney;<sup>348</sup> and, that in addition to the PBI, the person assessing a child could also make use of a Voice of the Child Report to further reflect on and report on the child's views in a legal matter.<sup>349</sup>

#### **5.4 Child participation in future: Proposed changes**

In chapter 4 of this dissertation five recommendations were made as to how the Children's Act may be amended or a new Regulation enacted to assist courts in applying their duty to allow child participation in legal proceedings more consistently.

The first recommendation for a proposed amendment or new Regulation discussed in chapter 4 was that courts consider appointing Legal Aid attorneys as curators *ad litem* more regularly in the case of very young children. The second recommendation was that courts consider appointing Legal Aid attorneys as legal representatives for older children more frequently and that such appointments be made in terms of section 28(1) at state expense. The third recommendation is to make courts more child friendly by applying the five factors suggested by Keyser and Ryke in this regard. The fourth recommendation is to make the PBI compulsory for any person tasked with assessing a child, particularly when ascertaining a child's views and wishes in legal proceedings. The fifth and last recommendation is that a court may in its discretion order a person assessing a child to conduct a Voice of the Child Report in addition to the obligatory PBI if the court feels such a report to be necessary.<sup>350</sup>

By way of the relatively minor amendment to existing legislation, namely the Children's Act, or by adding a short new Regulation, courts may be provided with much-needed guidance in respect of child participation in civil proceedings, including family law proceedings.

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<sup>347</sup> See 3.2.2 for a discussion on the PBI.

<sup>348</sup> See 3.2.1 for guidelines that child legal representatives may follow when representing children.

<sup>349</sup> See 3.2.3 for Voice of the Child Reports.

<sup>350</sup> See 4.4.2 for a more extensive discussion of the five recommendations.

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