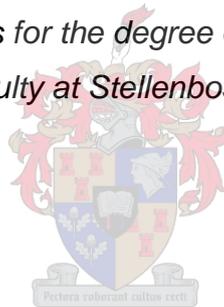


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Realising children's right to participation during the divorce proceedings of parents

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Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

To a child, the divorce of his or her parents is a traumatic and life-altering event. The divorce of parents and the proceedings related thereto have the potential to determine how various aspects of a child's life, such as where they will live and go to school or how often they will have contact with the parent with whom they do not live, will develop. Based hereupon it is safe to say that a child's parents' divorce and related proceedings can greatly affect a child.

In terms of article 12 of the United Nations Convention on the Rights of the Child, article 4(2) of the African Charter of the Rights and Welfare of the Child as well as sections 10 and 31(1) of the Children's Act 38 of 2005, a child, who is capable to do so, has the right to participate in matters that affect him or her by sharing his or her views and having these views considered.

Despite having a clear and well-established right to participate in a matter that so deeply affects them, a child's right to participate in their parents' divorce related proceedings is often not realised. This thesis will evaluate the various methods of representation and direct participation employed to give effect to the child's right to participation to determine to what extent the child's right to participation is being realised or not realised.

It is generally accepted that litigation is not the ideal way in which to resolve divorce and related proceedings, especially when children are involved. This thesis attempts to determine whether family mediation as model is better suited to realise a child's right to participation in this particular context. It does so by placing family mediation as a model in contrast with the traditional legal processes that go hand in hand with divorce related litigation.

To achieve the abovementioned, a model of measuring children's participation is proposed. The proposed model highlights the shortcomings as well as the positive aspects of the various methods of children's participation in South Africa. This exercise is repeated in the context of Australian divorce related proceedings in an attempt to compare and contrast the two jurisdictions.

Finally, the model is also employed to measure mediation as a model to realise a child's right to participation, in aid of determining whether mediation as a model is

better suited to realise a child's right to participation in his or her parents' divorce related matters.

Opsomming

Die egskeiding van ouers is 'n traumatiese en lewensveranderende gebeurtenis in 'n kind se lewe. 'n Egskeiding en ander gepaardgaande regsprosesse het die potensiaal om te bepaal hoe verskeie aspekte van die kind se lewe sal ontwikkel. Hierdie aspekte sluit onder meer in waar die kind sal woon en skool toe gaan, en hoe gereeld hul die ouer by wie hul nie woon nie, sal sien. Gebaseer hierop is dit regverdig om te sê dat 'n kind se ouers se egskeiding en gepaardgaande regsprosesse, 'n groot impak op die betrokke kind se lewe kan hê.

'n Kind het, in terme van artikel 12 van die *United Nations Convention on the Rights of the Child*, artikel 4(1) van die *African Charter of the Rights and Welfare of the Child* sowel as artikels 10 en 31(1) van die Kinderwet 38 van 2005, 'n reg om deel te neem in aangeleenthede wat hom of haar beïnvloed. Dit behels onder meer dat die kind hul siening mag deel, en daardie siening in ag geneem word.

Ten spyte van 'n kind se duidelike en gevestigde reg tot deelname, gebeur dit gereeld dat hierdie betrokke reg nie gerealiseer word nie. Hierdie tesis evalueer verskeie metodes van verteenwoordiging sowel as direkte deelname te evalueer ten einde vas te stel tot watter mate die kind se reg gerealiseer word, aldan nie.

Daar word oor die algemeen aanvaar dat litigasie nie die ideale manier is om egskeidings en verwante aangeleenthede te benader waar daar kinders betrokke is nie. Juis hierom poog hierdie tesis om vas te stel of gesinsbemiddeling as model meer geskik is om die kind se reg in die betrokke konteks te realiseer. Dit word gedoen deur tradisionele litigasie te vergelyk met gesinsbemiddeling.

Ten einde bogenoemde oogmerk te bereik, word 'n model wat verskillende vlakke van deelname meet, voorgestel. Die model werp lig op die tekortkominge sowel as positiewe eienskappe van verskeie metodes van deelname in Suid-Afrika sowel as Australië. Die model word ook gebruik om gesinsbemiddeling as model te evalueer om vas te stel of dit die kind se reg realiseer terwyl dit die tekortkominge van tradisionele litigasie aanspreek.

Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
ADR	Alternative Dispute Resolution
ALRC	Australian Law Reform Commission
AU	African Union
BERJ	British Education Research Journal
Can. Fam. L. Q.	Canadian Family Law Quarterly
CCTV	Closed-circuit television
CILSA	Comparative and International Law Journal of Southern Africa
CIVR	Child Interactive Video Recording
FDR	Family Dispute Resolution
FRC	Family Relationship Centre
GC	General Comment
ICL	Independent Child's lawyer
Int'l J. Child. Rts.	International Journal of Children's Rights
Int J Law Policy Fam	International Journal of Law, Policy and Family
NABFAM	National Accreditation Board for Family Mediators
NSW Law Journal	New South Wales Law Journal
OAU	Organisation of African Unity
Psychiatry, Psychol & L.	Psychiatry, Psychology & Law
SAJHR	South African Journal of Human Rights
SALRC	South African Law Reform Commission
THRHR	Journal of Contemporary Roman Dutch Law
TSAR	Journal of South African Law
UNCRC	United Nations Convention on the Rights of the Child

USA

United States of America

Chapter 1: *Introduction*

1 Introduction

The United Nations Convention on the Rights of the Child (hereafter “UNCRC”)¹ grants children a right to participation in article 12. This right places an obligation on State Parties, such as South Africa, to give “a child who is capable of forming his or her own views” the opportunity to express those views in any matter affecting him or her. This right also involves giving due weight to children’s views when decisions are being made about them.² In order to give effect to this right, the child must be provided the opportunity to be heard either directly or through a representative or an appropriate body.³

On a regional level, the African Charter on the Rights and Welfare of the Child (hereafter “ACRWC”)⁴ contains a similar provision, which can be found in article 4(2). On a national level, the Children’s Act 38 of 2005 (hereafter “Children’s Act”) grants children the right to participate in section 10, stating that “every child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration”. Section 31(1) of the Children’s Act furthermore grants a child the right to have their wishes expressed when major decisions that involve them are made. In terms of section 31(1) of the Children’s Act these “major decisions” include any decision:

- “(ii) affecting contact between the child and a co-holder of parental responsibilities and rights;⁵
- (iii) regarding the assignment of guardianship or care in respect of the child to any other person in terms of section 27;⁶ or
- (iv) which is likely to significantly change, or have an adverse effect on, the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being”.⁷

¹ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (1989) (hereafter “UNCRC”).

² G Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* Working Papers in Early Childhood Development (2005).

³ Art 12(2) of the UNCRC.

⁴ African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1990) (hereafter “ACRWC”).

⁵ S31(1)(b)(ii) of the Children’s Act.

⁶ S31(1)(b)(iii).

⁷ S31(1)(b)(iv).

The South African family law system employs various methods to give effect to the child's right to participation. In the context of divorce matters, these methods include legal representation under section 28(1)(h) of the Constitution of the Republic of South Africa, 1996 (hereafter "Constitution"),⁸ section 55 of the Children's Act as well as section 6(4) of the Divorce Act 70 of 1979 (hereafter "Divorce Act"). Furthermore, section 2 of the Mediation in Certain Divorce Matters Act 24 of 1987 (hereafter "Mediation in Certain Divorce Matters Act") makes provision for the involvement of a family advocate in order to advance the interests of children.

It is generally accepted that litigation is not the ideal way in which to resolve family law aspects such as divorce.⁹ This is especially true when children are involved, as the win or lose attitude associated with divorce rarely leaves room for the best interests of the child to be of much importance.¹⁰ The adversarial system of litigation is not conducive to resolving the "important, intimate, emotional and psychological aspects" of divorce.¹¹ Children often struggle to communicate their views as a result of the adversarial nature of court proceedings.¹²

This thesis places family mediation as model in contrast with the traditional legal processes that accompany divorce litigation. Family mediation can be defined as "a process in which the mediator, an impartial third party who has no decision-making powers, facilitates negotiations between disputing parties".¹³ The object of the

⁸ Although s 28(1)(h) of the Constitution only refers to a child's right to have a "legal practitioner" appointed at State expense, the Constitutional Court has used s 28(1)(h) to appoint a curator *ad litem* to protect the interest of children. The use of this constitutional section is significant as the Court was entitled to appoint a curator in terms of the Common Law. See T Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 111. Further, Magistrates' Courts as well as High Courts have the power to appoint a curator *ad litem* for the child. In this regard see Centre for Child Law *University of Pretoria Guidelines for legal representatives of children in civil matters* (2016) 5. An application for the appointment of a curator *ad litem* is brought in terms of s 33 of the Magistrates' Court Act 32 of 1944. Law Society of South Africa *Comments by the Law Society of South Africa on the South African Law Reform Commission's Issue Paper 31 Family Dispute Resolution: Care of and Contact with children* (2020) 53.

⁹ M de Jong "Arbitration of Family Separation Issues – A Useful Adjunct to Mediation and the Court Process" (2014) 17 *PER* 2356 2361.

¹⁰ Litigation regarding any aspect of the best interests of the child should not be of a "win or lose" nature. See JA Robinson "Die Adversatiewe Stelsel van Bewyslewing en die Beste Belang van die Kind in Egskeidingsaangeleenthede: Enkele Gedagtes oor Collaborative Law ter Beslegting van Ouerlike Geskille" (2015) 18 *PER* 1527 1535.

¹¹ M De Jong "An Acceptable, Applicable and Accesible Family Law System for South Africa - Some Suggestions concerning a Family Court and Family Mediation" (2005) 18 *TSAR* 33 33.

¹² L Claasen & G Spies "The voice of the child: experiences of children, in middle childhood, regarding Children's Court procedures" (2015) 51 *Social Work* 73 78.

¹³ Boezaart (ed) *Child Law in South Africa* 136.

negotiation is to get the disputing parties back on speaking terms and to facilitate the process of reaching an agreement with which both parties are both satisfied.¹⁴ This agreement must also acknowledge the rights and needs of all family members.¹⁵

2 Research question

The primary research question is as follows: Can mediation serve as a model to realise a child's right to participation in divorce related matters? To fully capture the primary research question, there are a number of secondary research questions that will also be considered.

- i. What is the nature and extent of a child's right to participation in their parents' divorce related proceedings in South Africa?
- ii. What are the shortcomings in the current state of affairs with regard to a child's right to participation in their parents' divorce related proceedings in South Africa?
- iii. Can mediation as a model address the shortcomings in the abovementioned current state?

3 Hypotheses

The primary hypothesis recognises that mediation can serve as a more suitable method to realise a child's right to participation in divorce matters. In support of the primary hypothesis, there are two secondary hypotheses, namely:

- i. A child's right to participation in their parents' divorce related proceedings is currently not sufficiently realised in South Africa.
- ii. Mediation, as a form of alternative dispute resolution, lends itself to realising a child's right to participation in their parent's divorce related proceedings.

4 Methodology

This research involves a literature overview of both local and international primary and secondary resources on the topic of a child's right to participation. International

¹⁴ Boezaart (ed) *Child Law in South Africa* 136.

¹⁵ 136.

and regional treaties, legislation, case law and academic commentary are used to test the hypotheses and answer the relevant research questions.

The research commences by establishing what a right to participation entails. This requires an analysis of article 12 of the UNCRC and article 4 of the ACRWC as well as sections 10 and 31(1) of the Children's Act. The initial research therefore focuses on the interpretation of the relevant treaties and legislation. This analysis is conducted by consulting various academic contributions on the topic in order to better engage with the concept of a child's right to participation.

In what follows, the focus of the research is on the possible ways in which a child's right to participation during their parents' divorce proceedings can be realised. An overview is provided of methods such as the role of the family advocate, the possibility of a judge consulting with children in chambers and legal representation under section 28(1)(h) of the Constitution, section 6(4) of the Divorce Act and section 55(1) of the Children's Act. The extent to and manner in which the child's right to participation is implemented in case law is also examined in this regard. The purpose of this discussion is to determine to what extent the present legal position in South Africa provides for a child to participate in divorce related proceedings.

After reaching a conclusion on whether the child's right to participation in this specific field is in fact realised or not, a closer look is taken at mediation as an additional or even an alternative model to realise this right. This entails looking at the inherent characteristics of mediation and ways in which it can facilitate the participation of children in their parents' divorce matters.

A comparative study is conducted by comparing the current South African legal position with that of children of divorcing parents in Australia. Australia, a jurisdiction seen as a pioneer in the field of family law mediation,¹⁶ ratified the UNCRC on 17 December 1990.¹⁷ As both jurisdictions are signatories to this treaty, it creates the

¹⁶ G Yeo & CZ Teng "Mediation Applied to Family Law in Singapore" (2017) ALSA National Chapter: Singapore 217 219. When it comes to the promulgation of legislation that encourages or forces divorcing couples to turn to mediation before going the litigation route, Australia has taken the lead. See M De Jong "Divorce mediation in Australia – valuable lessons for family law reform in South Africa" (2007) 40 *Comparative and International Law Journal of Southern Africa* 280 281.

¹⁷ P Alston & G Brennan (eds) *The UN Children's Convention and Australia* (1991) iii; United Nations Treaty Collection "Status of Treaties: United Nations Convention on the Rights of the Child" (05-05-2021) *United Nations Treaty Collection*

opportunity to directly compare and contrast the way in which these jurisdictions give effect to article 12.

5 Limitations

A child's right to participation as set out in article 12 of the UNCRC, article 4 of the ACRWC and sections 10 and 31(1) of the Children's Act, is applicable to all matters affecting the child. Landsdown, for example, lists decisions in respect of a child's school, health care and local community as areas of potential participation.¹⁸ Although there are various decisions in which a child could potentially exercise his or her right to participation, this thesis only focuses on the child's participation in proceedings relating to their parents' divorce, for example where the child resides, the child's contact with his or her parents, maintenance and other major decisions flowing from the parents' divorce.

The separation of parents who were not married will not specifically be investigated, although most of this research will still be applicable to the children of unmarried parents. Furthermore, although arbitration, a combination of mediation and arbitration techniques, and mediation are internationally viewed as appropriate forms of alternative dispute resolution in divorce matters,¹⁹ mediation is the only form of alternative dispute resolution that is investigated.

6 Rationale

The global rise in divorce rates has resulted in a global rise in the focus placed on the impact that divorce has on children.²⁰ To a child, the divorce of parents is a traumatic event.²¹ This life-changing occasion can cause children to experience anxiety and depression as well as feelings of anger and resentment as they attempt to make sense of the dramatic changes in their life situation.²²

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4 (accessed 05-05-2021).

¹⁸ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 21.

¹⁹ LJ Van Zyl *Alternative Dispute Resolution in the Best Interests of the Child* DPhil thesis, Rhodes University (1994) 164.

²⁰ C Brand, C Hoelson & G Howcraft "The Voice of the Child in Parental Divorce: Implications for Clinical Practice and Mental Health Practitioners" (2017) 29 *Journal of Child and Adolescent Mental Health* 169 169.

²¹ Van Zyl *Alternative Dispute Resolution in the Best Interests of the Child* 49.

²² NA Mundlamamo *The Views of Social Service Providers on the Use of Parenting Plans for Adolescents of Divorced Parents* MA thesis, Stellenbosch University (2016) 36.

The divorce and proceedings relating thereto does not only have the potential to have a negative emotional impact on children²³ but also determines, to a large extent, how various aspects of their lives will develop.²⁴ These aspects include factors such as where and with which parent the child will live; the care of the child; contact between the child and the parent with whom they are not living; their schooling and religious upbringing of the child.²⁵

In *WB v KB*²⁶ the Court emphasised the impact of parental divorce as follows:

“Divorce inevitably occasions change in the lives of children such as adjusting to the daily absence of one parent, while living with the other and going back and forth between two different households.”²⁷

Divorce is not a single event in the life of a child but rather a process, which usually begins some time before the separation and continues to have an effect for many years to come.²⁸ Many of the problems prevalent during divorce proceedings are of psychological nature.²⁹ Despite the major impact a divorce can have on children, they have been almost entirely voiceless in these issues for far too long.³⁰

To the extent that children feel voiceless in the decisions relating to their parents' divorce, they are often left unsure about what the future holds.³¹ In this regard, most children want to be able to have a say in matters that affect them.³² However, children generally do not want the responsibility of having to make choices with regards their care and contact arrangements.³³ Here, the distinction between giving a child a *voice*

²³ Mundlamamo *The Views of Social Service Providers on the Use of Parenting Plans for Adolescents of Divorced Parents* 36.

²⁴ D Graham *The Voice of Children: How Can We Hear It?* (2005) unpublished paper presented at the World Congress on Family Law and Children's Rights at Cape Town, 20-03-2005 – 23-03-2005 (available at https://www.childjustice.org/index.php?option=com_edocman&task=document.viewdoc&id=16&Itemid=&lang=en).

²⁵ S 33 Children's Act 38 of 2005; S 6(3) Divorce Act.

²⁶ 2015 JDR 2255 (GP).

²⁷ Para 45.

²⁸ M De Jong “Giving Children a Voice in Family Separation Issues: A Case for Mediation” (2008) 4 *TSAR* 785 785.

²⁹ Van Zyl *Alternative Dispute Resolution in the Best Interests of the Child* 33.

³⁰ De Jong (2008) *TSAR* 785.

³¹ SALC *Review of the Child Care Act Project* 103 (110/2002) 654.

³² C Eberhard *Giving Children their own Voice in Family Court Proceedings: a German Perspective* (2005) unpublished paper presented at the World Congress on Family Law and Children's Rights at Cape Town, 20-03-2005 – 23-03-2005 (available at https://www.childjustice.org/index.php?option=com_edocman&task=document.viewdoc&id=13&Itemid=&lang=en).

³³ J Cashmore & P Parkinson “Children's Participation in Family Law Disputes: The View of Children of Children, Parents, Lawyers and Counsellors” (2009) 82 *Family Matters* 15 20.

and giving the child a *choice* becomes evident. When it comes to the concept of a child's right to participation, the intention is to give the child a voice rather than a choice. This is because giving them a choice would entail giving them control over the outcome. Giving children the power to have their voices heard, leads to a sense of being empowered and valued without the level of responsibility required for making a choice.³⁴

Children are able to provide important perspectives about their experience that can lead to better informed decisions and possibly more “positive and workable outcomes”.³⁵ In order to create these more positive and workable outcomes and initiate the various advantages to giving children a voice,³⁶ the opportunity to be able to participate, should a child wish to, must first be created.

In their attempt to voice their opinions in matters affecting them, children are usually dependent on whether those who have authority over them consider it to be in their best interests, and whether they are deemed competent to be heard.³⁷ Despite their right to participation being acknowledged in various pieces of legislation and conventions, children are not always heard as a result of, amongst other things, adults (parents, attorneys and judges) who feel that children should not be involved in divorce proceedings for a variety of reasons.³⁸ There are various methods available to obtain the views of the child, such as the appointment of a psychologist or family counsellor, *curator ad litem* or legal representative in terms of section 28(1)(h) of the Constitution, an interview in chambers or a report by the family advocate. Despite the availability of

³⁴ Cashmore & Parkinson (2009) *Family Matters* 20.

³⁵ 15.

³⁶ Timms explains that listening to children when it comes to plans for their future have definite advantages. These advantages include: creating a sense of control of the traumatic situation the child is experiencing, creating a feeling of being respected even when the outcome is not what the child had hoped for and possibly inspiring the parents to think wider when planning the child's future. See J Timms *Can we protect Children and protect their Rights? Letting Children and Youth speak out for themselves*. (2001) unpublished paper presented at the World Congress on Family Law and Children's Rights at Bath 20-09—2001 – 22-09-2001 (available at https://www.childjustice.org/index.php?option=com_edocman&task=document.viewdoc&id=234&Itemid=&lang=en).

³⁷ Timms *Can we protect Children and protect their Rights?*

³⁸ Adults' assumptions of incompetence are based on five overarching preconceived notions, which are that: children's memories are not reliable; they are egocentric; children are extremely easily impressionable; they cannot always distinguish reality from fantasy; children make false accusations. See Timms *Can we protect Children and protect their Rights?*

these methods, case law illustrates that the child's right to participation is not always realised.³⁹

The UNCRC entered into force on 2 September 1990⁴⁰ and was ratified by South Africa on 16 June 1995.⁴¹ As a State Party to the Convention, South Africa has committed to the implementation of the child's "right to express those views freely in all matters affecting the child".⁴² Furthermore, as State Party, South Africa is committed to giving weight to these views in accordance with the child's age and maturity as well as to create an opportunity for the child to, either directly or through representation, have their views heard.

Further, South Africa also ratified the ACRWC on 7 January 2000.⁴³ Article 1 of the ACRWC states that "Member States ... shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter." This implies that South Africa, as State Party to the ACRWC, has agreed to undertake said steps to grant the child who is capable of communicating his or own views, the opportunity to have their views heard, either directly or through an impartial representative as party to the proceedings. These views shall not only be heard, but also considered by the relevant authority in line with appropriate law.

As South Africa is a party to both the UNCRC and the ACRWC, it is necessary to determine whether effect is given to the obligations created by the relevant treaties. The interpretation of the South African legislation and case law that gives content to a child's right to participation in their parents' divorce proceedings and other decisions relating thereto play a vital role in determining whether South Africa fulfils its obligations as a State Party.

³⁹ See discussion in Chapter 3.

⁴⁰ The UNCRC was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990 in accordance with article 49.

⁴¹ United Nations "Status of Treaties: United Nations Convention on the Rights of the Child" (10-04-2019) *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&lang=en> (accessed 10-04-2019).

⁴² Art 12(1) of the UNCRC.

⁴³ ACEWRC "Ratifications Table" (10-04-2019) *African Committee of Experts on the Rights and Welfare of the Child* <<https://www.acerwc.africa/ratifications-table/>> (accessed 10-04-2019); Department: Women, Children and People with Disabilities *South Africa's Combined Second, Third and Fourth Periodic State Party Report to the Committee on the Rights of the Child* (2012) 13.

Section 28(1)(h) of the Constitution grants every child a right to state funded legal representation in civil proceedings affecting the particular child. The right is applicable in situations where a substantial injustice would ensue, should the child not be afforded the legal assistance. In terms of legislation, section 10 of the Children's Act grants every child that is of such age, maturity and stage of development who is able to participate in any matter concerning them, the right to participate in an appropriate way. The child's views must be given due consideration. Furthermore, section 31 of the Act obliges a holder of parental responsibilities and rights to consider the views and wishes of the child when making decisions affecting the child.

In the past, courts have traditionally respected parents' rights to regulate the various aspects of their child's life to their discretion.⁴⁴ Children were seen as "objects of concern" who lacked the necessary capacity to participate and needed to be protected from parental conflict.⁴⁵ Although case law suggests that that some courts focus their attention on the rights and needs of children of divorce, there is no consistency regarding how the law is implemented. For purposes of the research, an overview of judgments clearly shows courts' failures to engage with the child's right to participation in a committed and consistent fashion.

*Rosen v Havenga*⁴⁶ is an example of a case where the child's views were heard and taken into account. In this case, the Court had to decide on matters including guardianship, access and care regarding a 9 year old boy.⁴⁷ The Court explained that a legal representative was appointed in terms of section 28(1)(h) of the Constitution in order to comply with article 12 of the UNCRC.⁴⁸ The defendant, the child's father, suggested that the boy be called to testify in court.⁴⁹ As it would place too much pressure on the boy, Moosa J chose to rather interview the boy in chambers to obtain his views regarding the matter.⁵⁰ Although the boy's views were not the determining factor, the judgment was in line with his views.⁵¹

⁴⁴ SALC *Review of the Child Care Act Project* 654.

⁴⁵ Mundlamamo *The Views of Social Service Providers on the Use of Parenting Plans for Adolescents of Divorced Parents* 127; R Bessner & Department of Justice Canada *Background Paper: The Voice of the Child in Divorce Custody and Access Proceedings 2002-FCY-1E* (2002) 72.

⁴⁶ 2005 (6) SA 535 (C).

⁴⁷ Para .

⁴⁸ Para 6.

⁴⁹ Para 31.

⁵⁰ Para 31.

⁵¹ Para 31 read with para 41.

In *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* (hereafter “*Ex Parte Van Niekerk*”)⁵² the views of two children (both girls, 14 and 15 years of age)⁵³ regarding their father’s access to them, as well as court-mandated therapy, was not considered during their parents’ divorce or the litigation thereafter. The mother was bound by court order to take all steps necessary to persuade her two daughters to attend therapy with their father.⁵⁴ As the children refused to attend treatment with their father, the mother approached the Centre for Child Law, motivated by her fear of being held in contempt of court.⁵⁵ As a result, legal representation was appointed to aid the children in 2004 and the children were joined to the proceedings.⁵⁶ Consequently, the two van Niekerk children were able to appeal against any court order that adversely affected them.⁵⁷

*J v J*⁵⁸ is an example of where a child did not enjoy the right to express his views regarding a matter that greatly affected him. In this case, an 8-year-old’s divorced parents engaged in litigation regarding which primary school their son was to attend. Although the High Court appointed a *curator ad litem* to represent the interests of the child, the child’s views were not canvassed in court and the Court did not even consider the child’s views regarding where he wished to attend primary school.⁵⁹ The *curator ad litem* as well as the Court miserably failed the child and his right to be heard.

In *HG v CG*,⁶⁰ the Court considered sections 10 and 31 of the Children’s Act. In this case an application for the variation of a parenting plan was made, which would enable the primary carer to relocate four children (an 11-year-old boy and a set of 8-year-old triplets) to Dubai.⁶¹ The Court made its appreciation of the sections clear by expressing frustration and disappointment in the social worker and clinical psychologist involved, for advocating that the children’s voices not be heard, despite the contents of sections 10 and 31 of the Children’s Act.⁶² Fortunately, the family counsellor appointed by the

⁵² 2005 JOL 14218 (T)

⁵³ Para 2.

⁵⁴ Para 4.

⁵⁵ Para 5.

⁵⁶ Para 8.

⁵⁷ Para 8.

⁵⁸ 2008 6 SA 30 (C).

⁵⁹ Although the Court quoted sections 31(1) and (2) of the Children’s Act, the Court only addressed subsection (2) which deals with the consideration of the wishes of co-holders of parental responsibilities and rights.

⁶⁰ 2010 3 SA 352 (ECP).

⁶¹ Paras 1-2.

⁶² Para 17.

Office of the Family Advocate obtained the children's views.⁶³ In line with the children's views, the Court ordered that the parenting plan remain unchanged, which meant that the children continued to reside in South Africa.⁶⁴

Another example of where professionals failed to consider the child's views is that of *SH v SR*.⁶⁵ Here, the court-mandated clinical psychologist did not obtain the wishes of the 7-year-old girl regarding her parents' contact arrangements. To comply with sections 10 and 31 of the Children's Act, the Court had to intervene and appointed an advocate to represent the child's interests and to canvas the child's views in court.⁶⁶ Although the child wanted to remain with her mother as she is closer with her mother and had always lived with her,⁶⁷ the Court ordered that the child would primarily reside with her father and enjoy structured contact with her mother.⁶⁸ While the Court did take the child's views into account, the Court explained that her physical, emotional as well as psychological security and development would be better supported if living with her father.⁶⁹

*TC v SC*⁷⁰ is a 2018 Western Cape High Court case that concerned maintenance of a 7-year-old and a 9-year-old. In this case, neither the applicant's nor the respondent's legal teams argued that the children's views should be heard. The Court did not have any recommendations regarding the children's participation to consider, nor did the Court take initiative and address the issue of the children's views. The Court's failure to recognise the child's right to participation in any way is particularly frustrating if one considers the attention that the same Court (then the Cape of Good Hope Provincial Division) paid to the child's right to participation in *Rosen v Havenga*.

In some instances, the Court acknowledges the child's right to participation, but does not deem the child to be capable to enjoy the right as they are too young. In *KM v CM*,⁷¹ a divorce action between the parents of an almost 7-year-old, the Court referred to the child's right to participation in terms of section 10 of the Children's Act

⁶³ *HG v CG* 2010 3 SA 352 (ECP) para 19

⁶⁴ Para 23.

⁶⁵ 2018 JDR 0655 (ECP).

⁶⁶ Para 3.3 read with para 3.4.

⁶⁷ Para 10.

⁶⁸ Para 27.

⁶⁹ Para 23.8.

⁷⁰ 2018 (4) SA 530 (WCC).

⁷¹ 2018 JDR 0093 (GJ).

but commented that “in the current circumstances the children are too young” to share their views.⁷² As a result, the child had no opportunity to share his views regarding relocating to Germany with his mother and the arrangements that accompany such a drastic change.

As previously mentioned, and illustrated above, the adversarial system of litigation is not the ideal system to resolve family disputes. Litigation tends to encourage bitterness and irreconcilability between divorcing parties. Parties to the divorce, including children, are often left “emotionally shattered”.⁷³ The adversarial system of litigation is hostile, formal and confrontational and can have a serious effect on children.⁷⁴ Too often, children become an “arena of struggle where spousal conflict plays out in the form of disputes about care and contact and other parenting issues.”⁷⁵ What adds to the trauma inflicted on the children is that they are often misused as pawns in the tug of war between their parents.

During divorce litigation, children are usually submitted to various forms of evaluation, which can also negatively affect the child. This is clearly illustrated in *J v J* where the 13-year-old child explained to his psychologist that: “I feel very mad, angry, cross when I get test (sic) like this because I am not a lab rat that has to be tested my whole life!!!”.⁷⁶

To avert the problems caused by the adversarial system of traditional court proceedings⁷⁷ and to give effect to the child’s right to participation to the greatest possible extent, alternative methods of realisation must also be explored. For this purpose, mediation, a form of alternative dispute resolution (hereafter “ADR”) is considered. Mediation is an inter-disciplinary process that addresses the psychological functioning of the disputing parents in a way that promotes their own and their children’s best interests.⁷⁸ Internationally, mediators are increasingly starting to include children in the process of family mediation.⁷⁹ Child-inclusive family

⁷² Para 84.

⁷³ De Jong (2005) *TSAR* 34.

⁷⁴ De Jong (2008) *TSAR* 787.

⁷⁵ *TC v SC* 2018 4 SA 530 (WCC) para 2.

⁷⁶ 2008 6 SA 30 (C) para 40.

⁷⁷ Boezaart (ed) *Child Law in South Africa* 135.

⁷⁸ 137.

⁷⁹ Boezaart (ed) *Child Law in South Africa* 152.

mediation creates a space for children to participate in the process and gives parents the opportunity to gain insight into their children's perspectives.⁸⁰

It is the very nature of mediation that justifies courts' sentiments towards family mediation. Mediation is an informal and private process.⁸¹ It is flexible and confidential⁸² and it promotes the best interests of the child.⁸³ In *MB v NB*,⁸⁴ Brassey AJ voiced the High Court's stamp of approval of family mediation and explained that litigation should not necessarily be the first resort, but that legal practitioners should rather make use of an approach that is conducive to conciliation and problem solving, as stipulated in section 6(4) of the Children's Act.⁸⁵

In this case, which dealt with various issues including the patrimonial consequences of the dissolution of the marriage as well as maintenance and specifically the defendant's alleged obligation to finance his son's attending of a private school, the court remarked that "this case cries out for mediation".⁸⁶ The Court further explained that mediation is appropriate for family disputes as:

"they engage the gamut of emotions, from greed through pain to vengefulness; they generally involve the rights of children ... who can only experience fear and bewilderment at the breakdown of love and support on which they, as family members have come to depend."⁸⁷

The Court also remarked that the money spent on legal fees could have been better utilised by the family.⁸⁸

*KM v CM*⁸⁹ concerned the granting of a decree of divorce, maintenance as well as an appropriate care and contact regime relating to the parties' two children.⁹⁰ Here, the High Court voiced its disappointment with the fact that the parties involved were not guided to solve their dispute in a way other than approaching court first.⁹¹ After seventeen days of litigation in the South Gauteng High Court, the plaintiff's legal fees and disbursements alone exceeded R6 million, criminal charges were brought by and

⁸⁰ 152.

⁸¹ 138.

⁸² J Brand, F Steadman & C Todd *Commercial Mediation: A User's Guide* (2012) 25.

⁸³ Boezaart (ed) *Child Law in South Africa* 140.

⁸⁴ 2010 3 SA 220 (GSJ)

⁸⁵ Paras 52-59.

⁸⁶ Para 51 as quoted from *Egan v Motor Services (Bath)* [2007] EWCA Civ 1002.

⁸⁷ Para 52.

⁸⁸ Para 52.

⁸⁹ 2018 JDR 0093 (GJ).

⁹⁰ Para 3.

⁹¹ Para 26.

against both parties and the children were subjected to at least six different assessments by six different professionals. It comes as no surprise that the Court commented that “the question arises as to whom are the beneficiaries of this litigation. It is definitely not the children.”⁹²

It is admitted that mediation is not perfect, and that mediation does not always solve all disputes.⁹³ However, it must be emphasized that the inherent characteristics of mediation⁹⁴ lends itself to addressing the challenges faced by children⁹⁵ in implementing their right to be heard in divorce proceedings.

7 Outline of Chapters

7.1 Chapter 2: A child’s right to participation

This chapter entails an analysis of a child’s right to participation as set out in article 12 of the UNCRC, article 4 of the ACRWC and sections 10 and 31 of the Children’s Act. Here, attention is paid to the concept of participation, how one measures participation, as well as the different degrees of child participation. The chapter contains a discussion of the obligations of State Parties to protect, respect, implement and fulfil the child’s right to participation as enshrined in the UNCRC and the ACRWC. Based on the theory set out in this chapter, a new model of measuring participation is proposed. This model is used throughout the thesis to measure various methods of children’s participation.

7.2 Chapter 3: A child’s right to participation in their parents’ divorce proceedings

This chapter focuses on a child’s right to participation in the specific field of South African divorce matters. This includes a study of how children *can* participate in their parents’ divorce proceedings and, where possible, how children *do* participate in these proceedings. Methods such as consulting with judges in chambers, the services of the family advocate and social workers, parenting plans as well as legal representation in terms of section 28(1)(h) of the Constitution, section 6(2) of the Divorce Act and section

⁹² *KM v CM* 2018 JDR 0093 (GJ) para 26.

⁹³ Cases that should not be mediated as well as factors that contribute that determine the success rate of the proposed mediation will be discussed in Chapter 5.

⁹⁴ Mediation is a voluntary process; it is flexible, informal and confidential. Mediation can save time and costs. It also creates a space to invent creative solutions and provides parties with the opportunity to preserve ongoing relationships. See Brand, Steadman & Todd *Commercial Mediation* 30.

⁹⁵ De Jong (2014) *PER* 2361.

55 of the Children's Act are explored in order to determine to what extent, if any, a child's right to participation is realised.

7.3 Chapter 4: Comparative analysis

This chapter considers how and to what measure a child's right to participation in their parents' divorce matter is realised in Australia. To achieve this, an analysis of Australia's relevant national legislation is conducted. Academic commentary and case law is discussed in order to determine to what extent the child's right to participation is in fact realised, for example by contrasting possible participation with effective participation.

7.4 Chapter 5: Mediation as model

This chapter investigates mediation as possible alternative to the "traditional" methods of participation contained in Chapter 3. To do so, a general overview of mediation is given which includes the definition and characteristics of mediation; why it is suitable in the context of divorce matters as well as court's sentiments towards divorce mediation. Furthermore, the different types of mediation are discussed in the context of the various opportunities for mediation in the Children's Act. This is followed by an explanation of the role of the mediator; their training and accreditation. How and when mediators can facilitate the child's participation and how they can create a child-friendly environment for the child to realise their right to participation is also discussed.

7.5 Chapter 6: Conclusion

The concluding chapter provides an answer to the primary and secondary research questions. These answers will be based on the analysis of the relevant sources of the child's right to participation. Furthermore, the chapter also summarises the lessons learnt from the comparative study and recommendations are made regarding more effective ways in which to realise a child's right to participation in divorce matters.

Chapter 2:

Children's Participation

1 Introduction

The chapter consists of an analysis of the right to participation as set out in the United Nations Convention on the Rights of the Child (hereafter "UNCRC");⁹⁶ the African Charter on the Rights and the Welfare of the Child (hereafter "ACRWC");⁹⁷ and the South African Children's Act 38 of 2005 (hereafter "Children's Act"). As a point of departure, the concept of participation will be investigated in order to gain a better understanding of what the child's right to participation entails.

This chapter is significant in that it serves as a basis for the rest of the thesis by providing a proposed model against which to measure participation.

2 Defining participation

The word *participate* refers to "being involved" or "taking part".⁹⁸ The term *participation* is often used in the general sense to refer to the process of sharing decisions which impacts on one's life.⁹⁹ *Participation* can refer to either a process or an outcome.¹⁰⁰ The United Nations Committee on the Rights of a Child (hereafter the "Committee"),¹⁰¹ in approaching the concept of participation from a functional point of view, defines participation as "to speak, to participate, to have [the child's] views taken into account".¹⁰²

⁹⁶ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (1989) (hereafter "UNCRC").

⁹⁷ African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1990) (hereafter "ACRWC")

⁹⁸ Anonymous "Participation" *Oxford English Dictionary* <<https://www.oed.com/view/Entry/138245?redirectedFrom=participation#eid>> (accessed 03-06-2019).

⁹⁹ R Hart *Children's Participation from tokenism to citizenship* (1992) 1 5.

¹⁰⁰ N Thomas "Towards a Theory of Child Participation" (2007) 15 *Int'l J. Child. Rts.* 199 199.

¹⁰¹ The United Nations Committee on the Rights of the Child, a group of independent international experts on the topic of children's rights, monitors State Parties' compliance with the UNCRC. L Lundy "'Voice' is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 *BERJ* 927 928. CRC Committee *General Comment No. 12: The Right of the Child to be Heard* (2009) CRC/C/GC/12 (hereafter "CRC Committee General Comment 12") was drafted by the Committee in 2009 and provides great insight and context to the interpretation and analysis of the child's right to be heard.

¹⁰² CRC Committee *Day of General Discussion on the Right of the Child to be Heard* (2006) 1 2.

In respect of children, facilitating their participation involves creating a space for a child to act and think on their own, as well as for adults to attach value to their contributions.¹⁰³ According to Matthews, children's participation is "an essential and moral ingredient of any democratic society – enhancing quality of life; enabling empowerment; encouraging psycho-social well-being; and providing a sense of inclusiveness".¹⁰⁴

Participation also involves informing the child in an appropriate manner of the current state of affairs, rather than leaving it to the child's imagination.¹⁰⁵ Children's participation implies that, in circumstances where it is not possible to act in accordance with the child's wishes for whichever reason, the child is entitled to an explanation as to the consideration given to his or her views and why it should not be implemented.¹⁰⁶ It is also important to realise that, in most instances, participation will not take place on one occasion, but rather over a period of time.¹⁰⁷

Adults often fail to recognise children's abilities due to them assessing children from an adult perspective.¹⁰⁸ Their acceptance of generalised conceptions of children and what is in their best interest, fails to take into account how important it is for the well-being of a child to have his or her views listened to and to be taken seriously.¹⁰⁹ Some of the greatest challenges in addressing children's participation are the labels that adults attach to children, as well as the ways in which children are analysed and theorised.¹¹⁰

¹⁰³ AE Boniface "Resolving Disputes with Regards to Child Participation in Divorce Mediation" (2013) 1 *Speculum Juris* 130 131.

¹⁰⁴ Thomas (2007) *Int'l J. Child. Rts.* 200.

¹⁰⁵ Centre for Child Law, University of Pretoria *Guidelines for legal representatives of children* 58.

¹⁰⁶ Lansdown *Can you hear me?: The Right of Young Children to Participate in Decisions Affecting Them* 3.

¹⁰⁷ R Chisholm *Softening the Blow- Changing Custody to Residence* (2001) unpublished paper presented at the World Congress on Family Law and Children's Rights at Bath, 20-09-2001 – 22-09-2001 (available at https://www.childjustice.org/index.php?option=com_edocman&task=document.viewdoc&id=203&Itemid=&lang=en).

¹⁰⁸ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 5.

¹⁰⁹ M Henaghan *Children and Lawyers Acting for Children in Legal Proceedings – What does a Child's Right to be heard in Legal Proceedings really mean?* (2005) unpublished paper presented at the World Congress on Family Law and Children's Rights at Cape Town, 20-03-2005 – 23-03-2005 (available at https://www.childjustice.org/index.php?option=com_edocman&task=document.viewdoc&id=126&Itemid=&lang=en).

¹¹⁰ Thomas (2007) *Int'l J. Child. Rts.* 206.

Adults naturally make assumptions about children's participation, such as: that it will make children act disrespectful towards adults;¹¹¹ that it may place children at risk as it inappropriately burdens children with responsibility;¹¹² and consequently deprives children of their childhood.¹¹³ Although it is clear that cultural diversity within South Africa has led to adults holding a variety of views on what is suitable for children, the bias towards protection rather than participation finds its roots in the hierarchies separating children from adults in South Africa.¹¹⁴

There are various arguments in favour of children's right to participation. This has led to a new recognition of the value of giving children the opportunity to have their voices heard.¹¹⁵ The empowerment rationale entails that children benefit from their participation in several ways,¹¹⁶ including: acquiring better levels of competence, which enhances the quality of participation;¹¹⁷ learning the value of political self-determination;¹¹⁸ and being less vulnerable to abuse as they are better able to contribute to their own safety when encouraged to express their views and wishes.¹¹⁹ Children furthermore benefit from participation as it leads to them experiencing an increase in self-esteem, personal autonomy and a sense of self;¹²⁰ and developing social responsibility and social competence.¹²¹ Their participation also creates a sense of control and the positive feeling of being heard, even if their wishes are not

¹¹¹ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 21.

¹¹² 18.

¹¹³ Chisholm *Softening the Blow- Changing Custody to Residence*.

¹¹⁴ S Moses "Children and Participation in South Africa: An overview" (2008) 16 *Int'l J Child Rts* 327 336.

¹¹⁵ Cashmore & Parkinson (2009) *Family Matters* 15.

¹¹⁶ 15.

¹¹⁷ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 7.

¹¹⁸ Hart *Children's Participation from tokenism to citizenship* 36.

¹¹⁹ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 9.

¹²⁰ Thomas (2007) *Int'l J. Child. Rts.* 200; C Eberhard *Giving Children their own Voice in Family Court Proceedings: a German Perspective* (2005) unpublished paper presented at the World Congress on Family Law and Children's Rights at Cape Town, 20-3-2005 – to 23-03-2005 (available at https://www.childjustice.org/index.php?option=com_edocman&task=document.viewdoc&id=13&Itemid=&lang=en).

¹²¹ Hart *Children's Participation from tokenism to citizenship* 93.

followed;¹²² reduces levels of anxiety, especially in uncertain times;¹²³ as well as an understanding and appreciation of democracy.¹²⁴

The enlightenment rationale on the other hand, entails that children have the ability to provide more information regarding their experience and perspective than adults can, which can contribute to more workable outcomes and informed decisions.¹²⁵ Introducing the child's voice to the solution-finding process often leads to the discovery of new alternatives and ideas.¹²⁶

3 Sources of a child's right to participation

3 1 The United Nations Convention on the Rights of the Child ("UNCRC")

3 1 1 Introduction

The UNCRC is an internationally agreed upon set of standards and obligations that recognise the rights that children are born with, independent of adults.¹²⁷ The Convention is universally acknowledged as the most vital definition or standard of children's rights and thus serves as a benchmark against which progress towards the realisation of these rights can be measured.¹²⁸ The UNCRC is also the most ratified convention in the world¹²⁹ and is considered to be a "landmark in the history of childhood".¹³⁰ By ratifying the UNCRC, signatory states, such as South Africa, have agreed to "undertake all appropriate legislative, administrative, administrative and other measures to implement the rights" as described in the Convention.¹³¹

There are four articles underpinning the general principles of the Convention, namely: article 3 (best interests of the child), article 2 (non-discrimination), article 6 (right to life, survival and development) and article 12 (respect for the views of the

¹²² Eberhard *Giving Children their own Voice in Family Court Proceedings: a German Perspective*; Chisholm *Softening the Blow - Changing Custody to Residence*.

¹²³ Chisholm *Softening the Blow - Changing Custody to Residence*.

¹²⁴ Thomas (2007) *Int'l J. Child. Rts.* 200.

¹²⁵ Cashmore & Parkinson (2009) *Family Matters* 15.

¹²⁶ Eberhard *Giving Children their own Voice in Family Court Proceedings: a German Perspective*.

¹²⁷ Mundlamamo *The Views of Social Service Providers on the Use of Parenting Plans for Adolescents of Divorced Parents* 45.

¹²⁸ 45.

¹²⁹ D De Bruin *Child Participation and Representation in Legal Matters* LLD thesis, University of Pretoria (2010) 221.

¹³⁰ Bessner & Department of Justice Canada *The Voice of the Child in Divorce Custody and Access Proceedings* 11.

¹³¹ Art 4 of the UNCRC.

child).¹³² According to Van Bueren, the UNCRC creates new rights for children and protects them, creates binding standards and new obligations, all of which are enjoyed by all children without any discrimination.¹³³

3 1 2 *The child's right to participation under article 12*

Although respect for children as participants is evident throughout the Convention, it is most clearly seen in article 12,¹³⁴ which states that:

- “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Lundy describes the text of article 12 as “a deliberate product which represents the hard-won consensus of the global community”.¹³⁵ A negative consequence of the careful deliberation that went into formulating the article is that the wording does not “trip off the tongue” and is not easily recalled word by word.¹³⁶ Although there is a need for a shortened version of the text, there is a danger that the content and significance of the obligation may get lost in an abbreviated form, regardless of how convenient it may be in practice.¹³⁷ Common shorthand terms include the child’s “right to be heard” or the “the voice of the child”.¹³⁸ The Committee issued General Comment 12 in order to provide guidance as to the implementation of article 12 has confirmed that, although the term *participation* is not used in the text of the article, the concept of participation is a legitimate description of article 12.¹³⁹

¹³² Mundlamamo *The Views of Social Service Providers on the Use of Parenting Plans for Adolescents of Divorced Parents* 46; De Bruin *Child Participation and Representation in Legal Matters* 225.

¹³³ De Bruin 227.

¹³⁴ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 1.

¹³⁵ Lundy (2007) *BERJ* 933.

¹³⁶ 933.

¹³⁷ 933

¹³⁸ L Lundy, J Tobin & A Parkes “Article 12: The Right to Respect for the Views of the Child” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 397 404.

¹³⁹ Lundy, Tobin & Parkes “Article 12” in *The UN Convention on the Rights of the Child* 404; CRC Committee *General Comment 12* paras 3 & 7.

Article 12 calls for children to enjoy a participatory right in proceedings that affect them.¹⁴⁰ As a result, Article 12 has two key elements; the child's right to express his or her view, and the right to have that view be given due weight. Neither of these two elements are absolute and the wording of article 12 contain additional phrases that expand and qualify the application of the two elements.¹⁴¹ It is a substantive right that gives children the opportunity to be actors in their own lives, rather than just being on the receiving end of adult protection and care.¹⁴² The rights in article 12 relate to all matters affecting the child and erases the traditional and exclusive area of adult-only decision-making.¹⁴³

It is important to view article 12 as part of a package of participation rights, which includes: article 13 (freedom of expression), article 14 (freedom of thought, conscience and religion), article 15 (freedom of association) and article 17 (right to information).¹⁴⁴ Alongside these other key rights in the UNCRC, article 12 recognises the child as an active agent in his or her own life.¹⁴⁵

Article 12 implies that children's participation has become a prominent feature in the field of children's rights¹⁴⁶ and has undoubtedly raised the profile of children's participation.¹⁴⁷ Despite its raised profile, limited awareness of article 12 itself is an ongoing obstacle to the successful implementation of the right.¹⁴⁸ Article 12 has not only been identified as one of the most far-reaching rights in the Convention,¹⁴⁹ but also as one of the least understood¹⁵⁰ and most widely violated rights in the lives of children.¹⁵¹

¹⁴⁰ C Barnett & JC Wilson "Children's "Wishes" in The Australian Family Court: Are They Wishful Thinking?" (2004) 11 *Psychiatry, Psychol & L* 73 73.

¹⁴¹ Lundy (2007) *BERJ* 931.

¹⁴² Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 1.

¹⁴³ Bessner & Department of Justice Canada *The Voice of the Child in Divorce Custody and Access Proceedings* 73..

¹⁴⁴ Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 401.

¹⁴⁵ G Lansdown, Save the Children & UNICEF *Every child's right to be heard* (2011) 3.

¹⁴⁶ Mundlamamo *The Views of Social Service Providers on the Use of Parenting Plans for Adolescents of Divorced Parents* 51.

¹⁴⁷ H Shier "Pathways to Participation: Openings, Opportunities and Obligations" (2001) 15 *Children & Society* 107 107.

¹⁴⁸ Lundy (2007) *BERJ* 930.

¹⁴⁹ Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 398.

¹⁵⁰ 402.

¹⁵¹ Shier (2005) *Children & Society* 107.

3 1 3 *An analysis of article 12(1) of the UNCRC*

3 1 3 1 The beneficiaries of the right

A right to participation is given “to the child who is capable of forming his or her own views”, in matters affecting him or her. The only proviso in article 12(1) of the UNCRC is that the child must be “capable of forming his or own views”.¹⁵² According to the Committee, this phrase must be seen as an obligation placed on State Parties to assess a child’s ability to form their own view to the largest extent possible.¹⁵³

The prerequisite that children must be capable of forming their own views presents a potential risk that adults may impose subjective standards as to when a child is able to form his or her view.¹⁵⁴ Adults who act as “gatekeepers” to article 12 directly contradict research that indicates that children are more capable than adults give them credit for.¹⁵⁵ It is clear that a child’s ability to make decisions increases proportionately to the opportunities they are offered to participate.¹⁵⁶

A child’s age should not inhibit them to participate in matters affecting them.¹⁵⁷ The Committee emphasises that children can form and express views from the earliest age, but that the nature of their participation will develop in line with their age and developing abilities.¹⁵⁸ The fact that there is no minimum age set for a child to enjoy this particular right can create legal uncertainty. The reality is, however, that establishing a fixed age would be problematic as children of different ages vary in their abilities.¹⁵⁹ Hodgkin and Newell emphasise that the UNCRC does not support state parties setting an age limit on a child’s right to participation.¹⁶⁰ The Committee proposes that state parties should work with a presumption that the child has the capacity to form a view and that it should not be up to the child to prove his or her capabilities.¹⁶¹

¹⁵² Lundy (2007) *BERJ* 935.

¹⁵³ CRC Committee *General Comment 12* para 20.

¹⁵⁴ Lundy et al “Article 12” in *The UN Convention on the Rights of the Child* 405.

¹⁵⁵ Lundy (2007) *BERJ* 937.

¹⁵⁶ Lundy et al “Article 12” in *The UN Convention on the Rights of the Child* 399.

¹⁵⁷ M Fernando “Family Law Proceedings and the Child’s Right to be Heard in Australia, The United Kingdom, New Zealand and Canada” (2014) 52 *Family Court Review* 46 47.

¹⁵⁸ CRC Committee *Day of General Discussion 3*.

¹⁵⁹ Boniface (2013) *Speculum Juris* 134.

¹⁶⁰ R Hodgkin & P Newell *Implementation Handbook for the Convention on the Rights of the Child* 3 ed (2007) 155.

¹⁶¹ CRC Committee *General Comment 12* para 20.

Article 12 does not require a child to demonstrate a comprehensive understanding of the matter affecting them. The Committee, however, suggests that a child must have “sufficient understanding to be capable of appropriately forming his or her views on the matter”.¹⁶² Based on the Committee’s comment, it is reasonable to say that a child should at least have an understanding of the issue at hand that is sufficient to enable the child to form their own view.¹⁶³ A child’s right to express his or her view is not dependent on their ability to form a *mature* view; it is only dependent on their ability to form *a* view.¹⁶⁴

It is important to remember that not all children express their views verbally. Full implementation of article 12 requires recognition of non-verbal forms of communication, such as body language, drawing, play and facial expressions.¹⁶⁵ The beneficiaries of article 12 is therefore a broad class of children who are able to form a view, regardless of the quality or form of expression of the view.¹⁶⁶

3 1 3 2 The scope and content of the right

3 1 3 2 1 “The right to express those views freely”

Article 12(1) of the UNCRC grants the relevant child “the right to express those views freely”. It is accepted that the article embodies a right and not a duty.¹⁶⁷ The aim of the article is not to pressure or to force a child to participate, but rather to provide them with a right to an opportunity to participate, should they wish to do so.¹⁶⁸ As it is a right and not a duty, the child is free to choose whether or not to exercise the right.¹⁶⁹

To be able to express his or her views, a child needs relevant and appropriate information based on which he or she can form their opinion.¹⁷⁰ A child also needs

¹⁶² Lundy et al “Article 12” in *The UN Convention on the Rights of the Child* 405.

¹⁶³ 405.

¹⁶⁴ Lundy (2007) *BERJ* 927 & 935.

¹⁶⁵ CRC Committee *General Comment 12* 21; Lundy et al “Article 12” in *The UN Convention on the Rights of the Child* 406.

¹⁶⁶ Lundy et al “Article 12” in *The UN Convention on the Rights of the Child* 406.

¹⁶⁷ CRC Committee *General Comment 12* para 16; Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 21.

¹⁶⁸ Mundlamamo *The Views of Social Service Providers on the Use of Parenting Plans for Adolescents of Divorced Parents* 48.

¹⁶⁹ Lansdown et al *Every child’s right to be heard* 22.

¹⁷⁰ 22.

space, time and encouragement to articulate these views confidently.¹⁷¹ The child needs safety to explore his or her views without the fear of punishment or criticism.¹⁷²

Lastly, it is the child's *own* views that he or she can express *freely*, without pressure, undue influence or manipulation from others.¹⁷³ The child must be able to express his or her with no constraint or coercion.¹⁷⁴

3 1 3 2 2 “In all matters affecting the child”

The inclusion of the phrase “in all matters affecting the child” distinguishes the right in article 12 from article 13 of the UNCRC, which grants the child the right to freedom of expression.¹⁷⁵ A child's right to participation applies to all relevant settings without limitation.¹⁷⁶ The Committee supports a wide interpretation of “all matters concerning the child”.¹⁷⁷ The range of matters on which a child is able to express his or her views should not be limited to a list of specific matters or the matters dealt with under the UNCRC.¹⁷⁸ Examples of matters that could affect a child include care and adoption cases, sexual abuse, the divorce of parents, applications for asylum or refugee status,¹⁷⁹ education and health.¹⁸⁰

The ordinary meaning of the word “affecting” implies that there must at least be some connection between the child and the particular matter.¹⁸¹ Children may often not realise that a certain matter has an effect on their lives. The State's obligation to “assure” the meaningful and effective enjoyment of this right includes taking steps to make the child aware of the matter.¹⁸² This obligation is in line with a child's right to receive information in terms of article 17 of the UNCRC.¹⁸³

¹⁷¹ Lansdown et al *Every child's right to be heard* 22.

¹⁷² 22.

¹⁷³ 22.

¹⁷⁴ Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* 155.

¹⁷⁵ Lundy et al “Article 12” in *The UN Convention on the Rights of the Child* 408.

¹⁷⁶ CRC Committee *Day of General Discussion 4*; *CRC General Comment 12* para 32.

¹⁷⁷ Lansdown et al *Every child's right to be heard* 22.

¹⁷⁸ Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* 155.

¹⁷⁹ CRC Committee *Day of General Discussion 4*.

¹⁸⁰ Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* 149.

¹⁸¹ Lundy et al “Article 12” in *The UN Convention on the Rights of the Child* 408.

¹⁸² 410.

¹⁸³ 410.

3 1 3 2 3 “The views of the child being given due weight in accordance with the age and maturity of the child”

It is not enough to simply listen to a child’s views. His or her views must be given serious consideration when decisions are being made.¹⁸⁴ This, however, must be done in line with the age and maturity of the child, as the child’s age and maturity will influence their understanding of the possible implications of the matter.¹⁸⁵ This does not mean that younger children’s views should automatically carry less weight.¹⁸⁶ Often very young children can show a high level of maturity that suggests that they do indeed understand the situation in which they find themselves.¹⁸⁷

Further, the child’s right to express his or her views on matters affecting them does not imply that the child’s views *must* be complied with.¹⁸⁸ It does however, give the child an opportunity to influence the outcome of a matter affecting him or her.¹⁸⁹ The relevant phrase acts as a justified practical restraint on the respect paid to the child’s views, as a result of the fact that some children may lack knowledge and experience to completely understand the consequences of implementing his or her views.¹⁹⁰ However, when it is not possible to give effect to the child’s views, the child should be informed of the motivations behind the decision.¹⁹¹ Article 12 provides two factors that must be considered when determining the weight attached to the child’s views, namely age and maturity.¹⁹² Although a child’s level of maturity will generally increase with age, these considerations are not to be treated as substitutes for one another.¹⁹³

The degree to which a child a child is involved is to be determined on a case by case basis and although it may be a difficult task to ensure that the child participates in the appropriate manner, it is a challenge that should not be avoided.¹⁹⁴ Adults should create the opportunities for children to express their views when they are able

¹⁸⁴ A Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* LLM thesis, University of Pretoria (2013) 11.

¹⁸⁵ Lansdown et al *Every child’s right to be heard* 23.

¹⁸⁶ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 4.

¹⁸⁷ Lansdown et al *Every child’s right to be heard* 23.

¹⁸⁸ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 3.

¹⁸⁹ Boniface (2013) *Speculum Juris* 135.

¹⁹⁰ Lundy et al “Article 12” in *The UN Convention on the Rights of the Child* 403.

¹⁹¹ Lansdown et al *Every child’s right to be heard* 23.

¹⁹² Lundy et al “Article 12” in *The UN Convention on the Rights of the Child Commentary* 411.

¹⁹³ 411.

¹⁹⁴ Chisholm *Softening the Blow - Changing Custody to Residence*.

and ready to do so.¹⁹⁵ The age at which this ability and readiness occurs can differ greatly in accordance with various external and internal factors in the child's life.¹⁹⁶

When determining whether a child is able to express his or her views and the amount of weight that will be attached to it, one cannot simply make use of age-related norms or developmental stages to determine the child's capabilities.¹⁹⁷ The child's participation should not be inhibited based on age alone.¹⁹⁸ In the process of determining the extent of the child's participation, attention should be paid to factors including the child's age, the degree to which the expression of the wish or view is clear and unequivocal, the child's maturity level, whether the child understands the nature of the relevant decision, the duration of time over which the wish has been expressed, possible influence of a parent or parents,¹⁹⁹ the child's social and emotional development as well as the child's perspective taking abilities.²⁰⁰

The Committee describes maturity as "the ability to understand and assess the implications of a particular matter".²⁰¹ The question as to how much weight should be attached to the child's views, remains.²⁰² What makes answering this so complex, is that the weight is usually dependent on the involved adults' perception of children's capacities.²⁰³ One of the most common criticisms of article 12 is that it is easy for the adults involved to superficially comply with the article, but ignore the child's view in the end.²⁰⁴ To this end, levels of participation and how one measures participation will be discussed below.²⁰⁵

Children's participation can occur to different degrees. Deeper levels of participation are linked to greater influence on a decision and more opportunities for personal

¹⁹⁵ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 2.

¹⁹⁶ Hart *Children's Participation from tokenism to citizenship* 31.

¹⁹⁷ 31.

¹⁹⁸ CRC Committee *Day of General Discussion* 8.

¹⁹⁹ RJ Williams *If wishes were Horses, then Beggars would die* (2001) unpublished paper presented at the World Congress on Family Law and Children's Rights at Bath, 20-09-2001 – 22-09-2001 (available at: https://www.childjustice.org/index.php?option=com_edocman&task=document.viewdoc&id=214&Itemid=&lang=en).

²⁰⁰ Hart *Children's Participation from tokenism to citizenship* 32.

²⁰¹ CRC Committee *General Comment 12* para 30.

²⁰² Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 411.

²⁰³ Lundy (2007) *BERJ* 937.

²⁰⁴ 938.

²⁰⁵ See 4 Measuring Participation.

growth.²⁰⁶ Children's participation as a concept is broad and as a result can refer to a variety of different practices with different goals and implications that take place in different contexts.²⁰⁷

3 1 4 State Parties' obligations

Article 12 provides that "State Parties shall assure" the right to the child as described in the text of the relevant provision. Thus, the article places a direct obligation on State Parties to take all appropriate measures to provide them with the opportunity to express their views and wishes regarding matters that have an impact on them.²⁰⁸ Although State Parties have a level of discretion regarding the measures they adopt, they cannot choose to adopt no measures to realise a child's rights in terms of article 12.²⁰⁹

In terms of article 4 of the UNCRC, State Parties are obliged to:

"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."

"Shall" implies that it is a State Party's obligation and not a State Party's choice. "Assure" is a legal term that carries specific legal strength.²¹⁰ According to Lundy, the use of the word *assure* rather than phrases such as "use their best efforts to ensure" or "take appropriate measures to ensure", which appear in the UNCRC, illustrate the obligation on State Parties to actively take steps to realise the child's right to participation.²¹¹

Measures taken by State Parties, must be "effective, ethical and meaningful" as well as consistent with other rights contained in the UNCRC.²¹² For children's participation to be effective and meaningful there are four vital components that must be present: (i) an ongoing process of active involvement; (ii) the respectful sharing of information;

²⁰⁶ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 14.

²⁰⁷ Moses (2008) *Int'l J. Child. Rts.* 327.

²⁰⁸ Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* 10.

²⁰⁹ Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 403.

²¹⁰ CRC Committee *General Comment 12* para 19.

²¹¹ Lundy (2007) *BERJ* 933-924.

²¹² Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 417.

(iii) power for children to exercise influence; and (iv) an acknowledgement of children's abilities and their interest in the matter at hand.²¹³

In order to fulfil their obligations, State Parties should adopt the strategies as set out by the Committee, namely, to review and withdraw declarations and reservations that restrict the workings of article 12, establish independent human rights commissions, provide training on article 12 and its application in practice, ensure appropriate conditions for encouraging children to communicate their views and also to combat negative attitudes towards children's participation.²¹⁴

The Committee has also outlined five key steps in an effort to facilitate the effective implementation of article 12.²¹⁵ These steps involve the preparation of the child, the hearing, assessment of the child's capacity, providing the child with feedback as well as an opportunity to complain.

3 1 5 *An analysis of article 12(2) of the UNCRC*

3 1 5 1 Scope and content of the right

The right involves being "heard in any judicial and administrative proceedings affecting the child".²¹⁶ The inclusion of administrative proceedings further broadens the scope to include, for example, formal decision-making.²¹⁷ The Committee has emphasised that both judicial and administrative proceedings can involve alternative dispute resolution processes such as mediation, arbitration and conciliation.²¹⁸ The child's right to participation applies to judicial and administrative proceedings initiated by the child as well as proceedings initiated by others in which the child has an interest.²¹⁹ Article 12 should not be interpreted to automatically exclude children who are not the main principle of concern in judicial or administrative proceedings.²²⁰

²¹³ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 13.

²¹⁴ CRC Committee *General Comment 12* para 49.

²¹⁵ Lansdown et al *Every child's right to be heard* 51-57; Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 432.

²¹⁶ Art 12(2) of the UNCRC.

²¹⁷ Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* 156.

²¹⁸ CRC Committee *General Comment 12* para 19.

²¹⁹ Lansdown et al *Every child's right to be heard* 24.

²²⁰ Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 422.

It is true that a child's participation cannot be meaningful and effective in an intimidating, hostile and insensitive environment.²²¹ Fortunately, the need for courts to be adapted in order to enable children to participate, is increasingly acknowledged. This could include changes such as separate waiting rooms for children, hearing testimony in camera, and judges hearing the views of the child in more informal clothing.²²² Further, a child's right to participation is not limited to judicial proceedings. The inclusion of administrative proceedings further broadens the scope to include, for example, formal decision-making.²²³

3 1 5 2 Mode of participation

3 1 5 2 1 "Either directly or indirectly through representative or an appropriate body"

Article 12 does not explicitly state when a child's views are to be heard directly and when they should be heard via representation. Therefore, a child's view can be communicated either directly by the child, or indirectly through a representative or an appropriate body.

The right to be heard directly involves the presumption that a child capable of forming their own views has the right to be heard in person by the presiding body or person facilitating the proceedings.²²⁴ The Committee recommends that the choice between direct and indirect participation is to be made by the child and that, where possible, the child must be given the chance to be heard directly.²²⁵ If a child's views are expressed through a representative, it is important to remember that it is the child's views that should be expressed, and not those of the representative.²²⁶

Although the representation of a child is not restricted to representation by a lawyer, it does not mean that anyone can represent a child.²²⁷ A representative must be competent and independent to be deemed appropriate.²²⁸ A conflict of interest is not

²²¹ CRC Committee *General Comment 12* para 34.

²²² Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* 156.

²²³ 156.

²²⁴ Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 424.

²²⁵ CRC Committee *General Comment 12* para 35; Fernando (2014) *Family Court Review* 47.

²²⁶ Lansdown et al *Every child's right to be heard* 24.

²²⁷ Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 427.

²²⁸ 427.

allowed. The notion of competency and appropriateness further demands that the child's views are communicated correctly to the decision-maker involved.²²⁹

The phrase "an appropriate body" must not be interpreted narrowly.²³⁰ An appropriate body can be a relevant social agency or institution,²³¹ for example, the Centre for Child Law in Pretoria, an impact litigation organisation that has represented children in many cases since 1998.²³²

There exists a debate within the field of legal representation of children regarding which form of representation is to be preferred.²³³ The Committee makes no comment regarding whether the best interests model (representing the child's best interests) or a client directed model (representing only the child's views) would give greater effect to article 12.²³⁴ These models will be discussed in Chapter 3.

3 1 5 2 2 "Represented in a manner consistent with law"

The Committee has emphasised that these words should not allow inadequate solutions in procedural law to prevent a child from enjoying this right.²³⁵ In fact, state parties are encouraged to comply with the basic principles of fair proceedings, for example, by allowing the child to view his or her own files.²³⁶ Courts should act with flexibility to admit children's evidence that might otherwise be inadmissible in terms of the law of evidence.²³⁷ Furthermore, there is a need for further special procedures and rules to ensure a child's right to participation.²³⁸ It is important to note that any new rules may not violate any of the other rights under the UNCRC.²³⁹

²²⁹ Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 428.

²³⁰ 431.

²³¹ 431.

²³² For more information on the Centre for Child Law see <https://centreforchildlaw.co.za/>.

²³³ Lundy et al "Article 12" in *The UN Convention on the Rights of the Child* 428.

²³⁴ 429.

²³⁵ CRC Committee *General Comment 12* para 34.

²³⁶ Lansdown *Every child's right to be heard* 26.

²³⁷ SALRC *Family Dispute Resolution: Care and Contact with Children* 31 (100D/2015) 57.

²³⁸ Lansdown et al *Every child's right to be heard* 26.

²³⁹ Lundy et al "Article 12" in *The UN Convention on the Rights of the Child*

3 2 The African Charter on the Rights and Welfare of the Child (“ACRWC”)

3 2 1 Background

The ACRWC, similar to the UNCRC, extensively defines universal rights, norms and principles as they relate to children.²⁴⁰ The ACRWC was the first regional treaty addressing the human rights of a child.²⁴¹ The UNCRC was deemed inadequate in an African context by the African countries involved in the drafting of the Convention.²⁴² Another problem was that African involvement in the drafting of the UNCRC was limited.²⁴³ As a result, the ACRWC was drafted to give specific regional application to the rights contained in the UNCRC.²⁴⁴ The ACRWC entered into force on 29 November 1999²⁴⁵ and was ratified by South Africa on 7 January 2000.²⁴⁶ The ACRWC reflects the priorities of Africa²⁴⁷ and its value must therefore be viewed against the reality of the child’s status in Africa.²⁴⁸

Although the ACRWC is not as widely known as the UNCRC and the UNCRC’s influence has been more extensive,²⁴⁹ the African Charter is also bound to impact the child’s participatory right in South Africa.²⁵⁰ African governments were much quicker to ratify the UNCRC than they were to ratify the ACRWC.²⁵¹ While the UNCRC entered into force less than a year after it was adopted by the United Nations General Assembly, the African Charter only entered into force in 1999, more than nine years after it was adopted by the Organization of African Unity (hereafter “OAU”).²⁵² This

²⁴⁰ Mundlamamo *The Views of Social Service Providers on the Use of Parenting Plans for Adolescents of Divorced Parents* 29.

²⁴¹ K Abrahams & T Matthews *Promoting Children’s Rights in South Africa: a Handbook for Members of Parliament* (2011) 28.

²⁴² Mulhoga and Wako list some of the specific issues not addressed satisfactorily or at all in the UNCRC. These issues include: the situation of children living under Apartheid, children and expectant mothers in prison, child soldiers, disadvantages influencing female children, practices such as female genital mutilation, socio-economic conditions and the conception of the community’s responsibilities. See Abrahams & Matthews *Promoting Children’s Rights in South Africa* 28.

²⁴³ T Boezaart (ed) *Child Law in South Africa* 2ed (2017) 355. For five of the nine years that the drafting of the final proposal took, only three African states were involved. Nine African states were involved by 1989. See Boezaart (ed) *Child Law in South Africa* 426.

²⁴⁴ Abrahams & Matthews *Promoting Children’s Rights in South Africa* 28.

²⁴⁵ Boezaart (ed) *Child Law in South Africa* 2ed 426.

²⁴⁶ 349.

²⁴⁷ 349.

²⁴⁸ De Bruin *Child Participation and Representation in Legal Matters* 228.

²⁴⁹ A Imoh & N Ansell *Children’s Lives in an Era of Children’s Rights: The Progress of the Convention on the Rights of the Child in Africa* (2014) 111.

²⁵⁰ De Bruin *Child Participation and Representation in Legal Matters* 229.

²⁵¹ 214.

²⁵² Imoh & Ansell *Children’s Lives in an Era of Children’s Rights* 111-112. The OAU is the African Union’s predecessor.

delay was the result of the time it took for the Charter to reach the required number of 15 ratifications.²⁵³ While all African Governments have ratified the UNCRC, there are nine African governments that have not yet ratified the ACRWC.²⁵⁴

3 2 2 *The right to participation under the ACRWC*

Similar to the UNCRC, the ACRWC is based on four cornerstone principles that are meant to be used to interpret the Charter. These principles are non-discrimination, the best interests of the child, the right to life, survival and development, and the views of the child.²⁵⁵

Article 4(2) of the ACRWC is concerned with the participation of the child and determines that:

“In all judicial or administrative proceedings affecting the 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 provision of appropriate law.”

Boezaart categorises the child’s right to participation as a self-asserting right and explains that the Charter regards the child as an active participant in proceedings that may affect him or her.²⁵⁶ The child should be granted the opportunity to share his or her views regarding the interpretation of the concept of the best interests, as it relates to the particular child.²⁵⁷ The notion of the child as a self-asserting and autonomous person is further enhanced by article 7 (freedom of expression), article 8 (freedom of association) and article 9 (freedom of thought, conscience and religion).²⁵⁸

The right afforded to the child to express his or her views is not without limits. The right is only assured to a child who is capable of communicating his or her views. This restriction can be viewed in contrast to the text of article 12 of the UNCRC which requires a child to be “capable of *forming* his or her own views” (own emphasis).²⁵⁹ De

²⁵³ Boezaart (ed) *Child Law in South Africa* 331.

²⁵⁴ Imoh & Ansell *Children’s Lives in an Era of Children’s Rights* 11-12.

²⁵⁵ D Olowu “Protecting children’s rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child” (2002) 10 *Int’l J. Child. Rts.* 127 129.

²⁵⁶ Boezaart (ed) *Child Law in South Africa* 337.

²⁵⁷ 338.

²⁵⁸ 338.

²⁵⁹ Lundy et al Article 12” *The UN Convention on the Rights of the Child* 406.

Bruin argues that article 12 of the UNCRC is to be favoured, as it requires less of the child involved.²⁶⁰

Furthermore, article 4 of the ACRWC provides the child with the right to participate “as a party to the proceedings”.²⁶¹ An interpretation hereof is that a child cannot be heard before he or she is joined as party to the proceedings.²⁶² The child’s right to participation in article 4 of the ACRWC is also more restrictive than article 12 of the UNCRC in that it limits the child’s right to judicial and administrative proceedings,²⁶³ as opposed to article 12 which grants the right to the child in all matters affecting him or her.

Another difference between article 4 of the ACRWC and article 12 of the UNCRC is that article 4 states that the child’s view must be considered “in accordance with the provisions of appropriate law”.²⁶⁴ According to Boniface, this provision is less favourable than the text of article 12 of the UNCRC which states that the child’s view must be given “due weight in accordance with the age and maturity of the child”.²⁶⁵

With regard to realising the child’s right to participation, State Parties should adopt a number of strategies, including enacting legislation to mark the official status of the ACRWC; informing government officials and staff of the rights contained in the Charter; and raising awareness of the rights in schools so that children know their rights.²⁶⁶

The Committee of Experts on the Rights and Welfare of the Child (hereafter the “African Committee”) is the enforcement mechanism under the ACRWC²⁶⁷ and has been described by Olowu as “perhaps the most remarkable landmark in the Charter”.²⁶⁸ This Committee is responsible for the supervision and monitoring of the implementation of the Charter and has the power to formulate rules in attempt to

²⁶⁰ De Bruin *Child Participation and Representation in Legal Matters* 245.

²⁶¹ Boezaart (ed) *Child Law in South Africa* 110.

²⁶² Boniface (2013) *Speculum Juris* 139; De Bruin *Child Participation and Representation in Legal Matters* 245.

²⁶³ Boezaart (ed) *Child Law in South Africa* 110.

²⁶⁴ 110.

²⁶⁵ Boniface (2013) *Speculum Juris* 139.

²⁶⁶ Olowu (2002) *Int’l J. Child. Rts.* 134.

²⁶⁷ F Viljoen “Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” (1998) 31 *CILSA* 199 200.

²⁶⁸ Olowu (2002) *Int’l J. Child. Rts.* 131.

promote the rights contained in the Charter.²⁶⁹ The African Committee is vested with the authority to draft a list of vital principles, which could be used when drafting legislation.²⁷⁰

3 3 The Children's Act 38 of 2005

3 3 1 *Background*

The Children's Act has brought about fundamental changes regarding the rights of children.²⁷¹ The Act was promulgated to give effect to children's rights as contained in the Constitution.²⁷² In its Preamble, the Act also takes note of, amongst others, the UNCRC as well as the ACRWC.²⁷³ The Act is testament to the progressive strides made in realising children's rights in South Africa.²⁷⁴ It is evident that the legislature has succeeded in entrenching the four cornerstone principles of the UNCRC in the Children's Act.²⁷⁵

The Children's Act does not only entitle children to certain rights, but further provides the opportunity to participate in any decision-making process that would affect him or her.²⁷⁶ As a result, it can be argued that the Act is the most important piece of legislation for children in the history of South Africa.²⁷⁷ The long and hard route followed during the legislative process resulted in a comprehensive act that provides the widest possible form of participation for a child in matters affecting him or her.²⁷⁸

²⁶⁹ Olowu (2002) *Int'l J. Child. Rts.* 131.

²⁷⁰ 134.

²⁷¹ Mundlamamo *The Views of Social Service Providers on the Use of Parenting Plans for Adolescents of Divorced Parents* 55.

²⁷² Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* 14.

²⁷³ The Preamble of the Children's Act reads: "And whereas the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children".

²⁷⁴ Abrahams & Matthews *Promoting Children's Rights in South Africa: a Handbook for Members of Parliament* 1.

²⁷⁵ De Bruin *Child Participation and Representation in Legal Matters* 513. The Children's Act incorporated Art 12 of the UNCRC and Art 4 of the ACRWC into South African law, thereby complying with South Africa's obligation as State Party. See T Boezaart "General Principles" in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) 2-20.

²⁷⁶ SALRC *Family Dispute Resolution* 52.

²⁷⁷ De Bruin *Child Participation and Representation in Legal Matters* 513.

²⁷⁸ 513.

3 3 2 *The right to participation under the Children's Act*

3 3 2 1 Section 10

One of the core functions of the Children's Act is to provide the child with a right to participation.²⁷⁹ Section 10 of the Act states that:

“Every child that is of such 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”.

The Act has extended the scope of the right to be heard contemplated in other legislation such as the Divorce Act.²⁸⁰ The open-ended nature of the wording of section 10 indicates that the legislator intended child's participation in any matter affecting the child.²⁸¹ Barrie suggests a progressive interpretation of section 10 with reference to the approach of Australian courts,²⁸² on which will be elaborated in Chapter 4.

3 3 2 2 Section 31

Section 31 of the Children's Act obliges a holder of parental responsibilities and rights and responsibilities to consider the views and wishes of the child when making decisions affecting the child.²⁸³ Section 31(1)(a) of the Children's Act reads as follows:

“Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development”.

Subsection (b) explains that paragraph (a) refers to any decision:

“in connection with a matter listed in section 18 (3)(c), affecting contact between the child and a co-holder of parental responsibilities and rights; regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being”.

The child's right to participation in terms of the Children's Act has played a decisive role in numerous cases²⁸⁴ as mentioned in Chapter 1. *B v B*²⁸⁵ serves as an example

²⁷⁹ De Bruin *Child Participation and Representation in Legal Matters* 309.

²⁸⁰ SALRC *Family Dispute Resolution* 52.

²⁸¹ De Bruin *Child Participation and Representation in Legal Matters* 314.

²⁸² J Heaton “The Interest of the Children of Divorcing Parents” in Heaton J & DPS Cronjé (eds) *South African Family Law* (2010) 169 169.

²⁸³ Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* 85.

²⁸⁴ Boezaart “General Principles” in *Commentary on the Children's Act* 2-20. See the discussion in Chapter 1 15-20.

²⁸⁵ 2012 JDR 1786 (SCA).

of such case.²⁸⁶ In this matter, the Supreme Court of Appeal ruled that section 10 of the Act must navigate the implementation of all legislation applicable to children.²⁸⁷ The children were therefore entitled to legal representation despite the fact that the relevant legislation, the Maintenance Act 99 of 1998, does not provide for it. The Court emphasised that the children's participation is a question of valuing a child as an autonomous individual.²⁸⁸

As with article 12 of the UNCRC and article 4 of the ACRWC, sections 10 and 31 of the Children's Act do not specify a certain age at which a child's views should be obtained, prevail or be disregarded.²⁸⁹ Once again, specific ages as barriers are rejected, as age is only one of the factors to be considered.²⁹⁰ The child's relationship with his or her parents, as well as vulnerability to parental pressure, can also play a role when determining the weight to attach to the child's views.²⁹¹ The Court in *McCall v McCall* explained that:

"with reference to the child's preference ... if the court is satisfied that the child has the necessary intellectual and emotional maturity to give in his or her expression of a preference a genuine and accurate reflection of his feeling towards and relationship with each of his parents, in other words to make an informed and intelligent judgement, weight should be given to his or her expressed preference".²⁹²

The Act does not determine how a child's views should be canvassed in court.²⁹³ This has led to various methods used by courts in obtaining a child's views.²⁹⁴ The different methods initiated by legislation and by presiding officers as illustrated in case law is discussed in Chapter 3.

4 Measuring participation

4 1 Introduction

Children's participation can occur to different degrees. Different degrees of participation are linked to greater influence on a decision and more opportunities for

²⁸⁶ *B v B* 2012 JDR 1786 (SCA). While this case refers to section 10 of the Children's Act in particular, it is relevant as sections 10 and 31 are to be read together.

²⁸⁷ Paras 18-20.

²⁸⁸ Para 20.

²⁸⁹ Boezaart "General Principles" in *Commentary on the Children's Act* 2-21.

²⁹⁰ 21.

²⁹¹ F Mahlobogwane "Determining the best interest of the child in custody battles: should a child's voice be considered?" (2010) 31 *Obiter* 232 236.

²⁹² *McCall v McCall* 1994 3 SA 201 (C) para 207H as cited in Mahlobogwane (2010) *Obiter* 236.

²⁹³ Boezaart "General Principles" in *Commentary on the Children's Act* 2-20.

²⁹⁴ Mahlobogwane (2010) *Obiter* 237-238.

personal growth.²⁹⁵ Children's participation as a concept is broad and, as a result, can refer to a variety of different practices with different goals and implications that take place in different contexts.²⁹⁶ When studying degrees of participation, it is helpful to look at some proposed typologies.²⁹⁷

4 2 Hart's Ladder of Participation

Shier argues that Hart's Ladder of Participation is seen as the most influential model in this area of study.²⁹⁸ The eight steps of the ladder are explained below,²⁹⁹ ranked from the lowest to the highest degree of participation. Hart describes only the top four steps as "models of genuine participation".³⁰⁰ Contrastingly, the first three steps are collectively named levels of non-participation.³⁰¹ These three steps are significant and will be employed to identify non-participation disguised as forms of participation. The first three steps are a clear illustration of how easily adults can manipulate children's participation to their own benefit.

4 2 1 Step 1: Manipulation

This is the lowest form of participation. Manipulation is when the child involved does not understand the issue at hand and therefore does not understand their own actions. Letting children share their views without listening to them, taking it into account or giving feedback to the child is also manipulation.³⁰² An example of manipulation in divorce proceedings is where the opinion of a child who is too immature or uninformed to form an opinion, is used in favour of a specific parent. Simply disregarding a child's views regarding an issue that has the potential to greatly impact their life is also manipulation.

²⁹⁵ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 14.

²⁹⁶ Moses (2008) *Int'l J. Child. Rts.* 327.

²⁹⁷ Thomas (2007) *Int'l J. Child. Rts.* 204.

²⁹⁸ Shier (2001) *Children & Society* 107.

²⁹⁹ Hart *Children's Participation from tokenism to citizenship* 8. Hart adapted Arnstein's "Ladder of citizen participation". For a detailed picture of Hart's ladder of participation, visit <http://www.myd.govt.nz/documents/engagement/harts-ladder.pdf>.

³⁰⁰ Hart *Children's Participation from tokenism to citizenship* 11.

³⁰¹ Shier (2001) *Children & Society* 110.

³⁰² Hart *Children's Participation from tokenism to citizenship* 9.

4 2 2 *Step 2: Decoration*

When children are only used to further a cause in an indirect way, they are simply decorations.³⁰³ An example of decoration in the context of divorce is where a parent informs the decision maker of the child's view, but only for the purpose of furthering their own case in the matter.

4 2 3 *Step 3: Tokenism*

Tokenism is a term used to describe situations where it seems as though children are given a voice, but in fact they have are given no choice to formulate their views or no freedom as to the subject of their views or the method in which they want to communicate their views.³⁰⁴ An example of tokenism in the context of divorce is where parents force their own views on the children, particularly when those views advance the one parent's case and is detrimental to the other.

4 2 4 *Step 4: Children are assigned but informed*

Children are assigned but informed when they understand the intentions of the project, are aware of why they are involved in the process and who decided that they will be participating, play a meaningful role in the process and voluntary participate after the intentions have been made clear and understood.³⁰⁵ In the context of divorce, children are assigned but informed when their parents ask them questions after providing them with the necessary information to answer the questions.

4 2 5 *Step 5: Children are consulted and informed*

Here, the process is designed and run by adults, but children understand the process and adults take their views and wishes seriously.³⁰⁶ Children's views are taken more seriously than in the fourth step of the ladder, but they do not make any decisions.

4 2 6 *Step 6: Adult-initiated shared decisions with children*

At this level, the process is designed and run by adults, but children participate in the decision-making.³⁰⁷ This step of the ladder is significant as it describes the divorce

³⁰³ Hart *Children's Participation from tokenism to citizenship* 9.

³⁰⁴ 9.

³⁰⁵ 11.

³⁰⁶ 2.

³⁰⁷ 12.

process very well. Two adult parents decide that they want to divorce, approach an adult attorney whom, with the assistance of other adults such as a psychologist, advocate and presiding officer, facilitate divorce proceedings until a decree of divorce is granted. It is clear that, despite how much the children's views are considered, the process remains adult-initiated.

4 2 7 *Step 7: Child-initiated and directed*

Here, children initiate the process and are supported by adults throughout.³⁰⁸ This step of the ladder would be difficult to reach in divorce proceedings as the process is ultimately directed by parents, legal representatives, officers of court and other adults such as mental health providers, even in cases where the children's views are completely considered and implemented.

4 2 8 *Step 8: Child-initiated, shared decisions with adults*

This is where the process is initiated by children and the decision-making is shared between adults and children. This process empowers children.³⁰⁹ This step of the ladder seems impossible to reach as, as mentioned above, the process of divorce remains one where certain measures can only be taken by adult role players.

It is unfortunate that resources spent in the evaluating and monitoring of the nature and quality as well as the impact of children's participation has been limited to date.³¹⁰ Hart explains that criteria or indicators against which children's participation can be measured, must be developed as it will help to identify the strengths and weaknesses of the process, as well as to identify the practices that are helpful or redundant and also to realise where resources are needed.³¹¹

4 3 Landsdown and O'Kane's dimensions to participation

Apart from Hart's Ladder of Participation, there are also three dimensions to participation that must be considered when determining whether a child is in fact enjoying their right to participation.³¹² Within each of these dimensions, there are various issues to consider when measuring the relevant dimension of participation.

³⁰⁸ Hart *Children's Participation from tokenism to citizenship* 14.

³⁰⁹ 14.

³¹⁰ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 26.

³¹¹ 26.

³¹² 27.

4 3 1 *Scope of participation*

The scope of participation is the degree of participation that has been achieved at certain stages of the process of participation.³¹³ In other words, it asks *what is being done?*³¹⁴ To assess the scope of participation, three further questions are posed, namely when do children participate,³¹⁵ at what level do they participate,³¹⁶ and which children participate?³¹⁷

4 3 2 *Quality of participation*

The quality of participation is the extent to which the process of participation complies with standards for effective and meaningful participation.³¹⁸ The relevant question here is *how is it being done?*³¹⁹ Requirements for effective and meaningful participation is explained under State Parties' obligations in terms of the UNCRC.

4 3 3 *Impact of participation*

The impact of the participation asks *what has changed?*³²⁰ The impact must be measured while keeping in mind the motivation behind involving the child in the first place.³²¹ Personal outcomes³²² as well as wider external outcomes³²³ are of importance when measuring the impact of the child's participation.

4 4 General Comment on Article 12 of the UNCRC

In terms on this General Comment, the basic requirements for the implementation of the right to participate are set out as follows.³²⁴

³¹³ G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* (2014) 1.

³¹⁴ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 27.

³¹⁵ Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 3.

³¹⁶ Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 4. The term "level" indicates *where* the child participates; for example at court-level as opposed to, for example, at home.

³¹⁷ 10.

³¹⁸ 1.

³¹⁹ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 27.

³²⁰ Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 1.

³²¹ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting Them* 31.

³²² Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 28.

³²³ Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 29.

³²⁴ CRC Committee *General Comment 12* paras 132 – 134.

4 4 1 *Transparent and informative*

Participation has a clear purpose, and the child understands his or her participation and how much input they will have in the decision-making.³²⁵

4 4 2 *Voluntary*

The child is given time to consider whether or not they want to participate and is aware of their right to withdraw from the process at any time.³²⁶

4 4 3 *Respectful*

The child is treated with respect when expressing their views and adults involved in the participation are encouraged to always respect the child.³²⁷

4 4 4 *Relevant*

The child participates in issues that are relevant to them and in ways that are in line with their own skills, knowledge, experience and abilities (and interests, where possible) at a level and pace that matches the child's stage of development.³²⁸

4 4 5 *Child-friendly*

Time and resources are invested to prepare for the child's participation and the meeting places, while activities are accessible to children with disabilities and child friendly.³²⁹

4 4 6 *Inclusive*

Children are not discriminated against based on their language, disability, religion, opinion, nationality, ethnicity, race, age or other status and the process is flexible enough to address the needs of different groups of children.³³⁰

³²⁵ CRC Committee *General Comment 12* para 134 (a); Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 16.

³²⁶ CRC Committee *General Comment 12* para 134 (b); Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 16-17.

³²⁷ CRC Committee *General Comment 12* para 134 (c); G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 17.

³²⁸ CRC Committee *General Comment 12* para 134 (d); G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 17.

³²⁹ CRC Committee *General Comment 12* para 134 (e); G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 17-18.

³³⁰ CRC Committee *General Comment 12* para 134 (f); G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 18.

4 4 7 *Supported by training for adults*

Adults involved are sensitised to children's participation and understand the need for it. They also receive tools, training, and opportunities to learn more about children's participation.³³¹

4 4 8 *Safe and sensitive to risk*

The protection of the child's right is always paramount, and the child is made aware of his or her right to be safe and free from abuse. The child knows where to find help.³³²

4 4 9 *Accountable*

Children are encouraged to take part in follow-up and evaluation processes and are given feedback of the impact of their participation.³³³ Although the implementation of article 12 cannot be guaranteed, it can be monitored.³³⁴

4 5 Proposed model of participation

This thesis makes use of a model to determine the nature and extent to which a child's right in their parents' divorce and related proceedings are realised. The same model is used in Chapter 5 to measure mediation's potential to address the shortcomings of the methods explored in Chapter 3. The content of the model is based on the theory explained above as well as various factors that are relevant to participation that became apparent upon reading case law.

4 5 1 *Level 1: Non-participation*

This level is significant as it identifies non-participation in situations where it is disguised as participation. This level is based on the first three steps of Hart's Ladder of Participation, namely: manipulation,³³⁵ decoration,³³⁶ and tokenism.³³⁷

³³¹ CRC Committee *General Comment 12* para 134 (g); G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 18.

³³² CRC Committee *General Comment 12* para 134 (h); G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 19.

³³³ CRC Committee *General Comment 12* para 134 (i), G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 19.

³³⁴ Lundy (2007) *BERJ* 939.

³³⁵ See section 4 2 1.

³³⁶ See section 4 2 2.

³³⁷ See section 4 2 3.

4 5 2 *Level 2: Providing an opportunity to share views*

This level is based on Lansdown and O’Kane’s first dimension of participation, namely the scope of participation. The level indicates that the child was given an explicit opportunity to share his or her views, should the child wish to do so. Here, the adults involved in the process acknowledge that the child has an interest in the matter at hand.³³⁸

This level is significant as it divides non-participation from participation. This is because a child voluntarily sharing his or her views forms the foundation of their participation. It should be mentioned that although a child does not have to participate if they do not wish to, their right to participation requires that they at least be given an opportunity to do so.

4 5 3 *Level 3: Sharing their views*

In order to determine if participation is at Level 3, two questions are asked, namely: (i) was the process facilitated in a respectful, safe and child-friendly way? and (ii) was the child provided with sufficient and age-appropriate information that would enable them to express his or her views on a matter? These questions will be expanded upon below.

4 5 3 1 Was the process facilitated in a respectful, safe and child-friendly way?

This question draws from Landsdown and O’Kane’s second dimension to participation, namely the quality of the child’s participation.³³⁹ The latter is greatly influenced by how respectfully,³⁴⁰ safely³⁴¹ and child-friendly³⁴² the process is facilitated. The question is also based on the requirements in General Comment 12, namely respectful, child-friendliness, as well as safety and sensitivity.³⁴³

³³⁸ See section 4 3 1.

³³⁹ See section 4 3 2.

³⁴⁰ CRC Committee *General Comment 12* para 134 (c); G Lansdown & C O’Kane *A toolkit for monitoring and evaluating children’s participation* 17.

³⁴¹ CRC Committee *General Comment 12* CG12 para 134 (h); G Lansdown & C O’Kane *A toolkit for monitoring and evaluating children’s participation* 19.

³⁴² CRC Committee *General Comment 12* CG12 para 134 (e); G Lansdown & C O’Kane *A toolkit for monitoring and evaluating children’s participation* 17-18.

³⁴³ See section 4 4.

4 5 3 2 Was the child provided with sufficient and age-appropriate information that would enable them to express his or her views on a matter?

Participation involves providing the child with relevant and age-appropriate information that will enable them to express his or her views on the matter.³⁴⁴ This question is informed by another characteristic of quality participation as proposed in General Comment 12, namely that the participation must be informative³⁴⁵ and relevant.³⁴⁶

4 5 4 Level 4: *The impact of the views shared*

Level 4 requires three questions to be asked, namely:

4 5 4 1 Were the child's views recorded and accurately communicated to court?

This question addresses the impact of the child's participation³⁴⁷ where his or her views were shared with someone else than the court itself. It also addresses a vital component of participation, namely, to acknowledge the interest³⁴⁸ that the child has in their parents' divorce and related proceedings. Furthermore, it addresses the scope of the child's participation; specifically relating to the level at which they participated.³⁴⁹ Here, the term "level" indicates where the child participated. For example, at court-level as opposed to only having their views recorded in a document that is never reported to court. It is argued that, reaching level three of the proposed model and then being able to answer this specific question in the positive, means that a child's participation has reached a stage where it can be called effective.

4 5 4 2 Where these views considered by the person who made a decision that impacted on the child?

This question is particularly important as considering a child's views is explicitly mentioned in the sections relating to children's participation in the UNCRC,³⁵⁰

³⁴⁴ Lansdown *Every child's right to be heard* 22.

³⁴⁵ See section 4 4 1.

³⁴⁶ See section 4 4 4 .

³⁴⁷ Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 1.

³⁴⁸ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting them* 13.

³⁴⁹ Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 1.

³⁵⁰ Art12 of the UNCRC.

ACRWC,³⁵¹ and the Children's Act.³⁵² The question also acknowledges the interest that the child has in the matter.³⁵³

4 5 4 3 If possible and without harming the child, were these views reflected in the decision made?

As with previous questions, this question addresses the interest that a child has in the matter.³⁵⁴ It does so while also acknowledging that that it is not always practically possible to implement the child's views, nor is it always practical to do so without harming the child.

If the child's views are reflected to an extent, the child's participation made an external as well as an internal impact.³⁵⁵ The internal impact where the decision does not reflect the child's views become relevant in the following question.

4 5 5 *Level 5: After the decision has been made*

Here, another two questions are asked, namely:

4 5 5 1 Was the decision, the effect thereof as well as the child's influence (or lack thereof) on the decision explained to the child?

Explaining the decision to the child improves the quality (transparency³⁵⁶ and accountability³⁵⁷) of the child's participation. It also acknowledges that children's participation is an ongoing process of involvement.³⁵⁸ If the decision, which does not reflect the child's views, was explained to the child, the child's participation has made an internal impact, in the sense that the child feels that their participation made a difference.³⁵⁹

³⁵¹ Art 4(2) of the ACRWC.

³⁵² Ss 10 & 31 of the Children's Act.

³⁵³ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting them* 13.

³⁵⁴ 13.

³⁵⁵ Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 29.

³⁵⁶ CRC Committee *General Comment 12* para 134 (i), G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 19.

³⁵⁷ CRC Committee *General Comment 12* para 134 (a); Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 16.

³⁵⁸ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting them* 13.

³⁵⁹ Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 28.

4 5 5 2 Was the child given an explicit chance to appeal the decision or report back on the implementation of the decision?

This question once again addresses the interest that the child has the matter.³⁶⁰ It also reminds us that children's participation is an ongoing process of involvement.³⁶¹ In terms of General Comment 12, participation that complies with both questions above in the positive, addresses transparency³⁶² and accountability.³⁶³

5 Conclusion

By analysing the text of article 12 of the UNCRC, article 4 of the ACRWC as well as sections 10 and 31 of the Children's Act, this chapter has made it clear that there is a well-established right to participation for children in South Africa. The chapter also investigated the theory behind the concept of participation to better understand what exactly a child's right to participation entails. The chapter introduced a proposed model that will be used throughout the thesis to evaluate different methods of children's participation in South Africa and Australia, as well as the practice of family mediation.

In the next chapter, the various methods of enabling children's participation in divorce proceedings as employed in South African divorce proceedings such as the appointment of a *curator ad litem*, psychologist or family advocate will be studied. The chapter will also explore the appointment of legal representation as well as the practice of judicial interviews.

³⁶⁰ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting them* 13.

³⁶¹ Lansdown *Can you hear me? The Right of Young Children to Participate in Decisions Affecting them* 13.

³⁶² CRC Committee *General Comment 12* para 134 (a); Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 16.

³⁶³ CRC Committee *General Comment 12* para 134 (i), G Lansdown & C O'Kane *A toolkit for monitoring and evaluating children's participation* 19.

Chapter 3:

A child's right to participation in his or her parents' divorce related proceedings

1 Introduction

As discussed in Chapter 2, the child's right to participation in matters affecting him or her is clearly established on an international, regional, and domestic level. A child's right to participation can be realised indirectly by way of the appointment of representation or by the child's direct participation. In this chapter, the various ways in which to realise a child's right to participation in line with the abovementioned broad distinction will be discussed.

Applying the proposed model discussed in chapter 2 to the various possibilities in South Africa to realise this right, makes it possible to determine the extent to which a child's right is in fact realised in their parent's divorce and related proceedings. This will serve as a stepping stone to determine whether mediation is the answer to better realising the particular right.

When measuring the level of participation reached by the various methods of representation or direct participation discussed in this chapter, it is important to consider how said methods manifest in practice, as opposed to only evaluating the legislation that is supposed to implement the various levels of the model. For example, the fact that a piece of legislation provides a child with a right to legal representation on paper, does not necessarily translate to effective participation in practice.

As discussed in chapter 2, it is argued that "effective participation" is where a child's participation can positively answer the first question in level four, namely whether the child's views, which were shared voluntarily after a child received age-appropriate information in a child-friendly manner, were considered by the person who made the ultimate decision.

2 Representation

The representation of children is a special practice of law that necessitates sensitivity towards the issue, the children and the manner in which the children are

represented.³⁶⁴ There are various forms of representation that have the potential to fulfil a child's right to participation, including legal representation in the form of an attorney or advocate; or other representatives such as a *curator ad litem*, the family advocate, social workers and psychologists.

2 1 Legal representation

A child's right to have his or her views represented flows from their right to participate in all matters affecting them.³⁶⁵ Having a legal representative (an attorney or advocate) represent the child's views in court, is one of the methods that can be employed to realise a child's right to participation.

Effective legal representation for children is vital to ensure the realisation of the child's right.³⁶⁶ Since the appointment of a legal practitioner for a child is still relatively uncommon, there are various uncertainties regarding the practicalities surrounding legal representation for children.³⁶⁷ These uncertainties include questions relating to: who is responsible for assigning the legal representative; how the representative is assigned; who is qualified to represent children; and who decides whether a child should be assigned a legal practitioner or a *curator ad litem*.³⁶⁸ These uncertainties have a negative influence on the level of participation that a child can reach in terms of the proposed model. This is because, in respect of participation by means of representation, effective legal representation assumes a process facilitated in a respectful, safe and child friendly way. In the absence of effective legal representation, a child's effective participation is compromised.

The uncertainties relating to separate legal representation for children becomes more complex when considering the difference between divorce, care and contact proceedings, as opposed to a child in need of care and protection.³⁶⁹ The latter are always heard in a Children's Court, while divorces and care and contact disputes are

³⁶⁴ J Gallinetti "The Children's Court" in CJ Davel & A Skelton (eds) *Commentary on the Children's Act* (2018) 4-23.

³⁶⁵ *Centre for Child Law v Hoërskool Fochville* 2016 2 SA 121 (SCA) Para 19.

³⁶⁶ D De Bruin *Child Participation and Representation in Legal Matters* LLD thesis, University of Pretoria (2010) 516.

³⁶⁷ C du Toit "Legal Representation of Children" in T Boezaart (red) *Child Law in South Africa* 2 ed (2017) 108 117.

³⁶⁸ 117.

³⁶⁹ 117.

mostly heard in the High Court, although care and contact proceedings can also be heard in the Children's Court.³⁷⁰

2 1 1 Statutory provision for legal representation

2 1 1 1 Constitution of the Republic of South Africa, 1996

Section 28(1)(h) of the Constitution is an "innovation to our law and practice".³⁷¹ It provides that:

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

When this section was inserted into the Bill of Rights as contained in the Constitution, the options of the involvement of the family advocate and the appointment of a *curator ad litem* were already available.³⁷² This means that, despite the common law and other agents of protection available to children, the drafters of the Constitution recognised that there are certain circumstances where children may require additional assistance.³⁷³ Legal representation, when effective, complies as minimum with level three of the model. The additional assistance that some children require is, when effective, exactly what drives a child's participation to reach higher levels (level four or five) in terms of the proposed model.

The importance of section 28(1)(h) of the Constitution is that it gives recognition to the reality that the child's interests are not always in line with his or her parents' interests, which creates a need for children to enjoy separate legal representation.³⁷⁴ Legal representation effectively makes the child a party to the legal proceedings.³⁷⁵

Further, section 28(1)(h) of the Constitution grants a child the right to, in certain circumstances, have legal representation appointed, as opposed to the relevant provisions of the UNCRC, ACRWC and Children's Act which only create a broad right to participation.

³⁷⁰ Section 45(3) of the Children's Act; See C Du Toit "Legal Representation of Children" in T Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 108 118.

³⁷¹ *Soller NO v G and Another* 2003 5 SA 430 (W) para 2.

³⁷² Centre for Child Law, University of Pretoria *Guidelines for legal representatives of children* 6.

³⁷³ *Centre for Child Law v Hoërskool Fochville* 2016 2 SA 121 (SCA) para 22.

³⁷⁴ *Soller NO v G and Another* 2003 5 SA 430 (W) para 8.

³⁷⁵ SALRC *Family Dispute Resolution* 55.

2 1 1 1 1 Circumstances under which a child is entitled to legal representation at state expense

The right to legal representation is potentially applicable to civil proceedings affecting the child,³⁷⁶ such as proceedings relating to the child's parents' divorce.³⁷⁷ The right to legal representation can be applicable to a child whether or not he or she is a party to the proceedings.³⁷⁸

An important potential restriction on this right is that it is only afforded in circumstances where "substantial injustice would otherwise result". To understand when a child is entitled to legal representation in terms of section 28(1)(h) of the Constitution, the meaning of "substantial injustice" must be established. It is unclear whether substantial injustice will follow as a result of no legal representative being appointed, or if a legal representative is not appointed at state expense.³⁷⁹

De Bruin explains that the interpretation of "substantial injustice" is of cardinal importance to children, especially those who are too young to communicate their views to the court.³⁸⁰ A lack of understanding of the meaning of "substantial injustice", coupled with the reality that there are no guidelines to assist presiding officers when determining whether substantial injustice would in fact result if legal representation is not appointed, places children at risk.³⁸¹ This poses a very real risk to the level that children's participation can reach in terms of the proposed model. Situations where a legal representative should have been appointed, was not, can arguably lead to a situation where a child does not enjoy their right to participation, or where their participation reaches a low level (level two or three) in terms of the proposed model.

Steytler remarks that when determining whether substantial injustice would otherwise result, one should "distinguish between injustices which could be tolerated and those substantial ones which should be avoided through the appointment of

³⁷⁶ *Soller NO v G and Another* 2003 5 SA 430 (W) para 5.

³⁷⁷ Satchwell J explains in para 7 that she can "envisage few proceedings of greater import to a child....than those that 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".

³⁷⁸ *Centre for Child Law v Hoërskool Fochville* 2016 2 SA 121 (SCA) para 22.

³⁷⁹ Du Toit "Legal Representation of Children" in *Child Law in South Africa* 118.

³⁸⁰ De Bruin *Child Participation and Representation in Legal Matters* 378.

³⁸¹ 379.

counsel.”³⁸² According to the Law Society of South Africa, the decision regarding whether substantial injustice would otherwise result, is made by the court in terms of principles relating to substantial injustice in terms of the Constitution and legislation.³⁸³ The Law Society’s comments are circular and vague. Fortunately, guidance can be drawn from case law where courts appointed legal representation for children.

*Rosen v Havenga*³⁸⁴ concerned the care, guardianship and access of J, the 9-year old son of the plaintiff and defendant. Although neither of the legal teams or the family advocate approached the Court to discuss the option of appointing a legal representative for J, Moosa J did so *mero motu*.³⁸⁵

Moosa J explained that a child has the right to legal representation in terms of article 12 of the UNCRC as well as section 28(1)(h) of the Constitution.³⁸⁶ Since the right in terms of the latter only exists in situations where substantial injustice would otherwise result, the Court highlighted why it was necessary to appoint a section 28(1)(h) legal representative.³⁸⁷ Firstly, the relief sought by die plaintiff (the mother) was drastic, especially in terms of how often the boy would be able to see his father, and would thus have a serious impact on J.³⁸⁸ In the second place, J’s interest might not be the same as his mother’s.³⁸⁹ Thirdly, J might need someone to express his views in Court since the matter has an impact on his life. In the last place, appointing separate legal representation may be in J’s best interest.³⁹⁰

Based on the considerations above, the Court appointed an advocate to articulate J’s views and represent his interests.³⁹¹ The concerns expressed by the Court are indicative of when substantial injustice might otherwise result. This judgment illustrates that, when an issue can have a significant impact on a child, the child’s views are not necessarily in line with those of his parents, and the child might need help with expressing his or her views, substantial injustice would follow if the Court fails to

³⁸² N Steytler *Constitutional Criminal Procedure A commentary on the Constitution* (1998) 308 as cited by De Bruin *Child Participation and Representation in Legal Matters* 380.

³⁸³ LSSA *Comments on the SALRC Issue Paper 31 Family Dispute Resolution* 7.

³⁸⁴ 2005 6 SA 535 (C).

³⁸⁵ Para 6.

³⁸⁶ Para 6.

³⁸⁷ Para 6.

³⁸⁸ Para 6.

³⁸⁹ Para 6.

³⁹⁰ Para 6.

³⁹¹ Para 7.

appoint separate legal representation for the child. Here, one can say that Moosa J ensured that J's participation reached at least level two of the proposed model.

*Ex Parte van Niekerk*³⁹² is another example of where a legal representative was appointed in terms of section 28(1)(h) of the Constitution. The brief facts of this case, which has been referred to in Chapter 1, are as follows: Two girls, aged 14 and 15, had to attend court-ordered therapy with their father, who was divorced from their mother in 2001. The mother was bound by court-order to take all steps necessary to persuade her two daughters to attend therapy with their father.³⁹³ The daughters refused attending therapy with their father and out of fear of being held in contempt of court, the mother approached the Centre for Child Law for advice.³⁹⁴

Up until 2004 (three years after divorce proceedings were initiated), the children had not had the opportunity to express their views³⁹⁵ and it was clear that the best interests of the children played a subordinate role in their parents' litigation.³⁹⁶ The Court explained that it could only enjoy a "balanced presentation of the situation" if someone presented the children's case on their behalf.³⁹⁷ The two daughters were not only appointed legal representation, but were also joined to the proceedings.³⁹⁸

The Court acknowledged not only the girls' interests in the matter but also the fact that they have a right to have their voices heard. It is unknown whether the girls' participation satisfied the requirements of level three (voluntarily sharing views after being provided with age-appropriate information facilitated in a safe and child-friendly manner) and whether they were afforded the opportunity to report back as a result of them being appointed legal representation. Still, it is argued that their participation reached the fourth level of the proposed model, as their views were accurately communicated to and considered by the Court, and the ultimate decision was made in line with their views.

³⁹² *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* 2005 JOL 14218 (T).

³⁹³ Para 4.

³⁹⁴ Para 5.

³⁹⁵ Para 6.

³⁹⁶ Para 7.

³⁹⁷ Para 7.

³⁹⁸ Para 8. Children joined as parties to the litigation between their parents, is discussed under section 3.4.

*Contrastingly, Fitschen v Fistchen*³⁹⁹ is an example of where the Court did not appoint a legal representative in terms of section 28(1)(h) of the Constitution. This case concerned the divorce action between the parents of two boys who were 12 and 14 years old when the matter was heard in Court. Apart from the decree of divorce, the plaintiff (the boys' mother) also sought an order granting, amongst other things, joint care of the two children, while residing with their father (the defendant).⁴⁰⁰ Plaintiff sought this order after leaving the couple's family home and leaving their children in their father's care.

Plaintiff's counsel approached Van Reenen J and foreshadowed an application to appoint legal representation in terms of section 28(1)(h) of the Constitution for the two sons. Counsel motivated that no adverse order could be made without consulting the children on the matter, either directly or indirectly.⁴⁰¹ However, no application was ever brought and the Court also did not appoint separate legal representation *mero motu*.⁴⁰² The Court nevertheless explained that legal representation in terms of section 28(1)(h) of the Constitution was only applicable where substantial injustice would ensue, should the legal representation not be appointed.⁴⁰³ As the Court was satisfied that the children's views were sufficiently canvassed by the two clinical psychologists involved, this was not such a case.⁴⁰⁴

Although the Court did consider the children's preference to reside with their mother, it was guided by a report in which a psychologist stated that she doubted "if the children have the maturity to make a well-informed choice".⁴⁰⁵ The Court ordered that it would be in the best interests of the boys to reside with their father.⁴⁰⁶ In terms of the proposed model, the boys' participation reached the fourth level of participation

³⁹⁹ 1997 JDR 0567 (C).

⁴⁰⁰ Para 2. "Plaintiff sought joint custody of the two boys and, while they resided with their father, access to them on the following occasions: (2.1) Every weekend from Friday evening to Saturday afternoon, alternatively Saturday evening to Sunday afternoon; (2.2) from 16:30 to 21:30 on either Tuesdays and Thursdays or Mondays and Wednesdays at her residence; (2.3) at reasonable times at Defendant's residence when one or both of the children are sick; (2.4) half of the total long weekends of the year; (2.5) one week during the June school holiday and three weeks over the December school holiday; (2.6) every mother's day; (2.7) three hours long visit on Plaintiff's birthday as well as each of the children's birthdays."

⁴⁰¹ Para 62.

⁴⁰² Para 62.

⁴⁰³ Para 63.

⁴⁰⁴ Para 63.

⁴⁰⁵ Para 64.

⁴⁰⁶ Para 66.

despite the fact that their views were not reflected in the court order. Here it is important to remember that the High Court is the upper guardian of all minor children. The children were provided with the opportunity to share their views by means of the psychologists' reports and the Court did consider their views. While the Court did not implement their views, it only did so because implementing their views would not have been in the children's best interests.

*Legal Aid Board v R*⁴⁰⁷ also concerned the appointment of a legal representative in terms of section 28(1)(h) of the Constitution. In this case, a 12-year-old girl,⁴⁰⁸ SR, sent an SMS to Childline South Africa, in which she requested help as her parents did not respect her views in matters affecting her.⁴⁰⁹ Her parents had been engaged in acrimonious divorce litigation since she was 5-years old.⁴¹⁰ Legal Aid in Durban was then contacted in this regard.⁴¹¹

The Legal Aid Board consequently brought an urgent application against the mother and father of the child, for an order declaring that an attorney were to be assigned as SR's legal representation in terms of section 28(1)(h) of the Constitution. While SR's father (first respondent) supported the application, the child's mother (second respondent) opposed the application.

In considering the appointment of legal representation for SR, the Court took into account that SR expressed, firmly and on two occasions, her desire to be represented by Mr Stilwell. The Court also considered the fact that Child Line as well as Govindasamy AJ (the presiding officer in the divorce action) believed that it was desirable that legal representation be appointed for SR.⁴¹² The Court explained that:

"When one is dealing with acrimonious litigation concerning the fundamentally important questions of where a child shall live and who shall be responsible for

⁴⁰⁷ *Legal Aid Board v R* 2009 2 SA 262 (D).

⁴⁰⁸ Para 14.

⁴⁰⁹ Para 13.

⁴¹⁰ Para 2.

⁴¹¹ Para 13.

⁴¹² Seven years earlier, in 2002, when SR was five-years old, her parents were engaged in a conflict-ridden and lengthy divorce action. Govindasamy AJ ordered that a skilled and experienced legal practitioner, preferably counsel, be appointed to represent SR in her parents' litigation in which they mainly fought over SR's custody. The Court ordered the Minister of Justice and Constitutional Development to take necessary steps to ensure the appointment and payment of said legal representative. Although both parties agreed that the child should be separately represented, it was held that this could not be done by the Legal Aid Board. As a result of various logistical problems regarding the implementation of the court's order, Govindasamy AJ set aside his previous order but emphasised that litigation should draw to a close. See paras 11-12 in this regard.

their principal day-to-day care and the central decisions concerning their lives, such as schooling, health, religion and the like, it seems to me that, if the court comes to the conclusion that the voice of the child has been drowned out by the warring voices of her or his parents, it is a necessary conclusion that substantial injustice to the child will result if he or she is not afforded the assistance of a legal practitioner to make his or her voice heard".⁴¹³

The Court consequently appointed Mr Stillwell as SR's legal practitioner in terms of section 28(1)(h) of the Constitution read with the Legal Aid Act.⁴¹⁴ The Court also interdicted SR's parents from hindering Mr Stilwell in the exercising of his mandate and discussing the case at hand with their daughter.⁴¹⁵ This is a clear illustration of the Court's appreciation of SR's interest in the matter as well as her right to be heard. It is also clear that the Court and the Legal Aid Board fought to have SR's participation reach at least the third level of the proposed model, before the Court even was being presented with her views.

As pointed out in the case law discussed above, there are various factors that may prove the need and appropriateness of assigning legal representation in terms of section 28(1)(h) of the Constitution.⁴¹⁶ Broad guidelines regarding when a section 28(1)(h) legal representative should be appointed include cases where: the recommendation made by the family advocate or professionals involved is not in line with the child's wishes or where they did not consider the child's wishes;⁴¹⁷ where there is an extreme level of conflict between the parents;⁴¹⁸ or where there is a conflict of interest between the child and one of his or her parents.⁴¹⁹ Sloth-Nielsen furthermore contends that one should take into account the child's age and ability to express their own views; the level of complexity of the case; and impact the final decision is likely to have on the child's every day wishes.⁴²⁰

Establishing whether substantial injustice would *undeniably* result is an almost impossible task.⁴²¹ It is argued that the focus should be placed on the *possibility* of substantial injustice taking place, rather than the *probability* thereof. Furthermore, it is an unfortunate reality that there are various situations where refusing or granting

⁴¹³ *Legal Aid Board v R* 2009 2 SA 262 (D) para 20.

⁴¹⁴ Para 9.

⁴¹⁵ Para 9.

⁴¹⁶ De Bruin *Child Participation and Representation in Legal Matters* 383.

⁴¹⁷ 383.

⁴¹⁸ 383.

⁴¹⁹ 383.

⁴²⁰ Du Toit "Legal Representation of Children" in *Child Law in South Africa* 119.

⁴²¹ De Bruin *Child Participation and Representation in Legal Matters* 383.

section 28(1)(h) legal representation for the child, could result in substantial injustice without the court even realising it.⁴²²

2 1 1 1 2 Scope and function of a section 28(1)(h) legal representative

Soller NO v G and Another (hereafter “Soller”)⁴²³ was the first reported case that discussed the interpretation and application of section 28(1)(h) at length.⁴²⁴ The case dealt with a 15-year-old boy who sought a variation of a care order,⁴²⁵ which was made subsequent to his parents’ divorce in February 2001.⁴²⁶ In terms of the care order, the boy, K, was to live with Mrs G, his mother, the first respondent in this application. K however, wished to live with his father, Mr G, and wanted to vary the care order to that effect. The judgment concerned the appointment of a legal practitioner in terms of section 28(1)(h) of the Constitution.⁴²⁷ Here, the Court dealt with the latter while considering the extent to which the views and wishes of a child should be decisive of issues relating to contact and care.⁴²⁸

Satchwell J acknowledged K’s right to participation by explaining that the boy was “entitled to be listened to and that his views should be given respectful and careful consideration”.⁴²⁹ This was especially true since any decisions made by the Court would influence K himself to the greatest extent.⁴³⁰ The Judge further described K’s views and wishes as *vital* to proceedings.⁴³¹ The Court decided that a legal practitioner should be appointed to K so that his “views and wishes can be expressed, presented and receive proper consideration.” Consequently, the Court appointed an attorney in line with the application brought before the Court.⁴³² The Court thus paved the road to K’s effective participation.

⁴²² De Bruin *Child Participation and Representation in Legal Matters* 378.

⁴²³ 2003 5 SA 430 (W).

⁴²⁴ De Bruin *Child Participation and Representation in Legal Matters* 258.

⁴²⁵ *Soller NO v G and Another* 2003 5 SA 430 (W) para 1.

⁴²⁶ Para 6.

⁴²⁷ Para 1. Soller (Applicant), who had since been struck from the roll, originally brought the application on behalf of K. Soller was motivated to bring the application on K’s behalf to give effect to section 28(1)(h) of the Constitution, as K is a minor and therefore cannot act in his own name.

⁴²⁸ Para 1.

⁴²⁹ Para 10. It is argued that Satchwell J’s words can be applied in every case involving children, as children have the right to share their views.

⁴³⁰ Para 10.

⁴³¹ Para 10.

⁴³² Para 17.

The Court described the role of the legal representative appointed in terms of section 28(1)(h) by contrasting it to that of the office of the family advocate.⁴³³ Satchwell J made it clear that section 28(1)(h) of the Constitution envisions a legal practitioner who not only has the necessary level of knowledge and experience of the law, but someone who is able to obtain the client's views and present and argue those views in Court.⁴³⁴ Here, the child's voice is exercised through the legal practitioner as opposed to a social worker, psychologist or other counsellor.⁴³⁵

This particular legal representative does not remain neutral during the proceedings but takes the side of the child and acts as their ambassador.⁴³⁶ The Court explained that the legal representative "stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child".⁴³⁷ This greatly contributes to the level that a child's participation can reach in terms of the proposed model, as it ensures that at least level three is reached.

Although the representative's task is to present and argue the child's wishes in court, they must also apply an adult perspective as well as legal expertise and knowledge to the child's standpoint.⁴³⁸ The appointed representative is therefore not merely a mouthpiece for the child's views.⁴³⁹ In other words, a legal representative's function in this specific context is to canvas the child's views and wishes in Court; to ensure that the child is under no duress to express those views; and to alert the Court of consequences that the legal representative can foresee but the child cannot.⁴⁴⁰

It was clear from the facts that K wished to live with his father. He made this clear to every adult involved in the process: Satchwell J, his attorney, the psychologist, family advocates and his parents.⁴⁴¹ He had also acted in accordance with this wish by running away from his mother's home to go live with his father.⁴⁴²

⁴³³ The function of the latter will be dealt with under section 2 2 1.

⁴³⁴ *Soller NO v G and Another* 2003 5 SA 430 (W) para 26.

⁴³⁵ Para 26.

⁴³⁶ Para 26.

⁴³⁷ Para 27.

⁴³⁸ Para 27.

⁴³⁹ Para 27.

⁴⁴⁰ The Court agreed with legal representative, Mr Mendelow's summary of his function as K's legal representative. See para 28 in this regard.

⁴⁴¹ Para 66.

⁴⁴² Para 43.

The weight of K's views was particularly relevant if one considers that the Court described Mr G as "an obsessive and uncontrollable former husband and co-parent"⁴⁴³ who is "presumptuous, obsessive to the point of fanaticism on issues where his interests are concerned".⁴⁴⁴ The Court also described him as someone with questionable values who is a "highly undesirable role model for any child including K."⁴⁴⁵ In direct contrast with the Court's views of K's father, the Court described Mrs G as a "dignified, intelligent, mature, practical, wise and forgiving women".⁴⁴⁶

Despite the Court and other professionals' opinions of Mr G,⁴⁴⁷ K wished to live with him.⁴⁴⁸ The Court explained that although a child's views are only of persuasive value, K's expressed preference to live with his father had become the determining factor.⁴⁴⁹ This was because K had proven himself "capable of ignoring curfews, disregarding arrangements made with his mother and establishing his own lifestyle in association with his father".⁴⁵⁰ The Court therefore not only took the child's wishes into account, but also his actions.⁴⁵¹

In considering K's views as canvassed in Court by his attorney, the Court concluded that forcing K to live with his mother or sending him to a place of safety was not only undesirable but also impractical.⁴⁵² This was because resentment, alienation from his family, rage and anger would follow such an order, the enforceability of which was doubted in any event.⁴⁵³ Furthermore, it could not be in K's best interests to constantly be in opposition to his mother and the courts.⁴⁵⁴ It should also be noted that despite all Mr G's undesired characteristics and behaviour, he did not beat or abuse his son but provided him with food and housing and encouraged his participation in Jewish

⁴⁴³ *Soller NO v G and Another* 2003 5 SA 430 (W) para 40.

⁴⁴⁴ Para 41.

⁴⁴⁵ Para 41.

⁴⁴⁶ Para 40.

⁴⁴⁷ Psychologist P Engelbrecht described Mr G as a "totally obsessed" person who has "lost a clear focus of the best interest of his children". See para 51.

⁴⁴⁸ At para 46 the Court quoted a letter that K wrote to his mother in which he explained: "Dear Mom, I am writing this letter to tell you that I will not come home on Thursday after my exam with you. I have decided on my own will not to come home with you. I will still come and visit you and talk to you on the phone. I still want to live with my Dad and I want you to respect that. It is also not necessary to bring urgent applications or even decide to lock Dad in jail. My mind is made up and this is what I want. From K".

⁴⁴⁹ Para 56.

⁴⁵⁰ Para 59.

⁴⁵¹ De Bruin *Child Participation and Representation in Legal Matters* 347.

⁴⁵² *Soller NO v G and Another* 2003 (5) SA 430 (W) para 68.

⁴⁵³ Para 60.

⁴⁵⁴ Para 69.

activities to which K attached much value.⁴⁵⁵ This is significant as it illustrates that it is possible for the Court to seriously consider and implement the child's views, without losing sight of the child's best interests.

In this case, the child's right to participation was realised by the appointment of a section 28(1)(h) representative, who made recommendations to the Court that were based on K's views but also informed by the representative's adult perspective and own legal expertise. Mr Mendelow recommended that the Court grant an interim order in terms of which K could live with his father while K's situation was monitored and concerns regarding K being exposed to an "unsavoury environment" were addressed.⁴⁵⁶

The Court highlighted the importance of the child's right to participation⁴⁵⁷ by granting the order in line with the recommendations made by K's attorney. The Court deemed the order a provisional arrangement that would give K the opportunity to not only live with his father, but also show that he was mature enough to justify the weight accorded to his wishes.⁴⁵⁸ As the order that was granted was only provisional and was therefore granted coupled with a return date, it is argued that K was afforded the opportunity to report back on the implementation of the decisions. It is therefore further argued that K's participation reached the fifth and highest level of participation in terms of the proposed model. It thus seems fair to say that Satchwell J and K's attorney facilitated K's participation to the best of their ability and paid an unheard of level of regard to his right to participation and his interests in the matter.

The *Soller* judgment has been described as one that has "broken new ground and furthered the development of a children's-rights approach in our law".⁴⁵⁹ While the development of such an approach is undoubtedly a step in the right direction, it is disheartening to realise that there has not been such a significant judgment since the *Soller* decision was handed down 18 years ago in 2003.

⁴⁵⁵ *Soller NO v G and Another* 2003 5 SA 430 (W) para 62 read with para 18.

⁴⁵⁶ Para 71.

⁴⁵⁷ De Bruin *Child Participation and Representation in Legal Matters* 345.

⁴⁵⁸ *Soller NO v G and Another* 2003 (5) SA 430 (W) para 74.

⁴⁵⁹ R Pillay & N Zaal "Child-interactive video recordings: a proposal for hearing the voices of children in divorce matters" (2005) 122 *S. Afr. Law J.* 684 686-687.

2 1 1 1 3 Implementation of the right

The right contained in section 28(1)(h) of the Constitution entails that a child enjoys legal representation even if their parents cannot afford to pay for it, as the representation is at the state's expense.⁴⁶⁰ The phrase "at state expense" has led to confusion regarding which state department is responsible for funding legal representation.⁴⁶¹ Fortunately, it has always been commonly accepted that legal representation "at state expense" refers to the provision of legal representation by Legal Aid South Africa ("Legal Aid").⁴⁶²

Furthermore, it has been made clear in *Legal Aid Board v R* that a child can approach Legal Aid on their own. When deciding whether or not to assist the child, Legal Aid does not need the child's guardian or parents' consent.⁴⁶³ An order of court is also not necessary for Legal Aid to appoint a legal representative for a child.⁴⁶⁴ This is indeed encouraging as it means there are fewer situations where adults can hinder children's effective participation. However, although rarely, there may be cases where Legal Aid deems it appropriate to first approach the High Court before appointing a legal representative for a child.⁴⁶⁵

2 1 1 2 Section 55 of the Children's Act 38 of 2005

Section 55 of the Children's Act states that:

- "(1) Where a child involved in a matter before the children's court is not represented by 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 Legal Aid South Africa referred to in section 2 of the Legal Aid South Africa Act, 2014.⁴⁶⁶
- (2) The Board must deal with a matter referred to in subsection (1) in accordance with section 3B of that Act, read with the changes required by the context."

⁴⁶⁰ In some instances, such as in the Soller case, the legal representatives act on behalf of the children at no cost whatsoever. *Soller NO v G and Another* 2003 5 SA 430 (W) para 19.

⁴⁶¹ Du Toit "Legal Representation of Children" in *Child Law in South Africa* 123.

⁴⁶² The process regarding a child obtaining legal representation from Legal Aid will be discussed in chapter 2, section 2.1.1.2.

⁴⁶³ *Legal Aid Board v R* 2009 2 SA 262 (D) para 4.

⁴⁶⁴ Para 4.

⁴⁶⁵ Para 40.

⁴⁶⁶ The original text of s 55(1) of the Children's Act which reads: "...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)" was amended by the Legal Aid South Africa Act 39 of 2014. After the amendment it refers to Legal Aid South Africa as referred to in the new act, rather than the Legal Aid Board. Subsection 2 still refers to the relevant provision in the 1969 Act.

Section 45(1) of the Children's Act regulates the jurisdiction of the Children's Court and reads as follows:

- “(1) Subject to section 1(4),⁴⁶⁷ 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, abused, 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 inter-country adoption;
 - (i) a child 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;
 - (k) or any other matter relating to the care, protection or well-being of a child provided for in this Act.”

In terms of section 55 of the Children's Act, a Children's Court is obligated to refer the matter to Legal Aid for consideration if the court is of the opinion that it would be in the best interests of the child to have legal representation appointed. Sloth-Nielsen describes Legal Aid South Africa as “the main role-player designated to provide legal representation to children in South Africa”.⁴⁶⁸ The matters relevant to section 55 of the Children's Act are those listed above in section 45 of the Children's Act. Other matters affecting children in other courts are dealt with in terms of section 28(1)(h) of the Constitution.

In *NM v Presiding Officer of the Children's Court, Krugersdorp*,⁴⁶⁹ the Court found that there is a duty on the presiding officer to inform parties that they can approach Legal Aid.⁴⁷⁰ This is especially true where there is a risk of an adverse decision being

⁴⁶⁷ S 1(4) of the Children's Act provides as follows: “Any proceedings arising out of the application of the Administration Amendment Act, 1929 (Act 9 of 1929), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court.” In terms of s 45(3) of the Act, the High Court has exclusive jurisdiction over the following matters relating to divorce proceedings: The guardianship of a child; the assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child; the departure, removal or abduction of a child from the Republic; applications requiring the return of a child to the Republic from abroad. .

⁴⁶⁸ J Sloth-Nielsen “Realising children's rights to legal representation and to be heard in judicial proceedings: an update” (2008) 24 *SAJHR* 495 496.

⁴⁶⁹ 2013 (4) SA 379 (GSJ).

⁴⁷⁰ Para xx.

made against the child.⁴⁷¹ The judgment is significant as it paves the road to more adults at least recognising the interests that children have in family matters and the right that they have to participate therein. The duty that rests on the presiding officer can potentially result in the child's participation reaching a higher level in terms of the proposed model than it would have, had the presiding officer not informed the parties that they can approach legal aid.

After a matter has been referred to Legal Aid by the court, a section 3B report must be compiled.⁴⁷² The Legal Aid Board must evaluate and report on the matter in writing and submit the report to the clerk of the court who shall make a copy of the report available to the court and the person concerned.⁴⁷³ This report must include a recommendation regarding whether the person qualifies for legal representation,⁴⁷⁴ the personal circumstances of the person, as well as any other factors which should be considered according to the board.⁴⁷⁵ While the section 3B report can pave the road to effective legal representation and, hopefully, effective legal representation, the report can also be a significant stumbling block if the author of the report is of the opinion that the child does not qualify for legal representation.

Once the court has received the report from Legal Aid, the court may order Legal Aid appoint legal representation at state expense.⁴⁷⁶ The effect of section 55 is to limit the right to legal representation at state expense to situations where the court orders Legal Aid to appoint legal representation for a child.⁴⁷⁷

2 1 1 3 Section 29(6) of the Children's Act 38 of 2005

Section 29(6) of the Children's Act grants a court to, subject to section 55 of the same Act:

- “(a) Appoint a legal practitioner to represent the child at the court proceedings;
- (b) and order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation.”

⁴⁷¹ 2013 (4) SA 379 (GSJ) para 7.

⁴⁷² Although the heading of s 3B reads “Direction for legal aid by court in criminal matters”, s 55(2) of the Children's Act provides that the section should be “read with the changes required by the context”, which requires the reading in of “civil matters”.

⁴⁷³ S 3B (2)(a) and (b) of the Legal Aid Act 22 of 1969.

⁴⁷⁴ S 3B (2)(c)(i).

⁴⁷⁵ S 3B (2)(c)(ii) and (iii).

⁴⁷⁶ Legal Aid South Africa *Legal Aid Guide* (2012) 67.

⁴⁷⁷ 67.

Section 29(6) of the Children's Act echoes section 28(1)(h) of the Constitution, which grants every child the right to legal representation at state expense in civil litigation, should substantial injustice result if legal representation is not appointed.⁴⁷⁸ It also echoes section 6(4) of the Divorce Act.⁴⁷⁹ However, section 29(6) of the Children's Act is subject to section 55 in the sense that it only refers to Children's Court proceedings.

The provision is important as it effectively broadens a child's right to legal representation in proceedings concerning parental responsibilities and rights.⁴⁸⁰ Furthermore, the provision is important as the court may also order the parties to the proceedings to carry the cost of the child's legal representation.

De Bruin explains that section 29(6) of the Act creates three possible routes for legal representation.⁴⁸¹ Firstly, the court can appoint legal representation in terms of section 55(1) of the Children's Act. However, in terms of section 55(2), it is Legal Aid that decides whether legal aid will be granted or not. This decision is guided by section 28(1)(h) of the Constitution.⁴⁸² The decision is also informed by criteria such as the seriousness of the matter,⁴⁸³ the level of complexity of the relevant procedure and law,⁴⁸⁴ the child's ability to represent him or herself without legal representation⁴⁸⁵ and whether the child has a substantial disadvantage compared to the other parties to the proceedings.⁴⁸⁶ The second possibility is to appoint a legal representative and order one or both of the parties to pay for the representation.⁴⁸⁷ The third option is for the child to appoint his or her own legal representation in terms of section 54 of the Children's Act.⁴⁸⁸ It is clear that section 29(6) creates a right for a child to be afforded legal representation in one of three ways. This paves the way for participation that can reach at least the third level of participation in terms of the proposed model.

⁴⁷⁸ Boezaart "General Principles" *Commentary on the Children's Act* 2-33.

⁴⁷⁹ Du Toit "Legal Representation of Children" in *Child Law in South Africa* 128. S 6(4) of the Children's Act will be discussed in more detail under section 2 1 1 4 below.

⁴⁸⁰ 8.

⁴⁸¹ De Bruin *Child Participation and Representation in Legal Matters* 339

⁴⁸² 339.

⁴⁸³ 339.

⁴⁸⁴ 339.

⁴⁸⁵ 339.

⁴⁸⁶ 339.

⁴⁸⁷ 339.

⁴⁸⁸ 339.

2 1 1 4 Section 6(4) of the Divorce Act 70 of 1979

Children's interests in their parents' divorce matter are specifically protected in the Divorce Act.⁴⁸⁹ A child's right to participation by means of separate legal representation is anticipated in section 6(4) of the Divorce Act.⁴⁹⁰ The section reads as follows:

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

The scope of section 6(4) of the Divorce Act differs from and is not as wide as that of section 28(1)(h) of the Constitution.⁴⁹¹ While section 28(1) of the Constitution grants a child the right to legal representation should substantial injustice otherwise result, section 6(4) of the Divorce Act grants the court the power to appoint legal representation at any one or both of the parties' expense.

Significantly, the use of section 6(4) is not settled in South African law and there are various problems associated with the provision.⁴⁹² Although the section has been used to appoint a *curator ad litem*,⁴⁹³ it has seldom been used to appoint separate legal representation for a child in the form of an attorney or advocate.⁴⁹⁴ While one could argue that the mere existence of section 6(4) creates a child's right to be legally represented in certain circumstances, which could, in turn, lead to a child's participation reaching at least the third level in terms of the proposed model, there are no reported cases where this section was utilised in practice.⁴⁹⁵ It is therefore unlikely that this provision has ever contributed to a child's effective legal representation and consequently effective participation. The South African Law Reform Commission has recommended that the provision of the Act should be used more frequently and that it should be amended to grant the court the authority to appoint an interested third party, such as a family member, to support the child according to the court's guidelines.⁴⁹⁶

⁴⁸⁹ D Louw & R Scherrer "Children's perception and experience of the family advocate system" (2004) 32 *International Journal of the Sociology of Law* 17 20.

⁴⁹⁰ Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* 8; S 29 of the Children's Act echoes s 6(4) of the Divorce Act which was enacted 26 years earlier. See Du Toit "Legal Representation of Children" in *Child Law in South Africa* 2 128.

⁴⁹¹ De Bruin *Child Participation and Representation in Legal Matters* 358.

⁴⁹² 363.

⁴⁹³ Du Toit "Legal Representation of Children" in *Child Law in South Africa* 111.

⁴⁹⁴ 357.

⁴⁹⁵ De Bruin *Child Participation and Representation in Legal Matters* 357; SALRC *Family Dispute Resolution* 52; Sloth-Nielsen (2008) *SAJHR* 502-503.

⁴⁹⁶ SALRC *Family Dispute Resolution* 52; SALC Review of the Child Care Act 642-643.

The provisions of section 6(4) of the Divorce Act are also problematic when divorcing parents are unable to pay for legal representation.⁴⁹⁷ As the Act provides for the legal representation to be paid by one or both parties to the proceedings and not for legal representation at state expense, it creates the impression that only children from financially stable families can benefit from such an appointment.⁴⁹⁸

2 1 1 5 Evaluating statutory legal representation

As the child's legal representative⁴⁹⁹ is mandated to represent and argue the child's wishes,⁵⁰⁰ it is argued that effective legal representation results in a child's participation reaching at least the third level of the proposed model. To reach a higher level, the presiding officer must consider and, if possible and not harmful to the child, implement the child's views in the court order.

Based on the proposed model of measuring children's participation, it is argued that mere legal representation mostly leads to the second level of participation. Effective legal participation, however, leads to the child's participation reaching at least the third level of the proposed model. Reaching the fifth and highest level proves to be more difficult, as it is dependent on not only the legal representative but also the presiding officer attaching great significance to the child's interests in the matter and providing them with a means to evaluate or appeal the decision that was made.

It is argued that a clear and concise definition of the principle of substantial injustice, coupled with the strict application thereof, will lead to more children having legal representation appointed and potentially having their right to participation realised at at least level four of the proposed model of measuring participation.

2 1 2 Common law provision for legal representation: *Curator ad litem*

2 1 2 1 The role of the *curator ad litem*

Children have always enjoyed some protection in terms of the common law.⁵⁰¹ When considering the legal capacity of a child, Roman Dutch Law distinguished

⁴⁹⁷ De Bruin *Child Participation and Representation in Legal Matters* 357.

⁴⁹⁸ De Bruin *Child Participation and Representation in Legal Matters* 357; SALRC *Family Dispute Resolution* 133.

⁴⁹⁹ In terms of section 28(1)(h) of the Constitution, sections 55 and 29(6) of the Children's Act as well as section 6(4) of the Divorce Act.

⁵⁰⁰ *Soller NO v G and Another* 2003 5 SA 430 (W) para 27.

⁵⁰¹ Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* 27.

between an *infans* (child under 7 years of age) and a minor (a child of 7 years or older).⁵⁰² The *infans* had no capacity to litigate in their own name, while the minor had limited capacity to litigate.⁵⁰³ It was generally accepted that minors could not institute or defend legal proceedings without their parents or guardians assisting them.⁵⁰⁴ Thus, an appointment of a *curator ad litem* originates from the common law,⁵⁰⁵ and was introduced in 1902.⁵⁰⁶

Courts have a wide discretion to appoint a person to substitute the child's guardian in matters of litigation, who is known as a *curator ad litem*.⁵⁰⁷ A *curator ad litem* is there to assist the court as well as the child and to protect the child's best interests.⁵⁰⁸ The appointment of a *curator ad litem* has been described as "that vigilant protection of the rights of minors which our system of law seeks to promote".⁵⁰⁹

When interviewing the child, the *curator ad litem* must inform the child of the reason for the interview and obtain a wide range of information from the child.⁵¹⁰ This obligation is in line with level two of the proposed model of measuring participation. The *curator ad litem* must compile a report that brings any relevant circumstances or facts, including the child's views, to the court's attention.⁵¹¹ This report will assist the court in establishing the child's best interests.⁵¹² The *curator ad litem*'s personal opinion is irrelevant during the whole process.⁵¹³ The *curator ad litem* is cardinal to ensure quality of the child's participation, as the child's views are not filtered by the *curator ad litem*, but directly conveyed. Accurately communicating a child's views to the court is in line with level three of the proposed model.

⁵⁰² Voet 2 4 4.

⁵⁰³ De Groot 1 4 1, 1 8 4.

⁵⁰⁴ De Groot 1 4 1.

⁵⁰⁵ De Groot 1 4 1, 1 8 4.

⁵⁰⁶ *Legal Aid Board in re Four Children* 2011 JDR 0279 (SCA) para 12.

⁵⁰⁷ Para 12.

⁵⁰⁸ Du Toit "Legal Representation of Children" in *Child Law in South Africa* 2 ed 131.

⁵⁰⁹ T Boezaart "The role of the curator ad litem and children's access to courts" 2013 *De Jure* 707 711.

⁵¹⁰ 716.

⁵¹¹ 716.

⁵¹² 716.

⁵¹³ See *Du Plessis NO v Strauss* 1988 2 SA 105 (A) paras 145-146 where van Heerden J explained that the *curator ad litem*'s intention to act objectively was in direct contrast with the role of the *curator ad litem* and that the *curator ad litem*'s own opinion is irrelevant. It is his function to argue on behalf of the minors.

*B v B*⁵¹⁴ provides an example of what a court expected of a *curator ad litem*. The case concerned an application for variation of a divorce order, in terms of which the divorced couple's two children lived with their mother, the respondent.⁵¹⁵ The parties were divorced in December 2008.⁵¹⁶ The applicant sought a variation of the divorce order a year later in November 2009,⁵¹⁷ but did not proceed with his application based on the family advocate's advice that moving the children so soon after the divorce would cause too much disruption.⁵¹⁸

The applicant requested that the family advocate re-evaluate the situation in 2015 as both the children (aged 7 and 10) continually requested to live with him.⁵¹⁹ After the respondent refused to communicate with the family advocate and the family advocate consequently closed the file, the applicant launched an application for a *curator ad litem* to be appointed for the two children.⁵²⁰ An advocate from Legal Aid was duly appointed as *curator ad litem*.⁵²¹

The *curator ad litem* was authorised to interview the children and any other interested parties to provide the Court with a report explaining the children's preferences as well as what would be in their best interests.⁵²² The children voluntarily sharing their views is in line with level two of the proposed model of measuring participation. In her report, which was filed at court, the *curator ad litem* noted that it would not be in the best interests of R to be separated from his sister, B, and that the children should reside with the applicant and have liberal contact with the respondent.⁵²³

Unfortunately, the *curator ad litem* only addressed the children's wishes in her report,⁵²⁴ and her only consultation with the children took place at a restaurant and lasted a maximum of 25 minutes.⁵²⁵ Furthermore, she did not investigate the children's relationship with their step-siblings or parents, nor did she review the respondent's

⁵¹⁴ *RB v AB* 2015 JDR 2641 (GP).

⁵¹⁵ Para 2.

⁵¹⁶ Para 2.

⁵¹⁷ Para 3.

⁵¹⁸ Para 4.

⁵¹⁹ Para 5.

⁵²⁰ Para 6.

⁵²¹ Para 6.

⁵²² Para 21.

⁵²³ Para 22.

⁵²⁴ Para 32.

⁵²⁵ Para 32.

financial position to determine whether she would be able to travel to and from Potchefstroom to fetch the children in Pretoria every alternative weekend.⁵²⁶ In obtaining the children's wishes in a rather superficial fashion and in failing to also investigate other relevant matters and make a recommendation accordingly, the *curator ad litem* clearly did not fulfil her role. This case is an unfortunate example of "decoration", which is a form of non-participation.⁵²⁷ While the curator *ad litem*'s asking the children to share their views may invoke optimism at face value, how she asked them to share their views and her lack of research regarding their circumstances, had a negative impact on the children's ability, desire and right to participate.

2 1 2 2 Circumstances under which to appoint a *curator ad litem*

According to Du Toit, the appointment of a *curator ad litem* seemingly has two purposes. The first is that the curator protects the child's interests by placing all relevant information before the court, thereby enabling the court to make a decision regarding the child's best interests.⁵²⁸ Secondly, the appointment creates a mechanism to place the child's view before court and thus allows the child to participate in proceedings affecting him or her.⁵²⁹

In terms of the common law, there are four established grounds for the appointment of a *curator ad litem* for a child, namely where:⁵³⁰

- (i) The minor has no parents or guardian;
- (ii) a parent or guardian cannot be found or is not available to assist the child;
- (iii) there is a conflict of interests between the child and his or her parent(s) or guardian, or there is a possibility of a conflict of interests;
- (iv) the child's parent or guardian unreasonably refuses to be of assistance.

*Ex Parte van Niekerk*⁵³¹ provides an example of a court's refusal to appoint a *curator ad litem* for the child.⁵³² Here, De Villiers J was of the view that a legal representative in terms of section 28(1)(h) of the Constitution should be appointed as opposed to the

⁵²⁶ *RB v AB* 2015 JDR 2641 (GP) para 32.

⁵²⁷ See Chapter 2 & section 4 2 2.

⁵²⁸ Du Toit "Legal Representation of Children" in *Child Law in South Africa* 127.

⁵²⁹ 112.

⁵³⁰ De Groot 1 4 1, 1 8 4; Voet 5 1 11; Van Leeuwen CF 2 1 10 8.

⁵³¹ 2005 JOL 14218 (T).

⁵³² The facts of this case are explained in Chapter 1 and under section 2 1 1 1 1 above.

curator ad litem as sought in the application.⁵³³ According to Davel, it appears that De Villiers J was of the opinion that the appointment of a *curator ad litem* would be inappropriate as the children's mother was willing and able to help her children.⁵³⁴ The Court was not convinced by the arguments of a potential conflict of interests, nor was the Court willing to assume the mother's role.⁵³⁵

2 1 2 3 The difference between a *curator ad litem* and a legal representative in terms of section 28(1)(h) of the Constitution

As previously discussed, section 28(1)(h) of the Constitution grants a child the right to legal representation at state expense in civil proceedings affecting him or her, should substantial injustice otherwise result.⁵³⁶ It is also accepted that the practice of appointing a *curator ad litem* is rooted in the common law.

In *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as amicus curiae)*,⁵³⁷ Skweyiya AJ explained that "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) of the Constitution". Du Toit and Boezaart agree that said obligation to appoint 'legal representation' in section 28(1)(h) should be broadly interpreted so as to include the appointment of a *curator ad litem*.⁵³⁸

A *curator ad litem* represents the child's best interests by canvassing arguments on the child's behalf.⁵³⁹ The *curator ad litem* assists the court as well as the child and advances the child's best interest.⁵⁴⁰ The legal representative appointed in terms of section 28(1)(h) of the Constitution on the other hand, takes instructions from the child

⁵³³ *Ex Parte van Niekerk and Another: In re van Niekerk v van Niekerk* 2005 JOL 14218 (T) para 5.

⁵³⁴ T Davel "The child's right to legal representation in divorce proceedings" in C Nagel (ed) *Gedenkbundel vir JMT Labuschagne* (2006) 26 cited by De Bruin *Child Participation and Representation in Legal Matters* 364.

⁵³⁵ 26.

⁵³⁶ Separate legal representation in terms of section 28(1)(h) of the Constitution is dealt with in detail under section 2 1 1 1.

⁵³⁷ 2003 3 SA 198 (CC).

⁵³⁸ Du Toit "Legal Representation of Children" in *Child Law in South Africa* 113; T Boezaart "The role of the curator ad litem and children's access to courts" (2013) 46 *De Jure* 707 712.

⁵³⁹ Boezaart (2013) *De Jure* 716.

⁵⁴⁰ 716.

and presents the child's views in court.⁵⁴¹ It is argued that the legal representative plays a more significant role in the child's pursuit of effective participation, as the legal representation takes instructions from the child; while the *curator ad litem* does not.

In situations where the child is very young, the legal representative's role would be more similar to that of a *curator ad litem*, whereas a legal representative would take instructions from older children and represent their views in court.⁵⁴² The appointment of either a *curator ad litem* or a separate legal representative in terms of section 28(1)(h) of the Constitution, is a form of participation that can be used in different circumstances according to the child's ability to provide instructions.⁵⁴³

Where a child is *not* capable of giving instructions, the appropriate course of action will depend on where the matter is heard.⁵⁴⁴ In the High Court, a *curator ad litem* is appointed for the child on application to the presiding officer.⁵⁴⁵ If the matter is heard in the Children's Court, a separate legal representative is appointed.⁵⁴⁶ This role is similar to that of a *curator ad litem's* in the High Court.⁵⁴⁷

As there is no age limit that a child must reach before enjoying their section 28(1)(h) right to legal representation, the assessment of a child's capacity to give instructions should be carried out on a case-by-case basis.⁵⁴⁸ Typically, older children are less likely to require to be proven capable of giving instructions. Older children will require the assistance of separate legal representation who will follow their instructions during their parents' divorce proceedings.⁵⁴⁹ It should be kept in mind that adults should not make decisions regarding children's participation solely based on age.⁵⁵⁰ Adults making decisions regarding children's participation based solely on age, not only limit the scope of children's participation, but also their actual participation.⁵⁵¹

⁵⁴¹ Boezaart (2013) *De Jure* 716.

⁵⁴² 716

⁵⁴³ Du Toit "Legal Representation of Children" in *Child Law in South Africa* 113.

⁵⁴⁴ 109.

⁵⁴⁵ 109.

⁵⁴⁶ 109.

⁵⁴⁷ 131.

⁵⁴⁸ 131.

⁵⁴⁹ 131.

⁵⁵⁰ See section 3 1 1 1.

⁵⁵¹ Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 10.

In *Legal Aid Board v Four Children*,⁵⁵² Legal Aid brought an application for the appointment of a legal representative in terms of section 28(1)(h) of the Constitution and not for the appointment of a *curator ad litem*. The Supreme Court of Appeal explained that Legal Aid should have simply brought an application to have one of its employees appointed as a *curator ad litem*.⁵⁵³ The Court also highlighted that the Constitutional Court has repeatedly remarked that cases should, where possible, be decided without reaching a constitutional issue.⁵⁵⁴

2 1 2 4 The difference between a *curator ad litem* and the family advocate

It has mistakenly been suggested that the family advocate⁵⁵⁵ accepts appointments as *curator ad litem* in some divorce cases.⁵⁵⁶ The Office of the Family Advocate was established in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.⁵⁵⁷ This act makes no reference to the appointment of the family advocate as a *curator ad litem*.⁵⁵⁸

While the *curator ad litem*'s role is to promote the child's views,⁵⁵⁹ the family advocate's function is to adopt an objective approach.⁵⁶⁰ The family advocate's function is to provide the court with balanced recommendations addressing care and contact arrangements that are in the child's best interests.⁵⁶¹ It is therefore fair to say that a *curator ad litem* has the potential to facilitate participation that reaches higher levels of children's participation in terms of the proposed model.

2 1 2 5 Evaluation of the role of the *curator ad litem*

It is clear that a *curator ad litem* can further and strengthen the child's right to participation. The *curator ad litem*'s function is to present the child's views as well as other relevant factors to the court, leaving it to the court to determine what is in the child's best interests. Based on this, the appointment of a *curator ad litem* complies with level three. To the extent that a presiding officer considers the child's views and

⁵⁵² *Legal Aid Board in re Four Children* 2011 JDR 0279 (SCA).

⁵⁵³ Para 19.

⁵⁵⁴ Para 19.

⁵⁵⁵ The role of the family advocate will be discussed in more detail under section 2 2 1.

⁵⁵⁶ Boezaart (2013) *De Jure* 714.

⁵⁵⁷ 715.

⁵⁵⁸ 715.

⁵⁵⁹ See *Legal Aid Board in re Four Children* 2011 JDR 0279 (SCA) para 12.

⁵⁶⁰ Para 21.

⁵⁶¹ Boezaart (2013) *De Jure* 716.

implements the views where possible and without harming the child, the participation reaches level four of the proposed model.

A way in which to elevate the level reached is for the *curator ad litem* to explain the court's decision as well as the possibility of an appeal to the child. If this happens, the child's level of participation can reach the highest level of participation.

2.2 Other forms of representation

2.2.1 *The Office of the Family Advocate*

2.2.1.1 History and background

The publication of the Report of the Hoexter Commission of Inquiry into the Structure and Functioning of Courts in South Africa⁵⁶² shed light on needs of children of divorcing parents.⁵⁶³ The first step to address children's needs was the establishment of the Office of the Family Advocate in terms of the Mediation in Certain Divorce Matters Act.⁵⁶⁴ The motivation behind the establishment of the Office of the Family Advocate was to attempt to reduce the traumatic impact of divorce proceedings on children as well as to investigate the interest of the children in a particular divorce.⁵⁶⁵

However noble the intention behind the establishment of this Office, attention must be paid to the extent to which this institution has actually achieved its purpose. This is especially relevant when considering the limited amount of resources provided to the Office as compared to the workload with which family advocates and counsellors are confronted on a daily basis.⁵⁶⁶ This sad reality undoubtedly negatively impacts the level that a child's participation can reach in terms of the proposed model.

⁵⁶² Hoexter Commission *Fifth and Final Report* (1983).

⁵⁶³ LJ Van Zyl *Alternative Dispute Resolution in the Best Interests of the Child* DPhil thesis, Rhodes University (1994) 134.

⁵⁶⁴ Van Zyl *Alternative Dispute Resolution in the Best Interests of the Child* 135.

⁵⁶⁵ Louw & Scherrer (2004) *International Journal of the Sociology of Law* 18.

⁵⁶⁶ Any parenting plan or settlement agreement that includes arrangements relating to children, must be endorsed by the Office of the Family Advocate. In 2018 alone there were 14 302 divorce actions involving minors in South Africa. See Statistics South Africa *Statistical Release P0307: Marriages and Divorce* (2020). It is important to note that there are only 28 branches of the Office of the Family Advocate in the whole of South Africa. Also see Department of Justice and Constitutional Development "The Office of the Family Advocate" (2020) Department of Justice and Constitutional Development < https://www.justice.gov.za/FMAdv/f_contacts.htm > (accessed 06-06-2020).

In terms of section 4(1) of the Mediation in Certain Divorce Matters Act, a family advocate *shall* institute an enquiry at the request of any party to the proceedings or the court in certain circumstances. This includes circumstances after a divorce action has been instituted⁵⁶⁷ or an application has been made for the variation, recession or suspension of an order made in terms of the Divorce Act.⁵⁶⁸ The aim of this enquiry is to enable the family advocate to provide the court with a report and recommendations regarding the child's welfare.⁵⁶⁹

In terms of section 4(2) of the Mediation in Certain Divorce Matters Act, the family advocate *may* also institute such an enquiry in the same circumstances⁵⁷⁰ as mentioned in subsection (1), if he or she considers it to be in the interest of any child of the parents involved. In this case, the family advocate must apply to the relevant court for an order authorising said enquiry.⁵⁷¹

Furthermore, in terms of subsection (3), the family advocate may, if it is in the interest of the child of the marriage concerned and requested by court, appear in court, adduce evidence and cross-examine witnesses.⁵⁷²

2 2 1 2 Role and functions of the Office of the family advocate

The Office of the Family Advocate has three functions, namely to monitor, to evaluate and to mediate.⁵⁷³ In *Soller*⁵⁷⁴ the Court explained the functions of the Office of the Family Advocate by distinguishing its functions from those of a legal representative appointed in terms of section 28(1)(h) of the Constitution. The family

⁵⁶⁷ S 4(1)(a) of the Divorce Act.

⁵⁶⁸ S 4(1)(b). These orders can relate to the custody or guardianship of, or access to a child.

⁵⁶⁹ S 4(1)(b).

⁵⁷⁰ S2(a) after the institution of a divorce action; or (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act.

⁵⁷¹ S 2(b).

⁵⁷² The family advocate may then appear "at the trial of any divorce action or the hearing of any application referred to in subsections (1)(b) and (2)(b)".

⁵⁷³ M de Jong "Child-informed Mediation and Parenting Coordination" in T Boezaart (ed) *Child Law in South Africa* (2017) 134 142. Section 4(1) of the Mediation in Certain Divorce Matters Act states that: "(a) after the institution of a divorce action; or (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979), if so requested by any party to such proceedings or the court concerned, *institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned*" (own emphasis). In terms of subsection (2) the same shall happen when a party seeks to have an order varied.

⁵⁷⁴ *Soller NO v G and Another* 2003 5 SA 430 (W).

advocate is not appointed to represent the child or any party to the proceedings,⁵⁷⁵ but rather to remain neutral and make a recommendation after considering all of the facts relevant to the case.⁵⁷⁶ The family advocate acts as a “go-between between the parties” and should not favour one party over the other.⁵⁷⁷ It can be argued that, since it was never the purpose of the Legislature to have the Family Advocate “champion the child’s views”, it is irrelevant that the level of participation is not elevated in this way.

The family advocate serves as a “professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer”.⁵⁷⁸ The family advocate may request that separate legal representation be appointed for the child if there are problems relating to the prayers and consent paper. Although this possibility seems encouraging when it comes to measuring participation in terms of the proposed model, the family advocate does not often appoint separate legal representation for children in practice.⁵⁷⁹

Sections 4(1)(b) and 4(2)(b) of the Mediation in Certain Divorce Matters Act make provision for the family advocate to conduct an enquiry into issues regarding the care and guardianship of, as well as access to, the children of the divorced or divorcing parents. The function of the enquiry is to ensure that the child’s interests are protected.⁵⁸⁰ The Act also provides for the appointment of family counsellors to assist the family advocate.⁵⁸¹ The assessment of the child is usually conducted by a family counsellor (typically a social worker appointed in terms of the Act).⁵⁸² Family advocates are generally involved in the assessment of older children, although the child’s age is not the only determining factor.⁵⁸³

⁵⁷⁵ Para 23.

⁵⁷⁶ *Soller NO v G and Another* 2003 5 SA 430 (W) para 23. SALRC *Family Dispute Resolution* 53; Centre for Child Law, University of Pretoria *Guidelines for legal representatives of children* 5.

⁵⁷⁷ *Soller NO v G and Another* 2003 5 SA 430 (W) paras 22 & 24.

⁵⁷⁸ Heaton “The Interest of the Children of Divorcing Parents” *South African Family Law* 176.

⁵⁷⁹ *Soller NO v G and Another* 2003 5 SA 430 (W) para 27.

⁵⁸⁰ De Jong “Child-informed Mediation and Parenting Coordination” in *Child Law in South Africa* 142.

⁵⁸¹ Section 3 of the Mediation in Certain Divorce Matters Act. As the family advocate and family counsellors work together on the enquiry, it can be said that the Office of the Family Advocate follows an interdisciplinary approach to resolving child-centred disputes. See De Jong “Child-informed Mediation and Parenting Coordination” in *Child Law in South Africa* 142.

⁵⁸² Louw & Scherrer (2004) *International Journal of the Sociology of Law* 19-20.

⁵⁸³ 20.

Methods used to assess children include interviews, observing the child in certain situations and psychometric testing.⁵⁸⁴ Although the South African Law Commission (as it was previously known) supported communicating the child's views to the court, does not require the family advocate or family counsellor to obtain the child's views.⁵⁸⁵ Instead of child-orientated, the prescribed questions focus on the parents and make no reference to the child's views or wishes regarding the proposed arrangements.⁵⁸⁶ This means that, where a family advocate or counsellor does not provide the child the opportunity to share his or her views *mero motu*, this form of representation shows very little potential to reach even the first level of participation in terms of the proposed model.

This was clearly illustrated in *Rosen v Havenga*,⁵⁸⁷ where the Court *mero motu* ordered the appointment of separate legal representation for a 9-year-old boy.⁵⁸⁸ Although the child was the subject of litigation between his parents, his views were not addressed by the family advocate or any of the other professionals involved in the matter.⁵⁸⁹

Another stumbling block between the family advocate and a high level of children's participation is that even when a child's views are indeed obtained, it is often inaccurately communicated to the court.⁵⁹⁰ This undoubtedly has a negative impact on the quality of the child's participation. Too often, the report compiled by the Office of the Family Advocate provides courts "at best, with only a somewhat muted and synthesised impression of the voices of children".⁵⁹¹ Furthermore, there is no guarantee that family advocates will place enough emphasis on the child's views and ensure that the court understands the child's views.⁵⁹²

⁵⁸⁴ 20.

⁵⁸⁵ SALC *Review of the Child Care Act* 655.

⁵⁸⁶ SALC *Review of the Child Care Act* 655-656 Further, an empirical study by Africa, Dawes, Swartz and Brandt found that only 17% of 29 reports drafted by Family Counsellors addressed the child's wishes. See Pillay & Zaal (2005) *S. Afr. Law J.* 687-688 in this regard.

⁵⁸⁷ 2005 (6) SA 535 (C).

⁵⁸⁸ Para 6.

⁵⁸⁹ Para 6.

⁵⁹⁰ Para 6. Also see Heaton "The Interest of the Children of Divorcing Parents" in *South African Family Law* 176.

⁵⁹¹ Pillay & Zaal (2005) *S. Afr. Law J.* 688; M Fernando "Children's Direct Participation and the Views of Australian Judges" (2013) 92 *Family Matters: Newsletter of the Australian Institute of Family Studies* 41 41.

⁵⁹² 688-689.

The family advocate's recommendations regarding the child's best interests are recorded in a report that is submitted to the court.⁵⁹³ Although the family advocate's recommendations do not bind the court,⁵⁹⁴ courts still tend to rely on these reports.⁵⁹⁵ In an attempt to address this, the South African Law Commission recommended that the standard questionnaire be amended to include questions regarding the child's views and, where appropriate, the child's wishes.⁵⁹⁶ More recently, in a report of the South African Law Reform Commission, the Law Society recommended that the family advocate or a social worker should be dedicated to obtaining and communicating the child's view to the court.⁵⁹⁷ This recommendation will ensure that at least the second level of the proposed model is reached as children will be afforded the opportunity to share their views. Whether their participation has the potential to reach a higher level will depend on the content of the family advocate's report as well as the presiding officer's appreciation of the child's interest and their right to participate in the matter. As courts tend to act in accordance with the family advocate's recommendations, whether or not they recommend that the child's views be considered or given effect to, is indeed significant.

It is only fair to mention that the Office of the Family Advocate functions under significant pressure as a result of its high workload. This renders it practically impossible to conduct in-depth assessments of every child involved in their parents' dispute.⁵⁹⁸ Another challenge is that the Office of the Family Advocate is not well known in disadvantaged areas and in some cases seen as foreign.⁵⁹⁹ These are both hurdles that stand in the way of the family advocate facilitating effective children's participation, whether it be by obtaining the child's views directly or appointing a legal representative to convey the children's views to court.

⁵⁹³ Centre for Child Law, University of Pretoria *Guidelines for legal representatives of children* 5-6.

⁵⁹⁴ SALRC *Family Dispute Resolution* 43.

⁵⁹⁵ Heaton "The Interest of the Children of Divorcing Parents" in *South African Family Law* 176; Pillay & Zaal (2005) *S. Afr. Law J.* 687.

⁵⁹⁶ The person conducting the interview should not pressure or force a child to choose between his or her parents. See SALC Review of the Child Care Act 656.

⁵⁹⁷ LSSA *Comments on the SALRC Issue Paper 31 Family Dispute Resolution* 4.

⁵⁹⁸ Louw & Scherrer (2004) *International Journal of the Sociology of Law* 20. In 2017 alone there were 25 390 divorces, of which 55.6% (14 121) involved children. See *Statistics South Africa Statistical Release P0307: Marriages and Divorce* (2017) 8.

⁵⁹⁹ 27.

It must be noted that there are cases where the views of the child involved are sufficiently addressed in the family advocate's report and communicated to court. In *Fitschen v Fitschen*⁶⁰⁰ the Court did not appoint an intermediary or separate legal representation as the Court was satisfied that the children's views were sufficiently addressed in the family advocate's report.⁶⁰¹ Here, the children's participation reached at least level three of the proposed model as the children's views were communicated to and considered by the Court

*HG v CG*⁶⁰² serves as another example. The case concerned the variation of a parenting plan that would enable the applicant (the children's mother) to move to Dubai and take her four children with her. The family counsellor, a clinical psychologist appointed by the Office of the Family Advocate, was the only appointed professional who canvassed the children's views in court.⁶⁰³ In accordance with the Act, the Court gave due consideration to the children's views as they were of an age and level of maturity to form their own independent and informed views. The parenting plan remained unchanged, in line with the children's wishes.⁶⁰⁴ Here, the family counsellor's approach stood in stark contrast with the social worker and clinical psychologist involved in this case, who advocated that the children's voices should not be heard.⁶⁰⁵ While it is unsure whether the children were provided with opportunities to provide feedback on the implementation of their views, it is safe to say that the involvement of the family counsellor ensured that level four of the proposed model of measuring participation was achieved.

2 2 1 3 Evaluation of the Office of the family advocate

As the family advocates and counsellors are under no obligation to enquire about the child's wishes,⁶⁰⁶ there is unfortunately no guarantee that this Office will facilitate the child's participation whatsoever. Should the family advocate or counsellor not

⁶⁰⁰ 1997 JDR 0567 (C).

⁶⁰¹ *Fitschen v Fitschen* 1997 JDR 0567 (C) paras 62-65 read with *Soller NO v G and Another* 2003 5 SA 430 (W) para 3.

⁶⁰² 2010 (3) SA 352 ECP.

⁶⁰³ "Goosen consulted fully with the children and their attitude both to relocating to Dubai and to a change in the custody regime was unequivocal." See para 19.

⁶⁰⁴ Para 23.

⁶⁰⁵ Para 17. The approach of both these professionals will be discussed under section 2 2 1 4 below .

⁶⁰⁶ SALC Review of the Child Care Act 655.

provide the child with an opportunity to do so, the child's so-called "participation" does not even reach the first level of the proposed model.

However, where a family advocate or counsellor does in fact obtain the child's views, the child's participation can reach at least the third level of the proposed model of measuring participation. It should be noted that the aforementioned statement is based on the assumption that family advocates and counsellors possess the necessary skill and experience to work with children.

Based on the fact that all family advocates and counsellors do not always accurately communicate the children's views in court,⁶⁰⁷ reaching the fourth level of the proposed model can sometimes pose a challenge. Fortunately, the opposite can also be seen in case law where family advocates and counsellors accurately communicate children's views in court.⁶⁰⁸

Despite perceptions that the role of family advocates and counsellors in divorce related proceedings ends when judgment is delivered,⁶⁰⁹ it is argued that said persons are in the ideal positions to explain the decisions and consequent possibilities to the child. This is once again based on the assumption that their training and experience would equip them to do so.

2 2 2 *Other professionals*

It is generally not only the presiding officer who is involved in realising a child's right to participation in divorce and related proceedings.⁶¹⁰ The most common method employed to obtain a child's views is through trained professionals.⁶¹¹ It can therefore be said that those trained professionals are the adults who are most commonly employed to aid the children in exercising their right to participation in matters that so greatly impact their lives. This means that a trained professional such as a psychologist, social worker, or healthcare provider meet with the child to gain a better understanding of the child.⁶¹² The purpose of this meeting should not only be to obtain

⁶⁰⁷ Pillay & Zaal (2005) *S. Afr. Law J* 688; Fernando (2014) 52 *Family Court Review* 47.

⁶⁰⁸ 2010 3 SA 352 ECP; 1997 JDR 0567 (C)

⁶⁰⁹ SALC Review of the Child Care Act 642 & 654.

⁶¹⁰ Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 6.

⁶¹¹ F Mahlobogwane "Determining the best interest of the child in custody battles: should a child's voice be considered?" (2010) 31 *Obiter* 232 238.

⁶¹² N Bala, R Birnbaum, F Cyr & D Mccolley "Children's Voices in Family Court: Guidelines for Judges Meeting Children" (2013) 47 *Family Law Quarterly* 379 383.

the child's views, but also to let the child know that his or her views will be considered, even if the court's final decision is not in line with those views.⁶¹³ By doing so, professionals convey to children that adults recognise not only the interest that they have in the divorce related proceedings, but also that they have a right to participate therein.

Section 6 of the Divorce Act serves as authority for the involvement of professional persons. In line with section 6(1) of the Act, no court may grant a decree of divorce unless it is satisfied that the provisions made regarding the child are the best that can be affected in the situation. Section 6(2) provides that, in order to determine what the best arrangement would be for the child concerned, the court may order that an investigation be done, and that any person appear in court. The court also has the authority to order one or both of the parties to cover the cost of the investigation as well as appearances.

Despite the power that the section above confers on courts, it is possible that a court fails to make use of this provision in cases where it is not aware that such an investigation is required, or where the court relies solely on the family advocate's report.⁶¹⁴ The parties to the proceedings (the child's parents) are also allowed to appoint experts.⁶¹⁵

Section 29(5) of the Children's Act contains a similar provision which grants a court the power to:

- "[F]or the purposes of the hearing, order that
- (a) a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court;
 - (b) a matter specified by the court must be investigated by a person designated by the court;
 - (c) a person specified by the court must appear before it to give or produce evidence; or
 - (d) the applicant or any party opposing the application must pay the costs of any such investigation or appearance."

Social workers, psychologists, medical doctors and other professionals may thus assess the child and report their findings to court. Regrettably, these professionals do not always obtain the children's views or canvas those views in court, as was

⁶¹³ 383.

⁶¹⁴ Pillay & Zaal (2005) *S Afr. Law J* 684 & 689.

⁶¹⁵ Heaton "The Interest of the Children of Divorcing Parents" in *South African Family Law*.

highlighted in *HG v CG*.⁶¹⁶ This case which, as mentioned above, concerned the variation of a parenting plan.⁶¹⁷ The applicant appointed a qualified social worker as well as a clinical psychologist to counsel the children and provide their expert opinion for the court proceedings. The professionals provided the Court with inconsistent and contradictory reports,⁶¹⁸ which contained recommendations solely based on financial considerations and failed to consider the children's wishes whatsoever.⁶¹⁹ It is submitted that this led to the child's participation reaching a lower level of participation in terms of the proposed model.

The children were consistent in their view that they wanted the parenting plan to remain the same and did not want to move to another country.⁶²⁰ Regrettably, the social worker and clinical psychologist's recommendations were influenced by their loyalty to the applicant who had commissioned them.⁶²¹ Here, although the children shared their views, it was not considered or even listened to by the appointed professionals. This is a clear illustration of manipulation, which is a form of non-participation, in other words, at level one of the proposed model.⁶²²

Although the professional services rendered to assess certain people and their situations assist the court in making decisions, continuous assessments might not always be in the child's best interests as it can sometimes be traumatic and intrusive.⁶²³ This was illustrated in *J v J* where a 13-year old boy was repeatedly being subjected to assessments during and after his parents' divorce proceedings.⁶²⁴ The boy explained during yet another assessment that: "I feel very mad, angry, cross when I get test (sic) like this because I am not a lab rat that has to be tested my whole life!!!"

⁶¹⁶ 2010 3 SA 352 ECP.

⁶¹⁷ See section 2 2 1 2.

⁶¹⁸ *HG v CG* 2010 3 SA 352 ECP para 16.

⁶¹⁹ *HG v CG* 2010 3 SA 352 ECP para 17.

⁶²⁰ "The children took turns to talk, there was no spokesperson. Regarding the current arrangement, the children were unanimous in stating that they have adjusted to the divorce and the current living arrangements... They were unanimous that they did not want to move away. They mentioned the loss of schools, in which they are very involved, the loss of their friends, and the loss of their father. They said that they would not be able to see him, that they did not want this, and wanted to see him often. They felt settled in Port Elizabeth. They did not know what it would be like living in the Emirates, as they had only spent a short while there. They would have to attend new and different schools, have no friends, different subjects, sports and activities. They repeated that they did not want to leave their father. They wanted to see both parents as they currently do." See para 19.

⁶²¹ Para 21.

⁶²² See Chapter 2 section 4 5 1.

⁶²³ CR Matthias & FN Zaal "Intrusive care and protective assessments: When should children have the right to say 'no'?" (2017) *SAJHR* 381 382.

⁶²⁴ 2008 6 SA 30 (C). See Chapter 1 section 6 for a discussion of the facts of the case.

(sic)".⁶²⁵ Clearly, the boy's participation was not voluntary, child friendly, age-appropriate, or safe and sensitive to risk as required by level two of the proposed model of measuring participation. This is yet another example of non-participation.

In response to the boy's reaction, the clinical psychologist recommended that no further testing be done except if necessitated by circumstances and both parents agree to the testing.⁶²⁶ The Court consequently ordered that the child should not "be the subject of a further full, thorough and proper investigation" as "the time has come for the child to be allowed to settle down without further litigation, assessment and investigation".⁶²⁷ The Court made a similar remark in *HG v CG*,⁶²⁸ stating that:

"the minor children have been unfortunately subjected to the litigation between their parents and several assessments over the past six years, which have no doubt taken its toll on them. The time has come for the minor children to be allowed to settle down without further influencing, litigation, assessment and investigation".⁶²⁹

2 2 1 4 Evaluating children's participation in the context of professionals

Evaluating a child's participation in the context of professionals as described above is particularly important as children's voices are most commonly heard through these trained professionals.⁶³⁰ Unfortunately, there are cases where the professionals involved do not pay any regard to the children's wishes whatsoever.⁶³¹ There are also situations where the evaluation of the child by said professionals emotionally harm the child.⁶³²

While it seems that it is relatively easy for a child's participation to reach level two in terms of the proposed model, the chances of the child's participation reaching level three, four or five depends on the professional as well as the presiding officer involved. However, based on the great financial costs of professionals in private practice and the workload of government social workers, the chances of the child's participation reaching level four or five do not seem significant at all.

⁶²⁵ Para 40.

⁶²⁶ *J v J* 2008 6 SA 30 (C) para 40.

⁶²⁷ Para 40.

⁶²⁸ *HG v CG* 2010 3 SA 352 ECP.

⁶²⁹ Para 38.

⁶³⁰ Mahlobogwane (2010) *Obiter* 238.

⁶³¹ *HG v CG* 2010 (3) SA 352 ECP; *H v R* [2018] ZAECPECH.

⁶³² *J v J* 2008 6 SA 30 (C).

3 Direct participation

Section 10 of the Children's Act states that a child has the right to participate in an "appropriate way". This section recognises the need for courts and other decision-making entities to be adapted to enable children to participate.⁶³³ The reality is that children do not always participate effectively in children's court proceedings and in some cases do not participate at all.⁶³⁴ When considering the amount of international, regional and local sources that provide for a child's right to participation, the implementation of the right is particularly disappointing.

3 1 Judicial interview

3 1 1 *Background*

Section 61 of the Children's Act aims to ensure the child's right to express his or her views on a matter affecting them in court proceedings.⁶³⁵ The section provides that:

"The presiding officer in a matter before a children's court must -

- (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so;
- (b) record the reasons if the court finds that the child is unable to participate in the proceedings or is unwilling to express a view or preference in the matter; and
- (c) intervene in the questioning or cross-examination of a child if the court finds that this would be in the best interests of the child."

One of the ways in which a presiding officer can fulfil their section 61 obligation, is by interviewing the child. A judicial interview enables the presiding officer to enquire about the child's views while determining his or her level of maturity and development. Providing a child with the opportunity to share his or her views is in line with level two of the proposed model of measuring participation. Although the international, regional and local sources of a child's right to participation does not require a presiding officer to interview the child, the court must consider the child's views.⁶³⁶

⁶³³ A Moyo "Child Participation Under South African Law: Beyond the Convention on the Rights of the Child?" (2015) 31 *SAJHR* 173 178.

⁶³⁴ L Claasen & G Spies "The voice of the child: experiences of children, in middle childhood, regarding Children's Court procedures" (2015) 51 *Social Work* 89.

⁶³⁵ De Bruin *Child Participation and Representation in Legal Matters* 330.

⁶³⁶ Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* 16-17.

Raitt describes the judge's decision to interview the child in chambers as the start of the process of inclusion.⁶³⁷ Indeed, interviewing a child in chambers can pave the road to effective participation as the presiding officer then enjoys the opportunity to hear the child's unfiltered views and perhaps even explain to the child why or why not his or her views can be implemented.

As there is no explicit statutory obligation on presiding officers to conduct a judicial interview, it is a matter of judicial discretion.⁶³⁸ Choosing to conduct such an interview can communicate to the child, as well as his parents or other parties involved, that the child's views matter and that the court does not blindly rely on the recommendations of the family advocate⁶³⁹ or any other professional.

In some jurisdictions, legislation explicitly permits a judge to conduct a judicial interview to obtain the child's views.⁶⁴⁰ Still, there is a lack of consistency among judges, even within the same jurisdiction, regarding how and when they meet with children.⁶⁴¹ In Germany, judges are obliged to personally meet with the parents as well as the children.⁶⁴² These Family Court Judges receive training in basic education and psychology to effectively communicate with children.⁶⁴³ Legislation of a few jurisdictions in the United States of America creates a presumption that judges will meet with children. There are two models of this type of statutory presumption one creates a presumptive right for parents to request that the judge interview their child, while the other creates a presumptive right for the child to meet with the judge.⁶⁴⁴

Meeting with a presiding officer in chambers provides the child with the opportunity to communicate freely (level two of the proposed model of measuring participation).⁶⁴⁵ The presiding officer also gets the opportunity to communicate with the child at his or her level.⁶⁴⁶ The interview enables the presiding officer to better consider and

⁶³⁷ F Raitt "Hearing children in family law proceedings: can judges make a difference?" (2007) 19 *Child and Family Law Quarterly* 204 210.

⁶³⁸ Raitt (2007) *Child and Family Law Quarterly* 210.

⁶³⁹ 210.

⁶⁴⁰ Bala, Birnbaum, Cyr & Mccolley (2013) *Family Law Quarterly* 379 386.

⁶⁴¹ 389.

⁶⁴² SALRC *Family Dispute Resolution* 86.

⁶⁴³ 86.

⁶⁴⁴ Bala, R Birnbaum, Cyr & Mccolley (2013) *Family Law Quarterly* 384.

⁶⁴⁵ Claasen & Spies (2015) *Social Work* 84.

⁶⁴⁶ 84.

understand the child and his or her views, rather than simply reading a report compiled by another person (level four of the proposed model).⁶⁴⁷

There are, however, also disadvantages and risks to the practice of judicial interview, which mainly relate to level three of the proposed model of measuring children's participation. The main concerns involve the presiding officer. Firstly, presiding officers often fail to foster a child-friendly and age-appropriate environment.⁶⁴⁸ The second concern is that presiding officers are not trained to effectively communicate with children.⁶⁴⁹ The Court admitted the latter in *Soller*⁶⁵⁰ where Satchwell J explained:

"I do not claim to be a social worker or psychologist. The circumstances were obviously extremely artificial in that K was engaging with myself in my capacity as a Judge where time was pressured, and it was obvious that distressed parents were outside in the Courtroom. However, K was able to express a clear view to which I shall later refer."⁶⁵¹

The South African Law Society is not in favour of an obligation to interview children, but endorses the view that it should occur in exceptional circumstances.⁶⁵² They also warn that certain safeguards should be put in place, including that a representative from the Office of the Family Advocate should be present and that the interview should be recorded and transcribed.⁶⁵³ This could address level three of the proposed model, as the family advocate could help make the child feel more at ease.

*Rosen v Havenga*⁶⁵⁴ is an example of where the presiding officer interviewed a 9-year-old boy.⁶⁵⁵ The case concerned the care, guardianship and access of K, the son of the plaintiff and defendant. During this interview, Moosa J gained insight and understanding of the boy's anxiety regarding the conflict between his parents as well as why he was not ready to have access to his father just yet.⁶⁵⁶ Although Moosa J realised during the interview that J is immature,⁶⁵⁷ he still presented J with an opportunity to have his voice heard, and in doing so, facilitated J's participation, which

⁶⁴⁷ Raitt (2007) *Child and Family Law Quarterly* 206.

⁶⁴⁸ Claasen & Spies (2015) *Social Work* 85.

⁶⁴⁹ Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* 17.

⁶⁵⁰ *Soller NO v G and Another* 2003 5 SA 430 (W). The facts of this case are dealt with earlier in this chapter under section 2 1 1 1 2.

⁶⁵¹ Para 33.

⁶⁵² LSSA *Comments on the SALRC Issue Paper 31 Family Dispute Resolution* 5.

⁶⁵³ 5.

⁶⁵⁴ 2005 JOL15235 (C).

⁶⁵⁵ Para 31.

⁶⁵⁶ Para 31.

⁶⁵⁷ Para 32.

consequently reached at least level two and possibly level three of the proposed model of measuring participation. While it is admitted that J's participation by means of judicial interview did not have a significant impact on the case, it must be noted that it was as a result of him being young and immature, and not simply a case of ignoring the child's wishes.⁶⁵⁸

In *DB v MP*⁶⁵⁹ the presiding officer declined an invitation from counsel to interview an 11-year-old boy. In terms of the existing care order made when the applicant and respondent were divorced in 2005,⁶⁶⁰ care was awarded to the respondent while the applicant was entitled to enjoy reasonable access.⁶⁶¹ In this case, the applicant (the boy's father) sought to amend the care order by having care his and the respondent's son.⁶⁶²

Counsel for the respondent submitted that the child should be interviewed in chambers to obtain his views regarding his primary place of residence (level two of the proposed model).⁶⁶³ In response the applicant argued that the interview would be of no value as a result of the respondent's constant manipulation of the child.⁶⁶⁴ The latter could lead to the child's non-participation in terms of the proposed model of measuring participation.

After considering section 10 of the Children's Act, Matojane J declined counsel's request to interview the boy in chambers, as he is "still [sic] young to decide on his own what is in his best interest".⁶⁶⁵ Unfortunately it seems that Matojane J failed to understand that a child's right to participation involves a child's *voice* as opposed to a child's *choice*. The child's views were also not conveyed through a legal representative or *curator ad litem*. The Court did, however, take notice of the child's preferences as communicated to other professionals.⁶⁶⁶ Based on the available information, the boy's participation reached at least the third level in terms of the proposed model.

⁶⁵⁸ Paras 31-32.

⁶⁵⁹ 2010 JDR 0716 (GNP).

⁶⁶⁰ Para 2.

⁶⁶¹ Para 2.

⁶⁶² Para 4.

⁶⁶³ Para 13.

⁶⁶⁴ Para 13.

⁶⁶⁵ Para 13.

⁶⁶⁶ Para 13.

3 1 2 *Evaluating judicial interviews*

A judicial interview complies with the second level of participation, as it automatically creates an opportunity for the child to share his or her views (level two). Whether the presiding officer facilitated the interview in a respectful and child-friendly way while providing the necessary information (level three) will depend on the specific presiding officer. Having a representative from the Office of the Family Advocate present as suggested by the South African Law Society could address this concern.⁶⁶⁷

Whether the presiding officer considers and reflects upon the views of the child (level four) will depend on the presiding officer's preference as well as the facts of each individual case. Whether the decision and consequent options (level five) are explained to the child will also depend on the presiding officer. It is argued that presiding officers should, where the child's views could not be adhered to and it is safe to do so, provide reasons in the judgment or to the child in person as to why they could not implement the wishes of the child.

3 2 Initiating court proceedings

3 2 1 *A child's right to litigate*

The Children's Act introduced new opportunities regarding child litigation in South Africa.⁶⁶⁸ In line with section 34 of the Constitution,⁶⁶⁹ section 14 of the Children's Act states that "every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court".⁶⁷⁰

A child's right to participation can be realised by the appointment of representation, or by the child directly participating. Section 14 links with section 10 of the same act and creates an opportunity for the child's right to participation to be realised through this right of access to a court.⁶⁷¹ It is important to take note that the application of this section is not confined to Children's Court matters but has general application.⁶⁷² The

⁶⁶⁷ LSSA *Comments on the SALRC Issue Paper 31 Family Dispute Resolution* 5.

⁶⁶⁸ T Boezaart & DW de Bruin "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" (2011) 44 *De Jure* 416 416.

⁶⁶⁹ T Boezaart "General Principles" in *Commentary on the Children's Act* 2-30.

⁶⁷⁰ The section commenced on 1 July 2007.

⁶⁷¹ Boezaart & De Bruin (2011) *De Jure* 419.

⁶⁷² 419.

right thus relates also to all divorce related court proceedings, bearing in mind that the specific court must have jurisdiction over the particular matter.

Against the background of the common law principles relating to a child's ability to litigate, the inclusion of this section raises some questions regarding a child's abilities to institute court proceedings.⁶⁷³ In terms of the common law, an *infans* (a child younger than 7 years of age) has no capacity to litigate personally.⁶⁷⁴ The *infans'* parent or guardian must act on behalf of the child.⁶⁷⁵ A minor, on the other hand, is a person between the age of 7 and 18 years of age.⁶⁷⁶ A minor generally has limited capacity to litigate.⁶⁷⁷ As minors have limited *persona standi in judicio*, they cannot institute or defend legal proceedings without being assisted by a guardian or parent.⁶⁷⁸

Interpreting the words "every child" in section 14 of the Children's Act in a literal fashion, would lead to an *infans* having limited capacity to litigate rather than no capacity whatsoever.⁶⁷⁹ Boezaart doubts that the legislature intended to grant such young children, who have no capacity to act, limited capacity to litigate.⁶⁸⁰ Rather, the Act should be interpreted as ensuring that every child enjoys access to court, whether it be directly when a guardian institutes an action on the child's behalf, or indirectly when a legal representative or *curator ad litem* is appointed to represent the child.⁶⁸¹ Heaton also doubts the legislature's intention to change the common law based on the aforementioned far-reaching consequences it would bring about.⁶⁸²

It is important to take into account that section 14 does not make any distinction between children younger than 7 and children older than 7, which renders it difficult or impossible to read the differentiation as described above into the relevant section.⁶⁸³ Further, the connection between section 14 of the Children's Act and section 28(1)(h) of the Constitution becomes apparent when considering a child's need for legal

⁶⁷³ 416.

⁶⁷⁴ T Boezaart "Child Law, the Child and South African Private Law" in T Boezaart (ed) *Child Law in South Africa* (2017) 3 19.

⁶⁷⁵ 22.

⁶⁷⁶ 20.

⁶⁷⁷ Boezaart & De Bruin (2011) *De Jure* 418.

⁶⁷⁸ 418.

⁶⁷⁹ Boezaart "Child Law, the Child and South African Private Law" in *Child Law in South Africa* 22.

⁶⁸⁰ 22.

⁶⁸¹ 22-23.

⁶⁸² Boezaart & De Bruin (2011) *De Jure* 419.

⁶⁸³ 420.

representation when bringing a matter to court.⁶⁸⁴ A child's right of access to court is not influenced by his or her incapacity to litigate on their own.⁶⁸⁵ This is noteworthy, as a child's access to court can play a significant role in realising a child's right to participation when it comes to divorce litigation in particular.

Section 14 of the Children's Act furthermore complies with section 34 of the Constitution which grants "everyone ... the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court". It does so by granting a child the right to be assisted in bringing his or her matter to court.⁶⁸⁶

Boezaart and De Bruin point out that section 14 may grant a child the right to bring their case to court but it fails to set out any procedural requirements or guidelines on how the right is to be exercised.⁶⁸⁷ Generally, a minor's guardian or parent will litigate on behalf of the child.⁶⁸⁸ This can pose a threat to a child's right to participation in circumstances where the child's views are not in line with their parent or guardian's views.

A *curator ad litem* can also be appointed to litigate in the minor's name and interests.⁶⁸⁹ Where a child institutes proceedings without the required assistance or consent, a judgment in favour of the child is enforceable and valid, but the same is not true for a judgment made against a child.⁶⁹⁰

In order to extend a child's right to participation in matters affecting him or her, sections 10 and 14 of the Children's Act should be read together.⁶⁹¹ This becomes particularly clear when comparing section 10 of the Children's Act with Article 4(2) of the ACRWC as well as Article 12 of the UNCRC.⁶⁹² Section 14 should be interpreted broadly to create the largest possible platform for a child to have his or her voice heard and considered.⁶⁹³

⁶⁸⁴ 420.

⁶⁸⁵ 420.

⁶⁸⁶ Boezaart & De Bruin (2011) *De Jure* 421.

⁶⁸⁷ 422.

⁶⁸⁸ 422.

⁶⁸⁹ 422. The appointment of a *curator ad litem* has been discussed under section 2 1 2 of this chapter.

⁶⁹⁰ 425.

⁶⁹¹ 429.

⁶⁹² 429.

⁶⁹³ 430.

3 2 2 Practicalities

It is now established that a child cannot bring a case to court without the assistance of either a guardian or parent, or a legal representative in the form of a legal practitioner or *curator ad litem*. If the child's guardian or parent is unable or unwilling to assist the child, or if there is a conflict of interest between the child and his or her guardian or parent, a *curator ad litem* may be appointed.⁶⁹⁴

As pointed out in *Legal Aid Board v R*,⁶⁹⁵ a child may directly approach Legal Aid for the appointment of a separate legal representative in terms of section 28(1)(h) of the Constitution. Boezaart submits that Legal Aid also had the option of approaching the Court for the appointment of a *curator ad litem* in terms of section 14 of the Children's Act.⁶⁹⁶ In such circumstances, a *curator ad litem* may also be appointed after the commencement of litigation.⁶⁹⁷

A child can thus approach Legal Aid directly for legal assistance. Still, when it comes to civil proceedings, the child's family must pass the Means Test before a legal practitioner is appointed to represent the child.⁶⁹⁸

The "substantial injustice" limitation in section 28(1)(h) of the Constitution is not applicable to section 14 of the Children's Act.⁶⁹⁹ In other words, as long as one of the established grounds for the appointment of a *curator ad litem* is present, a child must be able to be assisted by a *curator ad litem*.⁷⁰⁰

⁶⁹⁴ Boezaart "Child Law, the Child and South African Private Law" in *Child Law in South Africa* 34.

⁶⁹⁵ *Legal Aid Board v R* 2009 2 SA 262 (D).

⁶⁹⁶ Boezaart "General Principles" in *Commentary on the Children's Act* 2-38.

⁶⁹⁷ 2-38.

⁶⁹⁸ In terms of Legal Aid's Means Test, free legal representation will only be awarded if the child's household earns less than R8 000 per month, after tax deductions. If the child's parent(s) own a house, the total value of the house and belongings may not exceed R640 000. If they do not own a house, the value of all of their other belongings (furniture, car, clothing etcetera) may not exceed R128 000. See Legal Aid South Africa "How it works" (2018) *Legal Aid South Africa* <<http://legal-aid.co.za/how-it-works/>> (accessed 25/08/2019).

⁶⁹⁹ Boezaart "General Principles" in *Commentary on the Children's Act* 2-37.

⁷⁰⁰ Boezaart & De Bruin (2011) *De Jure* 431-432.

3 2 3 *Evaluation*

Although the Constitution addresses a child's right to legal representation, it does not directly address a child's right to participation.⁷⁰¹ The inclusion of the right in section 14 of the Children's Act, has filled this void.⁷⁰²

A child initiating court proceedings, with the assistance of an adult, has the potential to fulfil a child's right to participation. Doing so provides the child with an opportunity to share his or her views (at level two of the proposed model). With the help of adult, the child can participate in a respectful process while receiving adequate information (level three).

While the degree to which the court considers and reflects (level four) will depend upon both the specific court and the relevant circumstances. Further, level five can be reached if the child is effectively represented. It should be noted that, as a child cannot initiate proceedings without the assistance of an adult, the level of participation depends on the effectiveness of the child's representation, which once again highlights the significance of effective legal representation.

3 3 Challenging court decisions

3 3 1 *A child's right to challenge court decisions*

Section 22(6)(a) of the Children's Act provides that a parental responsibilities and rights agreement registered by the family advocate may be amended or terminated on application by the child, acting with leave of the court.⁷⁰³ Similarly, where a parental responsibilities and rights agreement has been made an order of court, it can be amended or terminated on application by the child. This can, however, only happen when a child acts with leave of the court.⁷⁰⁴

The same is true for section 28(3) of the Children's Act which provides that a child, with leave of the court, can apply to the High Court, Divorce Court or Children's Court for the termination, extension, suspension or restriction of parental responsibilities and rights. Again, in terms of section 34(5)(b)(c), a parenting plan that was made a court

⁷⁰¹ 432.

⁷⁰² 432.

⁷⁰³ Section 22(6)(a)(ii) of the Children's Act.

⁷⁰⁴ Section 22(6)(b)(ii).

order, can only be terminated or amended by another court order which was obtained on application by the child acting with leave of the court.

Once again, the connection between section 14 of the Children's Act and section 28(1)(h) of the Constitution becomes clear as "with leave of the court" in section 14 entails a child's right to be legally assisted in seeking leave to bring an application to either terminate or amend a parental responsibilities and rights agreement.⁷⁰⁵ This means that, as with initiating court proceedings, legislation limits the level a child's participation can reach.

3 3 2 *Evaluating a child's right to challenge court decisions*

Should the child be granted leave to bring an application to terminate or amend a parental responsibilities and rights agreement, the child's participation can reach at least the third level in terms of the proposed model of measuring children's participation. This is because the papers filed by their legal representative will contain the child's views. Once again, reaching level four or five will depend on the court's approach to the child's participation. As a child cannot challenge the proceedings without legal assistance, the potential level of participation also greatly depends on the effectiveness of the child's legal representation. The potential negative impact of the adversarial system should also be kept in mind as it can drastically impact a child's level of participation.

3 4 Joining court proceedings

3 4 1 *A child's right to join court proceedings*

Although there are concerns that involving a child in litigation may be detrimental to him or her,⁷⁰⁶ children may also be joined to proceedings. Fortin identifies children joining the litigation as the highest level of child participation in divorce proceedings.⁷⁰⁷

In *Ex Parte Van Niekerk*⁷⁰⁸ the Court ordered that the two van Niekerk children be joined as parties to the proceedings between their parents.⁷⁰⁹ Hartzenberg J referred to the Canadian matter of *Re Children's Aid Society of Winnipeg and AM and LC Re*

⁷⁰⁵ Boezaart & De Bruin (2011) *De Jure* 421.

⁷⁰⁶ Fernando (2013) *Family Court Review* 46.

⁷⁰⁷ J Fortin *Children's Rights and the Developing Law* (2003) 213.

⁷⁰⁸ 2005 JOL 14218 (T).

⁷⁰⁹ Para 1.

RAM. In this case the Court pointed out that unless the child is a party to the proceedings relating to his guardianship, it would be impossible for the child to appeal against an order which could clearly have an adverse impact on him (thus, reaching level five of the proposed model of measuring participation).⁷¹⁰ Hartzenberg J further explained that, in light of the argument as set out in the Canadian case, “to give proper effect to the provisions of section 28(1)(h) of the Constitution a court is entitled to join minors as parties to proceedings affecting their best interests”.⁷¹¹ As with the Canadian case, the two van Niekerk children would not have been able to appeal against an adverse order,⁷¹² such as court-mandated therapy with their father.

This case was heard in 2005, two years before the commencement of section 14 of the Children’s Act. It is uncertain whether it would have made any difference if section 14 had been in effect at the time.⁷¹³ Regardless, the *Ex parte van Niekerk* judgment is a valuable addition to a variety of High Court decisions that place an increasing emphasis on the importance of courts ensuring that a child’s voice is heard in his or her parents’ divorce and other related proceedings.⁷¹⁴

3 4 2 *Evaluating a child’s right to join court proceedings*

While a child participating by being joined to his or her parents’ divorce related proceedings can potentially realise a child’s right to participation, attention must be paid to the negative impact that being closely involved in such an adversarial process can have on the child.⁷¹⁵ Once again, the potential level of participation that can be reached by joining a child to the relevant court proceedings will depend on the effectiveness of the child’s legal representation. It is however argued that, here, a child’s participation is more likely to reach higher levels (for example, level four or five of the proposed model) as the child is more directly involved in the court proceedings.

Furthermore, as being joined to the proceedings entails being able to appeal against orders, this method of participation is capable of reaching the highest level of participation. However, it should be kept in mind that the sometimes hostile and child-

⁷¹⁰ Para 8.

⁷¹¹ Para 8.

⁷¹² *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* 2005 JOL 14218 (T) para 8.

⁷¹³ Boezaart & De Bruin (2011) *De Jure* 429.

⁷¹⁴ Pillay & Zaal (2005) *S. Afr. Law J.* 687.

⁷¹⁵ See Chapter 3.

unfriendly court environment has the potential to negatively impact the child's level of participation.

3 5 Children as witnesses

3 5 1 Background

A child may appear as a witness in civil proceedings, for example where care and contact arrangements are in dispute.⁷¹⁶ Fortin views a child acting as witness in family law proceedings as the second highest level of participation, with only children initiating proceedings themselves carrying more weight in terms of levels of participation.⁷¹⁷

Although a child may appear as a witness in litigation between their parents, it does not happen often as a result of a general consensus that involving children in such an adversarial process can negatively affect the child.⁷¹⁸ Those against including children as witnesses argue that court proceedings are not designed for children to participate,⁷¹⁹ and that a child will experience pressure to "choose" between parents.⁷²⁰ It is also argued that a child acting as a witness creates the potential for a parent or parents to act vindictive towards a child.⁷²¹

Acting as a witness, especially during cross-examination, tends to be intimidating.⁷²² The rigorous and daunting atmosphere can result in incomplete or incoherent testimony,⁷²³ which may bear little probative value.⁷²⁴ Feeling intimidated or unsafe will impact the quality of the child's participation and subsequently the effect thereof.

In *Rosen v Havenga*,⁷²⁵ the Court expressed its dismay at the proposal of having a 9-year-old boy testifying in his parents' litigation regarding care, guardianship and access. During the proceedings, the first defendant, the child's father, suggested that

⁷¹⁶ SALRC *Family Dispute Resolution* 56.

⁷¹⁷ Fortin *Children's Rights and the Developing Law* 212.

⁷¹⁸ Fernando (2014) *Family Court Review* 46.

⁷¹⁹ Bessner & Department of Justice Canada *The Voice of the Child in Divorce Custody and Access Proceedings* 222.

⁷²⁰ 211.

⁷²¹ 212; F Mahlobogwane (2010) *Obiter* 242.

⁷²² Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* 7.

⁷²³ Mahlobogwane *Obiter* 241.

⁷²⁴ Bessner & Department of Justice Canada *The Voice of the Child in Divorce Custody and Access Proceedings* 224.

⁷²⁵ 2005 JOL15235 (C).

the boy be called to testify in court.⁷²⁶ Moosa J refused the request and explained that doing so would have placed “tremendous strain on [the boy] and caused him untold distress. It would not have been in the best interests of [the boy] as he, in all likelihood would have had to take a stand against one or other of his parents.”⁷²⁷

Huddart and Ensminger, however, argue that children should often be called as witnesses in family law proceedings.⁷²⁸ They explain that, when a child’s views are expressed in court (level two of the proposed model), it forces the child’s parents to listen, if not hear, their child. The child will be assured that his or her views are being canvassed in court in a way and language that he or she chooses, without the danger of the child’s views being misstated by an adult who may mean well.⁷²⁹ Fortunately, professionals are increasingly realising that involving children in court proceedings should be done sensitively,⁷³⁰ and there is a recognised need to make court proceedings more child-friendly and less intimidating (level three of the proposed model).⁷³¹

3 5 2 *Evaluating children’s participation in acting as witness*

In theory, a child acting as a witness in court proceedings can reach a high level (level four or five) of participation. This, however, will be influenced by the court’s approach to children’s participation, as well as the general sensitivity and child-friendliness of court.

It is argued that civil courts as well as children’s courts must, through the use of various techniques, create a space where children can share their testimony without fear and without being pulled apart during cross examination. Should courts achieve the latter, a child’s participation when acting as witness in proceedings has the potential to reach at least the fourth level of participation in terms of the proposed model.

As the child’s testimony would hopefully entail the child directly sharing their unfiltered views, it seems fair to comment that a court would be more likely to at least

⁷²⁶ Para 31.

⁷²⁷ Para 31.

⁷²⁸ C Huddart & J Ensminger “Hearing the Voice of Children” (1991) 8 *Can. Fam. L.Q.* 95 104.

⁷²⁹ Huddart & Ensminger (1991) 8 *Can. Fam. L.Q.* 104.

⁷³⁰ Engelbrecht *Critical Analysis of Child Participation of Children in Legal Matters* 37.

⁷³¹ R Hodgkin & P Newell *Implementation Handbook for the Convention on the Rights of the Child* 3 ed (2007) 156.

address the child's views (if not implement them), than in a situation where the court simply receives a document that mentions the child's views. It also seems more likely for either the court or the child's legal representative to explain the decision made to the child, as the child was directly involved in the proceedings to such a large extent. This means that, by acting as a witness, a child's participation has the potential to reach the fifth and highest level of participation.

4 Conclusion

This chapter investigated the ways in which a child's right to participation manifests in his or her parents' divorce and related proceedings. A child's right to participation can be realised either by representation or by the child participating directly.

Representation can be divided into two subcategories, namely legal representation and other representation. Legal representation can be divided into two further subcategories, namely statutory legal representation and common law legal representation. In terms of statutory legal representation, this chapter measured legal representation in terms of section 28 of the Constitution, section 55 of the Children's Act and section 6(4) of the Divorce Act.

Measuring these sources of statutory legal representation in terms of the proposed model for children's participation, revealed the importance of effective legal representation. While the provisions regarding legal representation differ in how and when such representation is appointed, all of them envision a legal representative whose mandate it is to represent and argue a child's wishes.

As a result of this mandate, the mere appointment of a statutory legal representative reaches the second level of participation in terms of the proposed model. However, effective legal representation leads to the child's participation reaching the third level of participation. Reaching level four is greatly dependent on the presiding officer in the relevant matter, as it is the ultimate decision-making power rests with them. Reaching the fifth level of participation in terms of the proposed model, can depend either on the presiding officer or the legal representative, or both of the aforementioned. This is because the possibility of appeal or review of the decision must be explained to the child, and either of the two role players can fulfil that function.

Common law legal representation involves the appointment of a *curator ad litem*. A *curator ad litem*'s role is to assist the court and to protect the child's best interests. In contrast with statutory legal representation, a *curator ad litem* has a discretion when it comes to obtaining the child's views. This means that the mere appointment of a *curator ad litem* does not automatically result in the child's participation reaching level two of the proposed model. However, if the *curator ad litem* chooses to obtain the child's wishes, the child's participation can reach level three in terms of the proposed model. Reaching level four will depend on the effectiveness of the *curator ad litem*. Reaching levels four and five of the proposed model depends on the same factors as is the case with statutory legal representation.

This chapter also investigated other forms of representation that do not involve legal representation. The family advocate is one such an example. The family advocate is not appointed to represent the child's views, but to remain neutral and make recommendations to the court after considering all relevant information. Unfortunately, the family advocate has no obligation to obtain the child's views. When the family advocate does not obtain the child's views *mero muto*, the child's participation does not even reach the first level of participation in terms of the proposed model. Where they do obtain the child's views, the child's participation reaches the second level of participation. Reaching the third, fourth and fifth level will depend on the same factors as set out above. It is argued that the family advocate is in a particularly fitting position to realise the fifth level of participation as their knowledge and training regarding children equip them to explain decisions and further options to children.

Other professionals such as psychologists, social workers and other health care professionals can also represent children in their parents' divorce related proceedings. Other professionals conveying a child's views to the court are the most common way in which children's views are shared in family law litigation. However, these professionals do not always obtain and accurately communicate children's views. Children can also experience consulting with these professionals as highly intrusive. Where professionals do obtain children's views, the participation can reach level two of the proposed model. Once again, reaching higher levels will be determined by the same factors as above.

Furthermore, this chapter analysed the five ways in which children can directly participate in their parents' divorce related proceedings, the first of which was a judicial interview. A judicial officer conducting an interview in chambers with a child will automatically lead to the child's participation reaching the second level of the proposed model and can easily lead to reaching level four of the model. This is because the judicial interview enables the judicial officer to obtain the child's views directly from the child and considers the views without being influenced by a third party who might have otherwise canvassed the child's views in court. Interviewing the child in chambers also creates an opportunity for the presiding officer to engage with the child and explain to them why his or her views will or will not be implemented in the final decision. It should, however, be kept in mind that judicial officers are not trained to work with children, and the process can be harmful to the child. The child-friendliness of the process therefore poses a significant threat to the level that the child's participation can reach.

The second method of direct participation investigated, was the initiation of court proceedings by the child themselves. As with challenging or joining court proceedings, the child's participation will reach at least the third level of the proposed model. This is because the child's views will be canvassed in the papers that are filed at court. While reaching level four will greatly depend on the presiding officer, there is a great chance of the child's participation reaching level five of the proposed model, as they will be cited as parties to the proceedings. This means that they automatically enjoy the right appeal or take the decision on review. While these three models immediately offer the child access to higher levels of participation, the child friendliness of the processes pose a challenge. The same can be said about the fifth method, namely where a child acts as a witness in their parents' divorce related proceedings. This is however not common practice in South Africa as a result of the general consensus that the hostile environment that is a courtroom will have too great a negative influence on the child. Nevertheless, the child's participation can reach level two of the proposed model by means of this method.

Measuring the level of participation reached by the various methods employed, led to the conclusion that the relevant right is not always being realised. It also revealed that there is great uncertainty regarding how and in which circumstances this right will be realised. Furthermore, it was shown that there are too many subjective factors

within divorce related proceedings that influence the chances of the child's right being realised.

Applying the abovementioned theory to the current methods of children's participation highlighted the need for an alternative model to realise said right in divorce and related proceedings. This statement is supported not only by the lack of sufficient levels and low quality of participation, but also the correlation between higher levels of participation and the negative impact that the adversarial system tends to have on children. The latter is especially significant when looking at a child's direct participation in the relevant proceedings.

This chapter addressed one of the secondary research questions, namely: what are the shortcomings in the current state of affairs with regard to a child's right to participation in their parents' divorce proceedings in South Africa? The challenge is therefore to identify a model that sufficiently addresses a child's right to effective participation in his or her parents' divorce related proceedings. A model that does so in a manner that does not harm the child would most certainly be one worth exploring.

The next chapter will consider how a child's right to participation in his or her parents' divorce and related proceedings are realised in Australia. By comparing and contrasting Australia's approach to children's participation in legal matters affecting them, specifically in the context of divorce, it will be possible to establish whether a child's right to participation is better realised in Australia than in South Africa.

Chapter 4:

Comparative Study of Australia

1 Introduction

The purpose of this chapter is to explore the Australian approach to a child's right to participation in the context of divorce related proceedings and to measure the right to participation in terms of the model as set out in Chapter 2. In order to do so, a brief background to the Australian family law system will be provided. This will be followed by a discussion of the relevant provisions of The Family Law Act 1975 ("Family Law Act") to the extent that it regulates divorce and related proceedings.

As a result of the number of families who make use of alternative processes, the analysis will be divided into two sections, namely children's participation during alternative and pre-trial process and children's participation in traditional litigation. In conclusion, certain recommendations made by the Australian Law Reform Commission which are relevant in the context of this study will be briefly discussed.

2 Background to the Australian family law system

2.1 Family Law Act 1975

The Family Law Act came into force on 5 January 1976 and is the primary legislation that regulates proceedings regarding divorces, arrangements for children after their parents' divorce, maintenance, and other issues.⁷³² The Family Law Act introduced new measures regarding the care and welfare of children.⁷³³ It brought two significant changes to Australian divorce law, introducing no-fault divorce as well as the Family Court of Australia, which is an "establishment of specialist multi-disciplinary court for the resolution of family disputes".⁷³⁴ The Family Law Act has been described as a dynamic piece of legislation as a result of being amended frequently.⁷³⁵

⁷³² D Bryant *Care and Protection of Children: Australian and New Zealand Experience* (2005) unpublished paper presented at the World Congress on Family Law and Children's Rights at Cape Town, 20-03-2005 – 23-03-2005 (available at https://www.childjustice.org/index.php?option=com_edocman&task=document.viewdoc&id=10&Itemid=&lang=en).

⁷³³ De Bruin *Child Participation and Representation in Legal Matters* 486.

⁷³⁴ ALRC *Family Law for the Future – An Inquiry into the Family Law System Report 135* (2019) 56-57.

⁷³⁵ De Bruin *Child Participation and Representation in Legal Matters* 486. The most significant amendments were made in 2006, 2009 and 2012. Through the many amendments, Part VI of the

2.2 Court structure

Australia's family law system includes the Family Court of Australia, the Family Court of Western Australia, the Federal Circuit Court of Australia as well as other post-separation and other family law services.⁷³⁶ Section 21(1) of the Family Law Act establishes the Family Court of Australia. In terms of section 31(1) of the same Act, the Family Court has jurisdiction over all matters arising under the Family Law Act.⁷³⁷ The Family Court envisioned by the Act is a court that deals exclusively with family law matters and functions as a "helping court".⁷³⁸ Judges, as presiding officers, are appointed based on their suitability to attend to family law matters.⁷³⁹ They are assisted by registrars and family consultants.⁷⁴⁰ This means that, in the event that the matter follows the litigation route, children's participation in their parents' divorce related proceedings takes place specifically in the specialised Family Court, as opposed to a court that deals with various types of matters. Whether a family court will better aid in the facilitating effective children's participation will become apparent throughout this chapter.

2.3 The Family Law Act and article 12 of the United Nations Convention on the Rights of the Child ("UNCRC")

Australia ratified the UNCRC⁷⁴¹ on 17 December 1990.⁷⁴² By doing so, Australia undertook to, "with regard to economic, social and cultural rights",⁷⁴³ venture "all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention".⁷⁴⁴ Although the ratification of the

Act which regulates children's matters, has grown from less than 2700 words to more than 47 000 words. See G Riethmuller "Deciding Parenting Cases under Part VII: 42 Easy Steps" (2015) 24 *Australian Family Lawyer* 1 2.

⁷³⁶ Riethmuller (2015) *Australian Family Lawyer* 55.

⁷³⁷ Before the establishment of the Family Court, there was no court that specialised in family law matters. See: M Fernando *Judicial Meetings with Children in Australian Family Law Proceedings: Hearing Children's Voices DPhil thesis, University of Tasmania (2011)* 26. In 2019, the Australian Law Reform Commission recommended that the Australian Government should establish family courts in all territories and states. See ALRC *Family Law for the Future* 15.

⁷³⁸ 57.

⁷³⁹ 96.

⁷⁴⁰ 57.

⁷⁴¹ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (1989) (hereafter "UNCRC").

⁷⁴² United Nations Treaty Collection "Status of Treaties: United Nations Convention on the Rights of the Child" United Nations Treaty Collection.

⁷⁴³ Art 4 of the UNCRC.

⁷⁴⁴ Art 4.

UNCRC binds Australia in international law, it is not part of domestic law until it is granted the force of law by legislation.⁷⁴⁵

As previously mentioned, the Family Law Act regulates divorce and related proceedings.⁷⁴⁶ The objects of Part VII are set out in Section 60B⁷⁴⁷ and provide guidance to the court when interpreting the primary and additional considerations.⁷⁴⁸

Although section 60B makes no specific reference to a child's right to participation or any aspect thereof, it states in subsection (4) that: "an additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989". This reference to the UNCRC has been described as "a significant development in how children's rights will be recognised in family law matters".⁷⁴⁹ Section 60B(4) was the first provision to include the UNCRC in the Act.⁷⁵⁰ This section commenced in 2012. Significantly, a first draft of the Family Law Reform Bill 1994 explicitly included articles of the UNCRC, which were deleted in subsequent drafts.

Fernando contests that regarding the inclusion of the UNCRC into the objects of the Part VII, the legislature's only intention was to confirm the common law position, which is that, in ambiguous cases, Part VII of the Act should be interpreted in line with the provisions of the UNCRC.⁷⁵¹ The latter, however, is only true to the extent that the Act allows for such an interpretation.⁷⁵²

⁷⁴⁵ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 49.

⁷⁴⁶ Bryant *Care and Protection of Children: Australian and New Zealand Experience*.

⁷⁴⁷ S 60B reads as follows: "(1) The objects of this Part are to ensure that the best interests of children are met by: (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children. (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests): (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and (d) parents should agree about the future parenting of their children; and (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture)".

⁷⁴⁸ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 59.

⁷⁴⁹ M Fernando *Express recognition of the UN Convention on the Rights of a Child in the Family Law Act: What Impact for Children's Participation?* (2013) 36 *NSW Law Journal* 88 88.

⁷⁵⁰ 91.

⁷⁵¹ 102.

⁷⁵² 102.

In line with article 12(1) of the UNCRC, the child “who is capable of forming his or her own views” has the right “to express those views freely in all matters affecting” them. These views must also be “given due weight in accordance with the age and maturity of the child”. Where children are given the opportunity to express their views freely, their participation reaches the second level in terms of the proposed model. Level four of the proposed model address a child’s views being duly considered.

Article 12(2) places an obligation on State Parties, such as Australia, to provide the child in judicial and administrative proceedings the opportunity to be heard either directly or indirectly. Although the Act provides mechanisms to obtain the child’s views, (level two of the proposed model) there is no explicit reference to a child’s right to participation.⁷⁵³ While indirect participation is facilitated through family reports and independent child lawyers (hereafter “ICLs”), the child’s voice is not yet “fully represented in court”.⁷⁵⁴ The wording of this particular article makes it clear that, in the absence of an explicit incorporation of the child’s right to participation, article 12 is not implemented.⁷⁵⁵

Where the relevant provisions of the UNCRC, in this case article 12, are not explicitly incorporated in domestic legislation, the effect of the UNCRC is limited.⁷⁵⁶ In practice, it is only where there is ambiguity in legislation that the UNCRC is significant, as an interpretation in line with the convention must then be followed.⁷⁵⁷ Fernando argues that, until the UNCRC is explicitly incorporated in the Family Law Act, it remains an “aspirational document” with a very limited impact.⁷⁵⁸

Tobin explains that “although there is evidence of a trend to recognise the rights of children within legal systems of some states, Australia has remained obstinate in its refusal to implement the UNCRC”. He further remarks that “there has been no deliberate effort ... to use the UNCRC and the notion of children as rights bearers ... to develop, implement and monitor laws and policies affecting children”.⁷⁵⁹

⁷⁵³ R Chisholm *Softening the Blow - Changing Custody to Residence*.

⁷⁵⁴ D De Bruin *Child Participation and Representation in Legal Matters* 498.

⁷⁵⁵ Fernando (2013) *NSW Law Journal* 96.

⁷⁵⁶ 93.

⁷⁵⁷ 93.

⁷⁵⁸ 94.

⁷⁵⁹ J Tobin “The Development of Children’s Rights” in Monahan & Y Young (eds) *Children and the Law in Australia* (2008) 60 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 50.

In assessing Australia's commitment to the provisions of the UNCRC, the UN Committee on the Rights of the Child (hereafter "Committee") recommended that a child's right "to express his/her views in all matters affecting him/her be expressly provided in the Family Law reform".⁷⁶⁰ Although the Family Law Act has been amended twice since this recommendation has been made, the Act still makes no explicit reference to a child's right to express his or her views in matters affecting them.

Unfortunately, the only sanction possible to address Australia's failure to include a child's right to participation in domestic legislation is an unfavourable report by the Committee.⁷⁶¹ This report however lacks legal as well as punitive power.⁷⁶²

Whether the abovementioned lack of explicit reference to a child's right to express his or her views can be seen as Australia not implementing article 12 of the UNCRC and consequently not facilitating effective children's participation in terms of the proposed model will come to light when evaluating how the Family Law Act is implemented in practice.

3 The Family Law Act and children's participation

Although the Family Law Act places an obligation on a court to consider any views expressed by a child, it does not make any mention of a child's right to express his or her views, to be heard or to participate. Australian courts can employ, subject to court rules, "such other means as the court thinks appropriate".⁷⁶³

3 1 Section 60CC of the Family Law Act

Part VII of the Family Law Act regulates court proceedings regarding children. Section 60CC is significant as it introduces the notion of considering children's views in matters that affect them. This is important, as considering a child's views presupposes that the child has been offered an opportunity to share his or her views (level two), which in itself is vital to effective children's participation.

As in South Africa, decisions regarding children are made in line with the child's best interests.⁷⁶⁴ When determining the child's best interests, the court must take into

⁷⁶⁰ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 55; Fernando (2014) *Family Court Review* 147.

⁷⁶¹ Fernando (2013) *NSW Law Journal* 94.

⁷⁶² 94.

⁷⁶³ S 60CE(c) of the Family Law Act.

⁷⁶⁴ S 60CC of Family Law Act.

account the primary and additional considerations listed in section 60CC of the Family Law Act. The relevant section provides that:

- “(2) The primary considerations are
- (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
 - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part⁷⁶⁵ set out in paragraphs 60B(1)(a) and (b).

(2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the considerations set out in paragraph (2)(b).

- (3) Additional considerations are:⁷⁶⁶
- (a) any views expressed by the child and any factors (such as the child’s maturity or level of understanding)⁷⁶⁷ that the court thinks are relevant to the weight it should give to the child’s views⁷⁶⁸ (footnotes not in the original).

It is important to note that the 2006 amendments to the Family Law Act divided section 60CC into primary and additional considerations.⁷⁶⁹ Before the 2006 amendment, the Family Law Act contained a general list of factors that were to be considered by the court when determining the child’s best interests.⁷⁷⁰ The child’s wishes⁷⁷¹ were one of these factors. This is significant as considering any views expressed by the child facilitates children’s participation that reaches at the very least level two, or even level four of the proposed model.

However, the distinction between primary and additional considerations altered the way in which a court determines the child’s best interests.⁷⁷² According to Behrens and Fehlberg,⁷⁷³ a child’s view is no longer as significant as it used to be, as primary considerations carry more weight than additional considerations.⁷⁷⁴ This can be seen as possibly having a negative effect on the proposed model of measuring children’s participation, as it could mean that children do not enjoy an opportunity to share their views whatsoever. Parkinson, however, explains that, although the considerations

⁷⁶⁵ The objects of the Act are discussed in section 3 2 below.

⁷⁶⁶ For more additional considerations, see ss 60CC(3)(b)-(m) of the Family Law act.

⁷⁶⁷ Section 10 of the South African Children’s Act refers to the child’s maturity, age and stage of development.

⁷⁶⁸ Own emphasis added.

⁷⁶⁹ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 74.

⁷⁷⁰ Bryant *Care and Protection of Children: Australian and New Zealand Experience*.

⁷⁷¹ The term “wishes” was used prior to the 2006 amendment. The term was replaced with “views” in order to be consistent with the wording of article 12 of the UNCRC. See Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 47.

⁷⁷² 74.

⁷⁷³ B Fehlberg & J Behrens *Australian Family Law: The Contemporary Context* (2008) 280.

⁷⁷⁴ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 271.

have been divided into primary and additional considerations, it would be unusual for the two categories of considerations to be in conflict with each other.⁷⁷⁵ He explains that additional considerations are not a downgraded version of primary considerations, but rather considerations that magnify the primary considerations.⁷⁷⁶

It is also stated that primary considerations do not necessarily outweigh additional considerations, as primary considerations cannot be determined without paying attention to additional considerations.⁷⁷⁷ Parkinson further highlights the significance in Parliament's intentional use of the word "additional" rather than "secondary".⁷⁷⁸ Parliament has also pointed out that there may be cases where additional considerations as contemplated in section 60CC(3) "may outweigh the primary considerations".⁷⁷⁹ Regardless of the importance of the child's views in terms of section 60CC, it remains only one of many factors to be considered when making a decision regarding the child's welfare,⁷⁸⁰ for example in the context of divorce and related proceedings.

Section 60CC(3)(a) is qualified by the obligation on a court to take into account factors such as the child's level of understanding or development, or other factors the court deems relevant. The South African equivalent can be found in sections 10 and 31 of the Children's Act which requires that the child's age, maturity and stage of development.

3 2 Section 60CD(2) of the Family Law Act

Section 60CD(2)(1) stipulates that section 60CC(3)(a) requires that a court considers a child's views when making decisions regarding a parenting order in relation to the child. Subsection (2) consequently sets out how the court can obtain a child's views and states that:

⁷⁷⁵ P Parkinson "The Values of Parliament and the Best Interests of Children- A Response to Professor Chisholm" (2007) 21 *Australian Journal of Family Law* 213 213 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 58.

⁷⁷⁶ 213.

⁷⁷⁷ R Chisholm "Making It Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006" (2007) 21 *Australian Journal of Family Law* 143 170 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 59.

⁷⁷⁸ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 59.

⁷⁷⁹ F Raitt "Judicial Discretion and Methods of Ascertaining the Views of a Child" (2004) 16 *Child and Family Law Quarterly* 151 161 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 59.

⁷⁸⁰ Barnett & Wilson (2011) *Psychiatry, Psychol & L* 73 & 75.

“(2)The court may inform itself of views expressed by a child:

- (a) by having regard to anything contained in a report given to the court under subsection 62G(2); or
- (b) by making an order under section 68L for the child’s interests in the proceedings to be independently represented by a lawyer; or
- (c) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.”⁷⁸¹

3 3 Section 60CE of the Family Law Act

Section 60CE confirms that a court or person may not force a child to express his or her views. This section is in line with the interpretation followed by South Africa as well as the Committee that a child has a right and not a duty to participate.⁷⁸² It is also in line with level three of the proposed model of measuring participation, in terms of which a child’s views must voluntarily be shared.

4 Children’s participation during alternative methods of dispute resolution

The Family Court of Australia was established to resolve disputes by means of counselling and conciliation, only turning to trial as a last resort.⁷⁸³ It is argued that this an indication of the Australian family law system’s appreciation of the potential negative impact that divorce-related litigation can have on children. It is furthermore argued that the reason for the court’s establishment creates an expectation that the Family Court should attempt to address at least some of the characteristics of litigation that negatively influence children. Doing so could lead to a child’s participation reaching at least the third level in terms of the proposed model.

In 2006, the Family Law Amendment (Shared Parental Responsibility) Act 2006 brought further amendments that aimed to facilitate family law matters under the Act in a less adversarial manner.⁷⁸⁴ It can thus be said that the Australian family law system favours less adversarial and alternative routes to traditional litigation. The 2006 amendments to the Family Law Act have four aims, namely to: require families to attend family dispute resolution before launching a court application; place greater emphasis on parents’ involvement in their children’s lives after the separation; emphasise the attention paid to protecting children from violence and abuse; and

⁷⁸¹ Own emphasis added.

⁷⁸² CRC Committee *General Comment 12* para 16.

⁷⁸³ Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 178.

⁷⁸⁴ R Chisholm “Making it work: The Family Law Amendment (Shared Parental Responsibility) Act 2006” (2007) 21 *AJFL* 143 145 as cited in De Bruin *Child Participation and Representation in Legal Matters* 498.

introduce legislative support for less adversarial methods in matters involving children.⁷⁸⁵

Significantly, section 12A of the Family Law Act acknowledges the negative effects of traditional divorce litigation. In terms of this section, the Family Law Act aims to:

- (a) ensure that married couples considering separation or divorce are informed about the services available to help with a possible reconciliation, in situations where a reconciliation between the couple seems a reasonable possibility; and
- (b) ensure that people affected, or likely to be affected, by separation or divorce are informed about the services available to help them adjust to:
 - (i) separation or divorce; and
 - (ii) orders made under this Act; and
- (c) to ensure that people affected, or likely to be affected, by separation or divorce are informed about ways of resolving disputes other than by applying for orders under this Act.

The positive attitude towards dispute resolution methods other than litigation as is evident in the Family Law Act, is further emphasised by section 65F(2). In terms of this section, except where it is made with the consent of all parties involved,⁷⁸⁶ a court must not make a parenting order⁷⁸⁷ unless:

- (a) the parties to the proceedings have attended family counselling to discuss the matter to which the proceedings relate; or
- (b) the court is satisfied that there is an urgent need for the parenting order, or there is some other special circumstance (such as family violence), that makes it appropriate to make the order even though the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or
- (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

It is admitted that the negative consequences of traditional litigation cannot be ignored and that there is a need for an alternative approach to the acrimonious system that is traditional divorce litigation. It is, however, important to determine whether the alternative methods of dispute resolution employed by the Australian family law

⁷⁸⁵ Australian Institute of Family Studies “Evaluation of the 2006 family law reforms” (2009) <https://aifs.gov.au/publications/evaluation-2006-family-law-reforms/executive-summary> (accessed 05-09-2019).

⁷⁸⁶ S 65F(3)(a) of the Family Law Act.

⁷⁸⁷ Section 64B(2) pertains to parenting orders, which deals with issues such as with whom the child will live, how much time the child will spend with the other parent, parental responsibilities, decision-making when two or more parents share parental responsibility, communication with the child, maintenance of the child, variation of the parenting order, processes regarding dispute resolution, and any other aspect relating to the child’s welfare, care, development or parents’ responsibilities towards the child. See section 64B(2)(a)-(i).

system can realise a child's right to participation while addressing said negative consequences.

4 1 Family Relationship Centres

4 1 1 *Background*

The 2006 amendments to the Family Law Act established Family Relationship Centres (hereafter "FRCs") to provide professional support for families.⁷⁸⁸ Between 2006 and 2008, 65 government funded FRCs were established throughout Australia.⁷⁸⁹ These centres help separated or separating families to resolve their issues outside of the court system where possible and provide a link with services within the family law system in general.⁷⁹⁰ Although these centres have various roles,⁷⁹¹ their main function is to aid families in the process leading up to and following the separation of parents.⁷⁹² This function is fulfilled by use of Family Dispute Resolution which is discussed below.⁷⁹³

FRCs focus on children's needs and help parents to make decisions to address those needs.⁷⁹⁴ Children are made feel welcome⁷⁹⁵ and can expect a professional, though not overly formal, environment decorated in a way to make children feel at ease.⁷⁹⁶ Children also receive age-appropriate information and have the choice to engage in child-focused sessions with trained professionals.⁷⁹⁷ These practices greatly contribute to effective children's participation and will fulfil at least the requirements of the third level of participation.

FRCs were designed with the idea that parents who intend to separate, should reach out to a FRC to settle parenting and other family arrangements before

⁷⁸⁸ Attorney-General's Department of Australia *Operational Framework for Family Relationship Centres* (2019) 6.

⁷⁸⁹ P Parkinson "The Idea of Family Relationship Centres in Australia" (2013) *Family Court Review* 195 195.

⁷⁹⁰ Attorney-General's Department *Operational Framework for Family Relationship Centres* 6.

⁷⁹¹ FRCs also provide: pre-marital information sessions, information that aid families in strengthening their relationship with each other, assistance and referrals for families struggling with problems other than separation as well as advice and assistance to grandparents of children whose parents are either deceased or separated. See: Parkinson (2013) *Family Court Review* 197 & 201-202.

⁷⁹² Parkinson (2013) *Family Court Review* 195.

⁷⁹³ See section 4 1 2 below.

⁷⁹⁴ Attorney-General's Department *Operational Framework for Family Relationship Centres* 9.

⁷⁹⁵ 16.

⁷⁹⁶ 11.

⁷⁹⁷ 16.

approaching a family court.⁷⁹⁸ While the intention is to steer families away from an adversarial approach, FRCs still encourage families to acquire legal assistance where necessary and appropriate.⁷⁹⁹ On face value, FRCs seem to be an embodiment of section 65F(2) of the Family Law Act, which highlights the Act's preference towards ADR over traditional divorce litigation.⁸⁰⁰ It must, however, be determined whether steering away from the adversarial approach necessarily equals steering toward effective children's participation.

4 1 2 Family Dispute Resolution

Family Dispute Resolution ("FDR") is a "special type of mediation" that guides families to reach agreements regarding identified issues.⁸⁰¹ Parents who cannot agree to arrangements regarding their children must, unless exempt,⁸⁰² attend an FDR conference before being able to file an application for a parenting order.⁸⁰³ This special mediation process is regulated by Part II of the Family Law Act.

The main objective of this form of mediation is for the family to reach an agreement regarding arrangements pertaining to the children, which will then be set out in a parenting plan.⁸⁰⁴ The information shared in an FDR session is confidential and is not admissible in subsequent court proceedings.⁸⁰⁵ This does not apply in cases where there is a risk of abuse.⁸⁰⁶

⁷⁹⁸ Parkinson (2013) *Family Court Review* 200.

⁷⁹⁹ 201.

⁸⁰⁰ Subject to subsection (3), a court must not make a parenting order in relation to a child unless: the parties to the proceedings have attended family counselling to discuss the matter to which the proceedings relate; or (b) the court is satisfied that there is an urgent need for the parenting order, or there is some other special circumstance (such as family violence), that makes it appropriate to make the order even though the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

⁸⁰¹ Australian Government "Family mediation and dispute resolution" *Family Relationships Online* <<https://www.familyrelationships.gov.au/separation/family-mediation-dispute-resolution>> (accessed 25-09-2019).

⁸⁰² Subsection (9) lists circumstances under which a family is exempt.

⁸⁰³ S 60I(2) of the Family Law Act.

⁸⁰⁴ Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

⁸⁰⁵ Australian Government *Family Dispute Resolution Fact Sheet* (2015) 3.

⁸⁰⁶ 3.

4 1 3 *Family Dispute Resolution Practitioners*

The process of FDR is facilitated by an accredited FDR practitioner.⁸⁰⁷ An FDR practitioner is an independent person who specialises in family conflicts and has received training⁸⁰⁸ in negotiation and mediation.⁸⁰⁹ The practitioner takes a neutral stance during the proceedings, and only facilitates the process by encouraging parties to participate in finding solutions.⁸¹⁰ It is argued that FDR practitioners can, as a result of their expertise, greatly contribute to effective children's participation, especially as it relates to level three of the proposed model. This is based on the assumption that FDR practitioners are able to provide children with appropriate information and foster a child-friendly, age-appropriate and sensitive atmosphere which will enable the child to share his or her views, should they wish to do so.

4 1 4 *The Family Dispute Resolution process*

During the first session, the FDR practitioner will assess the suitability of FDR in the context of the specific family's situation.⁸¹¹ The practitioner will consider issues such as bargaining power, family violence and the mental health of the participants.⁸¹² Here, level three of the proposed model is once again relevant.

Should family violence be an issue, but the parties involved as well as the practitioner consider FDR to be a suitable approach, FDR sessions can be facilitated while parties are in separate rooms.⁸¹³ The practitioner is obliged to inform parties to the mediation of his or her role, training and qualifications, as well as fees involved and their right to lodge a complaint.⁸¹⁴ If FDR is suitable for the family situation, the practitioner will carry on explaining his or her role in the process.⁸¹⁵ After explaining his or her role, the practitioner will help the parties to identify the main issues that will

⁸⁰⁷ The standards for Family Dispute Resolution practitioners are explained in the Family Law Regulations 2008.

⁸⁰⁸ M De Jong "Opportunities for Mediation in the New Children's Act 38 of 2005" (2008) 71 THRHR 630 639. See Family Law Regulations 2008.

⁸⁰⁹ Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

⁸¹⁰ Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

⁸¹¹ Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

⁸¹² Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

⁸¹³ Australian Government *Family Dispute Resolution Fact Sheet 3*.

⁸¹⁴ 2.

⁸¹⁵ Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

hopefully be resolved by means of mediation.⁸¹⁶ The attendance of parties' attorneys is a matter at the FDR practitioner's discretion.⁸¹⁷

If a settlement regarding arrangements pertaining to the children has been reached, these arrangements will be recorded as the parenting plan.⁸¹⁸ The latter can be rendered legally binding by having the document made an order of court.⁸¹⁹ If no settlement was reached after attending the FDR conference, the matter proceeds to court. The family dispute practitioner may issue a certificate that must be filed alongside the application for a parenting order.⁸²⁰ This certificate can only be issued by accredited FDR practitioners.⁸²¹

4 1 5 *Evaluating children's participation in Family Dispute Resolution*

Whether or not children are involved in the mediation process is also a matter of the practitioner's discretion.⁸²² This means that a child's participation would not even reach the first level of the proposed model should the mediator decide to not involve the children. In some circumstances, depending on the child's age and maturity, a child-inclusive model of mediation can be adopted should the practitioner see it fit.⁸²³ Here, a child consultant engages in conversation with the child, and the child communicates his or her views during a mediation session.⁸²⁴ This means that a child's participation can, based on their opportunity to share his or her views and the training that the FDR practitioner has received, reach at least the third level of participation in terms of the proposed model.

As the involvement of children in this method depends completely on the facilitator, there is a possibility that children's participation is completely irrelevant in this method. If children are indeed involved, the level of participation reached will depend on various factors. If the matter is resolved during the FDR process, the child's level of participation will depend on the child's parents and their willingness to involve the child.

⁸¹⁶ Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

⁸¹⁷ Australian Government *Family Dispute Resolution Fact Sheet 2*.

⁸¹⁸ 3.

⁸¹⁹ 3.

⁸²⁰ ALRC *Family Law for the Future* 84.

⁸²¹ Australian Government *Family Dispute Resolution Fact Sheet 1*. See Ss 60I(a),(aa),(c),and (d).

⁸²² Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

⁸²³ Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

⁸²⁴ Australian Government "Family mediation and dispute resolution" *Family Relationships Online*.

It therefore seems that, while the use of FDR at FRCs ostensibly offered a solution for the problem that is the lack of child participation, it is not necessarily the case.

4.2 Child Responsive Programme

Most divorcing couples in Australia resolve their parenting issues without approaching a court.⁸²⁵ Where parents are not able to agree on issues relating to the children, one or both of them must bring an application under section 64B of the Family Law Act.

Before the matter can be heard in court, an initial procedural hearing will take place before a Registrar.⁸²⁶ This creates an opportunity for the parties to potentially resolve the issue and for the Registrar to assess the situation.⁸²⁷ From here, the Registrar can either order the parties to visit an FRC and attend FDR or complete the Child Responsive Program, or the parties can appear before the trial judge.⁸²⁸

The Child Responsive Program is a court-ordered program that consists of a series of consultations between the family consultant,⁸²⁹ parents (the divorcing couple), as well as their children.⁸³⁰ The aim of this program is to focus on the children's needs and to assist the court in dealing with the matter in accordance thereto.⁸³¹

The program acknowledges the benefit of hearing children's views,⁸³² and helps parents to understand their children's feelings and concerns.⁸³³ The family consultants provide the parents with feedback about their children's views and wishes,⁸³⁴ after which they explore the best possible arrangements for the children's futures.⁸³⁵ Here, merely providing a child the opportunity to share his or her views leads to their participation reaching level two of the proposed model. Facilitating the sharing of the child's views in a child-friendly and sensitive way, while providing the child with age-

⁸²⁵ In 2014, more than 70% of couples settled their issues without involving the court. See ALRC *Family Law for the Future* 79.

⁸²⁶ Family Law Rules r 12.04. See Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 28.

⁸²⁷ 28.

⁸²⁸ 28.

⁸²⁹ The role of a family consultant will be discussed under section 3.3.1.3 of this chapter.

⁸³⁰ Family Court of Australia *Child Dispute Services Fact Sheet: Child Responsive Program* FSCR_1113V2 1.

⁸³¹ 1.

⁸³² Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* Voices 29.

⁸³³ Family Court of Australia *Child Dispute Services Fact Sheet* 1.

⁸³⁴ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 28.

⁸³⁵ Family Court of Australia *Child Dispute Services Fact Sheet* 1.

appropriate information, would lead to the child's participation reaching level three. While level four will depend on whether the parents actually consider and implement their children's views, it is encouraging that family consultants provide feedback to parents regarding their children's views and wishes.

Family consultants are either psychologists or social workers who have the necessary experience and knowledge to work with families and specifically children.⁸³⁶ When children participate in processes facilitated by adults who have received the proper training, it can potentially increase the level of participation reached,⁸³⁷ which in terms of the proposed model is the third level of participation. This is because said professionals would likely have received training or gained experience relating to the significance of child participation.

The Child Responsive Program starts with an initial meeting with the parents, followed by a meeting with the children.⁸³⁸ The consultant will spend time with each child individually, and then again when all of the siblings are together. The time spent with the children take place in the absence of the parents.⁸³⁹ During the sessions with the children, they are asked, without being pressured, to share their views and wishes.⁸⁴⁰ This leads to a child's participation reaching at least the second level of the proposed model. It is argued that a child's participation has a significant chance of reaching level three of the model, thanks to the consultant's training which will hopefully lead to voluntary, sensitive, child-friendly, and age-appropriate participation. After consulting with the children, the consultant will provide the parents with feedback regarding the children's views and discuss possible future arrangements relating to the children.⁸⁴¹

If the family consultant deems the program appropriate in the particular family's situation, a settlement meeting with the parties and their legal representative will be arranged.⁸⁴² Furthermore, the family consultant will compile a Children and Parents Issues Assessment, which explains the main issues as well as the children's views

⁸³⁶ Family Court of Australia *Child Dispute Services Fact Sheet 1*.

⁸³⁷ CRC Committee *General Comment 12* para 134 (g); Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 18.

⁸³⁸ Family Court of Australia *Child Dispute Services Fact Sheet 2*.

⁸³⁹ 2.

⁸⁴⁰ 2.

⁸⁴¹ 2.

⁸⁴² Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 28.

concerning the matter.⁸⁴³ This assessment is made available to the parties and to the court.⁸⁴⁴ Where the court duly considers the child's views as canvassed in the report, it can be said that at least the first question posed in level four can be answered in the positive.⁸⁴⁵ The child's views being communicated to court is a crucial difference between the Child Responsive Program and FDR.

If parents cannot come to an agreement regarding arrangements for the children, the case can proceed to a Less Adversarial Trial.⁸⁴⁶ Here, the same family consultant will provide the court with their expert opinion about the family and children.⁸⁴⁷

Measuring a child's participation in the Child Responsive Program reveals that a child's participation in this program reaches at least the third level of participation. Although this method has the potential to reach a higher level, it is up to the parents to decide whether they wish to address their children's wishes or not. As with the FDR process, reaching a higher level is unlikely as it would entail the parents providing the child with the opportunity to appeal against their parents' decision. It is argued that children's participation in Australia is influenced by the discretion of the child's parents to a greater extent than in South Africa, where it is rather the discretion of trained professionals that have a larger influence.

5 Children's participation during court proceedings

5 1 Less Adversarial Trials

The Less Adversarial Trial procedure was born out of an increased recognition of the negative influences coupled with traditional adversarial divorce litigation.⁸⁴⁸ The procedure was introduced in 2006,⁸⁴⁹ but has not been in frequent use in recent years as a result of limited resources.⁸⁵⁰

⁸⁴³ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 28.

⁸⁴⁴ 28.

⁸⁴⁵ The question referred to her is whether the child's views were recorded and accurately communicated to the Court? See Chapter 2 section 4 5 4 1.

⁸⁴⁶ Family Court of Australia *Child Dispute Services Fact Shee t1*.

⁸⁴⁷ 1.

⁸⁴⁸ 32.

⁸⁴⁹ 32.

⁸⁵⁰ ALRC *Family Law for the Future* 367.

During a Less Adversarial Trial, the judge enjoys significantly greater control over the trial than during traditional divorce litigation.⁸⁵¹ Here, the judge actively participates in the proceedings, “rather than simply acting as an umpire”.⁸⁵²

The Less Adversarial Trial procedure considers the child’s needs and appreciates the effect that the proceedings could have on the child.⁸⁵³ The court must participate directly and control the proceedings,⁸⁵⁴ in order to protect the child and other parties against possible abuse.⁸⁵⁵ The proceedings must be conducted in a way that promotes child-focused and cooperative parenting,⁸⁵⁶ and the proceedings must be conducted with minimal formality and delays.⁸⁵⁷ This can contribute to a child’s participation reaching level three of the proposed model.

Before the Less Adversarial Trial commences, the registrar will make an order for the parties to file and serve a Parenting Questionnaire before the judge.⁸⁵⁸ On the first day of the trial, the judge will determine which expert reports will be required, whether a Family Report will be required, what evidence will be heard and who is to attend the trial, as well as the issues that must be decided on during the trial.⁸⁵⁹ As the judge has a discretion to decide whether or not the child will attend the Less Adversarial Trial, there is a possibility that the child will enjoy no opportunity to share his or her views.

Although the Less Adversarial Trial has the potential to have much less of a negative impact on children than the traditional adversarial system, this process does not necessarily translate into children participating in matters affecting them.⁸⁶⁰ The level of participation reached will depend on the presiding officer’s preferences in terms of whether or not a Family Report is required and who will attend the trial. This means that the chances of a child participating in a matter impacting him or her, depends on the subjective factors.

⁸⁵¹ Justice S O’Ryan *Less Adversarial Trial Handbook* (2009) 6 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 32.

⁸⁵² Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 32.

⁸⁵³ 32.

⁸⁵⁴ 32.

⁸⁵⁵ 32

⁸⁵⁶ 33.

⁸⁵⁷ 33.

⁸⁵⁸ Family Court of Australia *Less Adversarial Trials BRLESSADV0313V2* 2.

⁸⁵⁹ 3.

⁸⁶⁰ 33.

Where the Registrar does order a Family Report and the person who compiles same includes the child's views without filtering it, the child's participation can reach level four. It is argued that, where a presiding officer is as involved, as they are in Less Adversarial Trials, there is a fair chance of the judge considering the child's views and even implementing them where possible or explaining to the child why it could not be implemented (which would constitute level five participation in terms of the proposed model). As reaching the higher possible levels of participation in this case depends on an independent person and not the child's parents, it seems fair to argue that there is a greater chance of the child being offered the opportunity to either appeal or at least report back on the implementation of the decision.

If parties did not reach a settlement through any of the programs or procedures mentioned above, parties appear before a judge in traditional court proceedings. Here, the court makes a parenting order as it deems proper.⁸⁶¹ Children's participation during these court proceedings can be divided into representation and direct participation.

5 2 Representation of children during court proceedings

5 2 1 *Independent Children's Lawyer*

5 2 1 1 The role of an Independent Child's Lawyer

The 2006 amendments to the Family Law Act inserted the possibility of appointing an Independent Children's Lawyer ("ICL") to represent the child's best interests.⁸⁶² The introduction of the ICL was a progressive step towards realising children's right to participation in Australia.⁸⁶³

An ICL is an attorney who received additional training in the area of children's issues in the Family Court. This will hopefully contribute to an ICL facilitating sensitive, child-friendly and age-appropriate participation (level three). An ICL's function is to form an independent view of what is in the child's best interests based on available evidence,⁸⁶⁴ and consequently act according to their view.⁸⁶⁵ It is also the ICL's role to submit recommendations regarding the child's best interests to the relevant court.⁸⁶⁶

⁸⁶¹ S 65D(1) of the Family Law Act.

⁸⁶² De Bruin *Child Participation and Representation in Legal Matters* 496.

⁸⁶³ 494.

⁸⁶⁴ S 68LA(2)(a) of the Family Law Act.

⁸⁶⁵ S 68LA(2)(b) of the Family Law Act.

⁸⁶⁶ S 68LA(3).

However, it is important to take note that the ICL is not the child's separate legal representative.⁸⁶⁷ To that effect, he or she is not obliged to act in accordance with the child's instructions.⁸⁶⁸ The Australian Law Reform Commission explains that the ICL has three functions: to facilitate children's participation, gather evidence relevant to the child's best interests and manage litigation by encouraging settlement and "keeping the litigation on track".⁸⁶⁹ In terms of the ICL's specific duties, he or she must act impartially when dealing with the parties to the proceedings⁸⁷⁰ while ensuring that the child's views – if he or she expressed any – are fully communicated in court.⁸⁷¹ The ICL must also venture to minimise the traumatic impact that the proceedings can have on the child,⁸⁷² and facilitate an agreed resolution relating to the issues at hand, while focusing on the child's best interests.⁸⁷³ It is argued that a child's participation, when facilitated by an ICL, can reach at least the third level in terms of the proposed model. This is because the child receives an opportunity to share his or her views (level two) and the sharing of these views is facilitated in a child-friendly, age-appropriate, and sensitive way (level three).

In cases where a report or any other document regarding the child is to be used in the proceedings, the ICL is to analyse the document and consequently identify the most significant factors in determining the child's best interests.⁸⁷⁴ It is also their responsibility to ensure that the matters in the documents are brought to the court's attention.⁸⁷⁵ This can include other information that the child's parents may not otherwise bring to the court's attention, such as information regarding the child's well-being, relationships and school progress.⁸⁷⁶

Although the ICL is under no obligation and cannot be required to disclose information communicated by the child to the court,⁸⁷⁷ he or she may disclose such information in the case where the disclosure would be in the child's best interests.⁸⁷⁸

⁸⁶⁷ S 68LA(4)(a).

⁸⁶⁸ S 68LA(4)(b).

⁸⁶⁹ ALRC *Family Law for the Future* 372.

⁸⁷⁰ S 68LA(5)(a) of the Family Law Act.

⁸⁷¹ S 68LA(5)(b).

⁸⁷² S 68LA(5)(d).

⁸⁷³ S 68LA(5)(e).

⁸⁷⁴ S 68LA(5)(c)(i).

⁸⁷⁵ S 68LA(5)(c)(ii).

⁸⁷⁶ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 95.

⁸⁷⁷ S 68LA(6)(a) read with (b) of the Family Law Act.

⁸⁷⁸ S 68LA(7).

In such circumstances the ICL is permitted to disclose said information even if doing so goes against the child's wishes.⁸⁷⁹

The court may make an order for the specific purpose of allowing the legal representative to obtain the child's views on the matter at hand.⁸⁸⁰ The court's discretion to grant an order for the appointment of a legal representative has the potential to pave the way to effective children's participation. However, the court will not make an order to such effect in circumstances where obtaining the child's views would be inappropriate as a result of the child's age or maturity,⁸⁸¹ or where other special circumstances apply.⁸⁸² Once again, the court cannot require a child to share his or her views as there is no duty on them to do so.⁸⁸³

As ICLs represent the child's best interests and do not act upon the child's instruction and according to the child's views, the ICL is a best interests representative.⁸⁸⁴ Where the child's views are not in line with the ICL's perception of the child's best interests, the ICL must inform the court of their opinion.⁸⁸⁵ Still, the fact remains that the ICL must share the child's views in court, which renders level two of the proposed model the lowest form that a child's participation can reach in the context of this method.

The Australian Law Reform Commission and the Human Rights and Equal Opportunities Commission's Seen and Heard report⁸⁸⁶ recommended that children who are able and willing to provide instructions, should be able to direct the litigation.⁸⁸⁷ The report explains that:

"Many children have the maturity and judgment to direct their lawyer just as many adults have limited maturity and poor judgment but instruct legal representatives. The fact that a child's views may be editorialised or discounted for no reason other than that the representative disagrees with those views effectively holds children to a higher standard than adults".⁸⁸⁸

⁸⁷⁹ S 68LA(8) of the Family Act.

⁸⁸⁰ S 68(5).

⁸⁸¹ S 68(6)(a).

⁸⁸² S 68(6)(b).

⁸⁸³ S 68(5).

⁸⁸⁴ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 90.

⁸⁸⁵ 92.

⁸⁸⁶ ALRC *Seen and Heard: Priority For Children in the Legal Process Report 84* (1997).

⁸⁸⁷ ALRC *Priority for Children in the Legal Process* recommendation 70 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 93.

⁸⁸⁸ ALRC *Priority for Children in the Legal Process* para 13.53 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 93.

“Pathways for Children”, the Family Law Council’s report, recommended that children should be able to instruct their own attorneys, who should be appointed in addition to the ICL.⁸⁸⁹ However, this recommendation has not been implemented.⁸⁹⁰ It is argued that children being able to instruct their own attorneys could lead to higher levels of participation in terms of the proposed model. This is based on the argument that effective legal representation can lead to effective participation.

Guidelines for Independent Children’s Lawyers were published in 2013, seven years after the introduction of the ICL into the Australian family law system. The Chief Justice of the Family Court of Australia, the Federal Circuit Court of Australia as, well as the Family Court of Western Australia have endorsed these guidelines.⁸⁹¹ Although these guidelines carry no legal force,⁸⁹² they set out what is expected of an ICL,⁸⁹³ specifically as it pertains to the child’s views.

In considering any views expressed by the child, the ICL should be considerate of the fact that every child has different intellectual, cognitive and emotional abilities, family relationships as well as religious and cultural backgrounds.⁸⁹⁴ The ICL should also keep in mind that a child is particularly vulnerable when caught up in the conflict between their parents.⁸⁹⁵

In an effort to keep the child informed, the ICL must explain his or her relationship to the child and specifically address how the child can make his or her views known during the process as well as how the child can contact the ICL to do so.⁸⁹⁶ Where a child of sufficient maturity wishes to have a representative who will act according to the child’s views and instructions, the ICL should explain the possibility of launching an application to be joined to the proceedings to the child.⁸⁹⁷ It is argued that an ICL is the ideal candidate to explain various options, such as joining the proceedings or

⁸⁸⁹ Family Law Council *Pathways for Children* (2004) 39 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 93.

⁸⁹⁰ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 93.

⁸⁹¹ National Legal Aid *Guidelines for Independent Children’s Lawyers* (2013) 1.

⁸⁹² Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 92.

⁸⁹³ National Legal Aid *Guidelines for Independent Children’s Lawyers* (2013) 1.

⁸⁹⁴ 3.

⁸⁹⁵ 3.

⁸⁹⁶ 3.

⁸⁹⁷ 3. This possibility is discussed in section 5 5 3 of this chapter below.

taking the court's decision on appeal or review, to the child. Doing so can aid in the child's participation reaching level five in terms of the proposed model.

Unless the child is not yet of school-going age or there are other exceptional circumstances, such as risk for abuse of the child, the ICL must meet with the child.⁸⁹⁸ However, Fernando submits that ICLs often do not meet with the children they are representing.⁸⁹⁹ It is argued that this can have a significantly negative impact on the child. This is because obtaining the child's views (level two of the proposed model), in a child-friendly, age-appropriate and sensitive way (level three) will be very difficult to do without meeting the particular child at least once. In cases where the ICL does not meet with the child or consult the family consultant or other professional, there is a possibility that the child will not be given any opportunity to participate at all.

During their preparation, the ICL may consult with the Family Consultant, or other relevant experts, in relation to the child's wishes and the context in which they were expressed, as well as the child's willingness to share his or her views and any relevant factors that could influence the child's ability to communicate.⁹⁰⁰

It is the ICL's role to communicate the child's views in court, regardless how trivial the ICL considers it to be.⁹⁰¹ The ICL must arrange for evidence to be lead in court regarding the child's possible reaction if the conclusion reached is not in line with the child's views.⁹⁰²

If the ICL anticipates that an order will be made that is in line with the child's best interests but not the child's views, the ICL should inform the child that he or she intends to make submissions that are not in line with the child's views, while ensuring the child that his or her views will indeed be brought before court.⁹⁰³ The ICL must also make submissions regarding why the child's views are not in line with his or her best interests.⁹⁰⁴ Here, it is important to remember that children's participation revolves around giving a child a voice rather than a choice.

⁸⁹⁸ National Legal Aid *Guidelines for Independent Children's Lawyers* (2013) 6.

⁸⁹⁹ Fernando (2014) *Family Court Review* 53; National Legal Aid *Guidelines for Independent Children's Lawyers* (2013) 7.

⁹⁰⁰ Fernando (2014) *Family Court Review* 4.

⁹⁰¹ 5.

⁹⁰² 5.

⁹⁰³ 5.

⁹⁰⁴ 5.

After the conclusion of the trial, the ICL must explain, or facilitate an explanation by an appropriate expert, the court order and what the effect of the particular order entails.⁹⁰⁵ This is significant as it means the facilitation of the child's participation at the fifth level in terms of the proposed model. In the event that the ICL made submissions contrary to the child's views, the ICL must explain to the child the motivation behind doing so.⁹⁰⁶ Furthermore, the ICL has the right to appeal the order on the child's behalf.⁹⁰⁷ This, if in line with the child's wishes, can also contribute to the child's participation reaching the fifth level of the proposed model.

Rule 8.02(2) of the Family Law Rules 2004⁹⁰⁸ ("Family Law Rules") determines that where a court makes an order for the appointment of an ICL, the court can either request that a legal aid body arranges the appointment,⁹⁰⁹ or order that a party to the proceedings carry the cost of the ICL.⁹¹⁰

5 2 1 2 The appointment of an Independent Child's Lawyer

In terms of section 68L of the Family Law Act, the court may appoint an Independent Children's Lawyer to represent the child's interests independently. The court may make such an order in proceedings under the Family Law Act in which a child's best interests and welfare are a consideration.⁹¹¹ This shows once again that a court can pave the way to the child's effective participation.

An order for the appointment of such representation can be made *meru moto*,⁹¹² or on the application of the child,⁹¹³ an organisation concerned with the welfare of children,⁹¹⁴ or any other person.⁹¹⁵ The court may furthermore make other orders as deemed necessary to secure the independent representation of the child's interests.⁹¹⁶

⁹⁰⁵ Fernando (2014) *Family Court Review* 11.

⁹⁰⁶ 11.

⁹⁰⁷ 11.

⁹⁰⁸ Statutory Rules no. 375, 2003 made under the Family Law Act 1975, compilation no. 29.

⁹⁰⁹ Rule 8.02(2)(a) of the Family Law Rules. The child's family does not have to pass a means test to qualify for the appointment of an ICL by Legal Aid. See ALRC *Family Law for the Future* 97.

⁹¹⁰ Rule 8.02(2)(b) of the Family Law Rules.

⁹¹¹ S 68L(1) read with s(2) of the Family Law Act.

⁹¹² S 68(4)(a).

⁹¹³ S 68(4)(b)(i).

⁹¹⁴ S 68(4)(b)(ii).

⁹¹⁵ S 68(4)(b)(iii).

⁹¹⁶ S 68(2)(b).

ICLs are not automatically appointed in all cases involving children.⁹¹⁷ In *Re K*,⁹¹⁸ the Court confirmed the broad rule that a court will appoint an ICL in circumstances where the child's interests require representation independent from that of the child's parents.⁹¹⁹ The Court listed several grounds that justify the appointment of an ICL, which included instances where there is apparent conflict between the parents,⁹²⁰ and where a child is mature enough to express views regarding the change of custodial arrangements.⁹²¹ Based on the approach of the Court in *Re K*, it is argued that an ICL should be appointed for every child whose parents' divorce reach traditional litigation. Unfortunately, it appears that ICLs are in fact only appointed in a small number of contested cases.

Although case law provides guidance regarding when to appoint an ICL, no such guidance can be found in the Family Law Act.⁹²² The Family Law Council recommends against including grounds for appointment in legislation, as the inclusion could potentially limit the list of grounds.⁹²³ A closed list of grounds would not be in line with the Family Court's intention in *Re K*, which was that the grounds are non-exhaustive.⁹²⁴ The Family Law Council argues that grounds of appointment for an ICL is matter of judicial discretion.⁹²⁵ Naturally, there is concern regarding the consistency of the appointment of ICLs across Australia.⁹²⁶

5 2 1 3 Evaluating the Independent Children's Lawyer

The decisions impacting the child are made by the court and not the ICL. As a result, the degree to which the court's decision reflects the child's views does not completely

⁹¹⁷ Fernando (2014) *Family Court Review* 30.

⁹¹⁸ (1994) FLC 92-461. This case involved the guardianship of a 4-year-old child whose father murdered his mother.

⁹¹⁹ Family Law Council *Pathways for Children* 30.

⁹²⁰ 74.

⁹²¹ 75. Other circumstances include cases where: there are allegations of any sort of abuse, there are real cultural or religious differences that affect the child; the sexual preferences of either or both parents are likely to negatively influence the child's interests; contact with one or both of the parents negatively affect the child; there are medical issues; the child could be permanently removed from his or her current jurisdiction; where siblings could be separated; none of the parties are represented in custody proceedings. See Family Law Council *Pathways for Children* 74-76.

⁹²² Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 94.

⁹²³ Family Law Council *Pathways for Children* 30.

⁹²⁴ 30.

⁹²⁵ 30.

⁹²⁶ 30.

depend on the ICL. Still, it remains the ICL's mandate to accurately communicate the child's views to court.⁹²⁷

If the court considers the child's views and, where possible, makes a decision that reflects these views, the appointment of an ICL who acts in line with the Guidelines for Independent Children's Lawyers realises a child's right to participation at level five in terms of the proposed model. If the court's decision does not reflect the child's views because it was not in the child's best interests, the fifth level of participation can still be reached if the child's options are explained to him or her.

5.3 Case guardian

A case guardian, also known as a guardian *ad litem*, similar to an ICL, acts according to the child's best interests and not the child's instructions.⁹²⁸ The case guardian can be either a lawyer or a social worker.⁹²⁹ This person compiles a report which contains facts surrounding the child's situation.⁹³⁰ If the case guardian wishes to, he or she may include the child's views in the report.⁹³¹ The fact that the child's participation rests on the case guardian's subjective preferences is clearly problematic. The case guardian's discretion in this regard can possibly render the child's participation irrelevant.

Should the case guardian communicate the child's views to court, the child's participation can reach the third level of the proposed model. The fourth level can be reached depending on the court's approach to considering the child's views. As an explanation of the decision and the possibility of an appeal to the child does not fall within a case guardian's mandate, the child's participation is unlikely to reach the fifth level of participation in terms of the proposed model.

⁹²⁷ National Legal Aid *Guidelines for Independent Children's Lawyers* (2013) 7.

⁹²⁸ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 100.

⁹²⁹ 247.

⁹³⁰ 247.

⁹³¹ 247.

5 4 Family consultants

5 4 1 *The role of the family consultant*

Part III of the Family Law Act introduced family consultants to the Australian family law system.⁹³² Section 11B of the Family Law Act defines a family consultant as a person who is appointed in terms of the Federal Court of Australia Act 1979,⁹³³ the regulations⁹³⁴ or the law of a State.⁹³⁵ The role of the family consultant is similar to that of the family counsellor appointed in terms of the Mediation in Certain Divorce Matters Act in South Africa.⁹³⁶

A family consultant is either a social worker or a psychologist who specialises in child and other family issues post separation.⁹³⁷ As mentioned before, adults who are trained to facilitate processes where children are involved have the potential to greatly contribute to the quality of the children's participation.⁹³⁸ Trained adults can lead to a child's participation reaching the third level in terms of the proposed model as a result of being child-friendly, age appropriate and sensitive to risk.

A court can, in terms of section 11F of the Family Law Act, order a person to attend a family consultation.⁹³⁹ The latter is known as a section 11F-event.⁹⁴⁰ Although there are several other services such as counselling and information sessions for children and parents respectively, the majority of their services have been abandoned due to a lack of funding.⁹⁴¹

⁹³² ALRC *Family Law for the Future* 100.

⁹³³ S 11B(a) of the Family Law Act.

⁹³⁴ S 11B(c).

⁹³⁵ S 11B(d).

⁹³⁶ See Chapter 3 section 2 2 2 1.

⁹³⁷ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 84.

⁹³⁸ CRC Committee *General Comment 12* para 134 (g); Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 18.

⁹³⁹ S 11F of the Family Law Act provides: (1) A court exercising jurisdiction in proceedings under this Act may make either or both of the following kinds of order: (a) an order directing one or more parties to the proceedings to attend an appointment (or a series of appointments) with a family consultant; (b) an order directing one or more parties to the proceedings to arrange for a child to attend an appointment (or a series of appointments) with a family consultant.

⁹⁴⁰ ALRC *Family Law for the Future* 100.

⁹⁴¹ 368.

5 4 2 Family reports

Family reports are the most common method used by a court to hear a child's views.⁹⁴² A family report is a document compiled by a family consultant which includes the consultant's recommendations regarding arrangements that they consider to be in the child's best interests, as well as the child's views. A family report indirectly presents the child's views in court.⁹⁴³ This means that a family report automatically leads to a child's participation reaching level two in terms of the proposed model. This report is similar to the family advocate's report in South Africa.⁹⁴⁴

Including the child's wishes in the report is not a matter of discretion but rather an obligation that rests on the family consultant in terms of section 62G(3A) of the Family Law Act.⁹⁴⁵ A child's age, maturity or other special circumstances can however relieve the family consultant of this obligation where such circumstances prevent the child from being able to express his or her wishes.⁹⁴⁶ Once again, this means that a child's right to participation is limited in terms of the discretion that can be exercised by an adult. It is argued that this should not be the case as, in terms of section 60CC of the Family Law Act, it is not the factors such as the child's maturity that influence whether or not his or her views should be shared. Factors such as the child's maturity only becomes relevant when determining how much weight should be attached to the child's views.

Family reports are considered to be "a comprehensive assessment for the purpose of assisting the judge in making a final order".⁹⁴⁷ Children and parents are interviewed at home or at court.⁹⁴⁸ The family report must be prepared as quickly, although as comprehensively as possible.⁹⁴⁹ To this end, family consultants must spend enough time with children.⁹⁵⁰ This, however, is not always possible as there is more than a

⁹⁴² Family reports are ordered in 60% of contested matters that involve children. See Fernando (2014) *Family Court Review* 48.

⁹⁴³ De Bruin *Child Participation and Representation in Legal Matters* 493.

⁹⁴⁴ See Chapter 3 section 2 2 1 2.

⁹⁴⁵ S 62G(3A) of the Act provides that: a family consultant who is directed to give the court a report on a matter under subsection (2) must: (a) ascertain the views of the child in relation to that matter; and (b) include the views of the child on that matter in the report.

⁹⁴⁶ S 62G(3B) of the Family Law Act.

⁹⁴⁷ ALRC *Family Law for the Future* 366.

⁹⁴⁸ Barnett & Wilson (2004) *Psychiatry, Psychol & L* 75.

⁹⁴⁹ ALRC *Family Law for the Future* 367.

⁹⁵⁰ 367.

twelve week waiting period for family consultants to interview children.⁹⁵¹ This delay is due to the fact that there were only 76 family consultants in the entire Australian family court system in 2019.⁹⁵² This raises concern regarding whether family consultants are able to spend enough time with a child to enable them to compile a report that accurately depicts the child's views as result of their heavy caseloads.

Still, family reports are highly regarded and usually given significant weight.⁹⁵³ The family report forms part of the evidence and the family consultant may be cross-examined, especially regarding their recommendations.⁹⁵⁴

Communicating a child's views by means of a family report enables the child to be heard "in a way that shields them from the heat of the battle".⁹⁵⁵ Cashmore and Parkinson argue that a family report not only protects the child, but also allows for their voice to be heard and articulated by a professional who is trained to be sensitive to family dynamics and how children's views are communicated.⁹⁵⁶

However, it must be kept in mind that a family report does not communicate a child's wishes directly to the court, but rather filters it.⁹⁵⁷ Filtering a child's views could mean that a child is only heard "with qualifications and caveats".⁹⁵⁸ The same problem exists in the context of reports written by the family advocate in South Africa.⁹⁵⁹ As it is not common practice to provide a child with a copy of the report, the child will not know whether his or her views were correctly communicated in court.⁹⁶⁰ This will undeniably have a negative impact on the level of participation that can be reached in terms of the proposed model.

⁹⁵¹ 367.

⁹⁵² ALRC *Family Law for the Future* 100.

⁹⁵³ In one study, family reports were followed in 76% of cases. See Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 85.

⁹⁵⁴ 85.

⁹⁵⁵ P Parkinson & J Cashmore *The Voice of a Child in Family Law Disputes* (2008) 61 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 87.

⁹⁵⁶ Parkinson & Cashmore *The Voice of a Child in Family Law Disputes* 61 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 86.

⁹⁵⁷ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 74.

⁹⁵⁸ 87. In *ZN and YH and Child Representative*, Nicholson CJ had concerns regarding whether the views contained in the family report were in fact those of the children, and not those of the family counsellor. See para 105.

⁹⁵⁹ Pillay & Zaal (2005) *S. Afr. Law J.* 688

⁹⁶⁰ Parkinson & Cashmore *The Voice of a Child in Family Law Disputes* 61 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 87.

The Court in *Hall and Hall*⁹⁶¹ emphasised that a court is not bound by the family report or recommendations contained therein. As the family consultant is not the person responsible for the decision, it is understandable that they will not always address issues that the presiding officer deems important.⁹⁶² Furthermore, a family report could fail to address one specific issue that could have heavily influenced the court's decision.⁹⁶³ The recommendations may also be based on incorrect information or the family consultant could have formed a positive or negative view of the person during the interview.⁹⁶⁴ As Fernando points out, "there is no magic in a family report".⁹⁶⁵

5 4 3 *Evaluating family consultants*

In cases where the family consultant accurately communicates the child's views to court, the child's participation reaches level three of the proposed model. The degree to which the court considers and reflects the child's views in their decision, will determine whether or not the child's participation can reach level four of the proposed model.

From a practical perspective, as a result of a lack of funding⁹⁶⁶ and the limited amount of family consultants in Australia,⁹⁶⁷ the chances of a family consultant explaining the court's decision and the possibility of an appeal to a child, which would bring the child's participation to level five, are very slim.

5 5 Direct children's participation

5 5 1 *Judicial interview*

A judicial interview involves a judge meeting with a child in private, without the child giving evidence or being cross-examined.⁹⁶⁸ Despite the number of matters decided in Family Courts each year, Australian judges only meet with children once or twice per year in matters that go to trial.⁹⁶⁹

⁹⁶¹ (1979) FLC 90-713.

⁹⁶² Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 90.

⁹⁶³ 88-89.

⁹⁶⁴ 89.

⁹⁶⁵ Fernando (2014) *Family Court Review* 29.

⁹⁶⁶ ALRC *Family Law for the Future* 368.

⁹⁶⁷ 100.

⁹⁶⁸ M Fernando "Children's Direct Participation and the Views of Australian Judges" (2013) 92 *Family Matters: Newsletter of the Australian Institute of Family Studies* 41 51.

⁹⁶⁹ 51.

The rules regarding judicial interviews have undergone significant changes over the last two decades. In line with the 1984 Family Law Rules, information obtained by a judge during a judicial interview was not allowed to be used as evidence in court.⁹⁷⁰

More recently, rule 15.03 of the Family Law Rules 2004 explained that:

- (1) A judicial officer may interview a child who is the subject of a case under Part VII of the Act.
- (2) The interview may be conducted in the presence of a family consultant, or another person specified by the judicial officer.
- (3) If the child expresses a wish during the interview that is relevant to the case, the judicial officer may order a family report to be prepared.

Rule 15.03 was however omitted in 2010 without ever being replaced.⁹⁷¹ The explanatory statement that accompanied the Amendment Rules revealed that the particular rule was removed without any prior consultation.⁹⁷² The rule was omitted as a result of how infrequently judicial interviews occurred.⁹⁷³ Fernando argues that the latter is not a sufficient justification to remove the rule completely.⁹⁷⁴

Although judicial interviews are no longer explicitly regulated by any legislation or rules and it do not occur frequently, meeting with a child remains a matter of judicial discretion.⁹⁷⁵ This is because courts may, in terms of section 60CD(2)(c), obtain the child's views "by such other means as the court thinks appropriate".

Judges in favour of meeting with children are of the opinion that the practice of judicial interviews allows the judge to obtain the child's views without the views being filtered by a third party,⁹⁷⁶ such as a family consultant. These particular presiding officers also view explaining the court's decision to the child as their own responsibility.⁹⁷⁷ This will aid in the child's participation reaching level five of the proposed model.

⁹⁷⁰ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 97-98.

⁹⁷¹ ALRC *Family Law for the Future* 324.

⁹⁷² Judges of Family Court of Australia *Explanatory Statement: Select Legislative Instrument 2010 No. 238* 1.

⁹⁷³ One of the aims of the 2010 amendment rules is to "reflect that a Judge interviewing a child subject to proceedings is most unusual". See Judges of Family Court of Australia *Explanatory Statement: Select Legislative Instrument 2010 No. 238* 2.

⁹⁷⁴ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 98.

⁹⁷⁵ "The amendment removes the Rule which dealt with cases where a subject child was interviewed by a judicial officer. This does not generally occur and where it does can be the subject of case specific orders" (own emphasis). See Judges of Family Court of Australia *Explanatory Statement: Select Legislative Instrument 2010 No. 238* 16.

⁹⁷⁶ Fernando *Family Matters: Newsletter of the Australian Institute of Family Studies* 43.

⁹⁷⁷ 43.

Meeting with a child also reveals to the judge what the child regards as important in their life and creates a clearer picture of the child's unique family situation.⁹⁷⁸ Judicial interviews can also reveal new information. *ZN and YH and Child Representative*⁹⁷⁹ is an example of where important information that was not recorded in the family report, was disclosed during a judicial interview. The case concerned three children (aged 9, 12 and 14 years), whose mother (the applicant) wished to relocate the children to the United States of America to live with her new husband.⁹⁸⁰ The children's father, the respondent, opposed the application. Here, Nicholson CJ explained that:

"Having the children meet with the judge is not a practice routinely adopted and there are usually good reasons for caution. However there are circumstances, usually involving older children, where such a meeting is appropriate. There are also children who indicate that they would like to express their views directly to the judge. The Court should be mindful of the provisions of Article 12 of the Convention of the Rights of the Child in this regard, namely, that the children have both a right to be heard and to have their views taken into account."⁹⁸¹

The Judge further described the children's wishes as of "particular significance" in this case, as a result of the children's age and maturity.⁹⁸² It was clear from the family report that all three children wished to move to the USA with their mother.⁹⁸³

After hearing the family counsellor's evidence in the matter, Nicholson CJ invited the children to talk to him while the independent child lawyer was present.⁹⁸⁴ It is argued that, in doing so, Nicholson CJ employed the assistance of another adult to facilitate the child's participation in a more child-friendly manner (level three). Nicholson CJ was motivated to meet with the children as some time had passed since the family counsellor's report,⁹⁸⁵ and he also wished to establish whether the wishes portrayed in the family reports were in fact those of the children.⁹⁸⁶ The Judge spoke to each child separately and informed

⁹⁷⁸ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 127.

⁹⁷⁹ (2002) FLC 93-101.

⁹⁸⁰ Headnote.

⁹⁸¹ Para 1.

⁹⁸² Para 2.

⁹⁸³ S (14 years old), was in favour of relocating with her mother. B (12 years old), also wished to move with her mother to the USA. T (9 years old), although not as excited to move as her siblings, was also in favour of the relocation. See paras 104-105.

⁹⁸⁴ Para 104.

⁹⁸⁵ Para 105.

⁹⁸⁶ Para 105.

them that although he would take their views into account, he would not necessarily act according to them.⁹⁸⁷

During the judicial interview, it became clear to Nicholson CJ that two of the three children felt strongly about not moving to the United States of America.⁹⁸⁸ Since these wishes were not before the judge by way of evidence, Nicholson CJ ordered the family counsellor to once again interview the children and subsequently compile a new report.⁹⁸⁹

Altogether, the children's views weighed against moving with their mother to the USA.⁹⁹⁰ The children's views were, however, only one consideration in determining their best interests regarding the possibility of relocating to another country. The Court consequently decided that the move to the USA should be delayed.⁹⁹¹ Significantly, the Court highlighted that postponing their move to the USA by a predetermined number of years would deprive the children of expressing their views when it becomes time for them to move away.⁹⁹²

In this case, the judicial interview realised the children's right to express their views. This would not have been the case if the judge only considered the family report, which was not only outdated but also inaccurate.⁹⁹³

Despite the benefits of interviewing children in chambers,⁹⁹⁴ the overwhelming majority of Australian Family Court judges are not in favour of meeting with children.⁹⁹⁵ While Australian Family Court judges have considered compiling guidelines to lead them when meeting with children, their intentions remain fruitless.⁹⁹⁶

The majority of judges are concerned that they lack the necessary knowledge and experience to obtain children's views.⁹⁹⁷ Former Chief Justice of the Family Court of

⁹⁸⁷ Para 104.

⁹⁸⁸ ZN and YH and Child Representative 2002) FLC 93-101 para 115.

⁹⁸⁹ Para 116.

⁹⁹⁰ Para 138. Nicholson J, however, highlighted that the youngest child, B, did not yet completely understand the gravity of moving to another continent. See para 140.

⁹⁹¹ Para 166.

⁹⁹² Para 167.

⁹⁹³ Family Law Council *Pathways for Children* 109.

⁹⁹⁴ The arguments in favour of judicial interviews are explained in Chapter 3 section 3.1.

⁹⁹⁵ M Fernando "What do Australian Family Law Judges Think about Meeting with Children?" (2012) 26 *Australian Journal of Family Law* 51-53.

⁹⁹⁶ 39.

⁹⁹⁷ Fernando (2014) *Family Court Review* 52.

Australia, Diana Bryant CJ has voiced her disapproval of judges meeting with children by explaining that “judges are not qualified for this purpose, nor should you expect them to be”.⁹⁹⁸ The Judge further explained that trained and qualified experts are much better suited to interview children.⁹⁹⁹ Bryant CJ however sees the value of judges explaining their decisions to children, but warns that “even then you would have to be extremely careful about the process”.¹⁰⁰⁰

It is argued however, that Australian Family Court judges are the ideal candidates to, after receiving basic training on obtaining children’s views, meet directly with children. This recommendation is based on the fact that Family Court judges deal exclusively with family matters. Furthermore, the Family Law Act makes it clear that only a person who is “a suitable person to deal with matters of family law” as a result of “training, experience and personality” may be appointed as Family Court Judge.¹⁰⁰¹

In this light, Nicholson CJ pointed out that judges’ concerns regarding judicial interviews can easily be addressed by training.¹⁰⁰² He further explained that as the Family Court already offers training for judges, “there is no reason why such training should not be offered as part of that programme”.¹⁰⁰³

Although there are circumstances where judicial interviews are not appropriate,¹⁰⁰⁴ it is argued that judicial interviews can significantly enhance a child’s right to be heard.¹⁰⁰⁵ This submission is supported by Fernando, who recommends that section 60D(2) of the Family Law Act be amended to specifically include a meeting between the child and judge.¹⁰⁰⁶

Measuring children’s participation in the context of judicial interviews is no simple task. This is because every possible level of the child’s participation depends on the judge’s stance on children’s participation. The low number of judicial interviews that occur in Australia also makes it difficult to measure the level of children’s participation.

⁹⁹⁸ S Lunn “Judges urged to talk to kids in family disputes” *The Australian* (07-11-2008) 7.

⁹⁹⁹ 7.

¹⁰⁰⁰ 7.

¹⁰⁰¹ S 22(2)(b) of the Family Court Act.

¹⁰⁰² *ZN and YH and Child Representative* (2002) FLC 93-101 para 109.

¹⁰⁰³ Para 109.

¹⁰⁰⁴ Where a child is abused or manipulated by parents, or where a child does not want to meet the judge. See Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 106.

¹⁰⁰⁵ ALRC *Family Law for the Future* 161.

¹⁰⁰⁶ Fernando (2013) *NSW Law Journal* 104.

Nevertheless, it is argued that if a judge agrees to interview a child in chambers, it is fair to assume that he or she at least acknowledges the interests that the child has in the matter and is willing to give them an opportunity to share his or her views (level two). Whether the judge creates a respectful, safe and child-friendly atmosphere and provides the appropriate information (level three), will once again depend on the judge. Doing so is exactly what most judges feel they are not qualified for.¹⁰⁰⁷ Whether the judge considers and reflects the child's views when making a decision, will once again differ from case to case (level four).

Based on their caseload, it would be fair to conclude that judges often will not have time to explain the decision and the possibilities of an appeal to the relevant child (level five). Furthermore, it also seems fair to say that, based on their training and experience, a family consultant would be better placed to explain the abovementioned to the child.

5 5 2 *Child as witness*

Section 60CD of the Family Law Act does not explicitly refer to a child acting as a witness. It does, however, mention that a court may obtain the child's views, subject to court rules, "by such other means as the court thinks appropriate".¹⁰⁰⁸

Rule 15.02 of the Family Law Rules places a restriction on evidence given by children. This rule determines that the party applying for a child to be called as a witness must file an affidavit that includes the facts that support the application,¹⁰⁰⁹ the details of a support person,¹⁰¹⁰ as well as the evidence that will be adduced from the child.¹⁰¹¹ If the court grants the order pertaining to abovementioned application, it may further make an order regulating the manner in which the child will give evidence,¹⁰¹² as well as the person who is to be present while the child gives evidence.¹⁰¹³

Section 100B(2) of the Family Law Act, however, provides that a child may not remain in court, be called as a witness or swear to an affidavit unless the court grants an order to that effect. Although a child may, in the circumstances set out above, act

¹⁰⁰⁷ Fernando (2014) *Family Court Review* 52.

¹⁰⁰⁸ S 60CD(2)(c) of the Family Law Act.

¹⁰⁰⁹ Rule 15.02(1)(a) of the Family Law Rules.

¹⁰¹⁰ Rule 15.02(1)(b).

¹⁰¹¹ Rule 15.02(1)(c).

¹⁰¹² Affidavit, CCTV, video conference or other electronic communication. See Rule 15.02(2)(a).

¹⁰¹³ Rule 15.02(2)(b) of the Family Law Rules.

as a witness in court proceedings, it rarely happens.¹⁰¹⁴ Former Family Court Judge Richard Chisholm explained that it is “unusual for any party, or for the child’s representative, to suggest that children themselves should give evidence”.¹⁰¹⁵

The restriction contained in section 100B(2) of the Family Law Act is designed to prevent children from speaking in favour of or against a parent.¹⁰¹⁶ The case of *Todd and Todd*¹⁰¹⁷ concerned the care and control of the two daughters of the parties to a divorce action. In this case, Watson J explained that:

“I pause here to say that I personally would need a considerable amount of persuasion before I allowed any child to be called as a witness or to be used in any way as a witness in a court in which there is a dispute between that child’s parents. I could think of nothing more counter-productive to the relationship between parent and child for the future than allowing such a course to take place”.¹⁰¹⁸

*Fonley and Fonley*¹⁰¹⁹ concerned a divorce matter in which the respondent’s 17-year-old son from a previous relationship, submitted sworn affidavits in support of his father.¹⁰²⁰ The child also wished to be called as a witness. As children are not, without a court order to that effect, allowed to give evidence (orally or written),¹⁰²¹ Lambert J explained that there are certain factors that should be considered when deciding whether a child should be called as a witness in proceedings. These factors include:¹⁰²² the nature of the evidence; the nature of the proceedings; the child’s relationship with the persons involved in the proceedings; the child’s maturity; and whether the evidence is reasonably available from a different source.¹⁰²³

It is submitted that the latter consideration is most likely to be the basis on which a court would dismiss such an application, as the family consultant is obliged by section 62G(3A) of the Family Law Act to record the child’s views in the family report. The possibility of the child’s views being filtered by the family consultant could serve as counterargument in this regard. In *Fonley and Fonley*, the evidence was obtained by

¹⁰¹⁴ Barnett & Wilson (2004) *Psychiatry, Psychol & L* 75.

¹⁰¹⁵ Chisholm *Softening the Blow - Changing Custody to Residence*.

¹⁰¹⁶ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 101.

¹⁰¹⁷ (1976) FLC 90-001.

¹⁰¹⁸ J Tobin “The Development of Children’s Rights” in Monahan & Y Young (eds) *Children and the Law in Australia* (2008) 1 5. Own emphasis.

¹⁰¹⁹ (1978) FLC 90-511.

¹⁰²⁰ Tobin “The Development of Children’s Rights” in *Children and the Law in Australia* 2.

¹⁰²¹ Section 100B(2) of the Family Law Act.

¹⁰²² Tobin “The Development of Children’s Rights” in *Children and the Law in Australia* 2.

¹⁰²³ 2.

meeting with the child in chambers, thereby rendering the child acting as a witness unnecessary.¹⁰²⁴

On the other hand, former Nicholson CJ has explained that:¹⁰²⁵

“I wonder if it is not time to re-think the approach of never calling children as witnesses. Children do give evidence in other courts. Methods have been developed to protect them, including the opportunity to give evidence by video link from a location other than the court room. There may be children who wish to give evidence and if they do, it is difficult to see the rationale for preventing them doing so. To refuse them this right may well be a breach of their entitlements under [the United Nations Convention on the Rights of the Child] and may effectively prevent the Court ascertaining their wishes”.¹⁰²⁶

Evaluating children’s participation in the context of acting as witnesses once again proves to be challenging as a result of how infrequent children act as witnesses in family law proceedings. Such an evaluation will thus be done based on the theory as explained above.

While a child witness will enjoy the opportunity to share his or her views (level two), the child-friendliness of the court process (level three) could pose a challenge. Once again, the extent to which the child’s views are considered and reflected in the decisions (level four) made will depend on the judge. Here, it seems fair that a judge who ordered that a child act as a witness should explain the decision and the effects thereof to the child, or at least instruct the relevant attorney to do so (level five). Doing so will once again illustrate the crucial role that effective legal representation plays in effective participation.

5 5 3 *Children as parties to the proceedings*

De Bruin regards a child being joined as party to court proceedings as the most direct way in which a child can participate.¹⁰²⁷ In terms of section 69C of the Family Law Act, unless there appears to be a contrary intention, a child may institute any kind of proceedings in terms of the Family Law Act that relate to him or her. Section 65C(d) specifically mentions that a child may apply for a parenting order relating to him or herself. As is the case in South Africa, a child can therefore potentially act as a party to proceedings relating to him or her.¹⁰²⁸

¹⁰²⁴ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* Voices 103.

¹⁰²⁵ Nicholson “Children and Young People: The Law and Human Rights” as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings: Hearing Children’s Voices* 103.

¹⁰²⁶ Own emphasis.

¹⁰²⁷ De Bruin *Child Participation and Representation in Legal Matters* 493.

¹⁰²⁸ See Chapter 3 section 3 4.

A child may only act as a party to court proceedings if the court is satisfied that the child is conducting the case and understands the nature of the proceedings as well of the possible consequences thereof.¹⁰²⁹ If the court is not satisfied of the abovementioned, the child can only initiate, respond to or intervene in proceedings by means of a case guardian.¹⁰³⁰ Section 100B of the Family Law Act makes it clear that a child must not swear an affidavit for the purpose of the court proceedings unless the relevant court grants an order that allows the child to do so.

It rarely happens that a child is joined as a party to the proceedings.¹⁰³¹ This is a result of the fear that involving a child in litigation could harm the child.¹⁰³² Although the Family Court of Australia does not keep statistics of the number of children who are parties to proceedings relating to them, it is accepted that it is an uncommon practice.¹⁰³³

*Palgiarella and Pagliarella*¹⁰³⁴ is an example of a case where a 14-year-old child was joined as party to the proceedings.¹⁰³⁵ As the judgment concerned issues that arose after the order that joined the child as party, the reasons for the child being joined were not discussed.¹⁰³⁶

The Family Law Council argues that, where a child is sufficiently mature and wishes to have a representative who will act on his or her instructions, the ICL must inform the child of the possibility of being joined as a party to the proceedings and consequently instructing a legal representative.¹⁰³⁷ The child concerned must be *Gillick* competent, which means that the child is mature enough to make decisions relating to him or herself that are not in line with the child's parents' wishes.¹⁰³⁸ Circumstances where a child could be provided with direct representation who must act according to the child's instructions, include where:

¹⁰²⁹ Rule 6.08(2) of the Family Law Rules.

¹⁰³⁰ Rule 6.08(1).

¹⁰³¹ Fernando (2013) *NSW Law Journal* 99.

¹⁰³² 99; Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 99.

¹⁰³³ 100.

¹⁰³⁴ (1993) FLC 92-400

¹⁰³⁵ Para 1.

¹⁰³⁶ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 100.

¹⁰³⁷ Family Law Council *Pathways for Children* 77. Also see National Legal Aid *Guidelines for Independent Children's Lawyers* (2013) 3.

¹⁰³⁸ 38.

- i. the court considers the child to be *Gillick* competent;¹⁰³⁹
- ii. the child seeks independent legal representation to make submissions to support his or own views that are in contrast with that of the ICL;¹⁰⁴⁰
- iii. the ICL considers it in the child's best interests that the court hears the child's contrasting wishes;¹⁰⁴¹
- iv. the child holds a strong view regarding the result of the proceedings.¹⁰⁴²

The level of participation reached when a child is joined as party to the proceedings in his or her parents' divorce related proceedings depends on how well the person who represented the child executed their mandate. Once again, it is shown how representation leads to effective participation. While the extent to which the court considered the child's views and reflected it in the decision made (level four), depends on the court, effective legal representation will result in almost all of the other questions can be answered in the positive. Here, the child-friendliness and sensitivity of the court (level three) is also a stumbling block.

5 5 4 Appeal

Views expressed by the child form part of the evidence considered by the court when making decisions that involve the child.¹⁰⁴³ Although the child's views is only one factor to be taken into account by the court when making decisions, an appeal can be brought where a child was denied an opportunity to express his or her views.¹⁰⁴⁴ This contributes to the accountability of the child's participation,¹⁰⁴⁵ and emphasises the importance of taking a child's views into consideration when making decisions. The ICL can appeal a court order on the child's behalf in circumstances where the child's best interests would be promoted by the appeal.¹⁰⁴⁶

*Joannou v Joannou*¹⁰⁴⁷ concerned the guardianship and care of K (8 years old), W (7 years old), M (5 years old) and G (4 years old), all born from the marriage between

¹⁰³⁹ 39.

¹⁰⁴⁰ National Legal Aid *Guidelines for Independent Children's Lawyers* (2013) 39.

¹⁰⁴¹ 39. In this case there would be an ICL who acts as a best interests representative as well as a separate legal representative who acts purely according to the child's instructions.

¹⁰⁴² 39.

¹⁰⁴³ Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 64.

¹⁰⁴⁴ Fernando (2014) *Family Court Review* 47.

¹⁰⁴⁵ CRC Committee *General Comment 12* para 134 (i), Lansdown & O'Kane *A toolkit for monitoring and evaluating children's participation* 19.

¹⁰⁴⁶ National Legal Aid *Guidelines for Independent Children's Lawyers* (2013) 11.

¹⁰⁴⁷ (1985) FLC 91-643.

the plaintiff and the defendant. The children's mother, without their father's consent or knowledge, removed the children from their family home in Australia and relocated to New Zealand.¹⁰⁴⁸

The father brought an *ex parte* application in the Family Court of Australia for the care of the four children.¹⁰⁴⁹ The care order was granted, and the four children were to be returned to Australia.¹⁰⁵⁰ However, an interim order was made on the same day in New Zealand, granting interim care to the mother.¹⁰⁵¹

The mother agreed to return W and M to Australia, but refused that K and G do the same.¹⁰⁵² The mother then filed an application at the Family Court of Australia for the interim care order that was granted in her favour in New Zealand, to be registered under the Australian Family Law Act.¹⁰⁵³ Soon thereafter, the cross-applications were heard in the Australian Family Court before Asche J.¹⁰⁵⁴ Both parties were afforded the opportunity to make oral submissions before the Court.¹⁰⁵⁵ Asche J also ordered that a counsellor compile a report relating to the children's relationship with their father, as well as the children's wishes.¹⁰⁵⁶ The report was, however, limited to M and W, as K and G were still in New Zealand.¹⁰⁵⁷

Based on the evidence, the Court concluded that M and W wished to stay with their father in Australia, and that they shared a close bond with their father.¹⁰⁵⁸ It was ordered that the two children should remain in Australia,¹⁰⁵⁹ and that K and G were to be returned to their father in Australia.¹⁰⁶⁰

Some months later, the children's mother launched an application for interim care of the children at the Australian Family Court.¹⁰⁶¹ Shockingly, Treyvaud J described reports pertaining to the children as "a waste of time", as "the wishes of children of this

¹⁰⁴⁸ Tobin "The Development of Children's Rights" in *Children and the Law in Australia* 2.

¹⁰⁴⁹ 2.

¹⁰⁵⁰ 2.

¹⁰⁵¹ 2.

¹⁰⁵² 3.

¹⁰⁵³ 3.

¹⁰⁵⁴ 3.

¹⁰⁵⁵ 3.

¹⁰⁵⁶ 3.

¹⁰⁵⁷ 3.

¹⁰⁵⁸ 3-4.

¹⁰⁵⁹ 4.

¹⁰⁶⁰ 5.

¹⁰⁶¹ 6.

age seem to me to be so irrelevant it is not worth thinking about”.¹⁰⁶² He furthermore explained that “I’m not going to take any notice of their wishes at all. I can tell you that now”.¹⁰⁶³

Although Treyvaud J did not want to read any reports about the children, he did wish to consult with them in chambers, while making it abundantly clear that he would place “a minimal weight” on M and G’s wishes.¹⁰⁶⁴ While the first judge who was involved with the Joannou family situation, took the children’s views into account, the same could not be said about Treyvaud J. Treyvaud J clearly had no regard for the children’s right to participation in a matter that had a profound impact on their lives and his blatant disregard of the children’s interests in the matter and their right to participation lead to the children’s participation not even reaching the first level of the proposed model.

Treyvaud J’s judgment was consequently appealed against, based on the lack of concern afforded to the children’s views. Fortunately, on appeal, the Full Court approached their mandate to consider children’s views seriously and expressed their disappointment in Treyvaud J in no uncertain terms.¹⁰⁶⁵ Although the Court agreed that the children in the case were very young, the Court maintained that obtaining the children’s views, wishes and attitudes would have been to the Court’s benefit.¹⁰⁶⁶ The Court recognised the children’s interests in the matter and the children’s participation could reach at least the second level of the proposed model.

Upon appeal, the Full Court furthermore explained that Treyvaud J’s view of child participation was far too narrow in that it is not only the child’s wishes that are relevant, but also their perceptions and attitudes.¹⁰⁶⁷ Subsequently, the Full Court allowed the appeal and directed the matter to the Family Court to be retried.¹⁰⁶⁸ The Court ordered that the mother return the children to Australia so that the children can be duly interviewed by a counsellor who would lead evidence as to the children’s perceptions,

¹⁰⁶² 6.

¹⁰⁶³ Tobin “The Development of Children’s Rights” in *Children and the Law in Australia* 7.

¹⁰⁶⁴ 8.

¹⁰⁶⁵ 9 & 12.

¹⁰⁶⁶ 12.

¹⁰⁶⁷ 12.

¹⁰⁶⁸ 14.

views and attitudes.¹⁰⁶⁹ The children's participation thus reached the fourth level in terms of the proposed model.

*H and W*¹⁰⁷⁰ is another example of an appeal based on the trial judge's insufficient consideration given to a 7-year-old child's views. Here, Baker J emphasised that a child's views should not only be considered, but "must be shown to have been considered".¹⁰⁷¹ The judge further explained that where a court rejects a child's views, a clear motivation must be given for this rejection.¹⁰⁷²

If the abovementioned approach is followed and the court provides the child with reasons as to why his or her views were not implemented, the child's participation can reach the fifth level of the proposed model of measuring participation. Once again, the person who aids the child in this appeal will have a great impact on the level of participation, especially the third level of the relevant model. Still, with effective representation and a judge who shows that the child's views have been considered, this route can effectively realise a child's right to participation. It should, however, be mentioned that the ideal would have been that the child's views were properly considered and shown to be considered from the beginning. If that were the case, it would not have been necessary to appeal.

6 Recommendations by the Australian Law Reform Commission

The Australian Law Reform Commission recommended that the Family Law Act, with its subordinate legislation, should be "comprehensively redrafted".¹⁰⁷³ Significantly, the Australian Law Reform Commission also recommended that the Family Law Act should include an "explicit statement...that, in child-related proceedings, there must be consideration of whether any child or children have been given the opportunity to express their views and how this might best be facilitated, will assist with ensuring that a child has in fact had the opportunity to express his or her

¹⁰⁶⁹ 15.

¹⁰⁷⁰ (1995) FLC 92-598.

¹⁰⁷¹ Para 967 as cited in Fernando *Judicial Meetings with Children in Australian Family Law Proceedings* 66.

¹⁰⁷² Para 967.

¹⁰⁷³ ALRC *Family Law for the Future* 23.

views”.¹⁰⁷⁴ Should the child not wish to express his or her views, the court should take note thereof.¹⁰⁷⁵

The Australian Law Reform Commission further recommended that the Family Law Act be amended to “better protect vulnerable parties, to facilitate access to a range of appropriate dispute resolution processes, and to restore trust in the system with the aim of reducing, as far as possible, the negative impact of legal processes on separating families”.¹⁰⁷⁶ According to the Commission, their approach to children’s participation has been informed by the better understanding of children and their development.¹⁰⁷⁷

7 Conclusion

The Family Law Act renders it clear that the Australian family law system favours alternative methods of resolving family disputes over traditional divorce litigation. This can be seen in the objects of part VII of the Act,¹⁰⁷⁸ as well as section 65F of the Act which requires a variety of counselling before the court proceeds to traditional litigation.

While the latter is significant in that it recognises the potentially detrimental effects that traditional family litigation can have on children, this chapter has illustrated that, significantly, alternatives to traditional litigation do not necessarily guarantee a child’s right to participation.

This chapter employed the proposed model to measure various methods of children’s participation in Australia. In terms of alternative forms of dispute resolution, this chapter delved into FRCs as well as the Child Responsive Programme. It was established that FRCs have the potential to fulfil a child’s right to participation to at least level three of the proposed model in circumstances where the FRC practitioner chooses to involve the child in the process. The latter is not a problem when it comes to the Child Responsive Programme, as family consultants have an obligation to obtain the child’s views where the child chooses to share them, and to report these views to

¹⁰⁷⁴ 324.

¹⁰⁷⁵ 324.

¹⁰⁷⁶ ALRC *Family Law for the Future* 66.

¹⁰⁷⁷ 359.

¹⁰⁷⁸ S 12A of the Family Law Act.

court. This is an important difference between the two alternative methods of children's participation in Australia.

This chapter also discussed four methods of child's participation that take place in a court setting. The Less Adversarial Trial, while it has the potential to, in some limited cases, reach the fifth level in terms of the proposed model, grants the judge the discretion to choose whether or not he or she wants to involve the child in the process whatsoever. This means that this method does not necessarily grant the child the opportunity to share his or her views.

The ICL is a best-interests representative but does not fulfil the same role as a child's separate legal representative insofar as acting upon the child's instruction. This form of representation facilitates the child's participation to at least the third level in terms of the proposed model in cases where the ICL does indeed meet with the child.

A case guardian's role is to compile a family report to share with the court. Unfortunately, as this report does not have to contain the child's views, this form of representation does not necessarily grant the child the opportunity to share his or her views at all. However, where the report does contain the child's views, the child's participation reaches at least the third level in terms of the proposed model. While reaching level four will depend on the judge, it is unlikely that the child's participation will reach the fifth level as it is not part of the case guardian's mandate to engage with the child after any decisions have been made.

The last form of participation during court proceedings that this chapter investigated, was the use of the family consultant. Similar to the family advocate in South Africa, the family consultant compiles a report to assist the court in making a decision in the child's interests. While the child sharing his or her views with a family consultant will automatically reach the second level of participation in terms of the proposed model, the family consultant does not necessarily have to obtain the child's views. This is something that can render the child's participation irrelevant.

In terms of a child's direct participation, this chapter explored the practices of judicial participation, a child acting as a witness, a child being joined as a party to the proceedings and a child appealing the decision that so deeply impacts their life. The chapter revealed that while there are various subjective factors that impact the level that a child's participation can reach, the four forms of direct participation can only

reach the second level of the proposed model with absolute certainty. This is mainly because of the threats that a court poses to level three of the proposed model.

It is argued that the current levels of participation being reached can be increased by implementing effective legal representation (such as an ICL who performs their duties in accordance with the relevant Guidelines) and by doing away with various role players' discretion to provide a child with an opportunity to share his or her views, and to accurately communicate those views to the decision maker(s).

The next chapter will discuss mediation as alternative to realising a child's right to participation in his or her parents' divorce and related proceedings. An investigation of mediation as a model will shed light on the feasibility of mediation successfully realising a child's right to participation in his or her parents' divorce and related proceedings while addressing the negative impact of the adversarial system.

Chapter 5:

Mediation as a model to realise a child's right to participation

1 Introduction

As highlighted in chapters 3 and 4, by measuring the various methods of child participation against the proposed model as set out in chapter 2, a child's right to participation is not always realised in his or her parents' divorce related proceedings. The next step is to determine to what extent mediation is more suited to realise the child's right to participate in this context.

This chapter will do so by investigating and measuring the characteristics, different types, advantages, and suitability of family mediation against the proposed model of measuring children's participation. This will include an analysis of child-focused as well as child-inclusive mediation.

1 1 Defining mediation

There are a number of key characteristics evident in most definitions of mediation. The Centre for Effective Dispute Resolution describes mediation as "a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with parties in ultimate control of the decision to settle the terms of resolution".¹⁰⁷⁹

In an attempt to properly engage with the concept of mediation, it is also helpful to look at what mediation is not. Mediation is "neither therapy nor the practice of law".¹⁰⁸⁰ It is also not a universal solution for all family conflict.¹⁰⁸¹ Mediation encourages planning and reaching an agreement,¹⁰⁸² rather than necessarily effecting behavioural change.¹⁰⁸³

¹⁰⁷⁹ Centre for Effective Dispute Resolution as cited in CH Hoffman *The Contribution mediation can make in addressing economic crime in corporate commercial relationships in South Africa* LLD thesis, Stellenbosch University (2019) 36.

¹⁰⁸⁰ Al Schepard *Children, Courts and Custody: Interdisciplinary Models for Divorcing Families* (2005) 60.

¹⁰⁸¹ 64.

¹⁰⁸² 64.

¹⁰⁸³ 64.

Although mediation can take place in various contexts, the focus in this chapter is on family mediation. Family mediation is “a process in which the mediator, an impartial third party who has no decision-making powers, facilitates negotiations between disputing parties”.¹⁰⁸⁴ The object of the negotiation is to get the disputing parties – the family members – back on speaking terms and to facilitate the process of reaching an agreement with which both parties are both satisfied.¹⁰⁸⁵ This agreement must also acknowledge the rights and needs of all family members.¹⁰⁸⁶

It should be noted that, while family mediation can involve, for example, only the two parents, or parents and grandparents, or children without their parents, the issue at hand, namely children’s participation in their parents’ divorce related proceedings, necessitates the involvement of at least one child and one parent.

1 2 Characteristics of mediation

As the dissolution of a marriage is “a matter of the heart as well as the law”,¹⁰⁸⁷ it is argued that the system chosen to regulate the dissolution of a marriage should be able to recognise both of these aspects. It is further submitted that it is the inherent characteristics of the process of family mediation that equips the process to address both the legal as well as the emotional aspects of family dissolution. At its core, family mediation is:

- i. Voluntary:¹⁰⁸⁸ Although there are certain circumstances in which mediation is mandatory,¹⁰⁸⁹ ideally speaking, mediation is voluntary.¹⁰⁹⁰ The voluntariness of the process is likely to lessen conflict and increase the chances of successfully reaching an agreement.¹⁰⁹¹ It should be noted that, whether the process of mediation is voluntary or mandatory, the agreement reached must be voluntary. Voluntariness contributes to level three of the proposed model.

1084 T Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 136.

1085 136.

1086 136.

1087 3.

1088 Brand, Steadman & Todd *Commercial Mediation* 24.

1089 See section 2 1 below.

1090 Brand, Steadman & Todd *Commercial Mediation* 24.

1091 Schepard *Children, Courts and Custody* 59.

- ii. Impartially facilitated:¹⁰⁹² The mediator is a neutral third party who encourages and facilitates family members to think creatively to resolve family issues on their own.
- iii. Multi-disciplinary:¹⁰⁹³ The techniques employed by mediators are based on social and behavioural sciences.¹⁰⁹⁴ As is the case with divorce itself, mediation is not purely a legal process.¹⁰⁹⁵ Where the mediator is trained in engaging with children, it can result in mediation reaching level three of the proposed model by creating a sensitive, informative, age-appropriate and child-friendly environment that is more conducive to child participation.
- iv. Flexible:¹⁰⁹⁶ The process of mediation can adapt itself based on the individual family's context and needs.¹⁰⁹⁷ To this end, there are various forms of mediation.¹⁰⁹⁸
- v. Confidential:¹⁰⁹⁹ The guarantee of confidentiality during the process of mediation renders it more likely that parents will commit themselves to curating the best possible parenting arrangements for the child. This can be credited to the fact that parents can engage in the mediation without the fear that information revealed in the process will be used against them during litigation at a later stage.¹¹⁰⁰ It should however be noted that confidentiality can only be guaranteed to a certain extent as the mediator has an obligation report abusive behaviour.¹¹⁰¹ This is of particular importance when children are involved.
- vi. Informal:¹¹⁰² The process of mediation is not bound by the rules of court.¹¹⁰³ Where children are involved, this can increase the level of child participation that can be reached. The informality of the process also contributes to the third

¹⁰⁹² M De Jong "Judicial stamp of approval for divorce and family mediation in South Africa" (2005) 68 *THRHR* 95 96.

¹⁰⁹³ 96.

¹⁰⁹⁴ M De Jong "Child-focused Mediation" in T Boezaart (ed) *Child Law in South Africa* (2009) 115.

¹⁰⁹⁵ Schepard *Children, Courts and Custody Families* 3.

¹⁰⁹⁶ 115.

¹⁰⁹⁷ De Jong (2005) *THRHR* 96.

¹⁰⁹⁸ See section 1 3 of this chapter below.

¹⁰⁹⁹ De Jong "Child-focused Mediation" in *Child Law in South Africa* 116.

¹¹⁰⁰ DB Pickar & JJ Kahn "Settlement-focused Parenting Plan Consultations: an Evaluative Mediation Alternative to Child Custody Evaluations" (2011) 49 *Family Court Review* 59 65.

¹¹⁰¹ De Jong "Child-focused Mediation" in *Child Law in South Africa* 116.

¹¹⁰² 115.

¹¹⁰³ 115.

level of participation in terms of the proposed model. This is because an informal setting is less likely to make the child uncomfortable or scared as a court would.

- vii. Future-oriented:¹¹⁰⁴ Family mediation is not concerned with what has happened in the past, but how the family structure will function in the future. This characteristic speaks to the fifth level of participation in terms of the proposed model, which is in itself future-oriented.
- viii. A process that promotes the child's best interests:¹¹⁰⁵ Section 9 of the Children's Act and section 28(2) of the Constitution place an obligation on the mediator to ensure that parties involved in mediation place the interests of their child first.¹¹⁰⁶ Research has shown that mediated divorce related agreements are more advantageous for children than court orders.¹¹⁰⁷

1 3 Types of mediation

Schepard explains that mediators around the world do not agree on the theory and practice of mediation.¹¹⁰⁸ There are various forms of mediation that can be found on a spectrum ranging from facilitative to evaluative.¹¹⁰⁹ The difference between the various forms of mediation are typically more a matter of degree than of kind as most mediators combine techniques that belong to a number of forms of mediation.¹¹¹⁰ The manner in which the mediator performs his or her function thus determines the type of mediation. In what follows, the different approaches to mediation will be evaluated in terms of the proposed model.

1 3 1 *Facilitative mediation*

Facilitative mediation employs techniques and strategies that facilitate negotiation.¹¹¹¹ Here, the mediator facilitates a process designed to aid the parties in negotiating an agreement.¹¹¹² The mediator's opinions are irrelevant during this

¹¹⁰⁴ De Jong "Child-focused Mediation" in *Child Law in South Africa* 116.

¹¹⁰⁵ 117.

¹¹⁰⁶ 117.

¹¹⁰⁷ 117.

¹¹⁰⁸ Schepard *Children, Courts and Custody* 53.

¹¹⁰⁹ 53.

¹¹¹⁰ 54.

¹¹¹¹ 53.

¹¹¹² Brand, Steadman & Todd *Commercial Mediation: A User's Guide* 22.

process.¹¹¹³ This form of mediation is process oriented,¹¹¹⁴ client-centred,¹¹¹⁵ interest based,¹¹¹⁶ and focusses on communication.¹¹¹⁷ Based on the characteristics of facilitative mediation, it is argued that this approach lends itself to complying with level three of the proposed model.

During this structured process, the mediator facilitates effective communication between parties to the mediation.¹¹¹⁸ This entails parties sharing their views and concerns as well as truly listening to what the other parties' share.¹¹¹⁹ While the parties to the mediation are responsible for the content of the eventual agreement, the mediator's focus is on the process itself.¹¹²⁰

The facilitative mediator does not focus on legal issues, nor will they provide insight as to a probable outcome should the case go to trial.¹¹²¹ Furthermore, it is not the mediator's function to evaluate the parties' suggestions and opinions.¹¹²²

When it comes to facilitative mediation, it is of the opinion that the mediator assumes that the parents are the best people to make decisions about their children.¹¹²³ This is problematic as parents do not necessarily believe that their children should be involved or that their views be considered. If it is correct, facilitative mediation does not necessarily guarantee the child's right to participation. This poses a risk, as this right can therefore be completely disregarded in a context where decisions that will greatly impact the child's life, will be made.

1.3.2 *Evaluative mediation*

In evaluative mediation the mediator is actively involved in the content of the proposed agreement and the issues at hand.¹¹²⁴ To this end, the mediator is usually

¹¹¹³ Brand, Steadman & Todd *Commercial Mediation: A User's Guide* 22.

¹¹¹⁴ J Folberg, A Milne & P Salem *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 32.

¹¹¹⁵ 32.

¹¹¹⁶ 33.

¹¹¹⁷ 33.

¹¹¹⁸ K Salminen "Mediation and the Best Interest of the Child from the Child Law Perspective" in A Nylund, K Ervasti & L Adrian (eds) *Nordic Mediation Research* (2018) 209 214.

¹¹¹⁹ 215.

¹¹²⁰ 215.

¹¹²¹ 215.

¹¹²² 215.

¹¹²³ 215.

¹¹²⁴ Brand, Steadman & Todd *Commercial Mediation: A User's Guide* 22.

an expert in the relevant field, in this case, family law.¹¹²⁵ The evaluative mediator therefore has two main roles: facilitating the process itself and evaluating the content of the proposed agreement,¹¹²⁶ for example, the content of a parenting plan.

During this evaluative process, the mediator provides the parties with relevant information.¹¹²⁷ This type of mediation can ensure that the child's right to participation is not ignored,¹¹²⁸ and automatically creates an opportunity for the child to share his or her views and thus reach the second level of participation in terms of the proposed model. This statement rings true when a mediator informs parents of their children's right to participation and facilitates the process in a way that is conducive to children's participation. The mediator can also determine to what extent the parents are supporting or realising the child's rights and direct their focus back to the child.¹¹²⁹

Evaluative mediation requires that the mediator gets "knee deep in the content of the matter at hand".¹¹³⁰ The mediator must predict the outcome of the matter should it go to trial, propose various solutions, and assess every party's various strengths and weaknesses.¹¹³¹ This model assumes that the mediator is able and equipped to not only facilitate the process of mediation, but also evaluate the contents of the proposed agreement.¹¹³² The parties thus have the advantage of having knowledge and experience that they themselves do not have, being implemented in the agreement.¹¹³³

There are, however, also concerns with this form of mediation. Critics warn that the involvement of the mediator may define the issue at hand too narrowly.¹¹³⁴ This is because what the family deems relevant and what the mediator focusses on, is not necessarily the same.¹¹³⁵ Furthermore, there is the possibility that the mediator does

¹¹²⁵ Brand, Steadman & Todd *Commercial Mediation: A User's Guide* 22.

¹¹²⁶ Salminen "Mediation and the Best Interest of the Child from the Child Law Perspective" in *Nordic Mediation Research* 217.

¹¹²⁷ 217.

¹¹²⁸ 217.

¹¹²⁹ 218.

¹¹³⁰ Folberg, Milne & Salem *Divorce and Family Mediation* 73.

¹¹³¹ 217.

¹¹³² Salminen "Mediation and the Best Interest of the Child from the Child Law Perspective" in *Nordic Mediation Research* 217.

¹¹³³ Folberg, Milne & Salem *Divorce and Family Mediation* 73.

¹¹³⁴ 73.

¹¹³⁵ Salminen "Mediation and the Best Interest of the Child from the Child Law Perspective" in *Nordic Mediation Research* 218.

not have enough knowledge and experience in the field of family mediation and does not accurately evaluate the situation.

It is argued that evaluative mediation is the most suitable form of mediation where children are involved. It is further argued that suitably equipped family mediators will better be able to realise a child's right to participation by employing evaluative techniques, rather than only playing a facilitative role. Based on the child's opportunity to share his or her views as well as the child-friendly, age-appropriate and sensitive space created by the trained and experienced mediator, the child's participation can reach at least the third level in terms of the proposed model.

1 4 Advantages of family mediation

Family mediation lends itself to creating a child-friendly, age-appropriate, and sensitive space for the child to share his or her views. This is an environment that is conducive to achieving level three of the proposed model.

1 4 1 Advantageous to children involved

Settlement agreements reached by means of mediation have proven to be much more advantageous to children than those arrangements made by court order.¹¹³⁶ The employment of responsible conflict management provides children with a greater chance to ease into the restructuring of their family.¹¹³⁷

It is common for parents to struggle to separate their own interests from those of their children.¹¹³⁸ Mediation encourages parents to keep their children's interests as the top priority.¹¹³⁹ Mediation is also connected to less co-parenting conflict as well as increased flexibility in respect of the exercising of the care arrangements, compared to litigation.¹¹⁴⁰ It goes without saying that a lower level of conflict is beneficial to children.

¹¹³⁶ De Jong (2005) *THRHR* 98.

¹¹³⁷ MJ Schoffer "Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation" (2005) 43 *Family Court Review* 323 323.

¹¹³⁸ De Jong (2008) *TSAR* 785.

¹¹³⁹ 785. Also see: De Jong "Child-focused Mediation" *Child Law in South Africa* 117.

¹¹⁴⁰ Pickar & Kahn (2011) *Family Court Review* 59.

1 4 2 Higher compliance

One of the goals of mediation is for parties to reach an agreement.¹¹⁴¹ Mediated agreements are usually sustainable.¹¹⁴² This is particularly important when considering the low levels of compliance with court orders pertaining to divorce and related proceedings globally.¹¹⁴³ It seems that parties are more likely to stick to the agreement reached when they themselves are involved in drafting the terms of the agreement.¹¹⁴⁴ Higher levels of compliance also leads to lower levels of the matter being mediated or litigated once again.¹¹⁴⁵

1 4 3 Less conflict

It is argued that the remarkably lower levels of conflict¹¹⁴⁶ involved in mediation as opposed to litigation are the most significant advantage that mediation has to offer, especially for children. Mediation creates a space for family members to share their views and discuss the issues at hand while the mediator keeps their engagement relevant and on track.¹¹⁴⁷

The reduced amount of conflict can be attributed to, amongst other things, the improvement in parties' communication.¹¹⁴⁸ This is as a result of the mediator's facilitative role and the type of space that the process of mediation creates.¹¹⁴⁹

1 4 4 Cost and time effective

Mediation tends to be cheaper and more promptly resolved than litigation.¹¹⁵⁰ As a result, the process is also more accessible.¹¹⁵¹ Nonetheless, it should be noted that court ordered mediation tends to be concluded quicker than private mediation.¹¹⁵²

¹¹⁴¹ Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 225.

¹¹⁴² E Ryrstedt "Mediation Regarding Children – is the Result Always in the Best Interest of the Child? A View from Sweden" (2012) 26 *Int J Law Policy Fam* 220 227.

¹¹⁴³ 226.

¹¹⁴⁴ 227.

¹¹⁴⁵ 227.

¹¹⁴⁶ Schepard *Children, Courts and Custody* 63.

¹¹⁴⁷ 63.

¹¹⁴⁸ Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 222.

¹¹⁴⁹ 225.

¹¹⁵⁰ De Jong (2005) *THRHR* 97.

¹¹⁵¹ 97.

¹¹⁵² Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 231.

Although private mediation is usually cheaper than litigation, it is not always the case. It does however reduce the government's costs as one less case is heard in court.¹¹⁵³

1 5 Suitability of family mediation

Van Zyl describes mediation as “particularly appropriate in family disputes”.¹¹⁵⁴ This is because mediation addresses the complexity of the dissolution and reshuffling of family structures and dynamics. It is important to remember that, while divorce brings an end to the marriage, it does not terminate the couple's role as their children's parents.¹¹⁵⁵ It is argued that, as a future-oriented process,¹¹⁵⁶ mediation attempts to preserve and foster family relationships, civilized communication and co-parenting relationships.

South African courts have given their judicial stamp of approval to family mediation in various cases over the years. In 2003, the Court in *Van den Berg v Le Roux*¹¹⁵⁷ ordered that the parents of a 9-year-old child may only approach a court after attempting mediation.¹¹⁵⁸ The case dealt with the variation of a care order subsequent to her parents' divorce.¹¹⁵⁹

In 2010, Brassey AJ explained in *MB v NB*¹¹⁶⁰ that mediation is suitable when it comes to family disputes.¹¹⁶¹ This divorce matter included various matters such the defendant's alleged obligation to finance his son's private school education subsequent to his divorce from the plaintiff.¹¹⁶² Brassey AJ further explained that, had the matter been mediated, the parties involved “would have had ample scope for an informed, but informal debate” on the relevant issues.¹¹⁶³ The judge carried on to say that mediation would have saved time as well as money, and that “an overall solution

¹¹⁵³ Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 235.

¹¹⁵⁴ 237.

¹¹⁵⁵ 238.

¹¹⁵⁶ De Jong “Child-focused Mediation” in *Child Law in South Africa* 116.

¹¹⁵⁷ [2003] 3 ALL SA 599 (NC)

¹¹⁵⁸ Para 36.

¹¹⁵⁹ Para 1.

¹¹⁶⁰ 2010 3 220 (SGHC).

¹¹⁶¹ Para 52.

¹¹⁶² Para 13.

¹¹⁶³ Para 58.

would have been reached”.¹¹⁶⁴ Unfortunately, the parties’ legal teams failed to serve the interests of their clients by not suggesting that the matter rather be mediated.¹¹⁶⁵

More recently in 2018, the Court in *KM v CM*¹¹⁶⁶ explained its disappointment in the parties’ decision to litigate without attempting mediation. Here, the Court mentioned that the children were “definitely not” the beneficiaries of the litigation.¹¹⁶⁷ This comment once again illustrates the negative impact that litigation can have on children.

Despite the general suitability of mediation in family disputes, there are some circumstances that render the use of mediation less appropriate. Van Zyl suggests a screening procedure to determine whether mediation is a viable option for families.¹¹⁶⁸ Situations to carefully consider include:

- (i) Where there is a risk of family violence or abuse;¹¹⁶⁹
- (ii) Where there is a significant power imbalance between the parties;¹¹⁷⁰
- (iii) In high-level conflict cases;¹¹⁷¹
- (iv) Where mental health, drug or alcohol problems are involved;¹¹⁷²
- (v) Where the legal issues involved are extremely complex;¹¹⁷³
- (vi) Where the formal disclosure and admissibility is important as there are large estates involved;¹¹⁷⁴
- (vii) Where either or both parents are completely unwilling to participate in the mediation process.¹¹⁷⁵ It must however be noted that mediation can also be successful in cases where one or both parties are ordered to mandatory mediation.¹¹⁷⁶

¹¹⁶⁴ *MB v NB* 2010 3 220 (SGHC) para 58.

¹¹⁶⁵ Para 59. The latter could possibly become a less common phenomenon as a result of the recent introduction of Rule 41A which will be discussed under section 2 1 2 below.

¹¹⁶⁶ 2018 JDR 0093 (GJ).

¹¹⁶⁷ Para 26.

¹¹⁶⁸ Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 250.

¹¹⁶⁹ 234. There are however those who argue that the any presence of family abuse does not render the use of mediation unsuitable. See J Pearson “Ten Myths about Family Law” (1993) 27 *Family Law Quarterly* 279 288.

¹¹⁷⁰ De Jong “Child-focused Mediation” in *Child Law in South Africa* 118 ; Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 226.

¹¹⁷¹ 226.

¹¹⁷² De Jong “Child-focused Mediation” in *Child Law in South Africa* 118.

¹¹⁷³ 118.

¹¹⁷⁴ 118

¹¹⁷⁵ 118.

¹¹⁷⁶ Pearson (1993) *Family Law Quarterly* 286-287.

2 Child focused mediation

Based on the suitability and advantages of family mediation, it is not surprising that courts as well as the Legislature have started to promote or even mandate mediation in some cases that relate to families.¹¹⁷⁷

2 1 Mandatory mediation

2 1 1 *Children's Act*

The Children's Act emphasises the importance of an alternative approach to the resolution of child-centred disputes.¹¹⁷⁸ Section 6(4)(a) of the Act stipulates that: "in any matter concerning a child an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided".

Apart from demanding a problem-solving and conciliation-focused approach to dealing with matters that concern children, the Act also explicitly mandates mediation in specific circumstances, such as the parental responsibilities of unmarried fathers and the contents of parenting plans. In this regard, section 21(3)(a) of the Children's Act stipulates:

If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.¹¹⁷⁹

Furthermore, subsection (b) grants any party to the mediation the right to have the outcome of said mediation reviewed by a court. Section 33(4) of the same Act mandates parties who do not agree on the contents of a parenting plan to engage in mediation facilitated by a social worker or other qualified person. In the alternative, parties can consult a family advocate, psychologist, or social worker. While it is unclear who "any party" refers to. If it includes the child, it means that a child has the right to appeal a decision made during mediation or the contents of a parenting plan. Should this be the case, legal representation will have to be appointed to assist the child in their appeal.¹¹⁸⁰

¹¹⁷⁷ De Jong "Child-focused Mediation" in *Child Law in South Africa* 112.

¹¹⁷⁸ 112.

¹¹⁷⁹ Own emphasis.

¹¹⁸⁰ Legal representation as a means to facilitate effective participation is discussed in Chapter 3.

The provisions of the Act make it clear that parties involved may not approach a court before turning to mediation as alternative method to resolve the dispute at hand.¹¹⁸¹ The hope is that a neutral third party, the mediator, will facilitate the informal and private reaching of an agreement that renders it unnecessary for parties to take the matter to court.¹¹⁸² Schepard emphasises that mandatory mediation does not imply that parents are forced to agree to anything.¹¹⁸³ It simply means that they must attend the mediation session.¹¹⁸⁴

De Jong recommends that the mediator issue a certificate as proof of the parties' attendance of the mediation session.¹¹⁸⁵ This recommendation is in line with the Australian family law system.¹¹⁸⁶ It should be noted that this certificate is not a requirement where there is family violence or abuse.¹¹⁸⁷

2 1 2 Rule 41A of the Uniform Rules of Court (Rule 41A)

A significant rule, rule 41A, was inserted in the Uniform Rules of Court in February of 2020. This rule became operational in March of 2020 and requires that the legal representative of each client declare whether their client agrees to or opposes the referral of the relevant action or application to mediation.¹¹⁸⁸ The prescribed form (Form 27) must also include the party's reasons for agreeing or opposing to mediation.¹¹⁸⁹

The effect of the insertion of this rule is that parties and, specifically their legal representatives, are forced to consider mediation as an option before approaching a court. Form 27 (Notice of Agreement or Opposition to Mediation) must accompany any Summons or Combined Summons (in the case of an action) or notice of motion (in the case of an application) in the High Court.¹¹⁹⁰ The Defendant or Respondent must serve the same notice on the Plaintiff or Applicant any time before serving a Notice of

¹¹⁸¹ M De Jong "Opportunities for Mediation in the New Children's Act 38 of 2005" (2008) 71 *THRHR* 630 632.

¹¹⁸² 632.

¹¹⁸³ Schepard *Children, Courts and Custody*.

¹¹⁸⁴ 59.

¹¹⁸⁵ De Jong (2004) *THRHR* 633.

¹¹⁸⁶ See Chapter 4.

¹¹⁸⁷ De Jong (2004) *THRHR* 633. See s 60(l)(9) of the Family Law Act for a list of circumstances where a certificate is not required.

¹¹⁸⁸ Rule 41A(1)(a) of the Rules Board for Courts of Law 107 of 1985.

¹¹⁸⁹ Rule 41A(1)(c).

¹¹⁹⁰ Rule 41A(1)(a).

Intention to Defend or Notice of Intention to Oppose.¹¹⁹¹ A Judge or Case Management Judge in terms of rule 37A¹¹⁹² may, at any stage before judgment has been handed down, direct the parties to consider to refer the dispute to mediation.¹¹⁹³

A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of dispute to mediation, whereupon the parties may agree to refer the dispute to mediation. Where parties agree to mediation, parties shall then deliver a joint signed minute indicating their wish to mediate the matter,¹¹⁹⁴ and, before the commencement of mediation, enter into an agreement to mediate.¹¹⁹⁵ Mediation must be completed after 30 days after the joint minute was signed.¹¹⁹⁶

In terms of the costs of mediation, the parties are responsible for equal parts of the costs of the mediation.¹¹⁹⁷ When considering a costs order, the Court may have regard of the notices that were delivered in terms of this rule.¹¹⁹⁸ It is hopefully anticipated that courts will use costs orders to illustrate their disapproval of legal representatives who do not encourage or at least properly consider mediation. This has been done even before the introduction of Rule 41A, in the case of *MB v NB*¹¹⁹⁹ where the Court capped the fees that the legal representatives could recover from their own clients due to their failure to even consider mediation.¹²⁰⁰

It should be emphasised that, while the insertion of Rule 41A is undoubtedly a step towards mediation and away from the adversarial process, it does not place an obligation upon parties to mediate, but simply an instruction to consider mediation. Furthermore, where couples who are in the process of divorcing, agree to mediation, there is no obligation to include children in the process as the rule is not specific to

¹¹⁹¹ Rule 41A(2)(b) of the Rules Board for Courts of Law 107 of 1985..

¹¹⁹² A case management Judge in terms of Rule 37A is a Judge allocated to facilitate certain pre-trial gatherings between parties. This is not the same Judge that will eventually hear the case when it goes to trial.

¹¹⁹³ Rule 41A(3)(b)

¹¹⁹⁴ Rule 41A(4)(a).

¹¹⁹⁵ Rule 41A(4)(b).

¹¹⁹⁶ Rule 41A(4)(d).

¹¹⁹⁷ Rule 41A(9)(a).

¹¹⁹⁸ Rule 41A(9)(b).

¹¹⁹⁹ 2010 3 SA 220 (GSJ).

¹²⁰⁰ Para 7.

divorce and makes no reference to the inclusion of children or their views. This means that a child's participation can be considered completely irrelevant in such a case.

2.2 Court ordered mediation

The Children's Act grants the Children's Court the discretion to order parties to attend mediation. In terms of section 49(1), the court may, before deciding on an issue, order a lay forum that includes mediation by a suitable person.¹²⁰¹ Before making such an order, the court must consider the vulnerability of the child,¹²⁰² whether the child is able to participate,¹²⁰³ the power dynamics within the family,¹²⁰⁴ as well as the nature of any allegations made relevant to the matter.¹²⁰⁵ The fact that the court must consider whether the child is able to participate, presupposes that children can participate in court ordered mediation. It is argued that, where children are able and willing, they should participate in court mandated mediation.

Similarly, in terms of section 70 of the Children's Act, the Children's Court may order a family group conference¹²⁰⁶ that will be facilitated by a suitably qualified mediator appointed by the children's court.¹²⁰⁷ Here, the goal is that the family finds solutions for problems that involve the child themselves.¹²⁰⁸

Section 69 of the Children's Act regulates pre-hearing conferences. In contested divorce cases that involve children, the court may order a pre-hearing conference.¹²⁰⁹ The aim of such a conference is to facilitate mediation between parties,¹²¹⁰ to settle disputes where possible¹²¹¹ and to define issues to be decided on by the Children's Court.¹²¹²

Significantly, pre-hearing conferences are not an option where there are allegations of any form of abuse of the child.¹²¹³ Furthermore, the child around whom the issue is

¹²⁰¹ In terms of s 49(1) of the Children's Act a suitable person includes a "family advocate, social worker, social service professional or other suitably qualified person"

¹²⁰² S 49(2)(a).

¹²⁰³ S 49(2)(b).

¹²⁰⁴ S 49(2)(c).

¹²⁰⁵ S 49(2)(d).

¹²⁰⁶ S 70(1).

¹²⁰⁷ S 70(2).

¹²⁰⁸ S 70(1).

¹²⁰⁹ S 69(1).

¹²¹⁰ S 69(1)(a).

¹²¹¹ S 69(1)(b).

¹²¹² S 69(1)(c).

¹²¹³ S 69(2).

centred, may attend, and participate in the conference.¹²¹⁴ This is significant as the child is granted an opportunity to share his or her views, which means that their participation reaches at least the second level in terms of the proposed model. This is, however, not the case if the Children's Court decides that the child may not participate in the conference.¹²¹⁵ Nevertheless, it is argued that the formulation of section 69 makes a positive contribution to children's participation, as it explicitly grants a child the right to participate, except where the court decides otherwise.

Agreements reached during the abovementioned processes are recorded and considered by the Children's Court if or when the matter proceeds to trial.¹²¹⁶ As with mandatory mediation, parties will likely need proof of their attendance of the ordered mediation.¹²¹⁷ Once again, De Jong recommends a system similar to the Australian use of certificates.¹²¹⁸

3 Child-inclusive mediation

A child's right to participation in his or her parents' divorce related proceedings has been established. It is argued that mediation is a suitable forum for children to participate in the abovementioned proceedings.¹²¹⁹ Sapsonek comments that including children in mediation:

"gives them a voice, it gives them rights, it gives them status, and mostly, it gives them a forum of asserting their personal and individual power. The implications of this are quite significant: implicit in the act of empowering children are the assumptions that children are to be heard, that their opinions are valid and valued, that they are esteemed as important persons along with their parents in the process of decision making, and that what they will say will have a bearing upon and may influence the final decisions that are to be made".¹²²⁰

3.1 Why to include children

Apart from potentially realising a child's right to participation, there are various reasons to include a child in family mediation, such as the following:

¹²¹⁴ S 69(3) of the Children's Act. .

¹²¹⁵ S 69(3).

¹²¹⁶ De Jong (2004) *THRHR* 635.

¹²¹⁷ 635.

¹²¹⁸ 635.

¹²¹⁹ De Jong "Child-focused Mediation" in *Child Law in South Africa* (2009) 124.

¹²²⁰ D Sapsonek "The value of children in mediation: a cross-cultural perspective" (1991) *Mediation Quarterly* 325 331-332 as cited in De Jong "Child-focused Mediation" in *Child Law in South Africa* 125.

- (i) The mediator acts as a “nonaligned confidant” for the child during a difficult time in the child’s life.¹²²¹ This is significant as the feeling of having to “choose” between parents contributes to the negativity that children involved in traditional divorce litigation experience;¹²²²
- (ii) Children feel that they are actually being listened to and that their voice matters;¹²²³
- (iii) Parents are constantly reminded to focus their attention on the children and their needs;¹²²⁴
- (iv) Being involved and realising that their voices are being heard usually reduces anxiety and feelings of uncertainty;¹²²⁵
- (v) Children sharing their views educate parents on their children’s needs;¹²²⁶
- (vi) Agreements where children were involved in the mediation process are connected to better compliance with the agreement.¹²²⁷

3.2 How to include children

According to the Law Society of South Africa, how the child participates will depend on the facts of the case and the child’s best interests.¹²²⁸ It is important to realise that children will, most likely, not be present during every minute of family mediation.¹²²⁹ This is not only as a result of various practical and logistical issues, but also informed by a motivation to, to some extent, protect children from the conflict between their parents.¹²³⁰ It is for this reason that it is argued that the child not being present at every moment of the mediation does not have a negative impact on the level that the child’s participation can reach in terms of the proposed model.

¹²²¹ Folberg, Milne & Salem *Divorce and Family Mediation* 157.

¹²²² Bessner & Department of Justice Canada *The Voice of the Child in Divorce Custody and Access Proceedings* 32.

¹²²³ Folberg, Milne & Salem *Divorce and Family Mediation* 158; Pickar & Kahn (2011) *Family Court Review* 61.

¹²²⁴ Folberg, Milne & Salem *Divorce and Family Mediation* 158; De Jong “Child-focused Mediation” in *Child Law in South Africa* 129; De Jong (2008) *TSAR* 793.

¹²²⁵ Folberg, Milne & Salem *Divorce and Family Mediation* 158.

¹²²⁶ 158. Pickar & Kahn (2011) *Family Court Review* 61.

¹²²⁷ Folberg, Milne & Salem *Divorce and Family Mediation*; Pickar & Kahn (2011) *Family Court Review* 61.

¹²²⁸ LSSA *Comments on the SALRC Issue Paper 31 Family Dispute* 3.

¹²²⁹ De Jong “Child-focused Mediation” in *Child Law in South Africa* 126.

¹²³⁰ De Jong (2008) *TSAR* 791.

When including children in family mediation, it is important to explain to them why and how they will be included.¹²³¹ The mediator must assure children that they will not be expected to “choose” between their parents.¹²³² It is also important to explain to the parents that they should not behave or react in a way that will prevent the children from participating in the process.¹²³³ Mediators should create an atmosphere where a child feels comfortable to participate.¹²³⁴ They should also provide children with enough appropriate information to enable them to participate.¹²³⁵ Doing all of the above will contribute to level three of the proposed model of measuring children’s participation.

Children can be interviewed together with their siblings, individually or both.¹²³⁶ It is important to interview the child at least once without their parents present.¹²³⁷ Creating an opportunity for the child to share his or her views amounts to level two of the proposed model of measuring participation. When interviewing the child, the mediator will gain a sense of the child’s awareness of and attitude towards his or her parents’ divorce and the child’s preferences on various issues such as the amount of time the child wishes to spend with each parent.¹²³⁸ By interviewing them early during the process, the mediator can integrate the child’s views into the negotiation between parents.¹²³⁹

Once an agreement has been reached, children should once again join the mediation.¹²⁴⁰ Here, the mediator must explain the agreement to the children.¹²⁴¹ Children can also help adding more detail to basic parenting arrangements.¹²⁴² By explaining the agreement to the children, the mediator facilitates participation at the fifth level of the proposed model of measuring participation.

¹²³¹ De Jong “Child-focused Mediation” in *Child Law in South Africa* 126.

¹²³² De Jong (2008) *TSAR* 791.

¹²³³ De Jong “Child-focused Mediation” in *Child Law in South Africa* 126.

¹²³⁴ Folberg, Milne & Salem *Divorce and Family Mediation* 162.

¹²³⁵ De Jong (2008) *TSAR* 792.

¹²³⁶ 792.

¹²³⁷ De Jong “Child-focused Mediation” in *Child Law in South Africa* 126; Schoffer (2004) *Family Court Review* 326.

¹²³⁸ 326.

¹²³⁹ J Mcintosh “Child Inclusive Divorce Mediation Report on Qualitative Research Study” (2000) 18 *Mediation Quarterly* 55 58.

¹²⁴⁰ Folberg, Milne & Salem *Divorce and Family Mediation* 161.

¹²⁴¹ *LSSA Comments on the SALRC Issue Paper 31 Family Dispute* 3.

¹²⁴² De Jong (2008) *TSAR* 792.

3 3 When not to include children

It is important to keep in mind that there are certain circumstances where the decision to involve a child should be approached with extra caution. These circumstances include cases where:

- (i) The child does not want to participate in the proceedings;¹²⁴³
- (ii) The child is too young to understand the process;¹²⁴⁴
- (iii) There is a history of any form of abuse;¹²⁴⁵
- (iv) It is clear that the child is being manipulated by one parent;¹²⁴⁶
- (v) Parents are emotional to the point that it traumatises the child.¹²⁴⁷

While there are those who submit that children should not be involved where one or both parents do not want the children to be involved,¹²⁴⁸ or where the parents have reached an agreement with which they are both satisfied,¹²⁴⁹ it is argued that neither of the abovementioned reasons justify excluding a child from participating in the mediation process.

3 4 Successful family mediation

Ryrstedt explains that successful family mediation involves parents finding a solution in which their child can thrive.¹²⁵⁰ She further explains that mediation is successful if it produced an agreement that reflects the wishes of both parents as well as the best interests of the child.¹²⁵¹ In terms of the proposed model, this is equal to the fourth level of participation.

It is argued that, when evaluating the success of mediation, one must make a distinction between the process of mediation and the outcome thereof. This is because, arguably, a process where all family members contributed ideas, communicated respectfully, and reduced the levels of conflict within the family, must be regarded as successful, even when the parties involved could not reach an

¹²⁴³ De Jong (2008) *TSAR* 790; Folberg, Milne & Salem *Divorce and Family Mediation* 160.

¹²⁴⁴ De Jong (2008) *TSAR* 790.

¹²⁴⁵ 790.

¹²⁴⁶ 793; Folberg, Milne & Salem *Divorce and Family Mediation* 160.

¹²⁴⁷ De Jong (2008) *TSAR* 790.

¹²⁴⁸ Folberg, Milne & Salem *Divorce and Family Mediation* 160.

¹²⁴⁹ 160.

¹²⁵⁰ Ryrstedt (2012) *Int J Law Policy Fam* 231.

¹²⁵¹ 221.

agreement. Furthermore, the process of family mediation can be successful from a children's participation point of view, where the children effectively participated even if the outcome of the mediation might not have been successful. This argument is based on the notion that family mediation is about more than simply reaching an agreement.¹²⁵²

Where an agreement regarding the content of a parenting plan has been reached, the agreement may be reviewed.¹²⁵³ Subsequently, the parenting plan may either be registered with a family advocate or made an order of court.¹²⁵⁴

There are various factors that influence the chances of mediation being successful. These factors include:

- (i) The parties' attitudes toward the mediation;¹²⁵⁵
- (ii) Strategic behaviour;¹²⁵⁶
- (iii) The risk attached to what a court would order, should the matter be litigated;¹²⁵⁷
- (iv) The parties' abilities to carry the costs related to the mediation.¹²⁵⁸

3 5 Mediators facilitating child participation

3 5 1 General

In the same way that effective legal representation can lead to effective participation, the effectiveness of the mediator can have a great impact on the process as well as the outcome, and therefore the level that the child's participation can reach in terms of the proposed model.

To facilitate effective children's participation, there are a number of things that mediators should do and skills that are crucial for their role. The mediator should:

- (i) Direct the focus of the discussion back to the children;¹²⁵⁹

¹²⁵² Ryrstedt (2012) *Int J Law Policy Fam* 221.

¹²⁵³ S 21(3) of the Children's Act.

¹²⁵⁴ S 34(1)(b). See ss 34(2) and (3) for the requirements to register parenting plan or to have the parenting plan be made an order of court.

¹²⁵⁵ MS Melli, HS Erlanger & E Chambliss "The Process of Negotiation: An Exploratory Investigation in the Context of No-fault Divorce" (1988) 40 *Rutgers Law Review* 1133 1163.

¹²⁵⁶ RH Mnookin & L Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale LJ* 950 972.

¹²⁵⁷ 969.

¹²⁵⁸ 971.

¹²⁵⁹ Folberg, Milne & Salem Divorce and Family Mediation 103.

- (ii) Educate parents on communicating with each other and their children;¹²⁶⁰
- (iii) Provide a neutral and safe space where family members can comfortably communicate with each other;¹²⁶¹
- (iv) Lay ground rules for respectful and effective communication;¹²⁶²
- (v) Employ the assistance of other professionals such as psychologists and contact law enforcement if necessary;¹²⁶³
- (vi) Have excellent listening skills, as well as the ability to effectively formulate and communicate questions;¹²⁶⁴
- (vii) Have knowledge and experience in the field of family law, especially divorce and custody issues.¹²⁶⁵

Those who are against including children in mediation are mostly motivated by the fear the mediators are not equipped to work with children.¹²⁶⁶ It is argued that proper training, regulation and accreditation is the “path to public assistance”.¹²⁶⁷ Without it, it is difficult to enforce ethical and professional standards.¹²⁶⁸ The absence of certification and regulation also leads to a lack of control over mediation training.¹²⁶⁹ It goes without saying that mediators who wish to work with families and children require more extensive training.

3 5 2 Accreditation

Formal accreditation of a mediator confirms that the proposed mediator possesses the minimum required training and experience necessary to perform their functions.¹²⁷⁰ The process involves an independent body or organisation that sets certain standards for accreditation and continuously monitors the person’s compliance with these standards.¹²⁷¹ Accreditation in the context of family mediation is thus a formal

¹²⁶⁰ Folberg, Milne & Salem *Divorce and Family Mediation* 103.

¹²⁶¹ Van Zyl *Alternative Dispute Resolution in the Best Interests of the Child* 110.

¹²⁶² 116.

¹²⁶³ 114-115.

¹²⁶⁴ WMA *Spruyt Kompleksiteit en Bemiddeling: ‘n Model vir die Ontwerp van Gepaste Regulering* LLD thesis, Stellenbosch University (2017) 169.

¹²⁶⁵ Pickar & Kahn (2011) *Family Court Review* 60.

¹²⁶⁶ 16.

¹²⁶⁷ Folberg, Milne & Salem *Divorce and Family Mediation* 18.

¹²⁶⁸ 18.

¹²⁶⁹ 18.

¹²⁷⁰ *Spruyt Kompleksiteit en Bemiddeling: ‘n Model vir die Ontwerp van Gepaste Regulering* 170.

¹²⁷¹ 170.

acknowledgement that a certain person, the mediator, is equipped to facilitate mediation between family members.¹²⁷²

Rule 86 of the Magistrates' Court Rules currently regulates the accreditation of mediators in general. In terms of this rule, anyone applying for accreditation as mediator must complete 40 hours of theoretical and practical training. The theoretical training will include, amongst other things, basic civil procedure,¹²⁷³ the role of the mediator,¹²⁷⁴ conflict management,¹²⁷⁵ decision-making,¹²⁷⁶ neutrality¹²⁷⁷ and communication.¹²⁷⁸ Although these focus areas are relevant to family mediation, prospective mediators receive no training in the field of family law.

The National Accreditation Board for Family Mediators (hereafter "NABFAM") attempts to address the need for the regulation of specifically family mediators nationwide.¹²⁷⁹ To be accredited by NABFAM, applicants must, apart from general mediation training, receive training in the area of family law (including maintenance, divorce of parents) for 12 hours as well as mental health (psychology in the divorce of parents, developmental psychology, and step-parenting), also for 12 hours.

4 Evaluating mediation as model

It is clear that many of the advantages of family mediation directly juxtaposes and address the negative aspects of traditional divorce litigation.¹²⁸⁰ Evaluative mediation offers various solutions to the problems that children face when confronted with their parents' divorce and related proceedings and is arguably the most suitable form of mediation where children are involved.¹²⁸¹

Where the family mediator is a properly trained and qualified mediator with experience with working with children and the child is involved in the mediation, the child's participation can reach the third level of the proposed model. Whether the child's participation will reach level four of the proposed model depends on the extent

¹²⁷² Spruyt *Kompleksiteit en Bemiddeling: 'n Model vir die Ontwerp van Gepaste Regulering* 171.

¹²⁷³ i.

¹²⁷⁴ iii.

¹²⁷⁵ vi.

¹²⁷⁶ vii.

¹²⁷⁷ xiii.

¹²⁷⁸ viii.

¹²⁷⁹ For more information on NABFAM, visit <http://nabfam.co.za/>.

¹²⁸⁰ See section 1 4.

¹²⁸¹ See section 1 3 2.

to which the parents consider and implement the child's views in the decisions they make. Reaching level five entails the mediator facilitating a conversation in which they explain the reasons for the decision as well as any future options to the child. The challenge is therefore, as with other methods discussed throughout this thesis, that there are a number of subjective factors that have the potential to greatly impact the level of participation that family mediation can reach.

De Jong convincingly argues for child informed and focused mediation which can address the concerns noted in the discussion above.¹²⁸² De Jong contends that child-inclusive mediation "literally addresses all the risk factors prevalent at divorce and provides for better integration of children's voices in the process".¹²⁸³ The author explains that voluntary family mediation is an under utilised process that should be made mandatory as first step in formal divorce proceedings.¹²⁸⁴

5 Conclusion

This chapter has investigated and measured the characteristics, different types, advantages, and suitability of family mediation to determine whether it is capable of facilitating effective children's participation while addressing the shortcomings of the methods explored and measured in chapters 3 and 4.

It has been found that evaluative mediation is, in contrast to facilitative mediation, the preferable method in relation to facilitating effective child's participation. This is because a facilitative mediator does not necessarily involve a child in the mediation process whatsoever, which means that no opportunity for the child to share his or her views (level two) is created.

Still, when it comes to evaluative mediation where the mediator engages with the content of the discussion to a much greater level, it can only be said with certainty that the child's participation can reach the fourth level in terms of the proposed model. This is because reaching level four will necessitate that the child's parents truly consider and implement his or her views in their ultimate decisions. Should that be the case, the mediator can facilitate the process of explaining the decision and further options

¹²⁸² M de Jong "Suggestions for a Divorce Process Truly in the Best Interests of Children" (1) 81 THRHR 48 (2018), M de Jong "Suggestions for a Divorce Process Truly in the Best Interests of Children" (2) 81 THRHR 179 (2018).

¹²⁸³ De Jong *Suggestions for a Divorce Process Truly in the Best Inteterests of Children* (1) 64.

¹²⁸⁴ 62.

to the child, which can lead to the child's participation reaching the fifth level in terms of the proposed model.

Investigating and measuring the abovementioned proved to be a disappointing task in some respects. While it is still argued that family mediation is better suited to the family situation than traditional divorce litigation, it has become clear that, just like with the various other methods of realising the same right, there are too many subjective factors that influences the level that a child's participation can reach in terms of the proposed model.

Chapter 6:

Conclusion and recommendations

1 Overview of research

Chapter 2 established that, in line with article 12 of the UNCRC, article 4 of the ACRWC, as well as various pieces of South African legislation, a child has a right to participate in matters that affect him or her.¹²⁸⁵ This chapter also investigated various methods of measuring children's participation and based thereupon, proposed a new model of measuring children's participation.¹²⁸⁶

Chapter 3 employed the model above to measure various forms of representation¹²⁸⁷ and direct participation¹²⁸⁸ available to children in South Africa. The chapter showed that a child's right to participation can be realised either by representation or by the child participating directly.

Measuring sources of statutory legal representation in terms of the proposed model for children's participation emphasised the significance of effective legal representation.¹²⁸⁹ A statutory legal representative's mandate is to represent and argue the child's wishes. Therefore, the mere appointment of a statutory legal representative reaches level two of the proposed model. However, effective legal representation leads to the child's participation reaching the third level of participation. Reaching level four depends on the presiding officer, and level five on either the presiding officer or the legal representative, or both of the aforementioned.

A *curator ad litem* (common law representative) is tasked with the role of assisting the court and protecting the child's best interests.¹²⁹⁰ Because a *curator ad litem* has a discretion to obtain the child's views, the appointment of such does not guarantee that the child's participation will reach level two. However, if the *curator ad litem* chooses to obtain the child's wishes, the child's participation can reach level three in terms of

¹²⁸⁵ See Chapter 2, sections 3 1 & 3 2.

¹²⁸⁶ See Chapter 2, section 4 5.

¹²⁸⁷ See Chapter 3, sections 2 1 & 2 2.

¹²⁸⁸ See Chapter 3, section 2 3.

¹²⁸⁹ See Chapter 3, section 2 1 1 5.

¹²⁹⁰ See Chapter 3, section 2 1 2.

the proposed model. Reaching level four will depend on the effectiveness of the *curator ad litem*. Reaching levels four and five of the proposed model depends on the same factors as statutory legal representation.

This chapter also investigated other forms of representation that do not involve legal representation, such as the family advocate.¹²⁹¹ The family advocate is appointed to remain neutral and make recommendations to the court after considering all relevant information. The family advocate has no obligation to obtain the child's views which means that the involvement of the family advocate does not necessarily lead to the child's participation reaching level two. Where they do obtain the child's views, the child's participation reaches the second level of participation. Reaching the third, fourth and fifth level will depend on the same factors as in the cases of the *curator ad litem* and statutory legal representation.

Other professionals conveying a child's views to the court are the most common way in which children's views are shared in family law litigation.¹²⁹² Children can also experience consulting with these professionals as highly intrusive. Where professionals do obtain children's views, the participation can reach level two of the proposed model. Reaching higher levels will be determined by the same factors as above.

The first form of direct participation evaluated in this chapter is the judicial interview.¹²⁹³ This practice automatically realises a child's right to participation at level two, which can easily be elevated to level four. Unfortunately, the child-friendliness of the process therefore poses a significant threat to the level that the child's participation can reach.

The second form of direct participation is children initiating court proceedings.¹²⁹⁴ As with challenging or joining court proceedings,¹²⁹⁵ the child's participation will reach at least the third level of the proposed model. This is because the child's views will be canvassed in the papers that are filed at court. Reaching level four will greatly depend on the presiding officer. There is a great chance of the child's participation reaching

¹²⁹¹ See Chapter 3, section 2 2 1.

¹²⁹² See Chapter 3, section 2 2 2.

¹²⁹³ See Chapter 3, section 3 1.

¹²⁹⁴ See Chapter 3, section 3 2.

¹²⁹⁵ See Chapter 3, section 3 3.

level five of the proposed model, as they will be cited as parties to the proceedings and therefore automatically enjoy the right appeal or take the decision on review. While these three models immediately offer the child access to higher levels of participation, the child friendliness of the processes poses a great threat. The same can be said about the fifth method, where a child acts as witness in their parents' divorce related proceedings.

This chapter revealed that, despite the major effect that divorce and divorce related proceedings have on children, a child's right to participation, in the divorce related proceedings of his or her parents, is not always realised. The chapter also highlighted the importance of effective legal representation and the need for an approach or even an alternative model that realises a child's right to participation.

Chapter 4 engaged in a comparative study, contrasting the South African legal position with that of Australia and employing the same proposed model to measure the levels that children's participation can reach. The Family Law Act renders it clear that the Australian family law system favours alternative methods of resolving family disputes over traditional divorce litigation. While this is significant in that it recognises the potentially detrimental effects that traditional family litigation can have on children, alternatives to traditional litigation do not necessarily lead to child's participation.

This chapter evaluated Family Relationship Centres as well as the Child Responsive Programme.¹²⁹⁶ It was established that FRCs have the potential to fulfil a child's right to participation to at least level three of the proposed model in circumstances where the FRC practitioner chooses to involve the child in the process. The Child Responsive Programme does not face the same challenge, as family consultants have an obligation to obtain the child's views where the child chooses to share them, and to report these views to court.

The Less Adversarial Trial judge has the discretion to choose to involve the child in the process.¹²⁹⁷ This means that this method does not necessarily grant the child the opportunity to share his or her views whatsoever. Still, the method has the potential to, in some limited cases, reach level five.

¹²⁹⁶ See Chapter 4, section 4 1.

¹²⁹⁷ See Chapter 4, section 5 1.

The Child's Independent Lawyer facilitates the child's participation to at least the third level in terms of the proposed model in cases where the ICL does indeed meet with the child.¹²⁹⁸ A case guardian compiles a family report to share with the court.¹²⁹⁹ Unfortunately, this report does not have to contain the child's views. Where the report does contain the child's views, the child's participation reaches at least level three of the proposed model. While reaching level four will depend on the judge, it is unlikely that the child's participation will reach the fifth level as it is not part of the case guardian's mandate to engage with the child after any decisions have been made.

The family consultant compiles a report to assist the court in making a decision in the child's interests.¹³⁰⁰ Unfortunately, the family consultant is under no obligation to obtain the child's views. If the family consultant does obtain the child's views, the child's participation can reach the second level of the proposed model. While the child sharing his or her views with a family consultant will automatically reach the second level of participation in terms of the proposed model, the family consultant does not necessarily have to obtain the child's views. This is something that can render the child's participation irrelevant.

In terms of direct participation, this chapter explored the practices of judicial interview,¹³⁰¹ a child acting as a witness,¹³⁰² a child being joined as a party to the proceedings,¹³⁰³ and a child appealing the decision that so deeply impacts their life.¹³⁰⁴ The chapter illustrated that while there are various subjective factors that impact the level that a child's participation can reach, the four forms of direct participation can only reach the second level of the proposed model with absolute certainty. This is mainly because of the threats that a court poses to level three of the proposed model. Finally, Chapter 5 analysed mediation as a model to realise a child's participation. Measuring a child's level of participation in terms of the proposed model is somewhat disappointing. This is because, while mediation as a model addresses various of the concerns and negative aspects relating to traditional divorce litigation, as was pointed

¹²⁹⁸ See Chapter 4, section 5 2 1.

¹²⁹⁹ See Chapter 4, section 5 3.

¹³⁰⁰ See Chapter 4, section 5 4.

¹³⁰¹ See Chapter 4, section 5 5 1.

¹³⁰² See Chapter 4, section 5 5 2.

¹³⁰³ See Chapter 4, section 5 5 3.

¹³⁰⁴ See Chapter 4, section 5 5 4.

out in the discussion of the advantages of mediation,¹³⁰⁵ the level of the child's participation depends, to a large extent, on the approach of the mediator as well as the child-specific knowledge and expertise of the mediator.

2 Recommendations

In light of the research, it is recommended that the Legislature attend to making amendments that explicitly require a child's views to be given due weight and consideration in a matter that impacts him or her, such as his or her parents' divorce related proceedings.¹³⁰⁶ It is furthermore recommended that presiding officers receive training in the area of children's participation. It is also recommended that presiding officers, before granting a decree of divorce in unopposed divorces, require that the child's views be canvassed in court by means of a report compiled by a trained professional. It is also recommended that the Office of the Family Advocate in South Africa launch programmes in line with Australia's family-oriented programmes such as the Child Responsive Programme. Finally, it is recommended that greater emphasis be placed on providing children with separate legal representation and that these legal representatives receive special training to enable them to facilitate effective children's participation. Such training should include training on children's rights, basic child psychology and effective communication with children dependant on their age and level of maturity.

3 Proposed further research

Based on the findings of the thesis, as well as the limitations set out in Chapter 1,¹³⁰⁷ it is recommended that further empirical research be conducted in order to determine to what extent a child's right to participation is realised in the context of divorce.

4 Concluding remarks

Guided by the primary and secondary hypothesis, this research demonstrated that a child's right to participation in their parents' divorce related proceedings is currently

¹³⁰⁵ See Chapter 5, section 1 4.

¹³⁰⁶ In this regard, see SALRC *Alternative Dispute Resolution in Family Matters* (2019) and in particular clause 7 of the Draft Family Dispute Resolution Bill 2020 contained in Chapter 11 of the SALRC report. .

¹³⁰⁷ See Chapter 1, section 5.

not sufficiently realised in South Africa. This thesis has however illustrated that, while mediation addresses various negative aspects relating to traditional litigation, mediation as model does not necessarily offer the ideal solution.

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