

CHILD LAW MATTERS

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LEGAL REPRESENTATION OF CHILDREN: *HG v CG 2010 (3) SA 352 (ECP)*.

The law on legal representation of children has been developing slowly over the past 10 years in cases such as *Soller NO v G1*^{1[1]} and *Legal Aid Board v R and another*.^{2[2]} In addition to case law the Children's Act expressly gives children the right to participate,^{3[3]} to bring and be assisted in bringing a matter to court,^{4[4]} and to approach a court for relief when there has been a breach of rights.^{5[5]} In terms of the common law a child does not have capacity to litigate without the assistance of a parent, guardian or curator *ad litem*. In light of recent developments in case law and legislation the question becomes whether the common law has been developed to allow a child to approach a court without the assistance of a parent, guardian or curator but with the assistance of a legal representative.

A case which may shed some light on this question is *HG v CG 2010 (3) SA 352 (ECP)*. The applicant and respondent were awarded joint physical and legal custody of their four minor children when they divorced. The applicant and respondent bought two houses in the same complex and the children alternated living with each parent for a week. The children saw both parents daily, they had pets at each house and the domestic worker moved with them to which ever house they were living at that week. The applicant was the main breadwinner and the respondent could not afford to live in the specific housing complex without the financial assistance of the applicant. The arrangement had been in place for three years when the applicant was retrenched. During that time she had also developed a relationship with a man who worked mainly in Dubai. After her retrenchment she wanted to relocate to Dubai with the children. The respondent had indicated that he would be willing to relocate to another town or city in South Africa should the applicant obtain a position elsewhere. The respondent refused to consent to the relocation of the children to Dubai and the applicant therefore applied to the High Court for a relocation order.

The children were subjected to several assessments by psychologists. The applicant averred that the assessments were due to the children's unhappiness with the joint physical custody arrangement but the court finds that the assessments were done because of the applicant's wish to change the custody agreement. The evidence of the children to the

¹[1] 2003 (5)SA 430 (W).

²[2] 2009 (2)SA 262 (D).

³[3] Section 10 states that: '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.'

⁴[4] Section 14 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.'

⁵[5] Section 15 states that: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

(2) The persons who may approach a court, are:

(a) A child who is affected by or involved in the matter to be adjudicated;

psychologist, and subsequently to the Family Advocate, clearly contradict her assertion that the children are unhappy with joint custody. The children state unequivocally that they are emotionally very attached to the respondent and that they would like the existing joint custody arrangement to continue. The four children were unanimous that they like the current arrangement because it allows them daily contact with both parents. Furthermore, they did not wish to leave South Africa and relocate to Dubai. They did not want to leave their father and felt it would be extremely difficult to be separated from him. They expressed that they felt pressured by the applicant who kept talking about their future in Dubai as if it was a foregone conclusion. The children's views were confirmed by their own legal representative from Legal Aid South Africa.

The views of the children are recorded by both the psychologist and the Family Advocate. Despite the express views of the children and the clear strong bond that exist between the children and their father, the psychologist finds that the applicant should be allowed to relocate with the children. The court examines the children's right to participate in terms of s 10 of the Children's Act and in particular the duty on the court to give due consideration to the views of the child. In addition, s 31 enjoins parents to consider the views of the children when taking a major decision which will affect the children.

Based on the views of the children and their close relationship with their father, Chetty J finds that it would not be in the best interests of the children to relocate to Dubai. The judge ultimately decides that he is obliged by the Children's Act to give effect to the views and wishes of the children as they are mature and old enough to make informed decisions.

Children have a constitutional right to have a legal practitioner assigned to them in civil matters if substantial injustice would otherwise result. Recent case law has shown a move towards allowing children to actively participate in litigation by means of their own legal representative, assigned in terms of section 28(1)(h) and as a party to the proceedings.

As the assignment of a legal practitioner to a child is still an uncommon practice there are numerous questions around the actual practicalities of obtaining legal representation for children in terms of section 28(1)(h) such as: Who must decide to assign a legal representative for the child? How is the legal practitioner assigned? Who pays for the legal costs involved in representing the child? Who is qualified to represent children? Who decides whether a curator *ad litem* is required or whether the child is capable of directing the litigation and should therefore have their own attorney?

HG v CG, as well as the other cases relating to legal representation of children mentioned above, seems to indicate a move towards allowing children who are mature enough, to litigate in their own name with the assistance of an attorney. However, subsequent to the judgment in *HG v CG*, the children instituted proceedings in their own name with the assistance of Legal Aid South Africa to interdict their mother from moving them to Pretoria. The judge hearing that matter found that children did not have legal capacity to litigate and a curator *ad litem* must be appointed before the children may institute proceedings without the assistance of a guardian.^{6[6]} The subsequent judgment of Schoeman AJ is a severe blow to the development of a practice to appoint separate legal representation for children who are the subjects in high conflict family disputes and more especially, to their ability to participate in legal proceedings. The matter has been taken on appeal to the Supreme Court of Appeal by Legal Aid South Africa

^{6[6]} *Michael De Groot and others v Heidi May van Coeverden De Groot and another* Unreported Case Nr 3464/09 (Eastern Cape, Port Elizabeth)

who is acting in the public interest. This will be the first case to give a definitive answer to some of the questions about the implementation of section 28(1)(h) of the Constitution.
