Guidelines for legal representatives of children in civil matters

These guidelines were developed through a partnership between Legal Aid South Africa and the Centre for Child Law, University of Pretoria
January 2016
**Guidelines for legal representatives of children in civil matters**

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Legal Aid South Africa funded two national workshops held at their offices in Johannesburg which were attended by legal aid practitioners who work with children at Justice Centres around South Africa, listed below:


Their pooled knowledge and experience gave shape to the guidelines and enhanced their practicability.

Thanks to all those who participated.
Foreword

Malala Yousafzai, children’s rights activist who received the 2014 Nobel Peace Prize for her efforts in campaigning for girls’ education in Pakistan, once said that ‘we realise the importance of our voice when we are silenced.’ I can relate to Malala’s quote, especially when I reflect on my own experience of ‘voicelessness’ as a child ...

I am currently a final-year Law student. Growing up, I never wanted to study Law. I despised the Law. I detested the courts. My first encounter with the Law as a child was unpleasant to say the least. I spent much of my childhood fighting to have my voice heard. Similar to the man who was denied access to the Law by the ghastly ‘door keeper’ in Franz Kafka’s allegory titled ‘Before the Law’, I initially had neither had access to the Law, nor did I have a say.

As a child, the decisions concerning my life were made during a custody agreement between my parents who divorced in 2001. My sister’s and my views were not considered at the time and, when we refused to have contact with our father, the court wanted to compel our mother to make us go for therapy to have a relationship with him. We did not want to go for therapy nor did we want to be forced to have a relationship with him as he was breaking us down and being destructive. Initially, the court did not want to hear why we did not want contact with our father and it was making decisions for us unilaterally, without considering my sister’s and my feelings nor taking our views into account at all. All I wanted was for my views
to be taken into account and for the court to treat me like a human being. Instead, what I experienced was that other people were making decisions about my life while blatantly ignoring and overlooking my feelings in the process.

From the conclusion of my parents’ divorce, three years would pass before my voice was heard by the court. This occurred in 2004, after the Centre for Child Law brought an application for an order to have a legal representative appointed for me in terms of Section 28(1)(h) of the Constitution of the Republic of South Africa. For the first time, someone took my hand and helped me past the ‘door keeper’, allowing me to enter the gate leading to the Law. My sister’s and my case would become the first case in South Africa in which children were joined as parties in their parents’ divorce case. It resulted in a precedent being set for other cases, which allows for children to now have their own legal representatives in their parents’ divorce cases.

For a long time, children involved in civil proceedings have experienced prejudices merely because of their age, rather than being treated as individuals with their own personalities who are capable of deciding, or at least participating in the process of deciding, what is in their best interest. This has made the outcome of court decisions both unfair and damaging towards the children whose lives are involved. In our case, Judge Hartzenberg held: ‘It is possible that there are family situations where, regardless of who and what the cause of an unwillingness to associate with one of the parents is, it may have an adverse
effect on the child to force the child to try and normalise the relationship between parent and child … Only if the children or somebody on their behalf puts their case, which might not necessarily be their present views, but could also be the expert views of somebody unattached to either one of the parents, will a court have a balanced presentation of the situation."

Professor Ann Skelton, Director of the Centre and my lawyer, fought vigorously for my right as a child to legal representation and to be heard in matters concerning my life. It is encouraging and exciting to see the work that has been done on the representation of children by the Centre over the years, and how this field has progressed. This publication provides a valuable guideline for children’s legal representatives to understand and realise, among other things, their role as the mouthpiece of the child and how to articulate that role to the child as well as to other stakeholders.

Standing at the end of my LLB-degree and at the start of my own legal career, I am inspired to see how, through institutions like the Centre for Child Law, the Law can be used as a tool for social change and to advocate matters in the public interest. I am thankful to the Centre for its impact, not only on my life, but also on the lives of many young South Africans in whose interest court cases have been brought. I am also especially thankful to Professor Skelton, who has been a great mentor, role model and friend throughout my studies. Those who know her would agree that she is the epitome of strength and courage. I look forward to see what further constructive impact she, the Centre and anyone who uses this guide, will make in the
interests of children in South Africa, as they continue in their efforts as a voice for the voiceless.

I end this foreword with a quote from the *S v M* case where the Constitutional Court affirmed: ‘[i]f a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them ... Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.’

It goes without saying that the role of the child representative is imperative. Children must be listened to and their voices be heard. They must be included in the decision-making about their futures and allowed to actively participate in matters that affect their well-being for, in Dr Seuss’ words, ‘a person’s a person, no matter how small.’

*Sarisa van Niekerk*
GUIDELINES FOR LEGAL REPRESENTATIVES OF CHILDREN IN CIVIL MATTERS

1 The purpose of these guidelines

These guidelines seek to ensure that the legal representation of children in civil matters in South Africa conforms to recognised standards. Experience of representing children in civil matters has shown that it is a field of legal practice which can throw up challenges and dilemmas that professionals are not always expecting. These guidelines will assist children’s legal representatives to understand their role, explain their role to the child and to others, and to ensure good practice and adherence to appropriate ethical standards.

2 Background

Legal representation of children in civil matters is relatively new. Although children in the criminal justice system have long been entitled to legal representation, it is only in recent years that children have enjoyed the assistance of lawyers in civil matters. The Child Care Act 74 of 1983 did not include any provision for legal representation of children concerned in care and protection proceedings in the Children’s Court. An attempt was made to include such a provision through the insertion of section 8A in 1996, but this was never put into operation. Despite the lack of a legal provision, the last decade has seen a large increase in the number of children legally represented in children’s court matters. With regard to civil matters affecting children in the High Court, section 6(4) of the Divorce Act 70 of 1979 provided for a legal representative to be appointed for a child to represent them in divorce proceedings, with the cost to be born by the parents.¹

¹ This was also included in section 2(7) of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. This Act has now been repealed by the Children’s Act 38 of 2005.
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Children’s Act 38 of 2005 contains a similar provision in section 29(6) which effectively broadens access to legal representation for children to all care, contact and guardianship proceedings.2

However, it remained highly unusual for children to be separately legally represented in the High Court, except in the few cases where a curator ad litem was appointed. This was at least in part because the government’s long term approach to these matters was to have the children’s interests protected by the Family Advocate.3 Section 28(1)(h) of the Bill of Rights4 made it clear that the provision of legal representation of children in civil matters was a constitutional imperative. A few years elapsed between section 28(1)(h) coming into operation and the first reported case that provided a substantial interpretation of it which was Soller NO v G and Another.5 Soller explained the difference between the role of the Family Advocate and the role of a child’s legal representative as envisaged by section 28(1)(h). In Ex Parte Van Niekerk6 the court recognised the rights of children to have separate legal representation, and this was the first case in which the children were joined as parties in their parents’ case.

2 Section 29(6) states that: ‘The court may, subject to section 55 – (a) appoint a legal practitioner to represent the child at the court proceedings; and (b) 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.’
3 The Mediation in Certain Divorce Matters Act 24 of 1987 established the Office of the Family Advocate.
4 Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, if substantial injustice would otherwise result.
5 2003 (5) SA 430 (W). In R v H and Another 2005 (6) SA 535 (C) 539 the court decided to appoint a legal representative for the child in view of the drastic nature of the relief sought by the mother, which would cut off the child from the father. The court wanted to ensure that the child’s best interests were safeguarded and that the child’s views were articulated.
In *Legal Aid Board v R and Another*, the court found that the Legal Aid Board (as Legal Aid SA was then called) has the authority to appoint a legal representative for a child without the involvement of a court. This has been further underpinned by two judgments of the Supreme Court of Appeal, namely *Legal Aid Board in re Four Children* and *Brossy v Brossy*.

In a recent Supreme Court of Appeal case, *Centre for Child Law v Governing Body of Hoerskool Fochville*, the court said that ‘a useful starting point is an appreciation that the right of children to representation separate from their parents flows from their right to participate in all matters that affect them. That is a right which is widely recognised in international law and forms part of South African law’. The court went on to say that section 28(1)(h) of the Constitution is triggered not only when a child is party to proceedings, but whenever he or she is affected by litigation: ‘The child is then entitled, not merely to be heard, but to be afforded the envisaged legal representation at state expense’.

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7 2009 (2) SA 262 (D).
11 Per Ponnen JA para [22].
12 Ibid.
3 Current legal assistance available to children in civil matters in South Africa

3.1 Curator ad litem

Children have always enjoyed some entitlement to legal assistance under common law. In cases where there is no parent or guardian available to assist the child (or such parent or guardian is unwilling or unable to assist, or there is an actual or potential conflict of interest between the parent or guardian and the child) a court may appoint a curator ad litem. Both the High Court and the Magistrates’ Court have the power to make such appointments, though they are less commonly made in Magistrates’ Court. Traditionally, the curator’s role was mainly to consider children’s legal position and initiate litigation on behalf of children who lacked capacity. Over the years the role of the curator has evolved, and in the constitutional era the courts have taken to appointing curators to safeguard and report on the interests of children in a wide range of different circumstances relating to civil and even criminal proceedings.13

3.2 Family Advocate

The Office of the Family Advocate was established by the Mediation in Certain Divorce Matters Act 24 of 1987. The Family Advocate acts as an advisor to the court and mediator between family members. The Family Advocate does not represent any of the parties and is required to be neutral in order to investigate the issues in dispute and to report and make recommendations to the court. The views of the

13 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); Centre for Child Law and Others v Minister of Home Affairs and Others 2005 (6) SA 50 (T); S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC); AD v DW (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party) 2008 (3) SA 183 (CC). See further T Boezaart in Davel and Skelton
child are reflected in the report of the family advocate, and recommendations are made regarding what is in the child’s best interests. In some cases the wishes of the child and the consideration of his or her best interests may not correspond.

3.3 Section 28(1)(h) representative

When section 28(1)(h) was inserted into the Bill of Rights, the options of curator ad litem and Family Advocate were already in existence. In the *Soller* case, the court drew a distinction between the role of the Family Advocate and the role of the section 28(1)(h) representative, stating that ‘neutrality is not the virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador’. The *Soller* court clearly envisaged a lawyer acting on the instructions of a client. However, the Constitutional Court has also made reference to section 28(1)(h) when appointing a curator ad litem, which indicates that the section can be seen as inclusive of different models of legal representation of children.

An innovation in respect of section 28(1)(h) can be seen in the recent matter of *S v WR* 2015 (1) SACR 571 (GP). The High Court appointed an advocate to represent the interests of a minor complainant in a criminal trial. The child’s father had been convicted on a charge of rape based on the child’s testimony that he sexually abused her. After the trial the child recanted her statement and stated that her father had not raped her. Based on the child’s statement, the father brought an application for further evidence to be lead at the regional court. The regional court refused and the father took the decision of the magistrate on appeal to the High Court. The judge in the High Court was concerned about undue pressure on the child from the family and appointed a representative for the child. The child’s

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14 *Soller* para 26.
15 *Van Niekerk* (n 7 above).
representative filed a report with the High Court. The High Court ordered that the regional court trial should be re-opened and further evidence should be lead, specifically the child’s testimony that it was not her father who raped her. The High Court also ordered that the advocate appointed for the child should continue to hold a watching brief and assist the child during the regional court proceedings.

3.4 The Children’s Act

The child’s right to participation was incorporated into domestic legislation in the Children’s Act 38 of 2005, notably in section 10 of Chapter 2 of the Children’s Act:

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.

The Children’s Act throughout provides opportunity for the child to participate and to express his or her views. In terms of section 55, the Legal Aid Board may appoint a legal representative for children involved in Children’s Court proceedings. The court cannot order that legal representation must be provided but may refer the matter to the Legal Aid Board for consideration. The Legal Aid Board will

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16 Hereafter the Children’s Act.
17 Section 31 of the Children’s Act obliges any holder of parental responsibilities and rights to consider the views and wishes of the child when making any decision. Section 61 obliges a presiding officer in a Children’s Court to give the child an opportunity to participate. The child is given a choice as to whether he or she wishes to participate and the presiding officer must enter the reasons why a child does not participate into the record of the proceedings. An adoptable child who is ten years or older must consent to his or her own adoption in terms of section 233.
18 The Legal Aid Board was established in terms of the Legal Aid Act 22 of 1969 and provides legal aid to indigent persons.
19 See also Legal Aid Board v R 2009 (2) SA 262 (D) and Legal Aid Board: In re four children [2011] ZASCA 39 (29 March 2011) for an analysis of Legal Aid South Africa’s powers to assign legal representation for children.
then consider whether it is necessary to assign a legal representative to the child. Section 55 of the Children’s Act pertains only to proceedings in the Children’s Court and does not extend to proceedings in the High Court where divorces and care and contact disputes are litigated. Section 29(6) of the Children’s Act links section 55 to care and contact proceedings. It allows a judge to appoint a legal representative for a child in any matter dealing with parental responsibilities and rights in respect of the child. The court may order the parties to the proceedings to pay for the legal representation of the child.

There has been a significant increase in legal representation of children in matters concerning the Hague Convention on the Civil Aspects of International Child Abduction. In terms of section 279 of the Children’s Act every child concerned in a Hague Abduction matter must be provided with a legal representative. There have been several reported judgments indicating the importance of this20 but there is also an on-going practice in the High Court to appoint a legal representative for a child/children in Hague Abduction matters when the application for return of the child is launched.

The role of the legal representative in Hague Abduction matters is generally to safeguard the interests of the child, negotiating undertakings for the safe return of the child etc. However, where the child raises an objection to return to the country of habitual residence, the role of the legal representative becomes significantly more important. In those circumstances, the child’s legal representative has a duty to place the child’s objection before the court and actively litigate and argue against the child’s return.21

20 Central Authority for the Republic of South Africa v B 2012 (2) SA 296 (GSJ); Central Authority v MV (LS Intervening) 2011 (2) SA 428 (GNP); KG v CB 2012 (4) SA 136 (SCA).
21 Central Authority v JW and HW (Unreported case number 34008/2012, delivered on 6 May 2013).
4 Two models of legal representation

There are two models of legal representation of children that are being used in South Africa – client directed legal representation and best interests legal representation. However, lawyers operating within these models may be unaware of the important differences between the two, and may even be confused about their role. South African courts are also not fully familiar with the models of legal representation and sometimes have incorrect expectations of the legal representatives appearing before them. The solution to this role confusion starts with the need for legal representatives to be clear about their own roles. Once this is established, the child’s legal representative must clearly articulate that role to the child, other parties and their legal representatives, and to the court.

The two models of legal representation are set out here in table form for easier comparison
### CLIENT DIRECTED LEGAL REPRESENTATIVE

- This model of representation of children allows the child to direct the litigation.
- Suitable for children who are of sufficient age and maturity to be able to express a view and give instructions.
- Allows a lawyer-client relationship between the representative and the child, and allows children to participate in the proceedings directly if they want to and are able to do so.
- The standard lawyer-client relationship applies, such relationship allows for negotiation and discussion between the client and the representative to reach the most appropriate instructions.
- If the client directed model is followed the parent’s involvement must be limited as early as possible. It must be explained to parent that the legal representative will be acting on behalf of the child and not the parent.
- Best interests determination should be left to the court.

### BEST INTERESTS LEGAL REPRESENTATIVE

- This model ensures that the child’s interests are paramount in the representation, and the child does not give instructions.
- Suitable for children who are either too young or immature (or unable due to an on-going condition) to give instructions, though they may still be able to express views and wishes which must be elicited and taken into account by the best interests lawyer, unless they are unable to speak.
- Independent legal representation for the child is achieved by avoiding aligning with another party’s position or appearing to advance another party’s position.
- If the best interests model is followed the legal representative will have more contact with parents and other role players.
- Recommendations to be based on legal considerations and examination of factual and expert evidence. The best interest legal representative should refrain from making intuitive assumptions and decisions.
- Best interests determination should be left to the court.
5 Differentiation between care and contact and care and protection matters

In addition to the distinction between the two models of legal representation discussed above, it is also necessary to distinguish between two areas of work that are undertaken by children’s legal representatives. Previously it was common to distinguish between legal representation in the High Court and in the Children’s Court. The Children’s Act jurisdiction provisions no longer make that a very useful...
or accurate distinction. Some care and contact matters are now heard in the Children’s Court – for example, unmarried fathers, grandparents and other interested parties will be able to bring applications for care and contact in the Children’s Court (whereas previously all such matters had to be heard in the High Court). For this reason, these guidelines refer variously to ‘care and contact proceedings’ and ‘care and protection proceedings’. Whilst the latter will always be heard in the Children’s Court, the former may be heard in either the Children’s Court or the High Court.

It is important to note that the selection of the model of legal representation – client directed or best interests, relates to the capacity of the child to give instructions, not the type of case. Thus it is possible to appear in care and protection proceedings either as a client directed legal representative or as a best interests representative and these two models can equally be applied in care and contact proceedings.

6 When do children require legal representation?

It is not always necessary for a child to be legally represented in civil proceedings. In care and protection matters the social worker and the court are considering the best interests of the child. In care and contact matters the family advocate is there to provide recommendations on the best interests of the child whilst the court makes the final determination on best interests. The list set out below is not exhaustive, but it aims to identify the kind of situations where it is advisable for the child to be legally represented.

- Where a child of sufficient age and maturity is strongly expressing a view and a desire to participate;
- there are allegations of physical, sexual or psychological abuse;
there is an apparently intractable conflict between the parents;
there are real issues that relate to cultural or religious differences that are affecting the child;
there are issues relating to the sexual orientation of either or both of the parents (or other person having significant contact with the child) that are likely to deepen the conflict;
there are issues of significant physical or mental health problems in relation to either party or a child or other person having significant contact with the children;
a child of mature years is expressing strong views, and giving effect to those views which would mean changing a long standing care arrangement or denying a parent (or other significant person) contact completely;
one of the parties proposes removing the child permanently from the court’s jurisdiction;
it is proposed that siblings or a group of children who usually live together will be separated;
any matters in respect of Chapter 17 of the Children’s Act, Child Abduction;
where there is a dispute between the wishes of the child and the recommendations of the Family Advocate or an expert;
where the child is the subject of a maintenance dispute and can testify about disputed facts;
when other parties are represented in an adoption matter that has become conflictual; and
if a third party mentions concerns during an adoption matter;
It should be noted, however, that whilst the abovementioned matters relate mainly to family law or care and protection cases, children may need to be separately represented in a wide range of civil cases relating to their lives such matters concerning their civil and political rights, as well as their socio-economic rights.

7 Initial stages

7.1 Who refers the case to the legal representative?

- It is more likely that representation is necessary when the referral comes from the Family Advocate or an expert involved in the matter. The neutrality of the person referring is a significant indication.
- However, the child will most often be assisted by a parent in the referral or application process and the on-going involvement of the parent will depend on the model of legal representation.
- Matters are typically also referred by the Children’s Court or High Court presiding officer, school teachers and social workers.
- In general there is no limitation on who can refer the child.

7.2 Initial consultation

A key task at the first consultation is to establish whether the child does require legal representation and decide what model of legal representation should be followed.
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7.3 Does the child have capacity to give instructions?

- The task of the legal representative is not to assess the capacity of the child but rather to consider whether a child is willing and developmentally able to express a view as to the direction of the litigation. If so, the representative, after advising the child, should accept that direction and advocate for the child’s wishes.
- The representative should engage the child in an initial assessment of possible strategies for the case providing full explanation in simple language. The child’s ability to give instructions is greatly affected by the lawyer’s skill in communicating with him or her.
- Representatives must communicate at a level suitable for the particular child and use methods of communication with which the child is comfortable.
- Communication should preferably be face to face and not via a telephone or email.

7.4 Determining whether child has capacity to give instructions

In determining whether the child is capable of giving instructions, the child’s willingness to participate and ability to communicate should guide the representative rather than any assessment of the ‘good judgment’ or level of maturity of the child. Importantly this is about the child’s capacity and not about evaluating the child’s opinion.

7.5 Limited capacity

- Where a child is capable of and willing to provide instructions in relation to some issues, although not all issues, the representative must, after advising the child, follow the instructions of the child in relation to those issues in which instructions have been received. The representative must gather whatever information and assistance the child is willing and able to give in order to advance the child’s instructions.
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- If the child is unable or unwilling to provide any instructions, does not want to become involved in the litigation and does not want to express a choice or preference, then the representative must proceed as a best interests legal representative.

7.6 Disability

- Where a serious on-going, pre-existing condition affects a child’s capacity to give instructions then the representative must assume the role of a best interests legal representative.

- Where a disability affects a child’s ability to communicate instructions but the child does have the capacity to give instructions, the representative should seek help from appropriate service providers.

- In the majority of cases expert involvement to determine capacity will not be required but in matters where questions of capacity become disputed an expert report may be required to determine whether the child has capacity to give instructions.

7.7 Determine what your role will be as legal representative

Depending on the first consultation the legal representative must decide whether his/her role will be as a client directed legal representative or a best interest legal representative.
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8 The Guidelines

<table>
<thead>
<tr>
<th>CLIENT DIRECTED LEGAL REPRESENTATIVE</th>
<th>BEST INTERESTS LEGAL REPRESENTATIVE</th>
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<tbody>
<tr>
<td><strong>Taking instructions</strong></td>
<td><strong>Taking instructions</strong></td>
</tr>
<tr>
<td>Consulting with the child</td>
<td>Consulting with the child</td>
</tr>
<tr>
<td>The legal representative must see every child as soon as possible and before the hearing. Consult alone with the child, but there may be situations where the parent has to be involved.</td>
<td>The legal representative must see every child as soon as possible and preferably well before the first hearing. Even if the child is too young to give instructions the representative must consult with or see the child as soon as possible.</td>
</tr>
<tr>
<td><strong>Relationship with the child</strong></td>
<td><strong>Relationship with the child</strong></td>
</tr>
<tr>
<td>• When the practitioner is a client directed representative, it is preferable that he/she must meet with the child often enough in order to develop and maintain a lawyer-client relationship;</td>
<td>• When the practitioner is a best interests representative he/she should meet with the child, seek the views of the child as well as other information relevant to the child and the well-being of the child.</td>
</tr>
<tr>
<td>• The child must be advised that although the legal representative will follow instructions and represent the child to the best of his/her ability, the final decision is with the court, and it is possible that the outcome will be something different from what the child wants;</td>
<td>• He/she should identify options that are available to the child and advise about the consequences of these options.</td>
</tr>
<tr>
<td>• The legal representative must devote enough time to ensure that the child understands the nature of the proceedings and that the representative understands the child’s instructions;</td>
<td>• Best interest representatives do not take instructions from the child but they must still hear the view of the child and present this to the court, they must also keep the child informed about the progress of the litigation and act to minimise traumas for the child associated with the proceedings.</td>
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- The options available to the child client must be discussed and advice provided as to the possible consequences;
- The client directed representative must inform the child that the representative will follow his/her instructions and present the child's case to the court but that the court will decide what is in the best interests of the child which may be different from the child's wishes.

Time and venue of meeting with child

When arranging consultations with the child the representative must consider the child’s education and extramural programme and avoid any inconvenience as far as possible. A neutral venue may be appropriate if the child is in a high conflict situation.

Communication

- The representative should use language that is appropriate for the age, level of education, maturity, cultural context and degree of language proficiency of the child. If possible the consultation must be in the child’s mother tongue, and if necessary through an interpreter.
- Face-to-face communication should be given preference rather than communication by telephone or in writing.
- Explain the representative's role and the process that must be followed;
- Speak slowly;
- Allow the child to interrupt or ask questions;
- Treat the child with respect;

- The best interests representative must inform the child that the representative will put his/her views before the court but that the court will decide what is in the best interests of the child which may be different from the child’s wishes.

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- Treat the child with respect;
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- Provide examples when explaining legal concepts;
- Be aware of cultural or religious sensitivities; and
- Be aware of the special communication needs of children with disabilities and seeking further assistance from others where needed.

Explaining the child's options and possible outcomes
- The client directed representative explains the legal process so that the child understands;
- Explain the various options and strategies realistically available;
- Communicate realistic expectations of the proceedings and ensure that the child understands the representative’s role and capacity to effect change;
- Do not give undertakings that may not be possible to achieve in the legal proceedings; and
- Familiarise the child with the court if the child going to have to testify.

Consideration of alternative forms of dispute resolution
- Client directed legal representatives should consider whether it is appropriate to use alternative forms of dispute resolution, including negotiation, to seek expeditious resolution of the case;
- Consider the different developing models of mediation including child-directed mediation;
- Consider the mandatory mediation provisions included in the Children’s Act 38 of 2005;

- Provide examples when explaining legal concepts;
- Be aware of cultural or religious sensitivities; and
- Be aware of the special communication needs of children with disabilities and seeking further assistance from others where needed.

Explaining the nature of the case and the possible outcomes
- The best interests representative explains (to clients who can sufficiently understand) the legal process so that the child understands and has realistic expectations of what may come out of the matter may be.
- Keep in mind the child’s age and concentration capabilities.

Consideration of alternative forms of dispute resolution
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- Consider the different developing models of mediation;
- Consider the mandatory mediation provisions included in the Children’s Act 38 of 2005;
**GUIDELINES FOR LEGAL REPRESENTATIVES OF CHILDREN IN CIVIL MATTERS**

| • Explain mediation or alternative forms of dispute resolution to the child; and |
| • Discuss the child’s involvement and instructions for mediation; and |
| • Advise child on options available for mediation and take instructions. |

### Settlement

- The child’s instructions on any possible settlement should be thoroughly canvassed during consultation with the child.
- If a settlement is offered on terms not discussed with the child, the representative must first obtain instructions from the child.
- All agreements should be confirmed by a court and made an order or confirmed by the Family Advocate when there are already legal proceedings pending.
- Must confirm the content of the agreement with the child once a settlement has been reached, before it is made an order of court.

### Participation

- In care and protection proceedings the child is always a party to the proceedings;
- The presiding officer is obliged to speak with the child and encourage the child’s participation.

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| • Explain mediation or alternative forms of dispute resolution to the child; and |
| • Try to speak with the parents in matters that are not yet highly acrimonious and are not high conflict matters. The problem may be resolved without going to court in some cases. |

### Settlement

- Consideration should be given as to whether it is appropriate for a best interests representative to accept a settlement proposal on behalf of the child.
- In Children’s Court proceedings any settlements have to be approved by the Court and will only be confirmed if they are in the best interests of the child.
- The best interests legal representative for a child concerned in a High Court matter should be cautious when agreeing to a settlement that he or she is not usurping the role of the Judge to determine the best interests of the child.
- Preferably, all settlements should be confirmed by the court or the Family Advocate.

### Participation

- In care and protection proceedings the child is always a party to the proceedings.
- According to section 61 of the Children’s Act the presiding officer must encourage the child’s participation if the child is of sufficient age and maturity to participate, and the child’s legal representative can assist in this regard.
- Where the child cannot or does not wish to participate, the legal representative can obviously stand in for him or her.
GUIDELINES FOR LEGAL REPRESENTATIVES OF CHILDREN IN CIVIL MATTERS

<table>
<thead>
<tr>
<th>Care and contact proceedings:</th>
</tr>
</thead>
<tbody>
<tr>
<td>- When there are legal proceedings pending, the representative should consider bringing an application on behalf of the child to join as an intervening party;</td>
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<tr>
<td>- The advantages of being an intervening party are:</td>
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<tr>
<td>- It forces compliance in respect of notice and service of all process;</td>
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<tr>
<td>- The right to call witnesses and cross-examine witnesses;</td>
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<td>- The right to submit affidavits on behalf of the child;</td>
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<tr>
<td>- The right to submit oral and written arguments to the court; and</td>
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<tr>
<td>- The right to appeal.</td>
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<tr>
<td>- The legal representative must consider how the child will participate if the child does not join as an intervening party.</td>
</tr>
<tr>
<td>- When there are no legal proceedings pending, the representative must consider initiating legal proceedings.</td>
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<tr>
<td>- The representative must be cautious when deciding whether or not to initiate legal proceedings because this puts the child at the forefront of adversarial conflict.</td>
</tr>
<tr>
<td>- Discuss the impact initiating litigation will have on other aspects of the child’s life, for example, the child’s current living arrangements but still follow the child’s instructions.</td>
</tr>
</tbody>
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<tr>
<th>When should a best interests representative initiate legal proceedings on behalf of a child?</th>
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<tbody>
<tr>
<td>- When the child is unable or unwilling to give instructions but the circumstances require legal action to prevent harm or injustice.</td>
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<tr>
<td>- Consider the impact of initiating litigation will have on other aspects of the child’s life, for example, the child’s current living arrangements.</td>
</tr>
<tr>
<td>- It may be advisable to appoint a curator ad litem for the child.</td>
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GUIDELINES FOR LEGAL REPRESENTATIVES OF CHILDREN IN CIVIL MATTERS

Forms of direct participation

- During care and protection proceedings the presiding officer is obliged to ensure the participation of the child.
- In terms of section 61 of the Children’s Act the child should be given an opportunity to express a view and preference and the representative must ensure that this section is complied with.
- Applications are always decided on the papers and the child may therefore participate during care and contact matters in the Children’s Court and the High Court by filing affidavits.
- If a child asks to meet with the judge the representative must discuss the request with the child and let the judge as well as the other legal representatives (of the other parties) in the case know about the request.
- If the judge agrees discuss the terms of the meeting with the other legal representatives (of the other parties).
- Matters to be considered are: who will be present; how will the discussion be recorded; who may speak to the child during the meeting.

Whether a child should give evidence

- When deciding whether to call the child as a witness, or to consent to the child being a witness for another party, the representative should consider the following factors:
  - The child’s need or desire to give evidence;
  - any repercussions that could arise from giving evidence;
  - necessity of the child’s direct evidence;

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GUIDELINES FOR LEGAL REPRESENTATIVES OF CHILDREN IN CIVIL MATTERS

- use of intermediary as an alternative to direct evidence;
- use of affidavits as an alternatives to direct evidence; and
- the child’s developmental ability to give direct evidence and to withstand possible cross-examination.

Protecting a child witness giving evidence
When a child is being cross-examined by another party, practitioners should be vigilant about monitoring the phrasing of questions and they must object to inappropriate questioning, particularly where such questioning will confuse, intimidate or upset the child.

Safety of the child
The practitioner should minimise risk to the safety of the child when the child is required to attend interviews, hearings or any other proceedings.

Continuity
The representative should be consistently available to represent the child or to ensure that incoming representatives are properly briefed, and the child should be informed that a new legal representative is taking over, where this is unavoidable.

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The representative should be consistently available to represent the child or to ensure that incoming representatives are properly briefed, and the child should be informed that a new legal representative is taking over, where this is unavoidable.
**Confidentiality**

**General rule of confidentiality**
- A client directed representative owes the same duty of confidentiality to a child client as would be owed to an adult client.
- The practitioner must not disclose any confidential information about the child, unless the practitioner is permitted by the child or compelled by law to disclose it.

**Explanation of confidential relationship**
- The client directed representative must explain to the child the confidential nature of the relationship between the representative and child client.
- This includes explaining the circumstances in which the client directed legal representative may disclose confidential information.
- The practitioner must explain this information before starting the interview and/or taking instructions, and should repeat it as often as necessary.
- When necessary the client directed representative must explain when the representative is under a legal obligation to disclose information such as sexual abuse.

**Disclosure of confidential information**
- When the client directed legal representative is obliged to disclose personal information in accordance with the law he/she should explain the reasons why the disclosure should or must be made.

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**Confidentiality**

**General rule of confidentiality**
- A best interests legal representative also owes a duty of confidentiality to a child client.
- However, the rules of confidentiality are relaxed to the extent that it is necessary for the best interests representative to consult with other parties and experts.
- Explain to the child that you will have to divulge information at some point, maybe to the court or other parties.

**Disclosure of confidential information**
- When the best interests legal representative is obliged to disclose personal information in accordance with the law s/he must explain the reasons why the disclosure should or must be made (if the child is of sufficient age and maturity to understand).
**GUIDELINES FOR LEGAL REPRESENTATIVES OF CHILDREN IN CIVIL MATTERS**

- In all cases, the minimum amount of information necessary to relieve the client directed legal representative’s obligations should be disclosed.

### Client legal privilege

The rules of evidence relating to client legal privilege also applies to confidential communications between child clients and their legal representatives.

### Conflict of interest

When a client directed legal representative is acting on behalf of siblings or a group of children and a conflict of interests arise between the siblings, the legal representative must withdraw as representative for all siblings and separate representatives must be appointed for each of the siblings.

### Access to documents by child client

- A child client is entitled to access documents held by the client directed legal representative that have been created or received by the client directed representative for the purposes of the child client’s matter.
- Client directed representatives must ensure that any legal or court-ordered restrictions in relation to documents are followed and otherwise consider the impact on the child client who accesses case related documentation.

- In all cases, the minimum amount of information necessary to relieve the best interest legal representative’s obligations should be disclosed.

### Client legal privilege

The rule of evidence relating to client legal privilege also applies to confidential communications between child clients and their direct representatives.

### Conflict of interest

When a best interests legal representative is acting on behalf of siblings or a group of children and differences of opinion are raised between the children, the legal representative will probably be able to continue as a best interests representative, recommending different outcomes for children where appropriate.

### Access to documents by child client

- A child client is entitled to access documents held by the best interests legal representative that have been created or received by the representative for the purposes of the child’s matter.
- The best interests representatives must ensure that any legal or court-ordered restrictions in relation to documents are followed and otherwise consider the impact on the child who accesses case related documentation.
- The best interests lawyer may consider whether it is in the interests of the child to be provided with all the information or not.
GUIDELINES FOR LEGAL REPRESENTATIVES OF CHILDREN IN CIVIL MATTERS

Involvement of third parties
When the client directed representative considers it necessary to employ the services of experts or professionals (including counsel) to further the case, the child must be consulted about the involvement of the third party and advised about the nature and purpose of such involvement. Ultimately it is the child’s decision whether to involve an expert and the child’s instructions should be followed in this regard.

Involvement of third parties
When the best interests representative considers it necessary to employ the services of experts or professionals (including counsel) to further the case, the child must be consulted about the involvement of the third party and advised about the nature and purpose of such involvement if the child is of sufficient age, maturity and stage of development to understand.

Ending the relationship
Preparing child for end of relationship with practitioner
- The practitioner should prepare the child for the end of the relationship before the end of the case.
- The practitioner and the child should discuss the fact that the practitioner’s role will be over soon and determine what contact, if any, they will continue to have.
- Practitioners must inform the child that they can be contacted if there are problems arising from the case, however over-dependence on the practitioner should be discouraged.
- Practitioners may consider referring the child to non-legal services.

Ending the relationship
Preparing child for end of relationship with practitioner
- If a close professional relationship has developed between the best interests representative and the child, the best interests representative should prepare the child for the end of the relationship before the end of the case.
- The representative and the child should discuss the fact that the representative’s role will be over soon and determine what contact, if any, they will continue to have.
- Best interests representatives must inform the child that they can be contacted if there are problems arising from the case, however over-dependence on the representative should be discouraged.
- Representatives may consider referring the child to non-legal services.

Right to dismiss direct representative
If there is a breakdown of the relationship between the child client and the client directed legal representative then the child has a right to withdraw his or her mandate and a new legal representative should be appointed for the child.
### Conclusion of the proceedings

<table>
<thead>
<tr>
<th>Client directed legal representative</th>
<th>Best interests legal representative</th>
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<tbody>
<tr>
<td>The client directed legal representative must explain the outcome of the case to the child client.</td>
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</tr>
<tr>
<td>If the outcome is not in accordance with the instructions and wishes of the child, the representative must advise and explain the prospects of appeal.</td>
<td>An appeal against a decision must be considered with extreme caution as this will prolong litigation and conflict in the child’s life.</td>
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<td>If the child decides to adjust to the outcome of the case then the representative may refer the child to support services if appropriate.</td>
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