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The Best Interests of a child in a Divorce Proceeding

When parents divorce, it is usually the children that experience the most pain. In South African law there are provisions that aim to protect the child's emotional, physical and economical needs. This article will evaluate how successful legislation is when it comes to the best interests of a child during a custody battle.

In S28 (2) of the Constitution of the Republic of South Africa Act 108 of 1996, it is stated that "a child's best interests are of paramount importance in every matter concerning the child."

The Divorce Act 70 of 1979 also attempts to shield a child from the cruel consequences of divorce. Section 6 of the Act regulates the position of the child when a couple decides to get divorced. The court will not grant a decree of divorce until it is satisfied that the arrangements that have been made are the best that can be achieved in the circumstances. Once the court is satisfied, it can make any order it deems fit regarding the guardianship, custody, access and maintenance. Section 6 empowers the court to conduct any investigation it deems necessary or order any person to appear before it in order to gain enough information to establish what is best for the child in the circumstances. A court may also appoint a legal representative for the child and order the parties or a party to pay for the costs of such legal representation. Furthermore, s28(1)h of the Constitution entitles a child to have a legal practitioner assigned to him or her by the state, at state expense, if substantial injustice would otherwise result.¹

A tension may arise between the relationship of a child's interests and rights on the one hand, and interests and rights of other family members on the other hand. In many cases, parent litigants have failed to argue the rights of children separately from their own interests. Parents may put their own desires before their children's needs and thus it is up to a judge to determine a necessary outcome where children are shielded from harm.

As a child now has specific constitutional rights to have their "best interests" protected, it can be understood that children have some degree of autonomy to assert their rights against others, including their parents. Thus children should (after considering certain factors such as age and emotional maturity), participate in decisions about their future.

However, judges are not consistent in applying the above. Some courts take cognizance of a child's wishes and appoint curators to them, some only hear children when requested to do so, while other judges believe that children should not solicit their own opinions, especially with regards to custody. Therefore there are contradictory

decisions about a child's status as a party to litigation, although past practice points towards a conclusion that children have no rights of participation. This goes against s28(1)(h) and other legal provisions where the child's best interests are not being safeguarded.

South African Courts must adhere to the enacted legislation in order to improve the severe situation that some children are faced with in the event that their parents divorce.

Alan Levy Attorneys specialises in divorce, on providing advice on the divorce process and assisting in an amicable and cost effective divorce proceeding. Pam can be contacted at pam@alattorneys.co.za. Please visit www.alattorneys.co.za

¹ Cronje' and Heaton *South African family law* (2004).



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