

Child Participation in Family Law Matters Affecting Children in South Africa

Kelly-Anne Cleophas & Usang Maria Assim *

Abstract

The right of children to participate in all matters affecting them is considered to be one of the fundamental principles guiding the understanding, interpretation, and application of all children's rights. In terms of international law, this right is contained in Article 12 of the United Nations Convention on the Rights of the Child. Similar provisions are contained in the African Charter on the Rights and Welfare of the Child. Child participation establishes the right of every child to freely express his or her views, in all matters affecting him or her, as well as the 'subsequent right' for those views to be given due weight, in line with the age and maturity of the child involved. The right of the child to be heard, as expressed in the Convention on the Rights of the Child represents a shift in perspectives from children as 'incomplete human beings' to children as subjects of rights and not merely objects of legal protection. This article provides an overview of the manner in which the principle of child participation is incorporated in some family law matters affecting children in South Africa.

Keywords: child participation, family law, legal representation, Family Advocate, curator ad litem.

A Introduction

Prior to the adoption of South Africa's 1996 Constitution and Children's Act of 2005, the courts were inconsistent about hearing the voices of children. The attitude of the courts ranged from express consideration of the child's views,¹ to instances where the views of the child were deliberately not considered and the courts failed to mention the children's wishes.² Children's wishes were ignored or

* Kelly-Anne Cleophas: LLB (UWC), LLM (Missouri), LLM cum laude (UWC). Usang Maria Assim is a Post-Doctoral Research Fellow, Community Law Centre, University of the Western Cape (UWC), South Africa.

1 See among others *French v. French* 1971 (4) SA 298 (W); *Manning v. Manning* 1975 (4) SA 659 (T) 661G-H; *Mathews v. Mathews* 1983 (4) SA 136 (SE) 141B; *Märtens v. Märtens* 1991 (4) SA 287 (T) 294C-D; *McCall v. McCall* 1994 (3) SA 201 (C); *Meyer v. Gerber* 1999 (3) SA 650 (O); *I v. S* 2000 (2) SA 993 (C) 997D-E; *Lubbe v. Du Plessis* 2001 (4) SA 57 (C) 73E-I; *Prins v. Claasen*[2008] JOL 21693 (SE) 6; *Potgieter v. Potgieter* (Unreported) Case number: 215/2006, SCA, 30 March 2007, para 20; and *Blumenow v. Blumenow* (2008) JOL 21382 (W) para 28.

2 *Greenshields v. Wylie* 1989 (4) SA 898 (W) 899G-H; *Van Rooyen v. Van Rooyen* 1994 (2) SA 325 (W); *Van Rooyen v. Van Rooyen* 1999 (4) SA 435 (C).

not considered for various reasons, including where the evidence in this regard was insufficient or contradictory or the children's preferences could carry no weight because the children concerned were too young or immature or had been influenced by a parent.³

The most common litigated family law matter in South Africa relates to care and contact disputes, and the outcomes of these disputes have profound effects on children's lives. This article provides a general overview of how children's right to be heard, particularly the representation procedures available to children involved in or affected by family law matters, especially as it relates to the principle of the best interests of the child, is being implemented in South Africa. This is done against the background of the United Nations Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and South Africa's constitutional obligations.

B Child Participation in International and Regional Law

The right of the child to participate⁴ in all matters affecting him is considered to be one of the fundamental principles that guide the understanding, interpretation, and application of all children's rights.⁵ Article 12 of the CRC establishes the right of every child to freely express his views, in all matters affecting him, and the 'subsequent right' for those views to be given due weight, according to the child's age and maturity.⁶ Its inclusion in the CRC is a departure from the long-standing view that children are incompetent, lack responsibility, or, in short, are 'incomplete human beings'.⁷ Article 12 thus speaks to the legal and social status of children, who, on the one hand, lack full autonomy of adults but, on the other, are subjects of rights.⁸

Article 12 however makes it clear that the weight to be given to the child's views depends on the age and maturity of the child, in tandem with the evolving capacities of the child.⁹ However, the CRC places no limit(s) to the contexts within which children can express their views; they are to be heard in 'all' matters affecting them.¹⁰ Thus, child participation implies that children should be allowed to take an active role in the decision-making process about everything that affects

3 *Stock v. Stock* 1981 (3) SA 1280; *Van der Linde v. Van der Linde* 1996 (3) SA 509 (O) 513H-I; In *B v. P* 1991 (4) SA 113 (T) 119C-D.

4 The term 'participation' does not itself appear in the text of the CRC or ACRWC, but all the elements of a child's right to be heard have in recent years been collectively and broadly described as 'participation'.

5 R. Hodgkin & P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 2007, p. 42. The others include the right of the child to non-discrimination, the best interests of the child as a primary consideration in all actions concerning the child, and the right of the child to life, survival and development.

6 Art 12(1), CRC.

7 L. Krappmann, 'The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child)', *International Journal of Children's Rights*, Vol. 18, 2010, p. 502.

8 CRC Committee General Comment No. 12 (2009) 5.

9 Art 5, CRC.

10 Art 12, CRC.

them, in any setting whatsoever. While this does not imply an automatic endorsement of the views expressed, it requires that adequate consideration be given to the views expressed, to the extent that, if necessary and appropriate, such views impact on the outcomes that are reached.¹¹

The regional equivalent of Article 12(1)(2) of the CRC is found in Articles 4(2) and 7 of the African Children's Charter. In order to properly interpret the child's right to be heard in terms of the Charter, these two provisions must be read together, especially because the Charter confirms or even strengthens the global standards contained in the CRC. Article 1(2) of the Charter addresses the question of which level of protection a(n) (African) State should adhere to if that State has ratified both instruments. It states that the Charter's provisions do not affect 'any provisions that are more conducive to the realisation' of children's rights. Accordingly, where the Charter or CRC contains 'better' provisions or higher standards, the latter provisions should prevail. The guiding principle in resolving interpretative disputes between these two instruments should be 'the best interest of the child' as 'the primary consideration'.¹²

It has been argued that child participation in the Charter is both stronger and weaker than its equivalent in the CRC.¹³ The main difference between both provisions concerns the conception of the child's ability to express an opinion. The CRC refers to a child who is "capable of forming ... views" while the Charter refers to children "capable of communicating ... views". Participation is therefore only conditional on the child's ability to communicate his or her views. The Charter is in this instance phrased in a more restrictive way than the CRC because a child may not be able to verbally communicate a view but could have formed a view.

The Charter, conversely, does not contain the further limitations of a child's age, maturity, and stage of development as determinative of the weight that should be attached to the child's views. It could however be argued that this limitation can be read into the words 'capable of communicating his or her views'.¹⁴ Viljoen submits that this limitation may not only pertain to the child's age but also to the level of education and articulateness of the child.¹⁵

The CRC and the Charter both allow the child to participate, directly or indirectly, through the appointment of a legal representative. Appointing separate legal representation for a child is a form of participation and will not be necessary in every matter concerning the child.¹⁶ Ideally, the child will have the opportunity to choose from various participation methods how he or she would like to share his or her views. The African Charter goes a step further than the CRC by providing in Article 4(2) that the child may participate through an "impartial representative as a party to the proceedings" which would place the child's representative

11 M.S. Pais (Ed.), *A Human Rights Conceptual Framework for UNICEF*, 1997, p. 428.

12 Article 4(1) ACRWC; F. Viljoen, 'The African Charter on the Rights and Welfare of the Child', in T. Boezaart (Ed.), *Child Law in South Africa*, 2009, p. 338.

13 C. Du Toit, 'Legal Representation of Children', in T. Boezaart (Ed.), *Child Law in South Africa*, 2009, p. 95.

14 M. Gose, *The African Charter on the Rights and Welfare of the Child*, 2002, p. 127.

15 Viljoen 2009, p. 338.

16 Du Toit 2009, p. 98.

on an even footing with the other parties. The Charter therefore specifically provides for a procedure through which the child may place his or her views before the court.¹⁷ The limitation clause of the Charter however further states that the child's views shall be taken into consideration "in accordance with the provisions of appropriate law". This phrase in the Charter gives wide discretion to State parties and limits the right conferred on the child.

C Domestication of Child Participation in South Africa

South Africa ratified the CRC in June 1995 and the ACRWC in 2000, thereby agreeing to ensure the children's rights set forth in the two instruments. Further, South African courts are required to have regard to applicable international law when interpreting any legislation.¹⁸ In addition to the rights applicable to all citizens, section 28 of the Constitution provides specifically for rights of children including specifying that a child's best interests are of paramount importance in every matter concerning the child.¹⁹

I *Child Participation in the 1996 Constitution*

In the South African context, legal representation for children is mostly seen in three main types of proceedings, namely children's court enquiries, civil proceedings where a curator *ad litem* is appointed, and family law matters.²⁰ Family law matters involving children are usually matters related to divorce proceedings or post-divorce disputes regarding maintenance for the children or care and contact of the children.²¹ Children's court proceedings usually include adoption matters, foster care, or child-removal cases.²² Civil proceedings can entail an array of matters from alienation of a child's property to personal injury claims to enforcement of constitutional rights.

Section 28(1)(h) of the Constitution entitles every child to legal representation at state expense in civil proceedings, if substantial injustice would result if the child were unrepresented.²³ This provision is not limited by the capability of the child to form and express his or her view, as provided for in the CRC, or by the capability of communicating his or her own views, as provided for in the African Charter.²⁴

17 *Brossy v. Brossy* (602/11) [2012] ZASCA 151 (28 September 2012) – Submissions by the Amicus Curiae para 23.

18 Section 39 of the Constitution obliges courts to consider international law when interpreting the Bill of Rights.

19 Section 28(2).

20 J. Sloth-Nielsen, 'Realising Children's Rights to Legal Representation and to Be Heard in Judicial Proceedings: An Update', *South African Journal on Human Rights*, Vol. 24, 2008, p. 498.

21 Sloth-Nielsen 2008, p. 502.

22 See Section 45 of the Children's Act on matters the Children's Court may adjudicate

23 *3C38 Bill of Rights Compendium*, Butterworths Durban: 1996

24 Kassan D, *How Can the Voice of the Child Be Adequately Heard in Family Law Proceedings*, unpublished LLM Mini-thesis, UWC 2004, p. 37.

It has been argued that the constitutional right is awarded irrespective of whether the child is a party to proceedings, otherwise directly involved, or affected by the judicial proceedings where they are not directly before court. For example, in the divorce proceedings of their parents or contact and care disputes in respect of a child, the child will not be directly before court, but such proceedings will inevitably affect the child's life. The enforcement of this constitutional right has, however, posed some problems, especially regarding the interpretation of the phrase 'substantial injustice'.

1 *The "Substantial Injustice" Test*

In comparison to the CRC and the Charter, section 28(1)(h) appears to narrow the scope of legal representation for children in civil proceedings only to cases where substantial injustice would otherwise result. In effect, legal representation is not automatic.²⁵ It has been pointed out that the right to legal representation in terms of the Constitution is limited in scope and dependent on a "vague, predictive ground – the 'substantial injustice' test – which may prove somewhat difficult to delineate in practice".²⁶ In addition, the wording of section 28(1)(h) fails to de-link the right of children to have separate legal representation in civil matters from the right to the assignment of a legal representative by the state and at state expense. This is different from the right to legal representation as provided for in section 35 of the Constitution which first establishes the right to have legal representation before proceeding to provide for the right to be assigned a legal representative at state expense.²⁷ Thus, it has been argued that the proper interpretation of section 28(1)(h) is to recognise a child's right to legal representation as a separate right. The requirement that 'substantial injustice would otherwise result' applies only if legal representation for the child is to be provided at state expense.²⁸

In terms of case law, the 'substantial injustice' test invites courts to consider each case on its own facts, and this has been done extensively with courts endeavouring to spell out factors that should be taken into account in concluding whether the non-appointment of a legal representative will result in substantial injustice.²⁹ Legal Aid South Africa has also attempted to determine what the content of 'substantial injustice' is in its 2014 Guide, including factors such as the

25 Sloth-Nielsen 2008, p. 503.

26 N. Zaal & A. Skelton, 'Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts', *South African Journal on Human Rights*, Vol. 14, 1998, p. 541.

27 A. Skelton, 'Special Assignment: Interpreting the Right to Legal Representation in Terms of Section 28(1)(h) of the Constitution of South Africa', in J. Sloth-Nielsen & Z. Du Toit (Eds.) *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law*, 2008, p. 225.

28 *Brossy v. Brossy* (602/11) [2012] ZASCA 151 (28 September 2012) – Submissions by the Amicus Curiae para 74-76.

29 See among others, *Centre for Child Law and Another v. Minister of Home Affairs and Others* 2005 (6) SA 50 (TPD) para 581-590C; *Du Toit and Another v. Minister of Welfare and Population Development and Others (Gay and Lesbian Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) para 3; *R v. H and Another* [2006] 4 All SA 199 (C); *Legal Aid Board v. R* 2009 (2) SA 262 (D).

seriousness of the issue for the child and the financial situation of the child or the child's parents or guardians.³⁰

II *Child Participation and the Children's Act 38 of 2005*

Section 10, which is considered a general principle of the Children's Act,³¹ is at the core of child participation. It states that:

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

Section 10 incorporates article 12(1) of the CRC into South African domestic law and many of the considerations which are applicable to article 12(1) would be equally applicable in considering section 10. Section 10 confirms the positive obligation on decision-makers to listen to and take the views of children seriously both in terms of international law and domestic law. In deciding how much weight should be given to a child's view in any particular matter, the 'twin criteria' of age and maturity must be considered.³² Thus, while the right to participation is a gateway to the right of the child to legal representation in civil matters as set out in section 28(1)(h) of the Constitution, the application of section 28(1)(h) is broader than section 10 as it applies to 'every child'. Section 10 is limited to children who are of such age, maturity, and stage of development as to be able to participate in an appropriate way.³³

The inclusion of a general right of participation for children was a significant step taken by the legislature. *Fitschen v. Fitschen*³⁴ illustrated that there was a definite gap in the legislation with the court holding that Article 12 of the CRC had not been incorporated into domestic law, and, therefore, the appointment of a separate legal representative for the child was also not justified in the circumstances as the court was in possession of psychologist and Family Advocate reports.

Section 10 makes it clear from the outset of the Act that the opinion of the child is one aspect in the determination of the child's best interests that can no longer be ignored. This requires a mind shift on the part of litigants, legal practitioners, the presiding officers, and other professionals. In *DG v. DG*,³⁵ the court noted that the Children's Act brought about a fundamental shift in the parent/child relationship which prevailed in the pre-constitutional era. The Court was

30 Para 4.18.1 of the Legal Aid Guide 2012, 12th Edition, available from <www.legal-aid.co.za> last accessed 28 February 2015.

31 G. Barrie, 'Giving Due Consideration to Views Expressed by the Child in Family Law Proceedings: The Australian Experience and Lessons for South Africa', *Tydskrifvir die SuidAfrikaanseReg*, Vol. 1, 2013, p. 124. See also section 6(2)(a) of the Act.

32 C. Davel & A. Skelton, *Commentary on the Children's Act*, 2007, pp. 2-13.

33 T. Boezaart & D. de Bruin, 'Section 14 of the Children's Act 38 of 2005 and the Child's Capacity to Litigate', *De Jure*, Vol. 44, No. 2, 2011, n. 117.

34 Unreported Case number 9564/95, Cape Provincial Division, 31 July 1997.

35 [2010] JOL 25706 (E).

Kelly-Anne Cleophas & Usang Maria Assim

enjoined by the Act to give due consideration to the views of the children, who were of an age and level of maturity to make an informed decision. The court noted that although sections 10 and 31 of the Act recognises a child's right to be heard in any major decisions involving him or her, the applicant's two experts advocated that the children's voices not be heard in this case.

III Representation Procedures Available to Children Involved in or Affected by Family Law Matters

In most decisions where the child's views come up for consideration, the courts tend to focus on the question of whether or not the child should be regarded as competent to make a choice. The court generally determines the child's competency with the help of the resources at its disposal, such as expert reports, the legal representative of the child, a report by a curator *ad litem*, etc. However, the reported cases seldom discuss the reasoning behind the chosen method of presenting the child's views to the court or the efficacy of the chosen method.

In matters dealing with where children will live, who they will have contact with, where they will go to school, and what extracurricular activities they may participate, the child's views are crucial as it is the child who will ultimately be subject to the decision of the court. In order to determine the child's best interests, the court must have sufficient information, including the child's views and wishes on the possible outcomes of legal proceedings. Three of the major procedures are discussed in some detail.³⁶

1 Separate Legal Representative in terms of Section 28(1)(h) of the Constitution

The voice of the child, as represented by a separate legal representative (SLR), can play an important role in assisting the court in determining what would be in the best interests of the child.³⁷ The child's legal representative is on an even footing with the other parties, and the child is assured that his or her wishes will be placed at the forefront of the court proceedings. It should be emphasised that this does not mean that the child's wishes will be decisive.

In *Soller NO v. G and Another*,³⁸ the court expressed that "[t]he significance of section 28(1)(h) lies in the recognition, also found in the CRC, that the child's interests and the adults' interests may not always intersect and that a need exists for separate legal representation of the child's views".³⁹

The role of the SLR will depend, *inter alia*, on the nature of the proceedings, the age, maturity, and stage of development of the child, and the extent to which the child wishes to participate.⁴⁰ Older children may require the assistance of an SLR who will act on their instructions and follow their instructions during litigation. This is referred to as client-directed representation. If a child does not have

36 Others include experts' reports and judicial interviews.

37 M. Carnelley, 'The Right to Legal Representation at State Expense for Children in Care and Contact Disputes – A Discussion of the South African Legal Position with Lessons from Australia', *Obiter*, Vol. 31, No. 3, 2010, p. 641.

38 2003 (5) SA 430 (W).

39 *Soller NO v. G and Another* 434-435 paras. 7-8.

40 Du Toit 2009, p. 109. Also *Brossy v. Brossy* – Submissions by the Amicus Curiae para. 46-47.

the capacity to give instructions, then the legal representative acts as a best-interests representative advocating for the objective best interests of the child. The role that the SLR will play is dependent on which of the models of representation is applicable to the situation. The determining factor in the choice of model is the capacity of the child and not the nature of the case.⁴¹ However, it is submitted that the nature of proceedings and the court in which the matter is heard (*e.g.* Children's Court, Maintenance Court, or High Court) does have some impact on the model of representation which would be appropriate.⁴² The SLR, however, must be clear about his role from the outset.⁴³

In terms of appointment, a definitive list of circumstances where an SLR should be appointed is not advisable; each case has to be evaluated on its merits to determine whether an SLR is necessary for a particular child.

2 Curator ad litem

A key method in the common law to bring children's interests before the court in civil proceedings is through the appointment of a curator *ad litem*. A curator *ad litem* is appointed by the court to conduct proceedings on behalf of another person who lacks the capacity to litigate.⁴⁴ A curator is usually appointed by the court to represent the *interests* of a child (in contrast to *views*) where these may be affected.⁴⁵ Generally, the court will appoint a curator *ad litem* where there is a risk of injustice in general.⁴⁶

A curator is appointed to examine the circumstances surrounding the child (or children) in a particular situation. One of the further functions of the curator is also to determine whether it is necessary for a legal representative to be appointed for the child.⁴⁷ This highlights a main distinction between the role of a legal representative and a curator *ad litem*. However, 'legal practitioner' as used in section 28(1)(h) should be interpreted broadly to include the appointment of a curator *ad litem* as well. These are both forms of child participation and both can be relied upon depending on the circumstances of the case and the ability of the child to direct litigation.⁴⁸

In South African law, there are four recognised grounds for the appointment of a curator *ad litem* for a child, namely where (1) the minor is without parents or guardian; (2) a parent or guardian cannot be found or is not available (for exam-

41 Carnelley 2010, pp. 649-650.

42 *Brossy v. Brossy* – Submissions by the Amicus Curiae, para. 46-47.

43 Carnelley 2010, pp. 649-650.

44 Previously, only the High Court could appoint a curator *ad litem*. However, section 33 of the Magistrates Court Act makes it possible for the Magistrates' Court to appoint a curator *ad litem* in any case where such a curator is required or allowed by law for a party to any proceedings.

45 Sloth-Nielsen 2008, p. 500. Sloth-Nielsen however points out "that presumably children's views would be considered by the curator in establishing 'best interests'", p. 502.

46 Carnelley 2010, n. 52. See *Du Toit v. Minister of Welfare and Population Development (Lesbian and Gay Equality Project as amicus curiae)*, 2003 (2) SA 198 (CC) para. 3; *S v. M (Centre for Child Law as amicus curiae)* 2007 (2) SACR 53 (CC); and *AD v. DW (Center for Child Law as amicus curiae)* 2008 (3) SA 183 (CC).

47 Carnelley 2010, n. 52. See also *Centre for Child Law v. Minister of Home Affairs*.

48 Du Toit 2009, p. 97.

ple, due to an accident); (3) the interests of the minor are in conflict with those of the parent or guardian, or there is a possibility of such a conflict,⁴⁹ or (4) the parent or guardian unreasonably refuses to assist the minor.⁵⁰

The court has a wide discretion to appoint a person to substitute the guardian. The court's discretion also includes supplementing or altering the ordinary authority of a curator insofar as the matter requires. The court's discretion is only guided by the best interest of the child.⁵¹

3 *The Office of the Family Advocate*

Despite the theoretical availability of legal aid for at least some cases, the presence in court of a separate legal representative for a child in family law matters remains uncommon. Courts therefore tend to rely heavily on family advocates as a neutral source of information about children in divorce cases and care and contact disputes.⁵²

The Family Advocate is assisted by suitably qualified family counsellors or experienced social workers⁵³ in making enquiries after the institution of a divorce or after an application has been lodged for the variation, rescission, or suspension of an order with regard to custody or guardianship of, or access to, a child.⁵⁴ Upon conclusion of the enquiry, the Family Advocate must furnish the court with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage or regarding such matter as is referred to him by the court.⁵⁵

The Family Advocate may be requested to conduct such an enquiry either by any party to the proceedings or the court, or the Family Advocate may apply to court for authorisation to institute an enquiry into a matter before the court if it appears that an enquiry is needed.⁵⁶ The Family Advocate may also, if he or she deems it in the interest of the child concerned and if so requested by the court, appear at a trial or hearing and adduce any relevant evidence. The Family Advocate may then also cross-examine any witness giving evidence.⁵⁷

Where the parties are in agreement about the care and contact arrangements of the children, their decision will effectively be made an order of court, with the

49 See also *Legal Aid Board in re Four Children* and *Adams v. Adams* (unreported case number: A106/11) Cape Town High Court, 1 February 2012.

50 Davel & Skelton 2007, pp. 2-24. See also Skelton 2008.

51 *Legal Aid Board in re Four Children*, para 13.

52 R. Pillay & N. Zaal, 'Child-Interactive Video Recordings: A Proposal for Hearing the Voices of Children in Divorce Matters', *South African Law Journal*, Vol. 122, 2005, p. 687. See also *Soller v. G and Another* 2003 (5) SA 430 (W) para. 27.

53 In *Terblanche v. Terblanche* 1992 (1) SA 501 (WLD), the court discussed to some extent the function and duties of the Family Advocate.

54 Act 24 of 1987 still refers to the pre-Children's Act terminology of 'custody' and 'access'. Section 1(2) of the Children's Act 38 of 2005 provides that "in addition to the meaning assigned to the terms 'custody' and 'access' in any law and common law, the terms must be construed to mean 'care' and 'contact' as defined in the Children's Act".

55 Section 4(1) of Act 24 of 1987.

56 Section 4(1) and 4(2) of Act 24 of 1987.

57 Section 4(3) of Act 24 of 1987.

Family Advocate merely endorsing their settlement agreement. It is possible for the Family Advocate to investigate the arrangement and make a recommendation to the contrary, but this is seldom done, especially where the arrangement is *prima facie* satisfactory.⁵⁸

The *modus operandi* of the Family Advocate's office has become established over the years, and the accepted practice is that when conducting an enquiry, the Family Advocate will conduct interviews with the parents to ascertain their personal circumstances and the details of the dispute. The Family Advocate will also interview the child and allow him or her an opportunity to be heard. The Family Advocate will record the views of the child in its report and will consider them in making a recommendation. The Family Advocate's office maintains that the interview with the child prevents the child from having to appear in court.⁵⁹

Since the Family Advocate is not obliged to include the child's views in the report for the court, it has been observed that "the Office of the Family Advocate creates a (limited) platform for the views of the child to be heard".⁶⁰ The views of the child will not have an overriding effect on the recommendation that the Family Advocate will make. "The role of the family advocate is to make recommendations as to what is the overall best interest of the child (which may in some instances be contrary to the expressed wishes of the child). Their role is not to represent and advocate the wishes or voice of the child."⁶¹ However, a court is permitted to reject the Family Advocate's report *in toto* or to accept the factual findings yet make an order that materially differs from the Family Advocate's recommendations.⁶²

Other procedures available for placing the views of the child before the court include reliance on experts' reports⁶³ and judicial interviews – which is largely a matter of judicial discretion.

D Concluding Remarks

It has been argued that a "child's very competence to form and express a view may depend on the procedural participation opportunities provided".⁶⁴ The available procedures could enhance or inhibit the child's ability to form and express a view. A supportive and empowering environment to discuss and consider the available participation options may also have an effect on the child's ability.⁶⁵ It is however

58 Carnelley 2010, p. 649. *Van Vuuren v. Van Vuuren* 1993 SA 163 (T) contains guidelines on when a Family Advocate ought to investigate the arrangements regarding children.

59 Office of the Family Advocate <www.justice.gov.za/FMAdv/f_main.htm> (last accessed 28 February 2015).

60 Kassan 2004, p. 57.

61 Kassan 2004, p. 57.

62 *Van den Berg v. Le Roux* [2003] 3 All SA 599 (NC) 606-610.

63 Section 62 of the Children's Act.

64 A. Barratt, "The Best Interest of the Child" – Where Is the Child's Voice?, in S. Burman (Ed.), *The Fate of the Child: Legal Decisions on Children in the New South Africa*, Cape Town, Juta & Co. Ltd. 2003, p. 153.

65 Barratt 2003, p. 153.

Kelly-Anne Cleophas & Usang Maria Assim

important that children in family law matters be informed from the outset of the process, and during it, of the participation options which are available to them. They must be given appropriate information about the process and informed about what to expect.⁶⁶

Each participation method has its advantages and disadvantages. The child's development, social, economic, and cultural environment will all have an impact on how the child expresses himself or herself.⁶⁷ The circumstances of each case should therefore dictate what participation method or methods should be adopted. However, due regard should be given to the age of the child, the nature of the decision being made, the forum, the type and quality of the representation available, and the available state resources. Since the quality of participation is of crucial importance, it may be necessary to consider a combination of procedures as this may best serve the interests of both the child and the court.⁶⁸ Depending on the circumstances of the case, children tend to disclose their views through different means at different stages, as such a one-size-fits-all approach may not always be feasible.

66 J. Cashmore & P. Parkinson, 'What Responsibility Do Courts Have to Hear Children's Voices?', *International Journal of Children's Rights*, Vol. 15, 2007, p. 55.

67 Barratt 2003, p. 153.

68 See, for example, *Family Advocate v. B* (2007) 1 All SA 602 (SE).