

# QUESTIONNAIRE

## GENERAL

### QUESTION 1

1.

a) No difficulties have been experienced with the countries that accepted the succession of South Africa.

2. No

Particular questions.

3. Normally the Family Advocate will have interviews with abductor and children through a conciliation process. It should be noted that the office of the Family Advocate function in terms of domestic law as representatives of minor children and also utilise mediation as first option as opposed to litigation. The process might lead to a delay but it should be noted that is culturally more acceptable to South African population as a whole.

4. South Africa has signed the Convention with following reservation print that part in my speech pertain to reservations. In terms of the Act vatiying the Convention can act in which instance the services of the state attorney will be utilised. Parties however would still have to apply and qualify to obtain legal aid in terms of an application to be submitted to Legal Aid Board. Copy of Act is annexed.

5. In some instances the Office of Family Advocate would act. This has not been the position prior to Constitutional Court judgment of Sonderup v Tondelli.

6. The Central Authority of South Africa is also the Chief Family Advocate and the duties in terms of the Mediation in Certain Divorce Matters Act operates as one of the partners in the multi disciplinary team and will perform the following duties in respect of all children.

“to provide for mediation in divorce proceedings and applications arising from such proceedings in which minor or dependent children of the marriage are involved in order to safeguard the interests of such children. The Family Advocate works very closely with the Child Protection Unit as well. The institution consists of two government departments namely Department of Social Welfare and Department of Justice. Various non governmental organisations as well as psychological services may be utilised by the office to protect or contain conflict situation.

a) In terms of Domestic Legislation every person is obliged to inform child protection agencies. The office acts as representative of children and therefore protect the interest of children.

b) The office normally acts in an advisory capacity in regard to matters pertaining to children however the rights of children override the rights of parents in terms of domestic law.

c) The office is in the process of constituting a network between various government bodies. In terms of the South African Constitution government departments are obliged to form public private partnerships. The Department of Welfare has an international section of International Social Services.

d) In terms of the duties conferred to Chief Family Advocate proceedings for custody and access should normally be endorsed by the Chief Family Advocate.

e) The Office of the Family Advocate provides free advice in all matters pertaining to minor and dependent children.

f) The Office of the Family Advocate normally negotiates with the respective Central Authorities in obtaining undertakings. Should the undertaking not be adhered to, mirror orders can be obtained to ensure enforceability however the process is a civil process by reason of the fact that abduction is not regarded as a criminal offence in South Africa.

7.

a) Yes

b) Parties have to apply for legal aid but advise will normally be furnished.

c) South Africa has signed the Convention with reservation that government will not provide costs for applications. Normally parties will have to qualify for legal aid pursuant to application being lodged to Legal Aid Board.

d) According to South African Constitution Section 28 “the best interest of the child” dictates in terms of domestic law. Should an application for access be launched the principle of “best interest” of the child will be the paramount consideration prior to any court decision being taken.

8. The statistics are faxed separately.

9. In principle the recommendations are supported however with regard to reservations as supplied by the South African government on costs.

## QUESTION 2

1. Hague applications are normally launched in division of High Court where child is traced. In or recent matter the Constitutional Court delivered a judgement in matter of Sonderup v Tondelli which can be accessed at this website address: <http://www.concourt.gov.za>.

There is one constitutional court based in Johannesburg Gauteng. Divisions of the High Court are also faxed separately. It should be noted that Namibia and Zimbabwe does not form part of the Republic of South Africa. The Constitutional Court is the highest court in South Africa and deals with matters in terms of South African Constitution. (See Sonderup v Tondelli)

2. All applications are dealt with in the High Court and appeals are either done to Appeal Court or Constitutional Court.

3.

a) Yes, although affidavits have to conform to normal procedural Rules of High Court.

b) Normally oral evidence is not heard when motion proceedings are heard.

c) Should the parties qualify for Legal Aid an attorney and advocate will appear on behalf of applicant. The normal court of High Court will apply as well as Rules pertaining to urgency. In most instances the application proceed by way of motion proceedings and presiding judge would decide on urgency. South Africa does not have a Family Division in the High Court and consequently the judge on duty would hear the application.

d) The appeal procedures are determined by the Rules of Court however in the matter of Sonderup v Tondelli which is the precedent for Hague applications a special appeal granted to Constitutional Court within very short time period.

4. The Office of the Family Advocate will conduct interviews with minor children. Specific case law exist on basis of maturity. Annex McCall v McCall. In the letter judgment the court specifically dealt with preferences of child.

5. The defence raised must be interpreted in relation to international case law (See Sonderup v Tondelli matter). In general it is submitted that the normal principles of international juris prudence apply as set out in Section 231 of South African Constitution (see page 11 of paper delivered, e-mailed separately as Reunite Speech)

6. The proceedings are determined in terms of Civil Law. Should a return order not be adhered to an application of contempt would be launched where after the assistance of Interpol will be involved. However such situation has not arisen. In most instances the Office of the Family Advocate facilitated the return. Appeal proceedings have caused considerable delays prior to judgment in Sonderup matter being handed down.

7.

a) Yes

b) It should be difficult for Central Authority to prescribe the Court however in Sonderup matter the aspect was dealt with and international juris prudence was preferred.

c) Yes

d) Yes

e) Yes

f) Yes

g) In the Sonderup matter the duties and powers of the Family Advocate were clearly stated.

8. The Sonderup v Tondelli matter is a landmark decision in South African law.

9. I e-mailed separately (as Reunite Speech) paper delivered at International Reunite Conference on Child Abduction 26-27th January 2001 and Sonderup V Tondelli matter which sets out principles and procedure in South African law as well as Act no 72 of 1996 which act pertain to implementation of Convention.

### **QUESTION 3**

1. The undertakings are normally part of the court order granted.

2. The court will make the undertakings part of court order and the family advocate should facilitate adherence thereto.

3. The system of safe harbor orders does not exist however mirror orders have been granted.

4. The Convention have not been ratified by South Africa. Ratification process is normally spearheaded by the Department of Foreign Affairs.

5. The aspect of abduction is dealt within the realm of civil law perspective.

6. Abduction is not regarded as criminal offence in South Africa.

7. The South African judiciary have been reluctant to enter into such communications and matters are dealt with in terms of argument by counsel and information provided through Central Authority.

8. Not as yet, however it is envisaged that Judge Kate O` Reagan will attend the conference in March.

9. Proceedings in regard to custody and protection are channeled through Office of Family

Advocate which has also been designated as Central Authority.

10. No

11. a) Yes

b) Yes

c) Yes

d) It is not a criminal offence in South Africa.

e) Yes, very much recommended.

#### **QUESTION 4**

1.

a) Parties have to apply for legal aid and must qualify.

b) At present the African Charter and International Convention on Rights of Child dictates principles followed concerning custody and access are dealt with by Family Advocate who acts on behalf of children.

c) The Convention has not been ratified by South African however international jurisdiction has been recognised if it conforms with Constitution Section 28.

2.

a) The basic principles of best interest of the child takes precedence over all other rights in terms of South African Constitution.

b) Normally the Office of the Family Advocate as third counsel in access and other related family matter applications furnishes a report and recommendation to court for variation of access and custody orders. The last mentioned function is sanctioned in terms of domestic legislation.

In general the South African law regard access and custody as interrelated. All applications are considered by Office of the Family Advocate which office represent the best interest in general in court applications and trials.

#### **QUESTION 5**

The South African law prefers alternative dispute resolution methods as first option to any

litigation process. In practice it would be normally be preferable to approach the office of the Family Advocate to mediate or facilitate agreement prior to litigation process proceeding. The South African laws are highly sophisticated and advanced in the field of mediation.

#### **QUESTION 6**

No presumptions are accepted except the fact that the best interest of the child is regarded as paramount in any matter concerning the child. This will include action by police, justice department, courts, mediation procedures and anything related to children`s matters.

#### **QUESTION 7**

The South African Central Authority in collaboration with the South African branch of International Social Services. The last mentioned body has been of extreme assistance even in non convention matters and is held in very high regard in SADC countries and in general Africa and also matters relating to movement of children to South America and Africa.

#### **QUESTION 9**

a) Difference in legal systems and hierarchy of courts in Europe in particular support services have been lacky in European countries, for example Portugal and Austria. Even though South Africa was not a signatory to the Hague Convention normally the principles of the Convention have been applied long prior to South Africa becoming a signatory especially in regard to Commonwealth Countries.

#### **QUESTION 10**

The Office of the Family Advocate normally facilitates as representative of children the adherence to measures

#### **QUESTION 11**

Legal principles exist in regard to access and the Office of Family Advocate act as intermediary..