

**A Child's Right to Legal Representation in Divorce Matters**

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## ABSTRACT

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Section 28(1)(h) of the *Constitution* guarantees every child the right to legal representation in civil matters at state expense provided that the denial of the right will result in substantial injustice. This discussion focuses on the nature and ambit of a child's right to be heard and to legal representation in divorce matters in South Africa. The views and best interests of a child are often neglected when dealing with a divorce. Because divorce litigation in South Africa is of an adverse nature, the process often results in substantive differences within the family. This investigation commences with a discussion of relevant international as well as regional law. The relevant sections in the CRC and ACRWC are analysed to determine whether those documents may assist in the interpretation of section 28(1)(h) and relevant provisions in the *Children's Act*. This is followed by a critical analysis of the nature and extent of section 28(1)(h) of the *Constitution of the Republic of South Africa, 1996* and the relevant sections of the *Children's Act*; the *Divorce Act* and the *Legal Aid Act* pertaining to the right of the child to legal representation in divorce matters. Finally a conclusion is reached and recommendations are made.

### **Keywords**

Divorce; Participation of the Child; Child's right to legal representation; Right to be heard; Family Advocate; Curator *ad litem*; Available Resources; Substantial Injustice; African Charter on the Rights and Welfare of the Child; Convention on the Rights of the Child

## OPSOMMING

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Artikel 28(1)(h) van die Grondwet waarborg elke kind die reg tot regsverteenvoording in siviele sake op staatskoste, behoudens dat die weiering van die reg weselike onreg tot gevolg sal hê. Hierdie bespreking fokus op die aard en omvang van 'n kind se reg tot regsverteenvoording in egskeidingsake in Suid-Afrika. Die menings en beste belange van 'n kind word dikwels buite rekening gelaat wanneer 'n egskeiding aan die gang is. Omdat egskeidingslitigasie in Suid-Afrika antagonisties van aard is, het die proses dikwels weselike verskille binne die gesin tot gevolg. Die ondersoek begin met 'n bespreking van tersaaklike internasionale asook plaaslike reg. Die toepaslike artikels in die CRC en ACRWC word ontleed om te bepaal of daardie dokumente van hulp mag wees by die interpretasie van artikel 28(1)(h) en tersaaklike bepalings van die *Kinderwet*. Dit word gevolg deur 'n kritiese ontleding van die aard en omvang van artikel 28(1)(h) van die *Grondwet van die Republiek van Suid-Afrika*, 1996, en die tersaaklike artikels van die *Kinderwet*, die *Wet op Egskeidings* en die *Wet op Regshulp* rakende die reg van 'n kind op regsverteenvoording in egskeidingsake. Laastens word 'n gevolgtrekking bereik en aanbevelings word gemaak.

## LIST OF ABBREVIATIONS

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ACRWC	African Charter on the Rights and Welfare of the Child
<i>AHRLJ</i>	<i>African Human Rights Law Journal</i>
CRC	United Nations Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
<i>IJCR</i>	<i>International Journal of Children's Rights</i>
LAB	Legal Aid Board
LAG	Legal Aid Guide
<i>SAJHR</i>	<i>South African Journal on Human Rights</i>
<i>SAPL</i>	<i>SA Public Law</i>
<i>STELL LR</i>	<i>Stellenbosch Law Review</i>
<i>JCRDL</i>	<i>Journal of Contemporary Roman-Dutch Law</i>

## 1 Introduction

Traditionally the rights of children, including the right of a child to participate, did not receive proper recognition. Children were seen as objects<sup>1</sup> who were not worthy of having any rights. Children are now recognised as autonomous individuals worthy of having fundamental human rights, having those rights protected and giving them the opportunity to have their views and opinions heard and taken into consideration.<sup>2</sup> The right of children to have their own separate representative<sup>3</sup> is a fairly new concept in our courts, and this brings about great concern when dealing with the protection of children as children can now be directly involved in litigation.

Section 28<sup>4</sup> of the *Constitution of the Republic of South Africa, 1996* solely focuses on the rights of children and guarantees children extensive protection. Section 28(1)(h) specifically includes the right to legal representation in civil matters at the state expense provided that the denial of the right will result in substantial injustice.<sup>5</sup>

Section 28(1)(h) places a positive duty on the state to provide legal representation to children at the state expense. It is unclear to what extent this duty is immediately enforceable, given the reality that it is subject to the state's available resources. Section 28(1)(h) therefore places a duty on the state which is in turn dependant on the state's

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1 Mezmur 2008 *SAPL* 1.

2 Kassan "Children's Right to Legal Representation in Divorce Proceedings" 227.

3 Section 28(1)(h) of the Constitution of the Republic of South Africa, 1996 (hereafter referred to "the *Constitution*").

4 S 28 provides: "(1) Every child has the right - (a) to a name and a nationality from birth; (b) to family care, parental care, or appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services, and social services; (d) to be protected from maltreatment, neglect, abuse, or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that - (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under ss 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -(i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict. (2) A child's best interest is of paramount importance in every matter concerning the child. (3) In this ss, "child" means a person under the age of 18 years" (own emphasis).

5 Sarkin 1999 *The American Journal of Comparative Law* 82.

available resources.<sup>6</sup> The wording of section 28(1)(h) “if substantial justice would otherwise result” is of vital importance in the respect that it is linked with the constitutional rights of a child. If no legal representative is afforded to a child at the state expense and substantial injustice results, it can be argued that a child’s constitutional rights have been affected which in turn will carry much more weight than resource constraints.

To give effect to the constitutional rights imposed by section 28, the state enacted legislation.<sup>7</sup> Section 2(c) of the *Children’s Act* 38 of 2005<sup>8</sup> explicitly states that one of the objects of the Act is to give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic.<sup>9</sup> Both the United Nations Convention on the Rights of the Child,<sup>10</sup> and the African Charter on the Rights and Welfare of the Child,<sup>11</sup> had been ratified.<sup>12</sup> In terms of these international obligations the South African government is obliged to adopt legislation to transform these international conventions into domestic obligations. Article 12(2) of the CRC<sup>13</sup> grants the child the right to be heard in any judicial and administrative

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6 Stewart 2011 *IJCR* 296.

7 Currie and de Waal *Bill of Rights* 603.

8 *Children’s Act* 38 of 2005 (hereafter ‘the *Children’s Act*’).

9 S 231(4) of the *Constitution* states that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament.

10 The United Nations Convention on the Rights of the Child, 1989 (hereafter CRC).

11 The African Charter on the Rights and Welfare of the Child, 1999 (hereafter ACRWC).

12 In order for these provisions and principles to be enforced effectively, it must be incorporated into domestic law. In *Fitschen v Fitschen* 1997 JOL 1612 (C), involved teenage boys and their fathers’ objection to their mothers’ same sex relationship. An application was made for the independent legal representation for the children upon which it was refused. The ground on which it was refused was that a 12(2) of the CRC had in fact not been incorporated into domestic law, thereby not giving practical effect to s 28(1)(h) of the *Constitution* (Sloth-Nielsen and Mezmur 2008 *IJCR* 16). S 231 of the *Constitution* of the Republic of South Africa, 1996 sets out the procedure for ratifying international law instruments and states that international agreements become a binding document once it has been approved by the National Assembly and the National Council of Provinces (s 321(2)).

13 A 12 provides: (1) State 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.

proceedings affecting the child. Article 4(2) of the ACRWC states that in all judicial and administrative proceedings affecting the child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard.

As a result of section 28(1)(h) of the *Constitution* (and the mentioned provisions of the CRC and ACRWC), the *Children's Act* makes provision in section 10<sup>14</sup> for the child's right to be heard and to participate. With regard to children's court matters, it is the presiding officer that will decide whether it will be in the child's best interest to have a legal representative appointed to the child.<sup>15</sup> Section 55,<sup>16</sup> which has only been in force since 1 April 2010,<sup>17</sup> states that:

Where a child involved in a matter before the Children's Court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board referred to in section 2 of the Legal Aid Act 22 of 1969.

This section has to be read with section 14 of the Act which grants children the opportunity to have "access to the court". This means that children have the opportunity to bring a matter to court or to be assisted to bring a matter to court.<sup>18</sup>

This discussion focuses particularly on the nature and ambit of a child's right to be heard and to legal representation in divorce matters in South Africa. The author argues that the views and best interests of a child are often neglected when dealing with a divorce, and because divorce litigation in South Africa is of an adverse nature, the process often results in substantive differences within the family.<sup>19</sup>

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14 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.

15 Section 55 of the *Children's Act*.

16 Section 10 of the Act gives full effect to a 12 of the CRC and a 4(2) of the ACRWC in South Africa's domestic law. See Skelton and Davel (eds) *A Commentary on the Children's Act* 2-14.

17 Mahery, Proudlock and Jamieson 2010 "A Guide to the Children's Act" 6.

18 Sloth-Nielsen and Mezmur 2008 *IJCR* 20-21.

19 Robinson 2007 *JCRDL* 263.



This discussion commences with a discussion of international law as well as regional law. The relevant sections in the CRC and ACRWC will then be analysed to determine whether these documents may assist in the interpretation of section 28(1)(h) and relevant provisions in the *Children's Act*. A critical analysis of the nature and extent of section 28(1)(h) of the *Constitution* and the relevant sections of the *Children's Act*; the *Divorce Act*<sup>20</sup> and the *Legal Aid Act*<sup>21</sup> pertaining to the right of the child to legal representation in divorce matters, will then follow. Finally, a conclusion will be reached and recommendations will be made.

## 2 International instruments

### 2.1 Introduction

Once a state has signed and ratified an international agreement, that state becomes a member state and undertakes the obligation to enforce and protect the rights contained in these agreements.<sup>22</sup> Such a state is therefore under the duty to adapt its national laws and policies in order to set out the rights contained in the international law agreements.<sup>23</sup> Legislation is needed to incorporate international law into municipal law for the full realisation thereof.<sup>24</sup>

The *Constitution* includes specific children's rights in section 28 which articulates the rights contained in the CRC. In *S v Kwalase*,<sup>25</sup> the presiding judge made reference to the fact that South Africa had ratified the CRC, which meant that there was an international legal obligation to put into effect in its domestic law the provisions of the CRC. In *Fitschen v Fitschen*<sup>26</sup> the court refused to consider section 28(1)(h) and the relevant provisions of the CRC, arguing that it had not been translated into municipal

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20 *Divorce Act* 70 of 1979 (hereafter 'the *Divorce Act*').

21 *Legal Aid Act* 22 of 1969 (hereafter 'the *Legal Aid Act*').

22 S 231(2) of the *Constitution*. South Africa has ratified the CRC and thereby assumed an obligation under international law to incorporate it into its domestic law.

23 S 231(4) of the *Constitution*; Viljoen "The African Charter on the Rights and Welfare of the Child" 332.

24 Coomans and Yakpo 2004 *AHRLJ* 19.

25 *S v Kwalase* 2000 2 *SACR* 135 (CPD).

26 *Fitschen v Fitschen* 1997 *JOL* 1612 (C) par 62 (hereafter the *Fitschen*-case).

law.<sup>27</sup> The judge emphasised that provisions of the *Constitution* should consider international law when interpreting the Bill of Rights.<sup>28</sup> Merely this does not guarantee the accessibility of all the rights in the CRC. A need exists for legislative reform and community participation in order to implement all the rights contained in the CRC, as the mere constitutionalisation of children's rights is unfortunately not sufficient.<sup>29</sup> Julia Sloth-Nielsen correctly criticises the denial of courts to consider the CRC which have been ratified by state parties and argues that it

...seems to suggest that on the face of it, judges can happily ignore the convention, except where its principles have expressly been included in legislation in the municipal legal system.<sup>30</sup>

Section 231 of the *Constitution* sets out the general provisions with regard to the ratifying and incorporating of international law. In terms of section 233 of the *Constitution*, when interpreting any legislation, every court has to prefer any reasonable interpretation of the legislation that is consistent with international law to any alternative interpretation that is inconsistent with international law. Another provision which is of particular importance is that of section 234 which provides that "in order for the *Constitution* to deepen its culture of democracy, the Parliament may adopt Charters of Rights which are consistent with the *Constitution*".

At the moment of signing an international treaty, it is expected of state parties to take all reasonable steps and measures not to defeat the objective and purpose of the treaty.<sup>31</sup> Article 4 of the CRC provides that all state parties have to take all legal, administrative and other measures to implement the rights contained in the CRC. The *Constitution* also provides provisions for the consideration of international law.<sup>32</sup> They include section 39(1)(b), which states that, when interpreting the Bill of Rights, a court, tribunal

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27 Sloth-Nielsen 2002 *IJCR* 138, 145-146.

28 Sloth-Nielsen 2002 *IJCR* 145-146; section 39(1)(b) of the *Constitution*.

29 Spitz 1996 *Vanderbilt Journal of Transnational Law* 19.

30 Sloth-Nielsen 2002 *IJCR* 138.

31 Sloth-Nielsen 2002 *IJCR* 138.

32 Sloth-Nielsen 2002 *IJCR* 139.

or forum has to consider international law, and section 39(2) which states that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum has to promote the spirit, purport and objects of the Bill of Rights.

In the context of section 35(1)<sup>33</sup> of the interim Constitution it was held in *Makwayane*<sup>34</sup> that:

... public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

It was stated in *Grootboom*<sup>35</sup> that the relevant international law can be a guideline to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, when the relevant principle of international law binds South Africa, it may be directly applicable.

Positive rights require the state to take affirmative action,<sup>36</sup> and a failure of the state to act in a certain manner can amount to the violation of a particular right. All the countries that have ratified the CRC have to ensure that their legislation is completely compatible to those of the principles and provisions of the CRC.<sup>37</sup>

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33 S 35(1) of the Interim Constitution provides: In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

34 *S v Makwayane and Another* 1995 3 SA 391 (CC) par 35.

35 *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) par 26.

36 Quint 2009 *Maryland Journal of International Law* 42.

37 Anon 2008 [http://www.crin.org/resources/treaties/CRC\\_GMI.asp](http://www.crin.org/resources/treaties/CRC_GMI.asp).

## 2.2 *United Nations Convention on the Rights of the Child*

### 2.2.1 *Duty on the state*

The CRC served as the foundational text for section 28 of the *Constitution*.<sup>38</sup> When a court interprets the Bill of Rights, it is obliged to give due consideration to international law.<sup>39</sup> As mentioned above, the CRC has been signed and ratified by our government and as a result of that; our parliament has enacted the *Children's Act* in order to incorporate the provisions of the CRC into domestic law.<sup>40</sup>

The CRC is a comprehensive compilation<sup>41</sup> of international children's rights, and has been ratified by almost every country<sup>42</sup> in the world, including South Africa. It imposes new obligations<sup>43</sup> on the state, establishes binding standards and creates new rights for children in international law, including participation principles. The aim of the Convention is not only to protect the rights of the child, but also to enhance the participation. It is stated in article 3(1) of the CRC that the best interest of the child shall be a primary consideration when dealing with any action concerning the child. This allows for other principles and considerations to be taken into account when the best interests of the child are determined.<sup>44</sup> Judicial or administrative authorities may ascertain a child's best interests in a given case.<sup>45</sup> Article 12 of the CRC states that, when a child is capable of forming his or her own views, that child be given the opportunity to express those views in all matters concerning the child, taking into account the age and maturity of the child. Article 12 provides:

(1) State 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.

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38 Sloth-Nielsen and Mezmur 2008 *IJCR* 1.

39 S 39(1)(b) of the *Constitution*.

40 Stewart 2011 *IJCR* 299.

41 Mezmur 2008 *SAPL* 3.

42 Excluding Somalia and the United States of America.

43 Gallinetti *An Assessment of the Significance of the International Labour Organisation's Convention* 8.

44 Mezmur 2008 *SAPL* 9.

45 Detrick *A Commentary on the United Nations* 217.

(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.

It is clear that article 12 makes a distinction between the right to expression (to voice an opinion) and the right to be heard (to have the opinion taken into consideration).<sup>46</sup> The second part of article 12 states that children be afforded the opportunity to be heard in any judicial and administrative proceedings affecting the child. This right is of significant importance as children are no longer treated as objects, but rather as people, placing them on equal footing with adults. “Judicial proceedings” can be interpreted in a wide sense, creating the foundation for a child to be heard in divorce proceedings,<sup>47</sup> either directly or through a representative or an appropriate body. Article 12(2) protects the rights of children to participate as it places an obvious duty on the state to give children the opportunity to participate. This provision does not aim at forcing children to participate, but rather focuses on convincing states to make this opportunity available to children. The significance of article 12(2) in divorce proceedings lies in the recognition that “the child’s interests and the adults’ interests may not always intersect, and that a need exists for separate representation of the child’s views”.<sup>48</sup>

This right, however, places certain obligations on those private parties responsible for the care and upbringing of the child and on the state. A duty is placed on the family and the state to involve children when they wish to participate<sup>49</sup> and to ensure that the views of the child are expressed in all matters concerning the child. The duty to provide for a child’s basic needs rests on the parents of the child. A duty therefore rests on the state to ensure that a child is provided with these basic requirements and to provide the family of the child with the means to support those requirements.<sup>50</sup>

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46 Anderson and Spijker 2002 *Obiter* 369.

47 Kassan 2003 *De Jure* 165-166.

48 Sloth-Nielsen and Van Heerden 1996 *SAJHR* 250.

49 Kassan 2003 *De Jure* 165.

50 Currie and de Waal *Bill of Rights* 603.

Article 3(2)<sup>51</sup> of the CRC, together with article 5,<sup>52</sup> makes it clear that the duty to be responsible for providing children with the necessary direction and guidance is also conferred onto the parents, extended family, legal guardians as well as the community.<sup>53</sup> The state parties should be able to prove the steps taken in the realisation of children's views in judicial and administrative proceedings, as well as all the matters which affect the child.

The Committee on the Rights of the Child<sup>54</sup> is of the opinion that the drafters of the CRC made reference to article 2 of the International Covenant on Economic, Social and Cultural Rights<sup>55</sup> and article 2 of the International Covenant on Civil and Political Rights<sup>56</sup> while drafting article 4 of the CRC.<sup>57</sup> The Committee<sup>58</sup> states that the phrase "to the maximum of its available resources" in the ICESCR was intended to be interpreted as "both the resources existing within a state and those available from the international community through international co-operation and assistance". The minimum core obligation<sup>59</sup> is also of vital importance when interpreting article 4 of the CRC as the state has to show that it has done everything in its power and has made use of all the available resources in order to realise the right.<sup>60</sup>

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51 S 3(2) states that: States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

52 A 5 states that: States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

53 Stewart 2011 *IJCR* 302.

54 Committee on the Rights of the Child General Comment No 5.

55 International Covenant on Economic, Social and Cultural Rights, 1966 (hereafter the ICESCR).

56 International Covenant on Civil and Political Rights, 1966 (hereafter the ICCPR).

57 Detrick *A Commentary on the United Nations* 103.

58 Committee on Economic, Social and Cultural Rights General Comment No 3.

59 Minimum core obligation can be defined as all the rights which must be guaranteed to all persons in all matters. It indicates the lowest point in which a government should not perform, even in adverse conditions.

60 Detrick *A Commentary on the United Nations* 107; Committee on Economic, Social and Cultural Rights General Comment No 3.

Article 12(2) furthermore places a duty on the state parties to ensure that every child has the right to express his or her wishes and to have due weight attached to those wishes in any matter affecting the child. This is a positive obligation on the state as it requires the state to take affirmative action in order to realise the right. Article 4 of the CRC provides that:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States' Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Civil and political rights can be described as placing a negative duty on the state, requiring the state to not interfere with the rights of the child.<sup>61</sup> Socio-economic rights are rights which place positive obligations on the state, requiring a positive action<sup>62</sup> from the state for the full realisation of a child's right. However, it cannot be said that, due to the fact that the right of a child to legal representation places a positive duty on the state, requiring the state to implement all necessary measures to the maximum extent of its available resources to realise this right of a child, the state constitutes a socio-economic right. In *August v Electoral Commission*<sup>63</sup> it was held that civil and political rights may also require positive state action and state resources.<sup>64</sup>

Another distinction which can be drawn between civil and political rights and socio-economic rights is that civil and political rights can be enforced immediately, whereas socio-economic rights require reasonable steps within the state's available resources to realise those rights progressively.<sup>65</sup> Progressive realisation is described by the Committee<sup>66</sup> as the following:

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61 Stewart 2011 *IJCR* 300.

62 Stewart 2011 *IJCR* 297 "to take all reasonable measures within its available resources to realize this right".

63 *August v Electoral Commission* 1999 3 SA 1 (CC).

64 Stewart 2011 *IJCR* 305.

65 Stewart 2011 *IJCR* 297.

66 Committee on Economic, Social and Cultural Rights General Comment No 3.

...it constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.<sup>67</sup>

According to Stewart,<sup>68</sup> there is no immediate and mandatory duty on the state to realise the right of the child to be heard, but rather a progressive duty subject to available resources of the state.

### *2.2.2 Participation of the child*

Studying the wording in article 12(2) "...either directly, or through a representative or an appropriate body..." it is clear that children may express their views freely in one of two ways, namely through participation or representation. What can be understood under the term "participation" are all the rules which allow a child to be heard directly; the consultation with the child about his or her opinion; no intermediary is involved; or children are entitled to be parties to any legal action affecting them physically, psychologically or emotionally.<sup>69</sup> Representation on the other hand include all the rules pertaining to the child's ability to give legal representative instructions, seek legal advice, and to ensure that the child has access to the courts.<sup>70</sup>

In order for this right to be successfully implemented, children have to be informed of the right to have their views heard in cases of divorce, either directly or through a representative or an appropriate body.<sup>71</sup> Facilities have to be developed for the purposes of assisting children and consulting with them in order to determine whether a child is in need of a representative, as the influence of the parents will not be present. There rests a duty on the state to ensure that this right of a child is respected, promoted and protected, and to also ensure that no legislation infringes upon this right. The state,

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67 Par 9.

68 Stewart 2011 *IJCR* 297.

69 Skelton and Davel (eds) *A Commentary on the Children's Act 2-13*.

70 Skelton and Davel (eds) *A Commentary on the Children's Act 2-13*.

71 A 12(2) of the CRC.



parents and the children need to work together for the full realisation of the rights of children.<sup>72</sup>

Article 18(2) of the CRC obliges state parties to render “appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities” and to “ensure the development of institutions, facilities and services for the care of children”.<sup>73</sup> Parents or others responsible for the child bear the primary responsibility to provide for the child within their financial capability. If parents or others responsible for the child are unable to provide for the child financially, the state shall take appropriate measures to assist parents and others responsible for the child to implement this right.<sup>74</sup> Although primary responsibility lies with the parents, it is the state’s duty to assist parents in this regard, and in case of need, the state has to provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.<sup>75</sup>

### **2.3 African Charter on the Rights and Welfare of the Child**

The African Charter on the Rights and Welfare of the Child (ACRWC) is considered as the first regional binding instrument with the main purpose of asserting children’s rights in domestic, judicial or administrative proceedings.<sup>76</sup> The ACRWC has only been in force for the past two decades. The ACRWC was adopted in 1990, but it required the ratification of fifteen Organisation of African Unity member states before it could be enforced. It therefore only came into force on 29 November 1999 since it took a decade for the right amount of states to ratify the ACRWC.<sup>77</sup>

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72 De Villiers 1993 *Stell LR* 307.

73 Chirwa “Child Poverty and Children’s Rights” 11.

74 A 27(2) states that “The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacity, the conditions of living necessary for the child’s development.” A27(3) states that “States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

75 Skelton 2010 *SAJHR* 144.

76 Chirwa 2002 *IJCR* 157.

77 Viljoen “The African Charter on the Rights and Welfare of the Child” 331.

Children in Africa are more likely to suffer from human rights violations than adults; therefore a more urgent need exists for the special protection<sup>78</sup> of children in Africa than for children in other parts of the world.

### 2.3.1 *Duty on the state*

Within the African context and the special relevance of the ACRWC, resource constraints in realising the right of the child to be represented are of specific importance.<sup>79</sup> Article 4(2) of the ACRWC also places a positive duty on the state to exhaust all measures to the maximum extent of their available resources. Article 4(2) should however not be read in isolation, but together with article 1(1), which states the following:

State Parties have a two-fold obligation to firstly recognise the rights, freedoms and duties contained in the ACRWC and secondly, to undertake the necessary legislation and other measures to give effect to the provisions of the ACRWC.<sup>80</sup>

Where the resources are not available to provide children the right to be represented, it can in fact affect the realisation of the child's rights. The state is therefore obliged to demonstrate that it has taken all the reasonable steps in ensuring that it has exhausted the maximum extent of the available resources to give effect to the rights in the ACRWC. As mentioned above, article 4(1) provides that in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration. It is clear that article 4 includes the best interest of the child as well as the right of the child to be heard.<sup>81</sup> Parental responsibilities are set out in article 20(1) of the ACRWC, stating the following:

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78 Kassan *How can the Voice of the Child be Adequately Heard* 19.

79 Stewart 2011 *IJCR* 303.

80 Stewart 2011 *IJCR* 302.

81 Stewart 2011 *IJCR* 305.

Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty:

- (a) to ensure that the best interests of the child are their basic concern at all times-
- (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and
- (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

Furthermore, article 20(2) provides that where the parents of the child or the persons responsible for the child are unable to realise the right of a child to be heard, it becomes the state's obligation to assist the child with a legal representative at the expense of the state, subject to the parents' or responsible person's means and national conditions.<sup>82</sup>

### *2.3.2 Best interest of the child*

This best interest-principle is envisaged in article 4 of the ACRWC, which is similar to the best interest-principle contained in article 3 of the CRC. However, a distinction can be drawn between these two articles with regard to the wording. In the ACRWC, the best interest of the child has to be "the primary consideration", providing the child with more protection and is considered as a paramount consideration.<sup>83</sup> Chirwa is of the opinion that reference to the latter in the CRC, "a primary consideration" leaves room for other principles to be placed on equal footing.<sup>84</sup> Children can therefore rely on the ACRWC to have their views heard, knowing that their best interest overrides any other provision or principle. Concerning this specific aspect, the standing of the CRC is weaker, as children's best interests are not guaranteed to be the most important when deciding if a child's views may be heard in divorce proceedings.

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82 Stewart 2011 *IJCR* 305, 306.

83 Dausab 2009 "The Best Interest of the Child" 155.

84 Chirwa 2002 *IJCR* 160.

### 2.3.3 Participation of the child

In terms of article 2 of the ACRWC, a child is defined as “every human being below the age of eighteen years”.<sup>85</sup> Five categories of substantive rights are distinguished under the ACRWC, namely: survival rights, community right, self-asserting rights, protection rights and development rights.<sup>86</sup> This discussion will mainly focus on the self-asserting rights as children are seen as active participants in proceedings which might affect them.<sup>87</sup> It is of vital importance that when dealing with any matter concerning the child, the child’s best interest has to be the primary consideration.<sup>88</sup>

The right of the child to be heard is entrenched in article 4(2) of the ACRWC, which states that:

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.

This capability can be determined on grounds of the child’s age and/or his or her level of education and the child’s ability to articulate.<sup>89</sup> Article 4(2) may be problematic, because a child who is able to form his or her own opinion, but is unable to communicate those opinions, may not be given the opportunity to be heard. The CRC on the other hand only requires a child to form an opinion; therefore in this regard the CRC is placed in a more favourable position than the ACRWC.<sup>90</sup> Furthermore, this section limits the child’s participation to “judicial and administrative” proceedings and in turn ignores informal circumstances in which a child needs to be heard, for example a child’s right to be heard with regard to his medical condition.<sup>91</sup> Kaime argued that a

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85 Similar to the CRC, *Constitution* and the *Children’s Act*.

86 Viljoen “The African Charter on the Rights and Welfare of the Child” 337.

87 Viljoen “The African Charter on the Rights and Welfare of the Child” 338.

88 A 4(1) of the ACRWC.

89 Kassan 2003 *De Jure* 167.

90 Kassan *How can the Voice of the Child be Adequately Heard* 21.

91 Chirwa 2002 *IJCR* 161.

child's participation does not only vest in judicial and administrative proceedings, but rather in *all* proceedings which affect the child. For this reason it is stated that the participation-principle should be regarded as a general principle "which should be considered in all matters relating to the protections provided by the ACRWC".<sup>92</sup> In the same key, Kassan stated that divorce proceedings clearly fall within "judicial proceedings".<sup>93</sup>

The wording "an impartial representative as a party to the proceedings" allows for an interpretation that the child's representative will be placed on equal footing with the other parties to the divorce and that the legal representative does not represent any other party. This section makes it possible for children to be included as a third party to the divorce proceedings, which in turn depends solely on the child's capability of communicating his or her views.<sup>94</sup> This article should be read with article 7 which contains the provision for the child to form and express views regarding his or her welfare and interests,<sup>95</sup> and states that every child capable of communicating his or her views has the right to express his or her views freely in all matters and to disseminate those opinions subject to the restrictions of domestic law.<sup>96</sup>

It is of vital importance to take note of the fact that participation does not give a child the right to separate legal representation in every matter concerning the child, but instead, the child must rather be given the opportunity to express his or her views with regard to a decision which will have an adverse effect upon him or her. Section 28(1)(h) of the *Constitution* confers a right on every child to have a legal practitioner assigned to him or her if substantial injustice would otherwise occur. Article 4(2) states that the views of the child shall be taken into consideration "in accordance with the provisions of appropriate law" which again puts the CRC in a more favourable position as it makes provision for

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92 Kaime *The African Charter on the Rights and Welfare of the Child* 130.

93 Kassan 2003 *De Jure* 166.

94 Kassan 2003 *De Jure* 166.

95 Anderson and Spijker 2002 *Obiter* 370.

96 Skelton and Davel (eds) *A Commentary on the Children's Act* 2-14.

the child's views to be given "due weight in accordance with the age and maturity of the child".<sup>97</sup>

What is significant about article 4(2) of the ACRWC is that the wording pertaining to the right of a child to be heard, is more specific. It states that a child may be heard "directly or through an impartial representative as a party to the proceedings". What makes this article distinct from that of the CRC is that the ACRWC prescribes "how" children will be heard. This right is however limited to a "child capable of communicating his/her views."<sup>98</sup>

### **3 Constitutional right of the child**

#### **3.1 Participation of the child**

The rights of children as envisaged in the *Constitution's* Bill of Rights create the cornerstone of South Africa's obligations towards children. Every child has the right to have his or her views heard, and in order to achieve that, a legal representative has to be assigned at the state expense to the child, if substantial injustice would otherwise result.

In the case of *Rosen v Havenga*,<sup>99</sup> a minor boy was adversely affected by the divorce of his parents, and suffer emotional trauma due to his father's comments about his mother. After the examination of the pleadings, a need to appoint a separate legal representative was raised and no objection to this appointment was made by the parents. The court held that the appointment of a separate legal representative would be in the best interest of the child. The court based its judgement on section 28(1)(h) of the *Constitution*, and article 12 of the CRC, in that there might be the need to articulate

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97 Chirwa 2002 *IJCR* 161.

98 Kassan 2003 *De Jure* 166.

99 *Rosen v Havenga* 2006 4 SA 199 (C) (hereafter the *Rosen*-case).

the views of the minor in the proceedings in the interest of justice, and that separate legal representation might be in the best interest of the minor.<sup>100</sup>

Section 28(1)(h) affords every child the right to state his or her views or have his or her interests put before the court; this implies more than simply “hearing” the child’s voice; the interests of children become essentially protected.<sup>101</sup> As indicated above, the CRC is of vital importance in the interpretation of section 28(1)(h) of the *Constitution*, as article 12(2) of the CRC sets out the right of the child to participate and have his views given due weight, which in turn places an obligation on the State Parties to realise and protect this right. The *Fitschen*-case<sup>102</sup> involved a case of a child requesting independent legal representation in divorce proceedings in terms of section 28(1)(h) of the *Constitution*. This case involved a custody dispute between the parents. Two children were concerned, one of them already a teenager.<sup>103</sup> It was argued by the plaintiff’s counsel that the views and wishes of the children should be presented to the court either through an intermediary or through a legal representative to be appointed to the children by the court. The application was found to be unsuccessful. Kassan<sup>104</sup> argues that:

...the Judge did not regard the provision of the CRC or section 28(1)(h) binding upon the court, as they had not been incorporated into municipal legislation. It is submitted that the court erred in its finding since section 6(4) of the *Divorce Act*<sup>105</sup> provides that the court may appoint a legal practitioner to represent a child at the proceedings. This means that the child can make his or her views heard via the legal representative which is appointed to him or her. However, what section 6(4) fails to do is to provide that such representation may be sought at State expense.

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100 Par 6.

101 Sloth-Nielsen 2008 *SAJHR* 505.

102 *Fitschen v Fitschen* 1997 JOL 1612 (C).

103 Sloth-Nielsen and Mezmur 2008 *IJCR* 12-13.

104 Kassan *How can the Voice of the Child be Adequately Heard* 68-69; See Sloth-Nielsen’s criticism above.

105 *Divorce Act* 70 of 1979.

*Soller NO v G*<sup>106</sup> deals with the interpretation of section 28(1)(h) and focuses on why a child needs legal representation. In this case the custody of a fifteen-year old boy was concerned. The boy, K, wanted a different custody order, in that he wanted custody to be awarded to his father. An application on behalf of K was brought by the applicant, who was an attorney struck from the roll. The presiding judge felt that there was a need to appoint a legal representative in terms of section 28(1)(h) to assist K, and did so by appointing well-respected attorney M. With regard to why K needed separate legal representation the court stated the following:

I can envisage few proceedings of greater import to a child/young adult of K'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... The significance of section 28(1)(h) lies in the recognition, also found in the Convention on the Rights of the Child, that the child's interests and the adults' interests may not always intersect and that a need exists for separate legal representation of the child's views.<sup>107</sup>

### ***3.2 The respective roles of the family advocate, legal representative and curator ad litem***

Legal representation can be divided into two separate categories. One category deals with older children who will require the assistance of a separate legal representative. Such a legal representative has to take instructions from the child and act upon them as in the case of a legal representative acting on the instructions of the parents. This is also known as client-directed representation and is solely dependent on whether a child has the ability to give clear, concise instruction to the legal representative.<sup>108</sup>

The other category applies in cases where the child cannot or is unable to give clear instructions to the legal representative and the outcomes will depend on the manner in which the specific issue has been heard. In such cases, if the matter is heard by the High Court, a curator *ad litem* should be assigned to the child in order to represent his

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106 *Soller NO v G* 2003 5 SA 430 (W) (hereafter the *Soller*-case).

107 Par 7-8.

108 Du Toit "Legal Representation of Children" 109.



or her best interests. However, if the matter is heard in the Children's Court, a legal representative is appointed, whose role is not to act upon the instructions of the child, but to protect and act upon the child's best interests. This is known as "best interest's representation".<sup>109</sup> It is therefore necessary to discuss and to distinguish between the roles of the legal representative in terms of section 28(1)(h), curator *ad litem*, and the family advocate.

Various arguments were held on whether a family court should be established. A family advocate was only established in 1987 in order to protect children's rights and to afford them the opportunity to be heard in matters that affect them. The preamble to the *Mediation in Certain Divorce Matters Act*<sup>110</sup> established the Office of the family advocate<sup>111</sup> to "provide for mediation in certain divorce proceedings... in which minor or dependent children of the marriage are involved, in order to safeguard the interests of such children",<sup>112</sup> as well as to provide for the "investigation of the welfare of the children in divorce and custody related matters, and for reports of these investigations to be put before the court".<sup>113</sup>

The role of the family advocate can be explained as follows: the family advocate acts as an advisor, fulfilling the role of a mediator who is impartial and does not take sides.<sup>114</sup> The family advocate is also a qualified lawyer, has experience in family matters and may request investigations into the custody arrangements made by the parents.<sup>115</sup> The family advocate is expected to make an appropriate recommendation with regard to the best interest of the child. The court is however not bound to the recommendation of the family advocate.<sup>116</sup> It is important to note that the family advocate is not the representative of any of the parties, but simply undertakes an investigation to settle

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109 Du Toit "Legal Representation of Children" 109.

110 *Mediation in Certain Divorce Matters Act* 24 of 1987.

111 Du Toit "Legal Representation of Children" 107.

112 Robinson 2007 *JCRDL* 264-265.

113 Barratt 2002 *JCRDL* 571.

114 Skelton "Interpreting the right to legal representation" 221.

115 Barratt 2002 *JCRDL* 571.

116 Robinson 2007 *JCRDL* 265.

disputes arising from the divorce and to study the relationship between the children and the parents and the children's views on the future.<sup>117</sup>

As stated above, section 28(1)(h) of the *Constitution* makes provision for the right of every child to be assigned a legal practitioner. The role and responsibilities of the practitioner must therefore be distinct from the role of the family advocate. Section 28(1)(h) requires the appointment of a separate legal practitioner and not that of a social worker or psychologist.<sup>118</sup> The distinct roles and functions of both the family advocate and the legal representative as set out in section 28(1)(h) of the *Constitution* can be explained as follows, with reference to the *Soller-case*:<sup>119</sup>

The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and the task of presenting and arguing the wishes and desires of that child.<sup>120</sup>

In the *Soller-case* it was held that the application was actually brought by the father under the guise of K's request. It was found that K's expressed wishes did not result from duress or undue influence, but that he really preferred to live with his father; therefore M is convinced that those views had to be taken into account.<sup>121</sup>

In *Ex parte Centre for Child Law*<sup>122</sup> an *ex parte* application of two minors to the Centre for Child Law at the University of Pretoria was involved. The facts of the case were as follows: two sisters, one aged twelve and the other aged thirteen, brought an application not to have contact with their father after the divorce proceedings, due to fear of physical and emotional abuse. The girls were highly upset because their opinions and views had not been given due weight during the divorce proceedings.

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117 Du Toit "Legal Representation of Children" 108.

118 Du Toit "Legal Representation of Children" 108.

119 Par 438 D-G.

120 Skelton "Interpreting the right to legal representation" 221.

121 Par 66-67.

122 *Ex parte Centre for Child Law* case no 34054/2003 (TPD).

They had not been granted the opportunity to have those opinions and views expressed to the judge.<sup>123</sup>

The ruling was that the children had to undergo reunification counselling with their father. Both girls refused to attend the counselling as they wished not to see their father again. It is clear that the failure to grant the girls an opportunity to express their views and the failure to give their views due weight were breach of article 12 of the CRC.<sup>124</sup> The problem arose when the girls' refusal amounted to breach of an order. That refusal placed the girls at the risk of contempt of court even although they were never parties to the proceedings; it also placed the mother at the risk of contempt of court as it was her duty to ensure the compliance of the court order. As a result the girls together with the mother were found in a very complicated legal situation, therefore it was decided that the girls needed the assistance of a high court practitioner.<sup>125</sup>

Legal representation can take place by either the appointment of a curator *ad litem* or the assignment of a legal representative<sup>126</sup> in terms of section 28(1)(h). A curator *ad litem* must be appointed on the following grounds:<sup>127</sup>

- The minor does not have a parent or guardian;
- The parent or guardian cannot be found;
- The interests of the minor are in conflict with those of the parent or guardian, or there is a possibility of such a conflict; or
- The parent or guardian unreasonably refuses to assist the minor or is not readily available to assist the minor.

The judge agreed that the children were in the need of legal assistance and not a curator *ad litem* in terms of section 28(1)(h) of the *Constitution*. Skelton<sup>128</sup> therefore explains that the judge in this case decided so “because the mother of the children was

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123 Skelton “Interpreting the right to legal representation” 217-218.

124 Skelton “Interpreting the right to legal representation” 218.

125 Skelton “Interpreting the right to legal representation” 218-219.

126 Davel 2005 [http://www.childjustice.org/index.php?option=com\\_rubberdoc&view=category&id=81&Itemid=99](http://www.childjustice.org/index.php?option=com_rubberdoc&view=category&id=81&Itemid=99), see Chapter 3.1 above for the distinction.

127 Jordaan and Davel *Law of Persons* 94; Du Toit “Legal Representation of Children” 108.

128 Skelton “Interpreting the right to legal representation” 222.

available and willing to assist them”. The appointment of a curator *ad litem* would not be appropriate.

The duty of the curator *ad litem* is to support the child during the legal proceedings while upholding the best interests of the child, while a legal representative acts upon the instructions of the child and represents the views of the child in court. The judge in the *Fitschen*-case pointed out that the legal practitioner is not a mere mouthpiece of the child – in

the course of advocating the client’s views, the legal representative should provide ‘adult insight into those wishes’ and ‘apply legal knowledge and expertise to the child’s perspective’.

The duty of the curator *ad litem* was set out in *Legal Aid Board v Four Children*<sup>129</sup> as follows:

A curator who does not have the appropriate qualifications and skills to conduct the litigation might employ a legal representative to assist in the ordinary way, but a curator who has those qualifications and skills will not find it necessary to do so.<sup>130</sup>

In conclusion, the role of the Family Advocate is to provide a child with neutral assistance. The role of the curator *ad litem* is to advance the case of the minor<sup>131</sup> and lastly, the role of the legal representative is to act in accordance to instructions and to litigate the views of the child in court.

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129 *Legal Aid Board v Four Children* 2011 (ZASCA) 39 (29 March 2011) (case no 512/10).

130 Par 14.

131 Par 21.

### **3.3 Substantial injustice**

To determine what is meant by the phrase “if substantial justice would occur”, factors such as the complexity of each case, and the age and ability of the child to express his or her views have to be taken into consideration. Other factors which may also have an influence whether a child needs to be represented by a legal practitioner is the day-to-day changing circumstances as well as the existing custody arrangements.<sup>132</sup> If a child is of such an age and maturity that he or she is able to assert and make his or her views effectively heard without the assistance of a legal representative, substantial injustice will not occur.

The inclusion of the term “substantial injustice” in section 28(1)(h) of the *Constitution* does not set a criterion to lay the foundation for when it will be necessary for a child to have legal representation assigned to him or her in order to avoid substantial injustice. A child does not automatically have a right to legal representation, only in cases where substantial injustice would occur. What is needed for this right to be correctly enforced is a set of guidelines which to determine the instances in which “substantial injustice” would occur. In the absence of directives in cases law, “substantial injustice” is described by the *Legal Aid Guide*<sup>133</sup> as those instances in which a child’s “constitutional or personal rights are affected in a civil matter”.

Substantial injustice occurs on a case-to-case basis when the child’s personal or constitutional rights are affected,<sup>134</sup> since every case’s facts and circumstances are different from another. The current position is that courts refer all cases dealing with children to the Legal Aid Board to decide whether it will be in their best interest to appoint a legal representative.

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132 Legal Representation in Civil Proceedings *South African Constitutional Law* 23.13.

133 Legal Aid Board *Legal Aid Guide* (hereafter the LAG) (Explanation of words).

134 LAG (Explanation of words).

The test<sup>135</sup> provided for in section 28(1)(h) could be of significant importance in determining what may constitute to “substantial injustice”.<sup>136</sup> The Constitutional Court held the following with regard to in “substantial injustice” *Du Toit v Minister of Welfare and Population Development*.<sup>137</sup>

In matters where the interests of children are at stake, it is important that their interests are fully aired before the court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of section 28(1)(h).

In the same way as “substantial injustice” resulted in *Legal Aid Board v Otto Swart*,<sup>138</sup> due to legal representation being denied at the state expense, “substantial injustice” will result if a child is denied the right to have legal representation assigned to him or her at the state expense.<sup>139</sup> It was held in another case<sup>140</sup> that “ordering the trial to proceed without legal representation would result in ‘substantial injustice’” and that “resulted in an unfair trial”. This can be interpreted as the position with regard to civil cases involving the need of children to be legally represented. “Substantial injustice” will thus occur in cases where children are refused the right to legal representation at the state expense,<sup>141</sup> as a result of which their constitutional or personal rights will be affected.<sup>142</sup> Finally, “substantial injustice” boils down to the need of the child to obtain legal representation and whether his or her constitutional or personal rights have been affected, and not to the duty of the state to fulfil those rights of the child.<sup>143</sup> The LAG

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135 ...the complexity of the case and the age and ability of the child to express his or her wishes.

136 Legal Representation in Civil Proceedings *South African Constitutional Law* 23.13.

137 *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 2 SA 198 (CC).

138 *Legal Aid Board v Otto Swart* Case no 631/2004.

139 Own emphasis added.

140 *Mafongosi v Regional Court Magistrate Nel and Another* 2007 JOL 20706 (Ck).

141 Par 7; Stewart 2011 *IJCR* 306.

142 LAG par 4.18.1.

143 Stewart 2011 *IJCR* 306.

sets out the following criteria in paragraph 4.18.1 to determine when “substantial injustice” will result, with specific reference to section 28(1)(h) of the *Constitution*.<sup>144</sup>

- (1) the seriousness of the issue for the child, for example, if the child’s constitutional rights or personal rights are at risk;
- (2) the complexity of the relevant law and procedure;
- (3) the ability of the child to represent himself or herself effectively without a lawyer;
- (4) the financial situation of the child or the child’s parents or guardians;
- (5) the child’s chances of success in the case;
- (6) whether the child has a substantial disadvantage compared with the other party in the case.

### **3.4 Incorporation into South African domestic legislation**

As mentioned previously, the provisions of article 12 of the CRC and article 4(2) of the ACRWC have been included in our *Constitution*,<sup>145</sup> but only to a certain extent.<sup>146</sup> They have been incorporated into section 10 of the *Children’s Act* which provides for the participation of children provided that they are of such age, maturity and stage of development as to be able to express their views in an appropriate manner. This right of children to have a legal practitioner assigned to them at the state expense has been part of our *Constitution* for the past 14 years, but its nature and content are still very vague.

The difference between article 12 and article 4(2) and section 28(1)(h) of the *Constitution* is that the *Constitution* only refers to legal representation, whereas the CRC and the ACRWC both make reference to hearing the child’s views by other means.<sup>147</sup> A further distinction is the explicit reference in section 28(1)(h) of the *Constitution* that legal representation has to be provided on the state expense, whereas no such reference is made in any provision of the CRC.

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144 Stewart 2011 *IJCR* 312.

145 S 28(1)(h).

146 Sloth-Nielsen and Mezmur 2008 *IJCR* 15.

147 Sloth-Nielsen 2008 *SAJHR* 498.

Another case to be considered is that of *Du Toit and Another v Minister of Welfare and Population Development and Others*.<sup>148</sup> In this case the need for legal representation for children was discussed *obiter*. Although the case dealt mainly with adoption instead of divorce, the court commented as follows about section 28(1)(h) of the *Constitution*:

... that where there is a risk of substantial injustice to children a court is obliged to appoint a *curator ad litem*<sup>149</sup> to represent the interests of children, and that this obligation flows from the provisions of section 28(1)(h).<sup>150</sup>

Section 28(1)(h) of the *Constitution* requires that the legal representative should be a suitably qualified person with particular skills and expertise to specifically represent a child.<sup>151</sup> The reason for this is that the child's lawyer has to be able to:

Communicate effectively with a child, providing him/her with the information he/she needs to make an informed choice, and assisting him/her to reach a decision;  
Understand and interpret what the child is saying, contextualising this within a knowledge both of child development and the child's social environment, including factors pertaining to the child's cultural and economic background;  
Develop a relationship of trust with the child-client, which may require time, skill and patience; and  
Be able to liaise with other professionals involved with the child such as psychologists, social workers and teachers.<sup>152</sup>

It has to be emphasised that, what is meant by section 28(1)(h), is the appointment of a lawyer with the skills and expertise to be able to carry out and represent the views of children. It does not mean the appointment of a social worker, a counsellor or a psychologist. A child's voice must be heard in cases where substantial injustice would otherwise result and in order to achieve this, a legal representative has to be appointed

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148 *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 2 SA 198 (CC).

149 A *curator ad litem* is appointed in a case where a child does not have parents or a guardian, to support the child and court during the legal proceedings while upholding the best interest of the child, as will be explained in more detail below. A legal representative acts upon the instructions of the child and represents the views of the child in court.

150 Skelton "Interpreting the right to legal representation" 219.

151 This has also been stated in *Legal Aid Board v Four Children* as follows in Par 24: 'in each matter an independent curator should be appointed [which would mean] that suitably qualified attorneys and advocates in private practice will have to be appointed...'.<sup>152</sup>

152 Barratt 2002 *JCRDL* 570.



to represent the views of the child, whereas the appointment of a social worker will only act in the best interests of the child, but the voice of the child will still not be heard.<sup>153</sup>

Our legal system needs to develop a uniform set of criteria which will guide legal practitioners as well as judges regarding when to appoint legal representatives to children in divorce matters as well as in all other civil matters. The aim of this criteria has to be to give children the opportunity to have their voices heard and to give full realisation to section 28(1)(h) of the *Constitution*, as well as to all the other international instruments, as have been discussed above. Such criteria will make the position clear in relation to the stage and circumstances required for the appointment of a legal representative to a child. It will save a considerable amount of time and money during court procedures aimed at establishing when substantial injustice would occur if a legal representative has not been appointed to a child in divorce and other proceedings.

#### **4 Relevant legislation**

The right of a child to be heard, and to legal representation, is not only envisaged in the CRC, ACRWC and the *Constitution*, but also in “national legislation” including the *Divorce Act*, the *Children’s Act* and the *Legal Aid Act*.

##### **4.1 Divorce Act**

The right to be heard has been part of our legislation for the past 31 years. It has since 1979 been incorporated into our law in the *Divorce Act*, authorising the authority to appoint a legal representative to a child involved in divorce proceedings.<sup>154</sup> Section 28(1)(h) of the *Constitution* has in particular been given effect by the *Divorce Act*.<sup>155</sup> Divorce affects children and for that reason a decree of divorce should not be granted until the court is satisfied that the arrangements with regard to the welfare of the

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153 *Soller*-case par 26, own emphasis added.

154 Du Toit “Legal Representation of Children” 93.

155 Kassin “Children’s Right to Legal Representation in Divorce Proceedings” 231.

children have been decided upon to satisfy the best interest of a child in the particular circumstances.<sup>156</sup>

The main aim of section 6 of this Act is to safeguard the interests of dependent and minor children.<sup>157</sup> The relevant section which provides for the right of a child to legal representation in divorce proceedings is section 6(4) that states the following:

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

As a result of this section the court is provided with the discretion to appoint a legal representative to a child in divorce proceedings. The court may also decide who is to pay for the legal representation, but section 6(4) makes no mention thereof that the state will carry the cost at “state expense”. The court may also order any investigation and order the parties to pay for such an investigation if necessary.<sup>158</sup> This will allow the child’s views and wishes to be heard through his or her legal representative. Although this section expressly provides the court the opportunity to appoint a legal representative to a child involved in divorce proceedings, it is very reluctant to do so, due to the costs which will be incurred on one or both of the parents.<sup>159</sup> The courts are more likely to use this section to appoint a curator *ad litem* for the child<sup>160</sup> as their purpose is to pay attention to the best interest of the child. This may possibly be the reason why the *Children’s Act* and *Legal Aid Guide*<sup>161</sup> make better provision for relief if the parents might be unable to pay. The South African Law Commission suggested that amendment be made to allow a court to appoint an interested third party to support the child during the divorce proceedings.<sup>162</sup>

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156 S 6(1)(a) of the *Divorce Act*.

157 Kassan 2003 *De Jure* 169.

158 Robinson 2007 *JCRDL* 264.

159 Kassan “Children’s Right to Legal Representation in Divorce Proceedings” 232.

160 Du Toit “Legal Representation of Children” 93.

161 LAG.

162 Anderson and Spijker 2002 *Obiter* 367-368.

Section 28(1)(h) includes the phrase “at state expense” whereas section 6(4) makes no reference to that at all. This means that children from wealthy families will be able to afford separate legal representation since their parents will be in the position to be able to pay for it.<sup>163</sup> On the contrary, parents of children from less wealthy families will not be able to afford the costs of a separate legal practitioner assigned to their children. The position may occur that the child from a less wealthy family may be in desperate need for legal representation in divorce proceedings, but will not be able to obtain it, due to the family’s financial position and inability to afford the underlying costs, causing section 6(3) of the *Divorce Act* to violate the right based on unfair discrimination due to one’s financial status as stipulated according to the *Constitution*.

What is of relevant importance is who will be financially responsible for the costs of such legal representation if the parents are unable to afford it? Child-participation and the coherent appointment of a legal representative in court proceedings is a growing phenomenon in our courts. There have been several cases dealing with the question of whether a legal representative has to be appointed to children involved in divorce proceedings, including the *Soller*-case as discussed in detail above, in which the court ruled that, in terms of section 28(1)(h) of the *Constitution*, an lawyer had to be appointed and not simply a social worker or family advocate. Another relevant case is the *Rosen*-case<sup>164</sup> in which the court relied on article 12 of the CRC to appoint a legal representative for a child involved in divorce proceedings.<sup>165</sup>

With regard to the issue of the costs for the legal representation for children in all matters affecting them, the Legal Aid Board agreed to render its services of statutory legal representation for children in instances where substantial injustice would otherwise result.<sup>166</sup> Section 3 of the *Legal Aid Act* states the following:

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163 Kassan *How can the Voice of the Child be Adequately Heard* 49.

164 *Rosen v Havenga* 2006 4 ALL SA 199 (C).

165 Boniface “Revolutionary Changes” 160.

166 Sloth-Nielsen “Trials and Tribulations” 13.

The objects of the board shall be to render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the *Constitution*...<sup>167</sup>

With regard to jurisdiction,<sup>168</sup> a court for a regional division shall have jurisdiction to hear and determine suits relating to the divorce between persons and to decide upon any question arising therefrom.<sup>169</sup> Such a court for a regional division shall have the same jurisdiction as any High Court with regard to such a suit.

#### **4.2 Children's Act**

The *Children's Act* can be described as an extensive articulation of the ideal of the protection of children from all forms of neglect, abuse, maltreatment and degradation, as well as an elaborate blueprint for the revision of family relationship.<sup>170</sup> The main focus of the *Children's Act* is to give effect to the children's rights in relation to certain areas of family law, including care, protection from abuse and neglect, as well as to legal representation in all children court matters affecting the child.<sup>171</sup>

The current position is that a court may no longer order legal representation for a child at the state's expense, but has to refer the matter to the Legal Aid Board.<sup>172</sup> The LAB will consider the matter and decide whether the child in question is entitled to legal representation by the LAB.

Section 3A of the *Legal Aid Act* also sets out criteria for when a legal representative has to be appointed at the state expense, taking note of the Constitutional limitations.<sup>173</sup> This criteria can be referred to as the *Legal Aid Guide*<sup>174</sup> which was approved by the

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167 Vedalankar "Delivering Client-Focused Quality Legal Aid" 4.

168 *Jurisdiction of Regional Courts Amendment Act* 31 of 2008 (hereafter 'the *Jurisdiction Act*').

169 Section 7 of the *Jurisdiction Act*.

170 Sloth-Nielsen "Trials and Tribulations" 12.

171 Berry 2007 *SA Journal of CPD* 169.

172 Known as Legal Aid SA (hereafter 'the LAB').

173 S 36 of the *Constitution*.

174 LAG.

National Assembly and the National Council of Provinces in 2008. The criteria to decide whether a child has a right to legal aid in civil cases at state expense, reads as follows:

- The seriousness of the issue for the child, for example, if the child's constitutional rights or personal rights are at risk.
- The complexity of the relevant law and procedure.
- The ability of the child to represent himself or herself effectively without a lawyer.
- The financial situation of the child or the child's parents or guardians.
- The child's chances of success in the case.
- Whether the child has a substantial disadvantage compared with the other party in the case.

#### 4.2.1 *Relevant sections of the act*

Section 10 of the *Children's Act* envisages the participation rights of a child and should be read with section 14, in that it gives children the right to bring matters to court and to be assisted in doing so, as long as the matter falls within the jurisdiction of that court. In order for a child to bring a matter to court, a child will need the assistance of a legal practitioner. For this reason it is clear that the child will need to obtain legal representation in order to approach the court. As will be discussed in greater detail below, the court has to refer the matter to the LAB who may assign a legal representative for the child at its own discretion and in accordance with the Legal Guidelines. As age and maturity play a vital role, it is encouraged that these sections of the Act must not be strictly interpreted. A child who is capable of expressing a view, must have the right to be heard in any matter affecting him or her.<sup>175</sup>

In terms of the Act the Children's Court has increased jurisdiction, leaving the High Court exclusively for specific matters. As is provided for in section 1(4) of the Act, matters arising from the *Divorce Act* and other acts, are excluded from the Children's Court. Section 1(4) should however be read with section 45; more specifically section

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175 Boniface "Revolutionary Changes" 160.

45(1)<sup>176</sup> which sets out a list of issues which may well be dealt with by the Children's Court.<sup>177</sup>

Article 12(2) of the CRC is clearly envisaged in section 10 of the *Children's Act*. However, it seems to diverge from section 6(4) of the *Divorce Act*. With regard to the *Divorce Act* the presiding officer has the choice to either assign a legal practitioner to a child or not, whereas section 10 clearly sets out the right of a child who is competent to express his or her views, to participate.<sup>178</sup>

Section 10 should also be read with section 2 as it provides for the objectives of the Act, including the provision that the best interest of a child is of paramount importance in every matter concerning the child<sup>179</sup> and to generally promote the protection, development and well-being of the children.<sup>180</sup> The best interest of the child is also envisaged in articles 3(1) and 21 of the CRC, and in article 4(1) of the ACRWC which states that the best interest of children are of primary consideration.<sup>181</sup> As a result, when considering whether a child is entitled to legal representation, his or her best interest has always to be of paramount importance. Section 7 of the Act clearly sets out a checklist which should be followed in order to assure that the child's best interest is of paramount importance when dealing with any matter concerning the child. Section 7(g)(i) is of particular importance as it provides the criteria according to which a child's

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176 S 45(1): Subject to s 1 (4), a children's court may adjudicate any matter, involving- (a) the protection and well-being of a child; (b) the care of, or contact with, a child; (c) paternity of a child; (d) support of a child; (e) the provision of- (i) early childhood development services; or (ii) prevention or early intervention services; (f) maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard; (g) the temporary safe care of a child; (h) alternative care of a child; (i) the adoption of a child, including an inter-country adoption; (j) a child and youth care centre, a partial care facility or a shelter or drop-in centre, or any other facility purporting to be a care facility for children; or (k) any other matter relating to the care, protection or well-being of a child provided for in this Act.

177 Skelton "Parental Responsibilities and Rights" 81.

178 Robinson 2007 *JCRDL* 270-271.

179 S 2(a)(iv) and 9 of the *Children's Act*; s 28(2) of the *Constitution*.

180 S 2(i) of the *Children's Act*.

181 Anderson and Spijker 2002 *Obiter* 365.

age, maturity and stage of development are determined while keeping the best interest of the child at hand.<sup>182</sup>

The *Children's Act* contains many relevant sections<sup>183</sup> which have to be taken seriously into account when dealing with the participation rights of children. Section 6(5)<sup>184</sup> states that any child or person with parental rights and responsibilities in respect of that child has to be informed about any action or decision taken which will adversely affect the development of the child. This implies that if a divorce proceeding will affect the child's development; the court is obliged to inform the child if the child is of an age, maturity and at a stage of development to have the competence to understand the nature of the proceedings.

Another important section is section 31 of the Act which provides that a person who has parental rights and responsibilities may not take a major decision which may influence the life of the child without first considering the views and wishes of the child. Influences on the child's life may include a change in living conditions, education, health, or the child's well-being in general.<sup>185</sup>

Section 61 of the Act deals with the proceedings in the Children's Court and places a clear obligation on the presiding officer to give the child the opportunity to express his or her views on condition that the court finds that the child is of an age, maturity and stage of development to participate and if the child wishes to do so.<sup>186</sup> It is also required of the presiding officer to provide the court with reasons, if it is the case, why the child is considered not to have the capacity to participate in the proceedings.<sup>187</sup> From this it is

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182 Robinson 2007 *JCRDL* 271.

183 S 6(4)(a): In any matter concerning a child- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.

184 S 6(5) states that: 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.

185 Robinson 2007 *JCRDL* 271, 272, 276 and 277.

186 Krieling 2009 [http://www.justice.gov.za/cfw/2009child-law-kzn/day1\\_paper\\_Orders-ito-the-Childrens-Act38of2005.pdf](http://www.justice.gov.za/cfw/2009child-law-kzn/day1_paper_Orders-ito-the-Childrens-Act38of2005.pdf).

187 S 61(1)(b).

clear that the participation of a child is of vital importance and must be taken seriously by the presiding officer. What should be noted from this section is the fact that the child has to choose to participate. An opportunity to obtain a legal representative must always be provided to all children involved in divorce proceedings, and the children must be informed about their right to participate in order to have their views taken into account.<sup>188</sup> A child may however not be forced to participate in the divorce proceedings, but should rather be aware of his or her right to express their views and wishes through the assignment of a legal representative.

In terms of section 29 of the Act, courts are given the right to assign a legal representative to a child and to order that the parties to the dispute be responsible for the payment of the legal costs. This section is similar to section 6(4) of the *Divorce Act*, according to which the courts are reluctant to appoint a legal representative, but rather prefer to appoint a curator *ad litem*.<sup>189</sup> The purpose of the inclusion of section 29 is to encourage courts to make use of their power to appoint legal representatives for children in need of representation.

Another section which is of relevant importance is section 55(1), which states the following:

Where a child involved in a matter before the Children's Court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board referred to in section 2 of the Legal Aid Act, 1969 ( Act 22 of 1969 ).

This section refers directly to the right of the child to legal representation, but is limited to children court matters only.<sup>190</sup> This means that where a child is not represented in a children's court, and the court is of the opinion that it would be in the best interest of the child, the court is under the obligation to refer the matter to the Legal Aid Board.<sup>191</sup> This

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188 Du Toit "Legal Representation of Children" 99.

189 Du Toit "Legal Representation of Children" 93.

190 Stewart 2011 *IJCR* 310.

191 Sloth-Nielsen 2008 *SAJHR* 499.



section makes it clear that the Legal Aid Board has to assign a legal representative to a child who is involved in court proceedings 'where a child is not represented'.

Stewart<sup>192</sup> states that children may need legal representation in various proceeding and it cannot simply be restricted to the jurisdiction of children's court, it may include civil matters like for instance divorce. Divorce has a major influence on children, and for that reason children should have the right to legal representation at the expense of the state.

Section 10 is clearly in line with article 12 of the CRC, as it makes way for the different lifestyles and development of children in different growing-up situations. In essence, a court has to be able to clearly interpret what the child actually has in mind; the court should understand the views of the child and should attach due weight to those views.

Children are considered to be autonomous and have the right to autonomy in situations in which they are competent enough to make informed choices and decisions. In *McCall v McCall*,<sup>193</sup> it was held that:

If the court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference, a genuine and accurate reflection of his feelings towards and relationships with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his expressed preference.

In the same way, the aim of section 10 is to place a duty on the court to realise this competence of children and to give the necessary consideration to their views in all matters affecting them.

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192 Stewart 2011 *IJCR* 310.

193 *McCall v McCall* 1994 3 SA 201 (C) 207.

### 4.3 Legal Aid Act and Legal Aid Guidelines

The main purpose of the LAB is to provide legal aid to impoverished people. It was established in terms of the *Legal Aid Act* to provide legal representation at the expense of the state, as is stated in the *Constitution*.<sup>194</sup> In *R v M*<sup>195</sup> the plaintiff and the defendant had been in dispute with regard to the custody of their seven-year-old child. After all the evidence had been lead, the judge felt that, due to the emotional instability of the child, there was a need for a legal representative to be assigned to the child in terms of section 28(1)(h) of the *Constitution*. The parties agreed to the separate legal representation for the child and that the LAB was the responsible functionary<sup>196</sup> for the provision of legal representation in terms of section 3 of the *Legal Aid Act*.<sup>197</sup> The parents however failed to agree on how the appointment should be made, as it was at the sole discretion of the Board of the Legal Aid Board to select the legal representative.<sup>198</sup>

In making a decision, the acting judge took into account the relevant provisions of the *Legal Aid Act* as well as the LAG. As a result, the judge concluded that “the *Legal Aid Act* does not specifically empower the LAB to provide for legal assistance in terms of section 28(1)(h)”<sup>199</sup> of the *Constitution*. The *Legal Aid Act* was amended in 1996 and no mention was made of the right of the child to legal representation in civil matters. There

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194 Mugar “Practical Implementation of Representation for Children” 240.

195 *R v M and Others* DCLD Case No: 5493/02 (unreported).

196 Kassan “Children’s Right to Legal Representation in Divorce Proceedings” 234.

197 S 3 of the *Legal Aid Act* states: The objects of the board shall be to render or make available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the *Constitution*, and to that end the board shall, in addition to any other powers vested in it by this Act, have power- (a) to obtain the services of legal practitioners; (b) to purchase or otherwise acquire or to hold or alienate any movable property or, with the approval of the Minister acting in consultation with the Minister of Finance, any immovable property; (c) to hire or let any movable or immovable property; (d) to fix conditions subject to which legal aid is to be rendered, including conditions in accordance with which any rights in respect of costs recovered or recoverable in any legal proceedings or any dispute in respect of which the aid is rendered, shall be ceded to the board, and conditions relating to the payment of contributions to the board by persons to whom legal aid is rendered; (d A) to provide, subject to s 3A (3), legal representation at State expense as contemplated in s 25 (1) (c) and (3) (e) , read with s 33 (2), of the *Constitution*, where substantial injustice would otherwise result; (e) to do all such things and perform all such functions as may be necessary for or incidental to the attainment of the objects of the board.

198 Skelton “Interpreting the right to legal representation” 222-223.

199 Skelton “Interpreting the right to legal representation” 223.

was also no provision made for in the Interim Constitution which was in force at the time; therefore the judge could not place a duty on the LAB to assist the child with legal representation. It was finally held that:

...the child is entitled to have a legal practitioner with skill and experience in matrimonial law to be appointed to represent her in the action instituted by the plaintiff against the defendant, in order to advance her best interests in the custody and access disputes in the action, with the power to do all things necessary in order to achieve such object.

The judge examined the situation in which a minor is entitled to legal representation in terms of section 28(1)(h). This, according to Kassan,<sup>200</sup> is any matter which has a bearing or influence on the rights included in section 28(1)(h). He also adds that due and adequate consideration should be given in each case as to whether the absence of a legal representative would result in a substantial injustice to the minor. It has been deemed fit for a child to have legal representation in a complex situation where there are allegations of abuse.

The case of *Legal Aid Board v R and Another*,<sup>201</sup> deals with the application brought by the LAB against the parties with regard to custody of their minor child. The application sought the appointment of a legal practitioner to the minor son, SR, in terms of section 28(1)(h) of the *Constitution*. The application was brought after SR had already contacted the Child-line for assistance. The first respondent (the father) favoured the application, but the second respondent (the mother) did not.

The mother opposed the application for reasons that the applicant did not have the necessary authority to appoint a legal practitioner for a child in legal proceedings, and that the circumstances of the case were not necessary for such appointment. The court held that:

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200 Kassan "Children's Right to Legal Representation in Divorce Proceedings" 234, 236-237.

201 *Legal Aid Board v R and Another* 2009 2 SA 262 (D).

...in terms of the *Legal Aid Act* 22 of 1969, the applicant had the power to render legal assistance to a minor in discharge of the State's obligation in terms of s 28(1) (h) of the *Constitution* to provide legal assistance at the C State's expense to a minor if the failure to do so would otherwise result in substantial injustice. In deciding to render such assistance, the applicant was not constrained by a need to obtain either the consent of the child's guardian or that of any person exercising parental responsibilities and rights in relation to the child, or an order of court. It was a matter within the discretion of the applicant whether to seek such consent or an order in any D particular case. The attorney had, accordingly, been properly appointed to represent SR in the present proceedings.<sup>202</sup>

The court further noted that substantial injustice would occur if the child was not afforded the assistance of a legal practitioner to make his or her voice heard.<sup>203</sup> The applicant was also obliged in terms of section 3 of the *Legal Aid Act* to provide a child with legal assistance in circumstances where the requirements of section 28(1)(h) of the *Constitution* had been fulfilled.<sup>204</sup> It was finally decided that a legal practitioner had to be assigned to SR in the divorce proceeding.<sup>205</sup>

Legal Aid is only afforded to indigent people and those who comply with the requirements of the means test. Section 28(1)(h) of the *Constitution* simply states that children are entitled to a legal practitioner at the state expense if substantial injustice would otherwise result. This does not exclude children from having a legal practitioner simply because their parents are able to afford one.<sup>206</sup>

The State does make provision for legal representation for children in divorce. It is mentioned in the LAG<sup>207</sup> that a divorce court in a divorce matter or Children's Court for an order granting contact rights constitutes as a type of *Children's Act* matter where legal representation can be ordered. This legal representation by the LAB is however not without restraint. The following condition must be met before legal representation can be made available to a child in divorce matters:

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202 Par 3-5 and 35.

203 Par 20.

204 Par 41.

205 Par 9.

206 Gallinetti and Kassan "Submission on the Children's Bill" par 8.

207 LAG 65.

... the Regional Operations Executive must have given prior consent for the child to get legal representation to intervene in divorce proceedings between the parents of the child if –

- This is needed to protect the best interest of the child, and
- Is substantial injustice would otherwise result.<sup>208</sup>

With regard to the appointment of a curator *ad litem*, the LAG makes provision therefore. But before this can be done, the approval of the Regional Operations Executive must first be obtained before a curator *ad litem* may be appointed by the LAB.<sup>209</sup>

## 5 Conclusion and Recommendations

International law has to be incorporated comprehensively into domestic law. The general principles of the CRC, and not only parts of it, should be incorporated into national law in an attempt to bring about conformity.<sup>210</sup> Since the ratification of the CRC by South Africa, the right of children as stated in article 12 has been incorporated in the *Constitution* in section 28(1)(h), which provides for the child's right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. As most of the provisions of the CRC have been incorporated into section 28, "it can be concluded that the CRC has acquired legal significance via the *Constitution*".<sup>211</sup> Article 12(2) has been incorporated into section 10 of the *Children's Act* placing an obligation on the state to give full realisation and enforcement to the right of the child to be heard.<sup>212</sup>

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208 LAG 68.

209 LAG 69.

210 Anon 2007 [http://www.unicef.org/tdad/southafricacosting\(1\).pdf](http://www.unicef.org/tdad/southafricacosting(1).pdf).

211 Sloth-Nielsen 2002 *IJCR* 139.

212 Skelton and Davel (eds) *A Commentary on the Children's Act* 2-14.

If children feel that they have been thoroughly involved in decisions affecting them and that their views have been treated with respect and due weight has been given to it, they will be more cooperative to adapt to recommended solutions.<sup>213</sup> The judge would be in a position to assess whether a substantial injustice would result. Therefore, and because of the inherent power conferred to them as upper guardians of minors, as well as their common law responsibilities to determine the best interests of children, judges are in a unique position to actualise and implement section 28(1)(h) of the *Constitution*.<sup>214</sup>

After having examined the *Soller*-case, it can be considered that legal representation should be assigned to a fifteen-year-old child at state expense where there has been a variation of a divorce order. It was confirmed by the court that a fifteen-year-old child was entitled to have his or her views heard, and that due respect and careful consideration in order to prevent substantial injustice should be paid to it.<sup>215</sup> On the other hand, substantial injustice is regarded not to occur in instances where legal representation is appointed to a child in divorce proceedings as set out in the criteria in *R v M*,<sup>216</sup> which reads as follows:

... the presence of sexual allegations, and the fact that the parties were involved in a lengthy and acrimonious dispute over the custody of the minor and the complexity of the matter.<sup>217</sup>

For these reasons it is recommended that a set of criteria or guidelines be developed in order to establish exactly in what circumstances a legal representative must be assigned to a child in divorce proceedings at the expense of the state. This must be developed for the sole purpose of fulfilling and enforcing section 28(1)(h) of the *Constitution* in its entirety.

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213 Foley, Roche and Tucker (eds) *Children in Society* 32.

214 Skelton "Interpreting the right to legal representation" 226.

215 Kassan "Children's Right to Legal Representation in Divorce Proceedings" 237.

216 *R v M and Others* DCLD Case No: 5493/02 (unreported).

217 Kassan "Children's Right to Legal Representation in Divorce Proceedings" 237-238.

Child participation and the best interest of the child go hand in hand when dealing with the *Children's Act*, and these aspects also form the cornerstones of the CRC.<sup>218</sup> A child's participation right entails the appointment of a legal representative and not that of a family advocate.

The roles of the family advocate, curator *ad litem* and the legal representative are regarded to be distinct from one another; therefore it is of vital importance not to be confused about a child's legal representative versus the family advocate versus the curator *ad litem*. The function of a Family Advocate is to provide a child with neutral assistance, the curator *ad litem*'s function is to advance the case of the minor and the legal representative has the function to act in accordance to instructions and to litigate the views of the child in court.

Children are considered to be vulnerable during the process of the divorce of their parents. The breaking up of households has many implications for young children involved in such divorces. Amongst others it may include emotional problems, feelings of deprivation, unwantedness and not being loved, and their education get influenced as well.<sup>219</sup> Children must be allowed a true role in the legal proceedings which affect their lives, and not simply a symbolic role.<sup>220</sup>

Although primary responsibility lies with the parents, it is the state's duty to assist parents in that regard if parents or others responsible for the child are unable to abide by terms. In the case of need, the state must provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Section 55 of the *Children's Act* should not be limited to only children court matters, but should be considered the statutory counterpart of section 28(1)(h) of the *Constitution*.<sup>221</sup> It is stated in the LAG<sup>222</sup> that the effect of section 55 is to limit the right to legal

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218 Robinson 2007 *JCRDL* 272.

219 Smit 2010 *Child Abuse Research in South Africa* 11.

220 Bessner 2002 [http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2002/2002\\_1/2002\\_1no.html](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2002/2002_1/2002_1no.html).

221 Stewart 2011 *IJCR* 310.

222 LAG 65.

representation at State expense for matters relating to the *Children's Act* to when the court orders the LAB to provide legal representation for children.

A Children's Court should be granted the authority to appoint a legal representative to children at state expense if it is of the opinion that it is in the best interest of the child. The decision to appoint a legal representative should be taken directly by the Children's Court, as the officials involved in the proceedings of that court and of a specific case, will have personal knowledge about the circumstances of the case. The Children's Court also has to its disposal the expertise to recommend a legal practitioner to be assigned in order to prevent that substantial injustice would result. The responsibility should not lie with the Legal Aid Board to take the decision.

The LAG makes provision for the right of children to legal representation and for the appointment a curator *ad litem* on condition that the consent of the Regional Operations Executive is first obtained. However, legal aid is not readily available to just anyone. Persons who are able to afford their own legal representative are not entitled to legal aid. The affordability of legal representation depends on the person's means and the cost of the legal representation.<sup>223</sup>

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223 LAG 62.



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