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The constitutional rights of children and the Prevention of Organised Crime Act 121 of 1998

Summary

The *Prevention of Organised Crime Act* 121 of 1998 [POCA] embodies a serious attempt by the South African government to effectively police and curb organised crime, money laundering and criminal gang activities in South Africa. The Act provides *inter alia* for a range of crippling fines and for orders such as confiscation and forfeiture. Asset forfeiture and confiscation orders can affect the rights of third parties directly and indirectly in a number of ways. Young persons and children can be affected indirectly because asset forfeiture and confiscation orders may violate the right to parental care of the dependent young persons and children of the person who is subject to the order. This brief article will investigate aspects of the protection afforded to the rights of children when such orders are made in terms of the provisions of the *Prevention of Organised Crime Act*.

Die konstitusionele regte van kinders en die Wet op die Voorkoming van Georganiseerde Misdaad 121 van 1998

Die *Wet op die Voorkoming van Georganiseerde Misdaad* 121 van 1998 vorm deel van die Suid-Afrikaanse regering se program om georganiseerde misdaad, geldwas en die aktiwiteite van kriminele bendes te polisieer en te beperk. Die Wet maak onder andere voorsiening vir besondere hoë boetes sowel as konfiskasie- en verbeurdverklaringsbevele. Sodanige bevele kan die regte van derde partye op velerlei wyses, direk en indirek, beïnvloed. Konfiskasie- en verbeurdverklaringsbevele kan die posisie van kinders beïnvloed omdat die bevele die konstitusionele regte van afhanklike kinders moontlik kan skend. Hierdie kort artikel ondersoek aspekte van die beskerming van die regte van kinders wanneer konfiskasie- en verbeurdverklaringsbevele ingevolge die Wet gemaak word.

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“Children are our most valuable natural resource”

Herbert Hoover¹

1. Introduction

The Constitution of the Republic of South Africa² recognises and protects the fundamental rights of children. It enshrines, in particular, every child’s right to family and parental care and provides that a child’s best interests are of paramount importance in every matter concerning the child.³

The Bill of Rights in the Constitution contains specific provisions with regard to the limitation of human rights⁴ and any law that limits a human right in contradiction to these provisions is invalid.⁵

The *Prevention of Organised Crime Act*⁶ [POCA] embodies a serious attempt by the South African government to effectively police and curb organised crime, money laundering and criminal gang activities in South Africa.⁷ The Act provides *inter alia* for a range of crippling fines and for orders such as confiscation and forfeiture.⁸ Can the relevant provisions of the Act be reconciled with the rights of children contained in the Bill of Rights? Asset forfeiture and confiscation orders can affect the rights of third parties in a number of ways.⁹ Such orders may, for instance, have a direct effect on the property rights of third parties who are subject to the order. They could also affect the ordinary creditors of the defendant, including the victims of the defendant who have civil claims for compensation against the defendant, by draining the estate of the defendant and leaving them with insufficient assets against which to levy execution.¹⁰

1 As quoted in Wallace 2001:133.

2 Act 108/1996.

3 The *Constitution of the Republic of South Africa* 108/1996: section 28, in particular sections 28(1)(b) and 28(2).

4 Act 108/1996: section 36.

5 Act 108/1996: section 2.

6 Act 121/1998.

7 De Koker 2001:10; 1999:1-3. See also Pretorius & Strydom 1998:385ff.

8 It contains mechanisms for confiscation of proceeds of crime and for forfeiture of proceeds and instrumentalities of crimes. It furthermore provides for traditional financial penalties in the form of monetary fines. See De Koker 2001:11. The provisions are discussed in detail in paragraph 3.1 below. Forfeiture and confiscation orders are not necessarily punitive in nature. However, in certain cases the effect of these orders can be punitive. For a discussion on the US approach to the possible punitive nature of forfeiture and confiscation [referred to as criminal forfeiture in the US] orders, see Pretorius & Strydom 1998:392ff. See also *National Director of Public Prosecutions v Basson* Case no. 22421/99 (T) where this matter was discussed by Roux J.

9 The imposition of monetary fines can also affect the rights of third parties and, in particular, of children i.e. the imposition of a fine of R1 million in terms of section 8 of POCA could strip the estate of the accused to such an extent that no funds are available to maintain the children. In view of the controversial nature of the concept of forfeiture, this article will, however, focus on civil and criminal forfeiture (confiscation) orders imposed in terms of POCA.

10 De Koker & Pretorius 1998:145.

Asset forfeiture and confiscation orders can also have a more indirect effect because they may violate the right to parental care of the dependent young persons and children¹¹ of the person who is subject to the order.

The question that arises is whether and to what extent the constitutional rights of children are discounted, or indeed protected, when the Court imposes forfeiture and confiscation orders upon economic offenders. This brief article will investigate aspects of the protection afforded to the rights of children¹² when such orders are made in terms of the provisions of the *Prevention of Organised Crime Act*.¹³

2. Terminology

Before commenting on financial penalties and their effect on third parties, certain concepts should be clarified and some perspectives are required.

2.1 “Forfeiture”

Forfeiture can be described as a state action through which private property is lost to the state, without the consent or cooperation of the owner, usually because it is involved in crime in some way.¹⁴ The measure targets property that has been used in the commission of a crime, rather than the people who have used the property illegally. Forfeiture can be used against assets that have been used to commit a crime or assets that are the proceeds of crime.¹⁵

The most striking feature of forfeiture is that its purpose is not regulatory but acquisitive: it determines the government’s title to the property against others and for the public benefit.¹⁶ Traditionally, property is forfeited because

11 Persons under the age of 18. Any further reference to children should be read as a reference to children and young persons.

12 This article will investigate the rights of children as legitimate property owners as well as dependant persons entitled to parental care and maintenance.

13 Act 121/1998. Several provisions of the Act have been scrutinised by the Court since the Act came into effect in 1999. The retrospective application of the Act was questioned in *National Director of Public Prosecutions v Basson* Case no. 22421/99 (T), *The National Director of Public Prosecutions v Wouter Basson* Case no. 131/2000; *National Director of Public Prosecutions v Carolus* 1999 2 SACR 27 C; *National Director of Public Prosecutions of SA v Carolus and others* [1999] JOL 5832 A and *National Director of Public Prosecutions v Meyer* [1991] 4 All SA 263 D. In *Director of Public Prosecutions: Cape of Good Hope v Bathgate* [2000] JOL 5890 C [reported as In the *ex parte* Application of: *Director of Public Prosecutions: Cape of Good Hope v Bathgate*] the constitutionality of the restraint order provisions of the *Proceeds of Crime Act 76/1996* [repealed and re-enacted in an amended form in POCA] was challenged on the grounds that it violates the right to privacy and constitutionally enshrined property rights. Many other judgments have been delivered but they are not freely accessible as they have not been reported.

14 Van der Walt 2000:2.

15 Press statement by Minister Dullah Omar, the then Minister of Justice, 7 May 1998.

16 Van der Walt 2000:3.

it is contraband and possession thereof is illegal. In recent years, the scope of forfeiture orders was extended in most jurisdictions to include contraband as well as property regarded as instrumentalities¹⁷ and proceeds of crime.¹⁸ This extension increased the possibility that the forfeiture order could affect an innocent third party.

A forfeiture order does not require a prior criminal conviction of the property owner. It is obtained after civil proceedings during which the State proves that the property probably constitutes illegal contraband or that it was probably used for an illegal purpose. Furthermore, any property that relates back to the date of illegal use of property, regardless of whether it is still owned or possessed by the offender, can be forfeited. Consequently, forfeiture can be enforced against whoever holds or owns the affected property, regardless of his or her involvement in or knowledge of any crime. These principles are normally associated with the concept of forfeiture although their application and ambit are often limited by legislation.

2.2 “Confiscation”

Confiscation is a procedure by which the state deprives a specific person, who has already been convicted of a criminal offence, of property derived from that crime. Confiscation operates *in personam* i.e. against a specific person. The confiscation order depends on a conviction of a person¹⁹ and the confiscation order is generally restricted to property that forms part of that person's estate.²⁰ Modern economic crime legislation provides for an order for the payment of a sum of money in lieu of the proceeds of the crime.²¹

17 POCA 121/1998 defines an instrumentality of an offence in section 1 as “any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere”.

18 Section 1 of POCA 121 of 1998 defines proceeds of unlawful activities as “any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived”.

19 In *The National Director of Public Prosecutions v G Alexander and 4 others* Case no. 5792/2000(T) at p 11, Van der Westhuizen J made the following remark in respect of the confiscation provisions contained in POCA: “Obviously a conviction is a *sine qua non* for a confiscation order.”

20 For a brief discussion of the Australian position, see Chaikin 1999:Q16.

21 See POCA 121/1998:Section 18. Section 14(1) of the Australian *Proceeds of Crime Act* 1987 provides for two forms of confiscation orders: a forfeiture order against tainted property irrespective of the ownership of the property and a pecuniary order against a convicted person in respect of benefits derived by that person from the commission of the offence. See Chaikin 1999:Q1.20. The English *Criminal Justice Act* 1988: S 71 also provides for the payment of a sum of money. Home Office 1997:42. 21 U.S.C. § 853(p)(5) contains a similar provision allowing the Court in certain instances to “order the criminal forfeiture of any other property of the defendant up to the value” of any benefit derived from the commission of a crime.

3. The Prevention of Organised Crime Act 121 of 1998

The *Prevention of Organised Crime Act*²² *inter alia* criminalises racketeering and creates offences relating to activities of criminal gangs and money laundering.²³ As was stated before, it also contains mechanisms for confiscation of proceeds of crime and for forfeiture of proceeds and instrumentalities of offences.

3.1 Forfeiture and confiscation provisions contained in the Prevention of Organised Crime Act

3.1.1 Forfeiture under the Prevention of Organised Crime Act

Chapter 6 of the Act regulates forfeiture. The chapter provides that a High Court may make a preservation of property order with a view to the future forfeiture of such property if there are reasonable grounds to believe that such property is an instrumentality of an offence²⁵ or that such property is the proceeds of “unlawful activities”.²⁶ The Act allows for the forfeiture of any property that is subject to a preservation order if a High Court finds, on a balance of probabilities, that such property is an instrumentality of an offence²⁷ or that it is the proceeds of “unlawful activities”.²⁸

3.1.2 Confiscation under the Prevention of Organised Crime Act

According to the *Prevention of Organised Crime Act*, whenever a defendant is convicted of an offence, the Court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from that offence, any other offence of which the defendant has been convicted at the same trial and any criminal activity which the Court finds to be sufficiently related to those offences. If the Court finds that the defendant has benefited in such a way, the Court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate.²⁹ The High Court may not order the defendant

22 Although several South African statutes allow for confiscation POCA provides the general asset forfeiture procedures. This article is restricted to the relevant provisions of POCA. See De Koker 2001:11ff and Pretorius & Strydom 1998:387.

23 Act 121/1998:chapter 2.

24 This article focuses, in the main, on final asset confiscation and forfeiture orders. For the sake of completeness the author will also briefly discuss restraint and preservation of property orders that are made by the Court to preserve property for purposes of a confiscation or forfeiture order.

25 Section 48(1) read with section 38(2)(a).

26 Section 48(1) read with section 38(2)(b).

27 Act 121/1998: section 48(1) read with section 50(1)(a).

28 Act 121/1998: section 48(1) read with section 50(1)(b).

29 Section 18(1). The section furthermore provides that the Court may make any further orders as it may deem fit to ensure the effectiveness and fairness of the order.

to pay an amount to the State that exceeds the value of the defendant's proceeds of the offences or related criminal activities or the realisable amount in his estate, whichever is the lesser.³⁰

3.2 Protection afforded to third parties

3.2.1 Forfeiture

The concept of forfeiture is a very controversial one as it seemingly infringes on a number of constitutional rights.³¹ The South African legislature has therefore enacted certain measures to protect third parties when forfeiture orders are made. The *Prevention of Organised Crime Act* requires that the National Director of Public Prosecutions must give notice of a preservation of property order³² to all persons known to him to have an interest in the

30 Act 121/1998:section 18(2). Section 14 provides that realisable property comprises any property held by the defendant concerned and any property held by a person to whom that defendant has directly or indirectly made any affected gift, but not property in respect of which a declaration of forfeiture is in force. An affected gift is any gift made by the defendant concerned less than seven years before the fixed date; or any gift made by the defendant concerned at any time, if it was a gift of property received by that defendant in connection with an offence. Section 12 provides that a gift is also regarded as "affected" if it is a gift made by the defendant, of property which directly or indirectly represented in that defendant's hands property connected with an offence. In terms of section 16(1), a defendant is deemed to have made a gift if he or she transfers any property, directly or indirectly, to any other person for a consideration that is worth considerably less than the property that the defendant transferred.

31 For detailed discussions of the constitutionality of forfeiture, see Pretorius & Strydom 1998:385ff and Van der Walt 2000:1ff. In the USA a national non-profit organisation, Forfeiture Endangers American Rights (FEAR) was established to address the constitutionality of US asset forfeiture laws. The organisation is dedicated to the reform of federal and state asset forfeiture laws in order to restore due process and protect property rights in the forfeiture process. Information on FEAR is available at <http://www.fear.org>. See also German 1999:13-1ff for a detailed analysis of the remedies available to third parties who may be affected by Canadian proceeds of crime legislation.

32 A preservation of property order is obtained in terms of s 38 as a first step in the forfeiture process. An application for a preservation of property order is made *ex parte*. Persons with an interest in property do not get a notice of the application for the order and are not afforded an opportunity to oppose the initial application. The National Director of Public Prosecutions is only required to give notice to such persons after the order has been granted. [*Interim* orders imposed in terms of POCA is briefly discussed in par 3.2.3] In a recent case, *Yasien Mohamed NO v The National Director of Public Prosecutions* Case No 2000/21921 Cloete J, sitting in the Witwatersrand High Court, held that the section was inconsistent with section 34 of the Constitution Act 108/1996 and, therefore, unconstitutional, to the extent that it requires the NDDP to bring an application for a preservation of property order *ex parte* and makes no provision for a rule *nisi* calling upon interested parties to show cause why a preservation of property and seizure order should not be made. However, the Constitutional Court did not confirm the order of invalidity but referred the matter back to the High Court. In the judgment

property that is subject to the order and publish a notice of the order in the *Government Gazette* as soon as it is practicable after the making of the order.³³ Any person who has an interest in the property that is subject to the preservation order may, within fourteen days after the service of such a notice or after the date of the publication of the *Government Gazette*, enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation of the order.³⁴ Section 47 also provides affected parties with an opportunity to approach the Court in order to apply for the variation or rescission of preservation of property orders.³⁵ In the case of a subsequent forfeiture order, the National Director of Public Prosecutions must give fourteen days' notice of such an application to every person who entered an appearance with regard to the preservation of property order.³⁶ Any person who entered such an appearance may oppose the making of the order, apply for an order excluding his or her interest in the property from the operation of the order³⁷ or apply for an order varying the operation of the order.³⁸ The Act allows the Court to exclude an interest or vary an order in very specific and limited circumstances.³⁹

handed down per Ackermann J the Constitutional Court held that the applicants before Cloete J challenged the constitutionality of the whole of Chapter 6 of POCA and that the High Court erred by deciding the matter on the basis of the provisions of section 38 only instead of determining the constitutionality of the whole of Chapter 6 of the Act. [Unreported case No CCT 13/02].

33 Section 39(1). Section 54(1) allows a person who should have received notice of the preservation of property order, but did not get notice, to apply for an exclusion of his or her interest in the property from the operation of the forfeiture order or the varying of the operation of the forfeiture order in respect of such interest in the property.

34 Section 39(3) and (4).

35 Section 47(1) provides, in respect of movable property, that a High Court may, on the application of an affected party, vary or rescind the preservation order "if it is satisfied" that the order will "deprive the applicant of ... reasonable living expenses and cause undue hardship for the applicant; and ... the hardship ... outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred". Section 47(3) furthermore provides that a person who is affected by a preservation order made in respect of immovable property may apply for the order to be rescinded and the High Court shall rescind the order "if it deems it necessary in the interests of justice" to do so.

36 Section 48(2).

37 Section 52(1).

38 Section 52(2).

39 Section 52(1) provides that property that constitutes the proceeds of unlawful activities may be excluded if the Court finds, on a balance of probabilities, that the third party had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of the difference and, where the applicant had acquired the interest concerned after the commencement of the Act, he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities. The *POCA Second Amendment Act 38/1999* inserted the phrase "for a consideration" to thwart children and family members who innocently inherited proceeds or instrumentalities. In terms of section 52(2A), an instrumentality of an

3.2.2 Confiscation

The protection of third parties with regard to confiscation appears to be quite different from the protection afforded in relation to forfeiture. The only explicit protection of third parties is contained in subsections 26(4), 30(3), 30(4) and 30(5). Section 26(4) provides that a restraint order must provide for notice to be given to persons affected by the order.⁴⁰ Section 30(3) provides that property may not be realised in order to effect a confiscation order unless all persons known to have any interest in the property concerned have been afforded an opportunity to make representations to the Court in connection with the realisation of such property. Section 30(4), furthermore, provides that if a Court is satisfied that a person is likely to be directly affected by a confiscation order or has suffered damage to or loss of property or injury as a result of an offence or related criminal activity which was committed by the defendant, the Court may allow that person to make representations in connection with the realisation of that property. Finally, if the Court is satisfied that such a victim has instituted civil proceedings, or intends to institute civil proceedings against the criminal in respect of damages suffered as a result of the offence, the Court may order that the realisation of any confiscated property be suspended for the period that the Court deems fit in order to satisfy such a claim or judgment and related legal expenses.⁴¹

offence may be excluded if the Court finds, on a balance of probabilities, that the third party had acquired the interest concerned legally and neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence or, where the offence concerned had occurred before the commencement of the Act and the applicant has since the commencement of the Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence. Section 51(1) of POCA, furthermore, provides that a third party having an interest in or control over property may be notified that there are reasonable grounds to believe that such property is being used illegally.

- 40 A restraint order is obtained in terms of section 26. Such an order is often, although not necessarily, a first step in the confiscation process. The section empowers the National Director of Public Prosecutions to apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates. Such an application is an *ex parte* application. [*Interim* orders imposed in terms of POCA are briefly discussed in paragraph 3.2.3.]
- 41 Subsections 30(3) to 30(5) constitute a laudable though imperfect improvement in respect of victims' rights when compared to the confiscation procedure provided for in the *Proceeds of Crime Act 76/1996*. See De Koker 1999:114. The Court addressed the provisions of section 30 in a recent case, *National Director of Public Prosecutions v Rebutzi* [2000] JOL 6562 W. Goldstein J deemed it inconceivable that a confiscation order could be made in circumstances where a known complainant is entitled to compensation or to the repayment of a sum of money stolen that far exceed the total assets under restraint. According to the learned judge, it would be absurd to grant a confiscation order that would deprive an innocent third party of recourse (at p 8[11]). However, the Supreme Court of Appeal overturned the judgment in *The National Director of Public Prosecutions v Rebutzi* 2002 2 SA 1 A. Nugent AJA [Vivier, ADCJ, Marais and Mthiyane, JJA

3.2.3 Interim orders

The *Prevention of Organised Crime Act* provides for the imposition of *interim* or provisional freezing orders to preserve property pending confiscation and forfeiture. These orders are called restraint orders in the case of confiscation and preservation of property orders in the case of forfeiture procedures. Restraint orders are optional but preservation of property orders are mandatory and constitute the first step in the asset forfeiture process.⁴²

The question whether the interests of innocent third parties are discounted is particularly pertinent when *interim* orders are imposed. These orders are handed down and affect the rights of the defendant and third parties, including children, before the facts that justify a final confiscation or forfeiture order have been tested and proved.⁴³ A real possibility, therefore,

and Cloete, AJA concurring] held that "...sections 30(5) and 31(1) make it clear that the Legislature did not intend a confiscation order to be withheld merely because an identifiable victim has an equivalent claim for recovery of his loss. Not only do those sections recognise that a confiscation order might co-exist with a claim by the victim but they provide the means to avoid the claims competing for the defendant's property. Where the defendant's property has not yet been realised section 30(5) expressly authorises the High Court to suspend the realisation until the victim's claim or judgment has been met, and where the property has been realised section 31(1) enables the High Court to direct the manner in which the proceeds are to be distributed. There is no reason to think that a court that is called upon to give such directions will not recognise the claim of a victim and order that it be paid before any moneys accrue to the State bearing in mind that section 31(1) expressly provides that it does not have a preferential claim. Thus the making of a confiscation order need not deprive the victim of the means of recovering his loss, nor is there reason to think that it will ordinarily do so" (at par 17). The English *Criminal Justice Act* 1988, contains specific provisions to ensure that the position of victims is safeguarded when confiscation orders are made. If a Court makes a confiscation order and a compensation order against the same defendant in the same proceedings and it appears that the defendant has insufficient means to pay both orders, section 72(7) of the Act applies. This section provides that a Court may order any shortfall in payment of the compensation order to be paid out of moneys raised by the enforcement of the confiscation order. See Home Office, *Organised and International Crime Directorate* 1997:47ff for a discussion of the confiscation/compensation relationship in terms of English legislation. Compare *Clive Mitchell and Jennifer Mitchell* [2001] 2 Cr.App.R.(S) 29 where the Court avoided a situation where a confiscation order could prejudice victims. The Court combined a confiscation order with a compensation order and directed, in terms of section 72(7) of the *Criminal Justice Act* 1988, that so much of the compensation as would not be recoverable because of the insufficiency of the defendant's means should be paid out of any sums recovered under the confiscation order.

42 Sections 25 to 29A regulate restraint orders and sections 38 to 47 regulate preservation of property orders.

43 A restraint order may be made on the basis that a defendant is to be charged with an offence and that there are reasonable grounds to believe that a confiscation order may be made against that person if he or she is convicted of that offence. A preservation of property order may be made if there are reasonable grounds to believe that the property concerned is an instrumentality of a Schedule 1 offence or is the proceeds of crime. See sections 25 and 38.

exists that the defendant will not be convicted or that the reasonable grounds will not be proven on a preponderance of probabilities.

Apart from the notice provisions referred to earlier,⁴⁴ children's rights may be protected during the confiscation and forfeiture process by section 26(6)(a)⁴⁵ and section 44(1)(a).⁴⁶ These sections contain similar provisions to the effect that restraint and preservation of property orders may provide for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household.⁴⁷

The question that arises is what does "reasonable living expenses" constitute? For example, what if a defendant has a son that is studying at a university abroad? These studies are not undertaken with a bursary but paid for by the defendant. The National Director of Public Prosecutions applies for a restraint order and the defendant includes the payment of the university fees in his statement of monthly expenses.⁴⁸ Should the Court provide for the payment of such fees as part of reasonable living expenses? What if the Court does not allow for such expenses and the child has to terminate her studies at that university because of a lack of funding? It is debatable whether an *interim* order that is possibly so invasive can be justified if the child is an innocent party who is not afforded an adequate and reasonable opportunity to state her own case.

In the majority of cases the child is dependent on the defendant to present his or her case to the court. The information furnished in this process may obviously be perceived as tainted by the defendant's desire to protect his estate and assets for his own benefit.

A child who is entitled to financial support is also in a vulnerable position if the defendant is uncooperative and has no desire to protect his or her own ability to support the child. In view of the large number of South African parents who do not comply with their parental support obligations such a scenario is real. Who and how will the child's needs and predicament be brought to the attention of the court?

44 See paragraphs 3.2.1 and 3.2.2 above.

45 With regard to restraint orders with a view to confiscation.

46 With regard to preservation of property orders with a view to civil forfeiture.

47 Sections 26 and 44(2), however, provide that the Court can only make such provision if it is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property.

48 This scenario is based on the facts in *Ex parte Die Prokureur Generaal Natal in re J Bantho en twee ander* Case No 3279/97. The Attorney General brought an *ex parte* application for a restraint order in pursuance of section 16 of the *Proceeds of Crime Act 76/1996*. The provisions of section 26 of POCA and section 16 of the repealed *Proceeds of Crime Act* are similar.

4. The fundamental rights of children

4.1 International recognition of children's rights

The Convention on the Rights of the Child of 1989 was the first international human rights treaty that singled out children as the exclusive subjects of international rights and protection.⁴⁹ However, since the 1960s there has been an increasing effort to formulate and to establish special safeguards for children on account of their vulnerability to violations of human rights, particularly as a result of inadequate social conditions, armed conflict, exploitation, hunger and disability. The International Covenant on Political and Civil Rights, the European Social Charter, the African Charter on Human and People's Rights and the American Convention on Human Rights all contain provisions that protect the fundamental rights of children.⁵⁰

4.2 Children's rights in the Constitution of the Republic of South Africa⁵¹

Except for a few specific restrictions on the fundamental rights of children imposed by their youth,⁵² all children are given the same protection by the Bill of Rights as their adult counterparts.⁵³ In addition, section 28 of the Constitution affords children those personal, economic and social rights that are typical to them, such as the right to basic nutrition, shelter, health care and social services as well as the right to family and parental care.⁵⁴ The section obliges the State to ensure that children are provided with these basic requirements and to provide the family of the child with the means to support both these requirements.⁵⁵

4.2.1 The best interests of the child

The rule that "the best interests of children" should prevail in all issues relating to children is found in almost all human rights documents that address the rights of children.⁵⁶ It is also firmly entrenched in the South African Constitution.⁵⁷

49 Buergerthal 1995:77. The Convention is the most important international instrument on children's rights. For a brief discussion of the Convention, see Davis *et al* 1997:265–266. South Africa ratified the Convention in 1995. The ratification provides additional motivation for the protection of children's fundamental rights in South Africa.

50 Davis *et al* 1997:265.

51 Act 108/1996.

52 For example, only adult citizens have a right to vote.

53 See the case of *Planned Parenthood v Danforth* 482 US 52 (1976) as quoted by De Waal *et al* 2000:411.

54 Act 108/1996:section 28(1)(b) and (c). See also Clark 2001:344 and Van der Vyver 1997:303.

55 De Waal *et al* 2000:412.

56 Maithufi 1999:200.

57 Bosman & Van Zyl 1997:49.

Subsection 28(2) of the South African Constitution⁵⁸ proclaims that a child's best interests are of paramount importance in every matter concerning the child.⁵⁹ A child's best interests must therefore guide every judgment or administrative action that would directly or indirectly affect a child.⁶⁰

4.2.2 The right to family and parental care

Subsection 28(1)(b) places a duty on the parents and family of children to provide the necessary care. By implication, this section also puts a duty on the State to support the family as an institution.⁶¹ The subsection therefore inhibits legislation or administrative action that would interfere with the delivery of parental care or would have the effect of separating children from parents.⁶²

5. The constitutional rights of children and the Prevention of Organised Crime Act

Although the provisions of the *Prevention of Organised Crime Act* provide some protection for the interests of innocent third parties when asset forfeiture and confiscation orders are imposed, the protection is very limited and only allows for very specific situations.⁶³

Young persons and children are particularly vulnerable third parties in forfeiture and confiscation cases. Children are often the victims of their criminal parents or family members, who abuse their names and estates to hide the proceeds of crime. A criminal would, for instance, create a trust with the children as beneficiaries or transfer property to or buy property in their names. In reality, however, the criminal controls the property or money and remains the *de facto* owner. Children may also be disadvantaged by forfeiture and confiscation orders imposed in terms of the *Prevention of Organised Crime Act*, for instance, where the order strips the parents' estate of all value, leaving them unable to care for dependant children. The fact that the South African welfare system does not provide a safety net for children whose parents' or guardians' entire estate was forfeited and/or confiscated, rendering them unable to take proper care of their children, exacerbates the unfortunate position of children.⁶⁴

58 Act 108/1996.

59 Van der Vyver 1997:303.

60 Van der Vyver 1997:303. This principle has always been part of SA law, but was constitutionally enshrined in 1994. See Church & Bosman 1995:620, Davel & De Kock 2001:273 and Van Heerden 1991:91.

61 De Waal *et al* 2000:413.

62 The section does allow, however, that the State may remove children from the care of the parents when it is in the best interests of the child to do so. Where a child has been removed, the State must ensure that the environment in which the child is placed provides a similar or better standard of care to that which the child would have had in the family environment. De Waal *et al* 2000:413 and Davis *et al* 1997:267.

63 See paragraph 3.2 above.

64 Often the child's own estate could also be forfeited or confiscated, leaving no finances for any form of parental care or for the children to care for themselves.

The “innocent third party” provisions in respect of forfeiture will often be of very little value to children, be it as owners of property or as children legally entitled to maintenance. The nature of relationships between parents and children is such that children often receive property without adequate consideration. Consequently, children are, by definition, unable to utilise the provisions that allow the Court to exclude an interest or vary an order.⁶⁵

The lack of adequate protection of the property rights of children in these cases may be ascribed in part to the fact that their names and estates are often abused by their criminal parents. However, consider the predicament of a minor child who innocently and legally obtained property untainted by crime. Is such a child adequately empowered by the Act and the court to protect her property rights?

In *Director of Public Prosecutions: Cape of Good Hope v Bathgate*,⁶⁶ the respondent’s counsel maintained that the restraint provisions of the *Proceeds of Crime Act*⁶⁷ are unconstitutional as they violate his fundamental right to privacy and his right not to be deprived of property.⁶⁸ Van Zyl J rejected the argument, stating that measures such as restraint and confiscation, although encroaching upon protected fundamental rights, are both equitable and morally justified.⁶⁹ The learned judge weighed, on the one hand, the nature and importance of the curtailed right in an open and democratic society and, on the other hand, the nature, extent, importance and purpose of the limitation. He concluded that the limitations contained in the impugned provisions are eminently justified.⁷⁰

The question arises whether the limitation of children’s fundamental rights in terms of the *Prevention of Organised Crime Act* is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.⁷¹ The *Bathgate* case juxtaposed the rights of the respondent, an alleged criminal, and the nature, extent, importance and purpose of the relevant limitation.⁷² However, it can hardly be argued that the severe limitation of the fundamental rights of children by the *Prevention of Organised Crime Act* can be justified morally and legally because the Act provides a “necessary and reasonable tool in the fight against crime” in South Africa.⁷³

65 Section 52. See paragraph 3.2 above.

66 [2000] JOL 5890 C.

67 Act 76/1996.

68 At pp 11[25]-12[25].

69 At p 57[90].

70 At pp 67[111]-68[112]. The learned judge, did not, however, discuss the issues raised by De Koker and Pretorius 1999:145ff, Pretorius and Strydom 1998:385ff and Van der Walt 2000:1ff. The rights of children were also not raised in this case.

71 Act 108/1996:section 36(1).

72 In *Director of Public Prosecutions: Cape of Good Hope v Bathgate* [2000] JOL 5890 C:12[26].

73 A recent case, *National Director of Public Prosecutions v Rebuzzi* [2000] JOL 6562 W, clearly illustrated the Court’s hesitance, without even taking the constitutional implications into account, to make orders to the detriment of innocent third parties and victims. Goldstein J deemed it inconceivable that a confiscation order could be made in circumstances where a known complainant is entitled to compensation

6. Children as innocent third parties in civil and criminal forfeiture proceedings in the USA⁷⁴

6.1 Legislative provisions⁷⁵

6.1.1 Affirmative defences to forfeiture

American forfeiture legislation provides for a number of affirmative defences to forfeiture. Once the Government has established probable cause to believe that the property was involved in a criminal offence, the claimant has to establish the defence by a preponderance of evidence. Claimants may attempt to prove that the underlying crime did not occur, that all or part of the seized property has an independent source and has not been used illegally, that there was an unreasonable delay between the time of seizure of the property and the institution of forfeiture proceedings, that the conveyance was a common carrier, that another person possessed the conveyance criminally and illegally or that the civil forfeiture of his property constitutes an excessive fine in violation of the Eighth Amendment of the Constitution.⁷⁶

American forfeiture legislation also provides for an “innocent owner” defence.⁷⁷ In civil forfeiture proceedings the defence operates as an exception

or repayment of money stolen that far exceeds the total assets under restraint. According to the learned judge, it would be absurd to grant a confiscation order that would deprive an innocent third party of recourse (at p 8[11]). However, the Supreme Court of Appeal overturned the decision in *The National Director of Public Prosecutions v Rebutzi* 2002 (2) SA 1 A. See fn 41.

74 American civil forfeiture procedures primarily inspired the civil forfeiture procedure contained in POCA. See De Koker 2001:18. This discussion will therefore focus on American legislative provisions. The term forfeiture is used in the USA with reference to civil as well as criminal forfeiture. The term “criminal forfeiture” is equivalent to the South African concept of (criminal) confiscation.

75 This discussion aims to draw attention to the position of children as innocent third parties in forfeiture proceedings. The investigation of American legislative provisions will, therefore, be limited to aspects that may relate to the position of children in forfeiture proceedings. Where several statutes regulate forfeiture, the author will focus on the most commonly used statute.

76 USA DOJ 1998:4-84 - 4-105.

77 The “innocent owner defence” is the term used generically to describe the statutory defences available to claimants who assert that they had nothing to do with the illegal acts that gave rise to the forfeiture action against their property.

78 POCA contains similar provisions in section 52. Civil forfeiture in America is regulated by several federal and state statutes, i.e. the drug forfeiture statute, 21 U.S.C. § 881, the general forfeiture statute for Title 18 offences, 18 U.S.C. § 981 and the statute that regulates forfeiture based upon an illegal gambling business, 18 U.S.C. § 1955. In *Bennis v Michigan* 516 U.S. 442 (1996) the Supreme Court held that the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment do not protect property owners from the forfeiture

to the traditional view of civil forfeiture as an *in rem* action against the property.⁷⁸ The general “innocent owner” defence in civil forfeiture proceedings determines that a claimant must prove on a preponderance of evidence that he/she is an innocent owner. An “innocent owner” would be an owner who did not know of the conduct giving rise to forfeiture; or upon learning of the conduct giving rise to forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.⁷⁹

The “innocent owner” defence in criminal forfeiture proceedings entails that a petitioner must establish by a preponderance of the evidence that he/she has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the criminal forfeiture of the property, or that he/she is a *bona fide* purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to criminal forfeiture.⁸⁰

In criminal forfeiture proceedings third parties cannot object to the entry of the preliminary order of forfeiture, nor move to dismiss the order. They

of their property, when the property was used to commit a criminal offence, even if the property owner had no knowledge of, and did not consent to, the illegal use of the property. The Court also found that there is no innocent owner defence in the absence of a statute providing for it. Unfortunately, innocent owner defences were not enacted consistently. Consequently, some forfeiture statutes contained no statutory defences while others expressly included innocent owner provisions. The fact that the innocent owner provisions differed from statute to statute exacerbated the confusion and the lack of clarity with regard to this defence. See U.S.A. DOJ 1998: 4-90. In 1996 the US Department of Justice proposed a uniform innocent owner defence that would apply to almost all civil forfeiture actions undertaken under federal law. The proposal was enacted into law as part of the *Civil Asset Forfeiture Reform Act of 2000* (CAFRA). CAFRA took effect on August 23, 2000 and applies to all civil forfeiture proceedings commenced on or after this date. Cassella 2001:97. The “innocent owner defence” contained in the Act is codified at 18 U.S.C. § 983(d). All civil forfeiture statutes are subject to an innocent owner defence that is the same regardless of the statute under which the forfeiture action is brought. However, 18 U.S.C. § 983(i) excludes the Tariff Act of 1930 or any other provision of law codified in title 19, the Internal Revenue Code of 1986, the *Federal Food, Drug, and Cosmetic Act*, the *Trading with the Enemy Act* and section 1 of title VI of the Act of 15 June, 1917 from the ambit of § 983 (d). For civil forfeitures under these statutes, the innocent owner provisions of 21 U.S.C. § 881(a)(4) and not the uniform innocent owner defence contained in CAFRA, apply. Cassella 2001a:670. For an illuminating article on CAFRA and the legal position before August 2000, see Cassella 2001a:653-709. Compare n 88.

79 Cassella 2001a:672 and 2001b:111. For a discussion on what constitutes “knowledge” see U.S.A. DOJ 1998: 4-100, Cassella in U.S.A. DOJ 1999:1-5 and 2001a:684-686.

80 21 U.S.C. § 853(n)(6)(A) and (B).

81 The ancillary proceeding provisions provides a forum where third parties could establish that a criminal forfeiture order was invalid because the property belonged to them and not to the defendant. U.S.A. DOJ 1998:6-57. The hearings are governed by 21 U.S.C. 853(n).

must file a claim in an ancillary hearing proceeding in order to assert their interest in property subject to forfeiture.⁸¹ In order to have standing to file a petition in the ancillary hearing proceedings, claimants must assert a legal interest in property that has been ordered forfeited to the USA.⁸²

6.1.2 Remission or mitigation

21 U.S.C § 853 (i)(1) provides for the remission or mitigation of criminal forfeiture. In terms of this section, the Attorney General has a discretion to remit forfeited property to third parties after the conclusion of the ancillary hearing proceedings and the entry of the final order of forfeiture.⁸³ 28 C.F.R Part 9 allows for the remission or mitigation of *inter alia* civil and criminal judicial forfeitures.⁸⁴ The criteria for remission differ depending on whether the property is forfeited criminally or civilly. If the petitioner seeks remission of civilly forfeited property, it must establish:⁸⁵

a valid, *bona fides*, and

82 U.S.A. DOJ 1998:6-67. Spouses, lienholders, secured creditors, and persons who took title from the defendant or were using the defendant as a nominee owner are usually able to meet the standing requirements.

83 U.S.A. DOJ 1998:6-82. This is a remedy designed to ameliorate the harshness of the forfeiture sanction and is an act of pardon by the Executive Branch of Government. The statutory basis for petitions for remission or mitigation was enacted in its present form in the *Tariff Act* 1930, at 19 U.S.C. sections 1613 and 1618. U.S. DOJ 1998:9-1.

84 The Federal Bureau of Investigation, the Drug Enforcement Administration and the Immigration and Naturalization Service share the set of remission regulations found at 28 C.F.R. Part 9. These regulations apply to the Criminal Division of the Department of Justice for petition decisions in judicial forfeiture proceedings. The purpose of the regulations in Part 9 is to provide a basis for ameliorating the effects of forfeiture through the partial or total remission of forfeiture for individuals who have an interest in the forfeited property but who did not participate in, or have knowledge of, the conduct that resulted in the property being subject to forfeiture and, where required, took all reasonable steps under the circumstances to ensure that such property would not be used, acquired, or disposed of contrary to law. Additionally, the regulations provide for partial or total mitigation of the forfeiture and imposition of alternative conditions in appropriate circumstances.

85 In accordance with 28 C.F.R. § 9.5(a)(1).

86 28 C.F.R § 9.2(j) defines the term lienholder as a creditor whose claim or debt is secured by a specific right to obtain satisfaction against the particular property subject to forfeiture. A lien creditor qualifies as a lienholder if the lien was established by operation of law or contract, created as a result of an exchange of money, goods, or services and perfected against the specific property forfeited for which remission or mitigation is sought (e.g., a real estate mortgage; a mechanic's lien).

87 In terms of this section the term owner means the person in whom primary title is vested or whose interest is manifested by the actual and beneficial use of the property, even though the title is vested in another. A victim of an offence, as defined in paragraph (v) of this section, may also be an owner if he or she has a present legally recognised ownership interest in the property forfeited. A nominal owner of property will not be treated as its true owner if he or she is not its beneficial owner. 28 C.F.R. § 9.2(e) defines a "beneficial owner" as a person with actual use of, as well as an interest in, the property subject to forfeiture.

a legally recognized interest in the seized property as owner or lienholder as defined in 28 C.F.R. § 9.2(j)⁸⁶ or (l),⁸⁷

that it is innocent within the meaning of the innocent owner provisions of the applicable civil forfeiture statute,⁸⁸

and that it is a *bona fide* purchaser for value without cause to believe that the property was subject to forfeiture at the time of the purchase.

In the criminal forfeiture context,⁸⁹ the petitioner must establish:

a valid *bona fides*, and

a legally recognised interest in the seized property as owner or lienholder as defined in 28 C.F.R. § 9.2(j) or (l)

and that it is a *bona fide* purchaser for value without cause to believe that the property was subject to forfeiture at the time of the purchase; or

that it is one who holds a legally recognised interest in the seized property at the time of the violation underlying the forfeiture superior to that of the defendant within the meaning of the applicable criminal forfeiture statute and is thereby entitled to recover his or her interest in the forfeited property by statute.⁹⁰

The ruling official may grant mitigation to a party not involved in the commission of the offence when either the petitioner has not met the minimum conditions for remission, but some relief is warranted; or the petitioner has satisfied the minimum standards for remission, but the overall circumstances are such that complete relief is not warranted.⁹¹

6.1.3 Protection of the interests of children as innocent third parties in the imposition of *interim* orders

Apart from the provision contained in 18 U.S.C § 983(d)(3)(B) which protects the primary residence from forfeiture as “facilitating property” if one spouse was innocent, US forfeiture legislation does not make specific provision for the protection of children’s interests and their maintenance when assets are frozen or forfeited.⁹²

88 In petitions relating to forfeitures in terms of the *Tariff Act* of 1930 or any other provision of law codified in title 19, the Internal Revenue Code of 1986, the *Federal Food, Drug, and Cosmetic Act*, the *Trading with the Enemy Act* and section 1 of title VI of the Act of 15 June, 1917, the innocent owner provisions of 21 U.S.C. § 881(a)(4) apply. Compare n 78.

89 28 C.F.R. § 9.5(a) (1) also applies.

90 U.S.A. DOJ 1998:9-4.

91 28 C.F.R. § 9.5(b)(1). Relief may be granted to avoid extreme hardship and when it will promote the interest of justice and will not diminish the deterrent effect of the law. U.S.A. DOJ 1998:9-4-9-5.

92 Any person seeking to exclude assets or money in the interests of dependant children will, therefore, have to argue on the basis of constitutional law and the fundamental rights involved.

US constitutional law determines that no one has the right to use criminal proceeds for personal expenses pending trial. If, therefore, the government succeeds in showing, in the pre-trial setting, that there is "probable cause" to believe that certain assets were derived from or used to commit criminal activity, that property may not be used by the defendant for any personal purpose.⁹³

6.2 Relief for children as innocent third parties?

Any claimant contesting forfeiture in both civil or criminal forfeiture cases and any petitioner seeking remission or mitigation must trace a legal interest in the particular property that has been ordered forfeited.⁹⁴ To have standing, a claimant must demonstrate a sufficient interest in the property.⁹⁵ Courts generally look for some indication of ownership such as dominion and control over the property, title, possession, and financial stake.⁹⁶ Children cannot easily prove any of the above-mentioned indications as it is very difficult for children to exercise dominion and control over property held in their name. Minors, for instance, do not have legal capacity and their guardians assist them in legal intercourse. If the guardian is the accused, how does a child prove legal ownership?

93 In a leading case involving the use of such property to pay for legal counsel (a constitutional right under the 6th Amendment) *United States v Monsanto*, 491 U.S. 600 (1989), the Court found that the federal drug forfeiture statute (21 U.S.C § 853) authorizes a district court to enter a pre-trial order freezing assets in a defendant's possession, even where the defendant seeks to use those assets to pay an attorney and that such an order is permissible under the American Constitution. According to Casella, it is almost certain the same principle would apply to the use of such property for other personal expenses like household maintenance and childcare. American constitutional decisions, however, also hold that if a defendant first demonstrates that he lacks other funds to pay for essential expenses, including attorneys fees and living expenses for his family, the government must submit to a hearing, and must demonstrate probable cause in order to maintain its control over the defendant's assets pending trial. In *United States v Jones*, 160 F.3d 641 (10th Cir. 1998) the Court held that a defendant carries the initial burden of showing that he has no funds other than the restrained assets to pay for living expenses. If the defendant succeeds in showing this he is entitled to a hearing.

94 U.S.A. DOJ 1998:9-5.

95 A claimant must, therefore, have an ownership or possessory interest in the property. To have standing to assert an innocent owner claim under 18 U.S.C. § 981, in particular, one must be an owner or lienholder. U.S.A. DOJ 1998:4-32.

96 However, asserting bare legal title is not enough. Case law indicates that with remission, which follows the same rules for standing as other forfeiture contesting procedures, a person who holds legal title to property, but who exercised no dominion or control over the property will be denied remission. In *United States v Sokolow*, Crim. No 93-394-01, 1996 WL 32113 (E.D.Pa.Jan.26, 1996) (unpublished) the Court held that bare legal title without exercise of dominion and control is insufficient to establish standing, the defendant cannot protect his property from forfeiture simply by making sure it is titled in his daughter's name before he uses it to commit a crime. U.S.A. DOJ 1998:9-6.

97 28 C.F.R. § 9.5(b)(1)(i).

It seems as if relief for children may be available in mitigation of forfeiture orders. Mitigation may be granted *inter alia* when the petitioner has not met the minimum conditions for remission, but some relief is warranted.⁹⁷ As section 9.5(b) provides that such relief may be granted to avoid extreme hardship and when it will promote the interest of justice, these provisions may serve to protect children who are innocent third parties.⁹⁸

Possible relief may also be found in the Excessive Fines Clause of the Eighth Amendment.⁹⁹ If the mandatory forfeiture is “grossly disproportional to the gravity of the offence”, the forfeiture must be mitigated to avoid a violation of the Excessive Fines Clause of the Eighth Amendment. Courts are somewhat divided on what measures to employ when balancing the “gravity of the offence” against the impact of the forfeiture, but some courts do discount the impact of the forfeiture on the defendant’s family.¹⁰⁰

7. A possible solution

It is clear from the above that the interests of children can, in some instances, be severely affected by asset forfeiture and confiscation orders provided for under the *Prevention of Organised Crime Act*. It is also clear that the legislation does not specifically provide for the protection of the interests of children as innocent third parties in such proceedings. In order to avoid costly litigation and to conform to constitutional requirements, this *caveat* should be addressed without delay. Establishing a new structure for such proceedings will, however, be prohibitively expensive. A more viable solution would be to seek a solution in existing legislation protecting children’s rights in other areas of the law in South Africa.

Section 6 of the *Divorce Act*¹⁰¹ addresses the safeguarding of the interests of dependent and minor children in divorce matters. The Act determines that a High Court granting a divorce order may not dissolve a marriage unless it is satisfied that the provisions made for the minor and dependent children are “satisfactory” or “the best that can be effected in the circumstances”.¹⁰²

98 See footnote 82.

99 The Eighth Amendment in the US Constitution provides that presiding officers shall not require excessive bail, nor impose excessive fines, nor inflict cruel and unusual punishments.

100 See *United States v Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995).

101 Act 70/1979.

102 Section 6(1)(a). Clark 1996:86. Section 6(2) furthermore provides that in order to decide about the post-divorce care of the children, the High Court has the power to make any order which it may deem fit and may also cause any investigation to be made for the purpose of deciding the future care of the children. Bosman & Van Zyl 1997:58.

103 Act 70/1979.

104 24/1987. The Act came into operation in 1990 and established the Family Advocate’s office. It provides for the appointment of family advocates in the public service at each division of the High Court and for family counselors (qualified social workers) to assist the family advocates. The Act, through the

To this end, section 6(1)(b) of the Act¹⁰³ provides for an enquiry by the family advocate into the interests of a minor or dependent child in terms of the *Mediation in Certain Divorce Matters Act*.¹⁰⁴ Section 6(4) furthermore provides that the Court may appoint a legal practitioner to represent a child at divorce proceedings.¹⁰⁵

It is suggested that a minor amendment to the *Prevention of Organised Crime Act* should apply *mutatis mutandis* the provisions of the *Mediation in Certain Divorce Matters Act*¹⁰⁶ in certain cases where property are forfeited or confiscated in terms of the *Prevention of Organised Crime Act*.¹⁰⁷

Whenever the Court hears an application for an asset forfeiture or confiscation order and the defendant has minor or dependent children, the Court should consider whether there is a possibility that property that the defendant obtained legally and is required for purposes of maintenance or parental care of minor children may be exposed to forfeiture or confiscation. In the event that such a possibility exists, the Court should request the Office of the Family Advocate to become involved to safeguard the interests of such children. Upon request of the Court, a family counsellor should institute an enquiry into the welfare of the children. The purpose of an enquiry should be to enable the Family Advocate to furnish the Court with a report and recommendations on any matter concerning the financial welfare of each minor or dependent child of the defendant, the possible effect of

involvement of the Family Advocate's office, plays an important role in the protection of the interests of children in divorce and related matters. The Family Advocate may become involved in a matter in three ways: By perusing the compulsory Annexure A which is attached to every divorce summons [S 4(2) of Act 24/1987], upon request by the parties involved or the Court concerned [S 4(2)]. The aim of the Family Advocate is to settle the matter between the parties on terms that will reduce conflict and be most favourable to the welfare of the children. The purpose of an enquiry is to enable the Family Advocate to furnish the Court with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage. If the Family Advocate assists the Court and a report is filed, the Court may dissolve the marriage only after the report and recommendation(s) have been considered. [Section 6(1)(b) of Act 70/1979] See Burman & McLennan 1996:71-72; Bosman & Van Zyl 1997:64 and Cronje & Heaton 1999:187.

105 The Court may also order the parties to pay the costs of the representation.

106 Act 24/1987.

107 Such a suggestion might meet with the criticism that the Office lacks the necessary human resources for such an extended brief. Burman and McLennan 1996:81 have already indicated during 1996 that the Office of the Family Advocate will require many creative solutions to cope with the number of cases it is involved in. Since 1996 the functions of the Office of the Family Advocate have been extended to include enquiries in terms of the *Natural Fathers of Children Born out of Wedlock Act* 86/1997 and the *Recognition of Customary Marriages Act* 120/1998. For a brief discussion highlighting the problems plaguing the Office of the Family Advocate, see Whittle 2001:22.

108 It is important to note that the author is not suggesting that children should acquire rights in illegally obtained property and that such property should not be confiscated or forfeited because children may use or need it. Therefore, a distinction should be drawn between cases where the property forfeited or

such orders and the future care of the children. The Court should only be allowed to make an order after the report and the recommendations have been considered.¹⁰⁸

In the absence of such an amendment to the *Prevention of Organised Crime Act* the Courts are urged to consider the impact of the orders that they may make on minor children and possible ways to protect their rights.

8. Conclusion

Section 28 of the South African Constitution makes it patently clear that with regard to issues such as family or parental care, social services, maltreatment and abuse or degradation, the approach of the Courts must be to regard the child's best interests as paramount.¹⁰⁹

Therefore, the constitutional rights of children should guide every legislative decree, executive action and judicial decision that has a bearing, directly or indirectly, on children.¹¹⁰

The judiciary should jealously guard the fundamental rights of children and promote the spirit, purport and objects of the Bill of Rights¹¹¹ when it

confiscated can be clearly identified and distinguished from legally obtained assets and cases where it is not possible to identify the proceeds so clearly. It is only when the proceeds of crime are so intermingled with other legally obtained property that it cannot be identified that children's rights come into play and forfeiture and confiscation orders should be imposed with due cognisance of the relevant constitutionally protected human rights of innocent third parties, in particular children, involved.

109 Davis *et al* 1997:265.

110 An obligation rests upon the State to initiate legislation and programmes which will ensure that the rights of children are respected not only *vis-à-vis* the State, but also between individuals. The State should not only take steps to ensure that no legislation infringes upon the rights of children, but should also adopt legislative and other measures to ensure that legal standards are applied in the community. For a discussion of the enforcement of children's rights in South Africa, see De Villiers 1993:289-310.

111 *The Constitution of the Republic of SA Act 108/1996*: s 39(2).

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