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**CHILDREN'S PARTICIPATION AND PROCEDURES AT THE
OFFICE OF THE FAMILY ADVOCATE**

BY

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DECLARATION

I, FELICITY GERTRUDE WILLIAMS hereby declare that this
dissertation

“CHILDREN’S PARTICIPATION AND PRACTICES AT THE
OFFICE OF THE FAMILY ADVOCATE”

is the result of my own work entirely, except as indicated in the text
by references and quotations. This dissertation has not been
submitted in part or in full to any other institution or for any other
degree.

.....
F.G. WILLIAMS

ABSTRACT

Children's right to participate in judicial and administrative matters that affect them is perhaps the most frequently overlooked children's right, globally. This research was a descriptive study of what exists with regard to children's participation, at the Office of the Family Advocate, when parents divorce.

The methods of data collection used included a content analysis (quantitative method) a focus group interview (qualitative method) and review of the literature and legislation. The content analysis involved analyzing the data of forty case files involving disputed cases, according to a content analysis schedule. The focus group interview was conducted with family advocates and family counselors and focused on various factors that facilitate or impede children's participation at the enquiry.

The data obtained was analyzed manually and presented in the form of pie charts, tables, discussions and quotes. From the content analysis the researcher found that most children had definite views regarding their future care. One of the factors that hinder children's participation at the enquiry is the fact that not all enquiries are conducted using the team approach. The research also indicates that the adversarial nature of divorce proceedings impact negatively on children's participation and a more conciliatory approach would prove more child-centered.

The focus group interview indicates that the professionals involved have positive attitudes towards children's views and participation in the enquiry. Children's expressed wishes are considered in conjunction with other factors such as the bond between parent and child, and the suitability of the parent. The focus group participants made various suggestions with regard to ensuring a more child-centered approach regarding children's participation. The researcher presented the major findings, together with recommendations for future research at the end of the study.

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Foreword

In a meeting of under-18 delegates to the United Special Session on Children, held in New York from 5 to 7 of May 2002, children had their own views on children's participation. An extract from this Children's Forum Message, titled "A world fit for us" reads as follows:

We see the active participation of children:

- Raised awareness and respect among people of all ages about every child's right to full and meaningful participation, in the spirit of the Convention on the Rights of the Child,
- Children actively involved in decision-making at all levels and in planning, implementing, monitoring and evaluating all matters affecting the rights of the child.

We pledge an equal partnership in this fight for children's rights. And while we promise to support the actions you take on behalf of children, we also ask for your commitment and support in the actions we are taking – because the children of the world are misunderstood.

We are not the sources of problems; we are the resources that are needed to solve them.

We are not expenses; we are investments.

We are not just young people; we are people and citizens of the world.

(A world fit for us – 2002)

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Chapter 1

Children's participation: Practices and procedures at the Office of the Family Advocate.

1. Introduction

Much interest and concern is evident in the welfare of children experiencing parental divorce. The dramatic increase in the number of divorces granted in South African Courts, combined with changes in the local and international legal framework and a shift from parental rights to children's rights, all give rise to the need for on-going research in this field. For children, parental divorce is a traumatic and stressful time, when they are often not informed of, or consulted regarding any of the decisions taken. 'Children are often not told what is happening, until it happens' (Bishop & Mitchell, 1989: 441). The trauma that usually accompanies the disintegration of the family unit can be minimized by appropriate post-divorce arrangements for the children (Burman & McLennan, 1996: 69). Children's involvement in such arrangements could prove invaluable in focusing parents on the children's needs during this process.

The shift towards children's rights has contributed to a growing awareness that children should be viewed as active bearers of rights as opposed to passive victims of their parents' divorce (Douglas et al, 2001: 373). Research on children's participation in decision-making could assist in ascertaining the extent and nature of such participation, and how to improve on children's participation in matters that affect them. The literature indicates two levels of children's participation, one at the level of the family and one at the level of the State (Rwezaura, 1998: 296). This research aims to evaluate issues relating children's participation at the level of the State, when there is a dispute between parents regarding custody or access of the children. It focuses on participation of children at the enquiry process at the Office of the Family Advocate. This research also

aims to ascertain the attitudes of family advocates and family counsellors at the Office of the Family Advocate towards children's participation.

1.1 Motivation and value of the study

Divorce is perceived by most, including the South African legislature, as an issue between two spouses. For this reason, only a husband and a wife are allowed to be party to the divorce proceedings and children have no right to be joined as parties. Yet, children are often the ones whose lives are most severely affected by this process (Hardy, 1999: 207). As a family counsellor at the Office of the Family advocate the researcher comes into contact daily with children whose lives are disrupted by the breakdown of their families. They often have little or no control over events in their lives at this stage. A process that allows children to participate meaningfully when custody and access issues are concluded, gives children some control over their own future at this time.

There is a tendency in family law proceedings to rely on parents to convey the views of the children regarding custody and access arrangements, a practice that is not necessarily in children's best interests. Attorneys who act on behalf of parents during divorce proceedings also have a tendency of hearing about the children second hand (Bishop & Mitchell, 1989: 441). Despite having ratified the UN Convention on the Rights of the Child in June 1995, the legislature has done little to actively ensure children's participation in matters that affect them. The literature suggests that most children want to participate in matters that affect their lives as directly as divorce and its consequences do.

Countries such as England and Scotland have included in their legislation mechanisms to ensure children's participation and ascertaining their views in judicial or administrative proceedings, to bring them in line with the UN Convention. There is a need to research this issue in the South African context, to ensure that our country works towards ensuring children's participatory rights as set out in the Convention.

Children's rights and interests have become a global interest. Governments around the world have realized that children's rights need to be prioritized. Despite this, few countries invest in their children by way of allocating appropriate budgets and resources. Those who advocate for children's participation in decision-making acknowledges that it is a process that requires time, commitment and finances.

The concept of children's participation in decision-making evokes divergent views and is also by its very nature, a complex notion which requires research. Boyden and Ennew, as quoted by McNeish (1999:191) mention two interpretations of the term 'participation'. 'It can simply mean taking part or being present. Alternatively it can denote the transfer of power so that participants have real influence on decisions' (McNeish, 1999: 191). In the researcher's opinion, the latter is the type of participation envisaged by the UN Convention. The practical **challenges** involved in this form of participation should not be under-estimated and requires scrutiny and evaluation. It involves changes in people's mindsets, transformation of organizations' culture and requires adaptation of procedures and policies. This study hopes to contribute to the growing body of knowledge on what the obstacles and challenges are to children's participation when their parents are divorcing. Ensuring and promoting children's participation at the Office of the Family Advocate, a State department and therefore a duty-bearer in terms of the Convention, requires further deliberation.

1.2 Aims and objectives of this study

1. To ascertain what practices and procedures are currently in place in South Africa to promote children's participation upon their parent's divorce.
2. To assist with the formulation of more focused policy with regard to children's participation at the enquiry conducted at the Office of the Family Advocate.
3. To make a contribution to the growing body of knowledge on how to improve on children's participation in family law proceedings.

1.3 Key questions

1. What practices and procedures are in place at the Office of the Family Advocate to ensure and promote children's participation at the time of their parents' divorce?
2. What are the attitudes, views, perceptions of family Advocates and family counsellors with regard to children's participation at the enquiry?

1.4 Research methodology

1.4.1 Selection of a design

Research design has the distinct purpose of providing answers to our research questions. It is aptly described as a 'program to guide the researcher in collecting, analyzing and interpreting observed facts' (Bless & Higson-Smith, 1995: 63). A research design is also seen as the 'total plan' used by a researcher to assist in answering research questions (Grinnell, 1990: 138). Both qualitative and quantitative methods were utilized in this research.

The content analysis (or record method) utilized in this research is a quantitative method of data collection. Bless & Higson-Smith (1995: 126) describes this as a useful method to combine with other methods. In this study, the content analysis was used in conjunction with the focus group interview. The latter is a qualitative method of data collection. An overview of the literature gives one a sense of qualitative research being concerned with learning, understanding and interpreting human conduct. Qualitative research aims to 'tap the deeper meanings of particular human experiences and are intended to generate theoretically richer observations that are not easily reduced to numbers' (Rubin & Babbie, 1997: 26).

The purpose of research is generally defined in the literature as exploration, description and explanation. Rubin and Babbie (1997: 108) report that, most studies have traces of all three. This study adopted a descriptive approach, as it was aimed at establishing 'what exists or occurs' with regard to the children's participation and best interests, at the Office of the Family Advocate when custody or access was in dispute. It was aimed at ascertaining the extent to which children participate and have their voices heard during these proceedings. The study also contained an element of evaluation, as it considered the suitability of current practices and ways in which to improve these, in order to enrich outcomes for the children involved.

1.4.2 Sampling method

Two types of sampling methods exist, namely probability and non-probability sampling. The former is more likely to render a sample representative of the population under study (Rubin & Babbie, 1997:237).

The researcher analyzed the contents of 40 randomly selected case files, from the Office of the Family Advocate, KwaZulu-Natal. Cases were selected in accordance with the following criteria.

- Parents who initiated divorce proceedings or requested a variation of custody or access in the period 2001 to 2003.
- There was a dispute between the parents regarding custody or access of the minor children born of the marriage.
- The parties attended an enquiry at the Office of the Family Advocate.
- The children were 10 years or older and were able to participate at the enquiry by way of expressing their views and feelings regarding the outcome of the custody or access dispute.

The reason for including children from age 10, stems from an existing norm set by the Child Care Act (74 of 1983) where in adoption matters, children of 10 years and older must consent to being adopted. The legislature appears to view

children of this age as competent to make informed decisions regarding their own placement.

1.4.3 Methods of data Collection:

1.4.3.1 Review of literature, legislation and case law

Reviewing current literature, legislation and policies relating to children's participation at the time of parents' divorce provides a good basis from which to commence this research. Section 6 of the Divorce Act (70 of 1979) allows for the courts to scrutinize the custody and access arrangements made for the children to ensure they are the best that can be made under the circumstances. The granting of a final order of divorce therefore depends on the courts' satisfaction with these arrangements (Davel, 2000: 69). The Mediation in Certain Divorce Matters Act (24 of 1987), hereafter referred to as the Mediation Act, provides for the involvement of a family advocate and family counsellor, to safeguard the children's interests at the time of divorce, and thereafter (Robinson, 1997: 65). The above review provides a backdrop against which to evaluate children's involvement in the enquiry at the Office of the Family Advocate.

1.4.3.2 Content analysis of case files

Content analysis is described as a quantitative data collection technique used for examining information or content and is used most often in descriptive research (Neuman, 1997: 31). As referred to earlier, this method is also described by some as the record method (Bless & Higson-Smith, 1995: 125). A content analysis method was utilized to collect data, instead of conducting interviews with children, a method that can cause further distress at this point when they are experiencing the disruption of parental divorce. This method allows for the gathering of information without direct interaction with the respondents.

Information was obtained from previous records of enquiries held with children and their parents, the content of which is contained in case files and evaluation reports compiled by family advocates and family counsellors. As the respondents were unaware that they are the subjects of a study, this method of data collection eliminated some biases (Bless & Higson-Smith, 1995: 126).

Evaluation reports are compiled mostly by family counsellors, in accordance with the objective of the Mediation in Certain Divorce Matters Act (24 of 1987), 'to safeguard the interests of such children'. These reports contain biographical details of parents and children, claims made by both parents, the reasons for such claims, the children's views and input, together with recommendations by the family advocate and family counsellor. This report formed the basis of this study.

The content analysis framework covered three themes relevant to the study. These 3 areas include

- Demographic details of parents and children.
- Practices and process of the enquiry held at the Office of the Family Advocate and the opportunities provided for children to participate and express their views and feelings.
- The extent to which the child's views and wishes were instrumental in shaping final recommendations made to the court by the Office of the Family Advocate. In cases where the family advocate's and –counsellor's recommendations did not reflect the expressed wishes of the child, the reasons given for the discrepancy was ascertained.

1.4.3.3 Focus group interview

A focus group interview is a qualitative method that allows the researcher to interview several people at the same time, regarding a particular topic. Bless & Higson-Smith (1995: 113) view of the focus group is that it "enables members of a group to share their experiences and to reach some kind of consensus about

the topic of research'. The use of a focus group interview was ideal in this study, as the group members were afforded the opportunity to exchange ideas and experiences on children's participation.

Family advocates and family counsellors are the professionals tasked with putting the Mediation in Certain Divorce Matters Act 24 of 1987 into practice. Their role is to safeguard children's best interests at the time of parents' divorce or thereafter. They are best equipped to comment on the participatory process at the Office of the Family Advocate, and this knowledge base was tapped by means of a focus group interview with the family advocates and family counsellors. A focus group ensured that any concerns regarding children's participation and input at the inquiries were brought to the fore.

A focus group interview guide was formulated, based on results and pertinent issues identified in the content analysis. The central issues focused on matters pertaining to practices and procedures at the Office of the Family Advocate, the views and feelings of the family advocates and counsellors on how best to promote children's participation at the enquiry. Permission to conduct this study was obtained in writing from Advocate M. C. O'Gorman, head of the Office of the Family Advocate, KwaZulu-Natal. All participants of the focus group consented to being part of the study.

1.5 Data analysis

Data obtained was analyzed and depicted using tables and graphs.

1.6 Limitations of the study

One of the limitations of the study was not hearing from the children directly, since the topic is children's participation. Information obtained through records of previous inquiries held with the child possibly has the possible disadvantage of reflecting the views of the professionals, rather than the child's. On the other hand, this unobtrusive method of data collection has the advantage of not subjecting children to further questioning, considering the trauma and stress

already associated with divorce. Also, time limits would pose a problem, as children and parents whose case files were included come from the Province of KwaZulu-Natal, a vast area to cover by other means. The study will further only include case files of parents who reside in KwaZulu-Natal, and the sample will therefore be limited to this region and will exclude practices in other Provinces.

1.7 Key concepts

Access – refers to contact by a non-resident parent in order to maintain an on-going relationship with the child. It is also referred to as visitation.

Child – refers to a person under the age of 18 years (Constitution of South Africa, Act 108 of 1996)

Custody – ‘implies control over the person of the child in other words control over the child’s day-to-day life’ (Cronjé, 1999: 208).

Divorce – refers to dissolution or termination of a marriage by a court (Hahlo, 1985: 330). It also means, to terminate ones’ marriage (Thesaurus dictionary)

Enquiry – refers to the meeting conducted by the Office of the Family Advocate, where arrangements relating to the best interests of the children involved are discussed, monitored, mediated and evaluated.

Non-custodial parent – refers to the parent who is not responsible for the child’s day-to-day care, and is also referred to as the non-resident parent.

Participation – In this study the concept of participation denotes the involvement of the child and their inclusion and contribution in the enquiry process. It is also aimed at ascertaining the children’s views and encompasses the number of inquiries conducted.

1.8 Structure of the report

This report will consist of four chapters, which will cover the following topics:

Chapter 1 - Introduction, Motivation and Research methodology

Chapter 2 - Review of the literature

Chapter 3 - Data analysis and discussion

Chapter 4 - Recommendations and Conclusion

Chapter 2

Literature review

Issues underlying children's participation in family law proceedings

2. Introduction

The United Nations Convention on the Rights of the Child (1989) has put children's rights in the local and international spotlight and on the agendas of most governments. Van Bueren (1996: 31) describes it as a 'quiet revolution' in that this Convention acts as a catalyst for reform in the area of children's rights. It compels governments around the world to evaluate their policies, practices and legislation pertaining to children. It also provides us with the opportunity to hold States accountable for ensuring children's right in the four broad categories, namely: prevention, provision, protection and participation (Van Bueren, 2000: 203).

Hollamby, (<http://www.gu.edu.au/centre/flru/hollamby.doc>) reports that even though children's participation form one of the four cornerstones of the UN Convention, this aspect is seldom considered in the South African context when laws are made or reformed. Those involved in the process of resolving custody and access disputes realize the potential benefits of allowing children to participate in decision-making processes. Research reveals that including children in the mediation and decision-making process, assists in the following ways:

- It satisfies both parents' and children's requests to be involved.
- It helps everyone maintain or refocus on the children's needs.
- It gives children a sense of being heard or being able to offer something at a time when they feel helpless and powerless.
- It allows for expansion of parents' thinking when their differing / divergent views threaten an impasse (Gentry, 1997: 311).

To meaningfully research the issue of children's participation, there is a need to understand the unique South African framework, and issues that underlie, facilitate or impede on children's participation.

This chapter examines 5 major themes central to children's participation in decision-making at the time of their parents' divorce. These include:

- 2.1 The United Convention on the Rights of the Child and children's participation
- 2.2 The best interests of the child concept
- 2.3 Divorce as an adversarial process
- 2.4 Family law legislation, policies, practices and procedures relating to children when parents divorce
- 2.5 Children's participation in custody and access disputes

2.1 The United Nations Convention on the Rights of the Child and children's participation

The United Nations Convention on the Rights of the Child (1989) lays the base for children's participation in administrative and judicial matters that affect them. Having ratified the United Nations Convention on the Rights of the Child (hereafter referred to as the UN Convention) the State is obliged to fulfill the duties laid down by this Convention. Van Bueren (2000: 203) mentions that the UN Convention is mainly concerned with the four 'P's, namely:

- Protection against discrimination and all forms of torture.
- Prevention of harm to children.
- Provision of assistance for children's basic needs.
- Participation of children in decisions affecting their destiny and community life

Many regard the above as a hierarchy of rights with protection, provision and prevention as more important than a child's right to participation. The researcher is of the view that participatory rights of children are as important as their other rights, as this right to participate will ensure that services aimed at protecting and providing for children, are responsive to their actual rather than their perceived

needs. Van Bueren, (2000: 207) aptly captures what she refers to as a 'false priority' where preference is afforded to children's protection rights, to the detriment of their right to participate in matters that affect them. She further recounts that it is implicit in the UN Convention that the quality and nature of child protection improves in communities that listen to children (Van Bueren, 2000: 202).

For the purpose of this research, particularly pertinent to participation, is Article 12 of the UN Convention on the Rights of the Child (1989) which reads as follows:

- 1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child.*
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Masson (<http://www.gu.edu.au/center/flru/masson.doc>) opines that children are the experts in their own lives and that the Article 12 of the UN Convention seeks to challenge children's exclusion from decision-making, thereby facilitating their development and improving decisions made about them. She also views children's right to participate, as an acknowledgment of the importance of their views. Rwezaura (1998: 296) is of the view that the most important aim of Article 12 is 'to promote the best interests of the child by enabling that child to participate, in a meaningful way, in all decisions that affect his or her life.'

Barrat (2002, 152) fittingly describes Article 12, as "essentially a procedural right", and reports that it directs us to review procedural aspects and methods in which children's views are articulated. She further postulates that whether the

child's views eventually take precedence or not, the participation in itself could prove valuable.

2.2 The best interests of the child and participation

The best interests of the child at the time of divorce or at any other time is said to be 'like a golden thread, which runs throughout the whole fabric of our law relating to children' (Clarke, 2000: 3). The researcher is of the view that participation of children in issues that affect their lives is central to the best interest's concept and therefore will be included in the literature review. One cannot claim to act in children's best interests, without allowing participation and the power to influence decisions that affect their lives. In this lies the dilemma that in some instances the child's best interests is viewed as being in conflict with their expressed wishes.

2.2.1 International and local framework and the best interests of the child:

The best interests' standard is contained in various international and local guidelines, aimed at promoting children's rights and interests. These instruments serve to influence the manner in which children's issues are addressed, and therefore require further scrutiny. These will be dealt with from a broader (international) perspective, to a more South African (local) perspective.

2.2.1.1 The UN Convention and the best interests' concept

Article 3 of the UN Convention requires that in all actions concerning children, their best interests shall be a primary consideration. It is therefore logical that this area of family law will have to be reconsidered to reflect the intent and spirit of this Convention. The UN Convention is described as a 'powerful yet peaceful agent of social change', and has 'persuaded all but two of the world's governments to be legally bound by the Convention's provisions' (Van Bueren, 2000: 202). John (1996: 6) aptly describes the UN Convention as the 'benchmark for a change of priorities in our relationships with children, professionally and otherwise'.

2.2.1.2 The African Charter on the Rights and Welfare of the Child and the best interests' standard:

Viljoen (2000: 214) reports that the African Charter is not well known in South Africa or in other countries in Africa and that it has recently (1999) come into force. Article 4 of the African Charter on the Rights and Welfare of the Child (hereafter referred to as the African Charter), places a duty on the State to ensure that the best interests of the child is the primary consideration in every matter that affects the child. It places a further duty on powers other than the State, to also ensure that the child is afforded an opportunity to have his / her views heard. This can be done 'either directly or through an impartial representative as a party to the proceeding and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate laws'

Interestingly, the African Charter contains both issues of best interests and the child's right to be heard within the same Article. The drafters recognized and acknowledged the fact that the two concepts are inextricably linked. It is difficult to promote a child's best interests, without allowing the child, capable of participating, a voice in the process. The difficulties associated with children's participation poses particular challenge in Africa, as decision-making has always been the domain of adults. Rwezaura's (1998: 296) appropriately captures our African perspective on this point as follows; 'Although the child's right to participate in decisions is often overlooked in our region, this right is central to the whole children's rights agenda'.

2.2.1.3 History of the best interests principle and the role of the South African Constitution

The South African courts traditionally allocated custody of the children born of the marriage on the basis of what was known as the 'fault factor'. According to Schäfer (1993: 25), this practice stems from the patriarchal character of Roman-Dutch law of custody. The fault factor meant that the person responsible for the

breakdown of the marriage would generally be regarded as less suitable to have custody of the children born of the marriage. It has since become an accepted norm that the reason for the breakdown of a marriage more often reflect on the parties as spouses, rather than as parents. In other words a parent could, by virtue of his / her behaviour, be responsible for the breakdown of the marriage but cannot necessarily be regarded as an unsuitable or unfit custodian for the same reasons. The best interest concept therefore provided a more objective and less judgmental means of determining which parent should be awarded custody of the children.

Since 1948 the courts approved the notion that the best interests of the child should be the paramount consideration in divorce matters (Keightley, 1996: 99; *Fletcher v Fletcher* 1948 (1) SA 130 (A). It was however not until 1971, in the case of *French v French* (1971) (4) SA 298 (W) that the court for the first time provided some guidance as to the relevant factors when referring to the term "best interests". These factors include the following:

- The child's sense of security.
- The suitability of the proposed custodian parent.
- Material resources of the parents, insofar as it impacts on the child.
- The wishes of the child.

This last factor paved the way for children's participation when parents are divorcing and indicates the need for policies and procedures to allow for children to be part of the process. This constituted a major shift in the judiciary's attitude towards children, as this period was known for 'children should be seen and not heard'.

Later, in the judgment of *McCall v McCall* 1994 (3) SA 201 Judge King listed thirteen (13) factors the court considered important in ascertaining a child's best interests. This list includes "the child's preference, if the court is satisfied that in the particular circumstances, the child's preference should be taken into consideration". This factor implies that the child will be consulted and that his /

her views and wishes will be given some consideration by the court. This list has been of tremendous assistance to both legal and mental health professionals in determining exactly what the courts consider relevant in child custody evaluations.

As the supreme law of this country, the Constitution of South Africa (Act 108 of 1996) has the capacity to influence all policies, procedures and practices generally and specifically in relation to children. Section 28(2) of the Constitution guarantees us that a child's best interests are of paramount importance in every matter concerning the child. The difficulties associated with the best interest's concept have been identified by many, more recently by Bekink and Brand (2000: 194). They regard the criticism of the concept as based on its 'vagueness and inability to set, a clear standard' (Bekink & Brand. Heaton (1990: 95) is of the view that the biggest problem with the best interest's concept is its indeterminacy.

One of the ways in which more clarity can be obtained on the issue of best interests of the children in custody and access disputes, is to provide the child who is capable of participating, an opportunity to express their views. The literature overwhelmingly suggests that excluding children from the decision-making process inevitably lead to unjust or inappropriate policies and decisions that are not in children's best interests.

2.3 Divorce as an adversarial process: The birth of the Office of the Family Advocate in South Africa

In South Africa divorce is an adversarial process, which influences the climate in which children participate in divorce and post-divorce arrangements. This factor reinforces parents' notion that custody and access disputes are battles to be won. In the process parents sometimes use their children as a weapon to punish an errant spouse. Here the value of children's participation is apparent and can play a significant role in focusing all role players on the needs of the

children in custody and access disputes. The birth of the Office of the Family Advocate stems directly from an attempt to ameliorate the effects of the adversarial system on children.

2.3.1 Dilemmas and difficulties with the adversarial approach which affects children's participation

The adversarial approach is said to allow litigants or parties 'to present their individual cases before a court as adversaries, as opposed to the approach where the decision maker participates fully in the searching for facts of the matter' (Robinson, 1997: 66). The Thesaurus gives the definition of the word adversary as enemy, antagonist or opponent and this sets the arena for conflict. The children involved, are more often than not, the casualties of this war. The practice in South Africa and elsewhere in the world, where court procedures are adversarial, is that parties either represent their own cases, or engage attorneys to do so on their behalf. Attorneys are often criticized for adopting an aggressive or combative stance in divorce and related matters, and thereby exacerbating the discord. It is said that during the divorce process, most divorcing clients do not want to be reasonable, and often an adversary approach is exactly what they want from their attorneys (Van Zyl, 1997: 106).

Even in cases where parties agree on the need for a divorce, and the arrangements for the children, our present adversarial system insists that they assume the stance of Plaintiff and Defendant, thereby regarding themselves as opponents. South African legislation allows for parents to settle matters of custody, access and guardianship, without the assistance of an attorney. The adversarial climate in which parents and attorneys conclude children's care arrangements is often focused on the needs of parents and has little regard for children's views and participation.

2.3.2 State interference or family autonomy in divorce matters:

One school of thought is of the belief that the family should be allowed to function autonomously and parents should be allowed to make all the decisions that govern their children's lives. Another more feminist view is that state interference in the family can be justified in view of the patriarchal nature and imbalance of power and subsequent violence in the traditional nuclear family (Van Zyl, 1997: 18). A third point of view is that the entire private / public debate is futile, and that the State has always played an interventionist and contributory role in determining what the family is (Van Zyl, 1997: 19).

Much is said in the literature about the State's role within the context of parent-child relationships. 'Whether the courts are the most appropriate body to provide rules for the reorganization of parent-child relationships upon divorce is a difficult question, as is the question whether it is fair, or right, for society to expect the courts to make such decisions' (Mowatt, 1987: 611). Despite this controversy, South African High Courts have customarily been charged with the role of upper guardian of all children in its jurisdiction. This allows for the Court to intervene or adjudicate in parental or other controversy that involve children, especially those relating to issues of custody, access and guardianship. Schäfer argues that the South African Supreme Courts (now known as High Courts) have always 'jealously guarded their role as upper guardian of all minor children in its area of jurisdiction' (Schäfer, 1993:127).

2.3.3 The establishment of the Office of the Family Advocate in South Africa

South Africa has had its fair share of difficulties with the adversarial system. The Commission of Inquiry into the Structure and Functioning of the Courts in South Africa (referred to as the Hoexter Report: 1983) identified the following difficulties with the adversarial procedure:

- It is an expensive process.
- It is a lengthy and time-consuming.

- It encourages hostility between the parties.
- It assumes there will be a winner and a loser.
- It does not attempt to address the difficulties or reduce the conflict (Robinson, 1997: 66).

Robinson (1997: 66) further states that despite the Government's acceptance of the recommendations made by the Hoexter Commission, including the establishment of Family Courts around the country, these recommendations are yet to be implemented as envisaged. Despite the Government having researched these concerns in-depth in 1983 and having drafted the necessary legislation, this legislation was never put into operation (Budlender, 2000: 3). Later, in 1997, it was envisaged by the Department of Justice's task team for family courts that a Family Court system, with appropriate support structures in the form of mediation and counseling should be established. This idea was shelved in the short term, due to a shortage of financial resources (Budlender, 2000: 3).

Robinson (1997: 66) regards the promulgation of the Mediation in Certain Divorce Matters Act (Act 24 of 1987) as a direct result of the Hoexter Commission's recommendations. Even though the Hoexter report was published in 1983 the establishment of Family Courts is gaining momentum slowly, with pilot projects in some of the major cities, including Durban. The difficulties associated with establishing these courts is evident in the literature (Loots, 2002). The present fragmented system of dealing with family-related issues such as custody, access, maintenance and domestic violence continues to pose a challenge to all involved.

The opening of the Divorce Courts as part of the Family Court in Durban has seen a dramatic increase in the number of divorce matters being finalized, through this court, mostly without legal representation. In KwaZulu-Natal, more divorce cases are presently being initiated in the NorthEastern Divorce Court, than at the High Court (Summons Register, Office of the Family Advocate, 2002).

Offices of the Family Advocate currently exist in all the divisions of the High Court. The establishment of the Office of the Family Advocate has assisted in addressing some of the difficulties and limitations associated with the adversarial process. It aims to mediate contentious issues regarding the children by making the process of divorce more participatory for all the role-players and encouraging a more child-centered approach and focus to custody and access disputes.

Schäfer views the role of the family advocate as critical in addressing some of these shortcomings and lists the following anticipated improvements the establishment of the Office of the Family Advocate would make.

- The Family Advocate will fulfill a monitoring function
- Any intervention can be at the instance of party, the court or the Family Advocate, thus ensuring that intervention is 'more meaningful than before' (Schäfer, 1993: 127).

One of the most meaningful roles fulfilled by the Office of the Family Advocate currently is placing the views of the children before the court.

2.4 Family law legislation, policies, practices and procedures relating to children when parents divorce

Family law legislation provides the main framework within which policies, practices and procedures relating to children and divorce are made. If one is therefore to evaluate these practices and procedures, it has to be done in conjunction with evaluating current legislation relating to divorce. Various pieces of legislation impact on children's lives at the time of their parents' divorce. A brief summary of the relevant sections of the legislation will be given.

2.4.1 The Divorce Act (70 of 1979)

The introduction of the Divorce Act (70 of 1979) caused children's needs to become an important consideration for divorcing parents, their legal representatives and the Courts. It also forms the basis for some of the procedures adopted by the Office of the Family Advocate as it places a duty on

the court to ensure the arrangements made for children at the divorce, are in their best interests. The following is a brief summary of the important Sections that pertain to the arrangements made for children at the time of divorce.

Section (6)(1)(a) of the Divorce Act compels the Court to ensure that the arrangements made for the minor or dependent children of the marriage are satisfactory or the best that can be effected under the circumstances (Bosman & Van Zyl, 1997: 58). This section places an onus upon the Court to refuse the granting of a final order of divorce, until it is satisfied that the provisions made for the children, are satisfactory. Section (6)(1)(a) is a useful tool in encouraging parents to attend the enquiry arranged by the Office of the Family Advocate, as their divorce cannot proceed until the arrangements made for the children are considered acceptable and in their best interests.

Section 6(2) allows the court to request any further information it requires, and allows for 'any investigation to be made' before deciding on the future care of the children. This section allows for the court to order any intervention required before granting a divorce order. Prior to the promulgation of the Mediation in Certain Divorce Matters Act (24 of 1987) and the establishment of the Office of the Family Advocate in the early 1990's, the courts used this section to enlist assistance from social workers. These social workers were usually in the employ of the then Department of Health and Welfare and assisted the courts in investigations into custody and access disputes. The introduction of the Mediation Act created the posts of family advocates and family counsellors to fulfill this function. The court considers the report submitted by the family advocate and or family counsellor with regard to the best interests of the children, before granting a final divorce order.

Section 6(3) of the Divorce Act, allows the court to 'make any order which it may deem fit'. These may include custody orders, (custody, sole custody, joint custody, split custody) access orders (reasonable access, supervised access,

phased-in access) guardianship orders (joint guardianship, sole guardianship) and maintenance orders. Much criticism is leveled at the South African courts for its opposition to joint custody orders. This is considered contrary to Article 18(1) of the UN Convention on the Rights of the Child, as it does not allow for both parents to have common responsibilities for the upbringing and development of the child (Robinson, 2000: 70). Some research indicates more paternal involvement and increased tendency pay maintenance or child support in joint custody cases. The academic, social and emotional benefits of joint custody are well documented in several studies (<http://www.fatherhood.hhs.gov/SIPP/pt2.htm>).

2.4.2 The Mediation in Certain Divorce Matters Act (24 of 1987)

The Mediation in Certain Divorce Matters Act (24 of 1987) (hereafter referred to as the Mediation Act), came into operation in 1990, thereby heralding a new era for children in divorce or -related cases. The Mediation Act read in conjunction with the Divorce Act is aimed at protecting the interests of children whose parents are divorcing (Davel, 2000: 66). Mediation is defined as a cooperative process whereby the disputing parties attempt to reach a mutually acceptable agreement or settlement on specific issues, or, failing a mutually acceptable agreement or settlement, at least to reduce conflict (Davel, 2000, 91). From this definition it is evident how beneficial such a process could be for the children whose parents are in the process of a divorce.

Robinson briefly describes the aims of the Mediation in Certain Divorce Matters Act (1987) as follows:

- (a) For the family advocate to institute an enquiry, which will enable him/her to furnish the court with recommendations on issues, pertaining to children's best interests, in custody, access and guardianship.
- (b) To remove children from 'the arena of conflict, at the earliest possible stage' (Robinson, 1997: 64).

The Mediation Act makes provision for the appointment of both family advocates (Section 2) with the assistance of family counsellors (Section 3) to discharge the duties imposed by the Act. The Mediation Act prescribes that family counsellors must be suitably qualified and experienced. Van Zyl notes that the Act does not define the qualifications required for this position (Van Zyl, 1997: 111). Family counsellors are mostly experienced social workers, in the employ of the Department of Social Development.

It is important to note that the intervention of the family advocate in terms of the Mediation in Certain Divorce Matters can only occur once there is an action or an application pending in court. There are obvious difficulties associated with this procedure, as parents and children often require assistance or intervention prior to the initiation of divorce proceedings. Robinson (1997:64) mentions the following circumstances where the family advocate can intervene in the best interests of children:

- (a) After the institution of a divorce action.
- (b) After an application has been lodged for the variation, rescission or suspension of an order with regard to custody of, guardianship of and access to a child, made in terms of the Divorce Act 70 of 1979.

2.4.2.1 Criticisms of the Mediation in Certain Divorce Matters Act (1987)

The Mediation in Certain Divorce Matters Act is criticized, for offering its assistance or intervention in the 'adversarial environment of the court'. Mowatt (1987: 612) is further of the view that this intervention would have been more appropriate, and is required at an earlier stage, when parties would be more amenable to, or likely to accept guidance. He opines that the family advocate should intervene 'before the parties had hardened in the acrimonious atmosphere of the hearing of a divorce action'. This appears to be a more befitting suggestion, considering that in practice, arrangements made with regard to custody and access at the time of separation, but before initiating divorce proceedings, are often amicably decided by the parties themselves.

2.4.2.2 Procedure for instituting an enquiry

Section 4(1) of the Mediation in Certain Divorce Matters Act (24 of 1987) makes provision for the family advocate to institute an enquiry in certain divorce matters. According to Section 4 of the Act, an enquiry can be requested in one of three ways:

1. If requested by either party involved in the proceedings. This is done by completing an Annexure B form (Request for family advocate to institute proceedings in terms of Section 4 of the Mediation in Certain Divorce Matters Act (Act 24 of 1987))
2. If requested by the Judge or Presiding Officer responsible for the case. This is done by way of a court order, requesting the family advocate to intervene in the matter of custody, access or guardianship.
3. The family advocate could also request that an enquiry be instituted (in terms of Section 4(2) of the Act) if arrangements made for the care of the children do not appear to be in their best interests. Also, if allegations of abuse or neglect of the children are contained in the court documents. This is done through a written request to the Court, who in turn authorizes the family advocate to institute an enquiry into the matter.

Once an enquiry is instituted, a written notice is placed on the court file, and parties are unable to proceed with the divorce until the matter has been investigated and a report has been received from the Office of the Family Advocate. Both parties are notified in writing of the date and details of the enquiry, unless an urgent investigation is required and parties are notified telephonically, or via their attorneys.

2.4.2.3 Cooperation of social work and law disciplines

The Mediation Act compels the two disciplines (social work and law) to work together towards a common goal, the best interests of the child. There appears to be consensus amongst legal and mental health professionals on the need to safeguard children's interests at this traumatic time. In order to achieve this, the

Mediation Act hopes to focus parents and professionals on the needs of the children amidst all the upheaval and disruption. The importance of a multi-disciplinary team in child-placement cases was hitherto not acknowledged by the legislature.

The then Director of the Department of Justice, Grobler (1990: 133) reported that: 'the Act may be the first step towards forging a new and unique working relationship between the legal fraternity and social service disciplines in a joint effort to protect the interests of children affected by divorce'. Despite this commitment from the Department of Justice, one of the most pressing problems faced by Offices of the Family Advocate across South Africa is the lack of family counsellors. This reality negatively impacts on the delivery of services to the country's children.

The Manual for family counsellors (1990: 20) raises an interesting aspect, in that the Act compels the legal and social disciplines to conduct the enquiry as a team and therefore acts as a built in control for maintaining acceptable standards. Difficulties do however arise because two State Departments have to cooperate in this regard. Family advocates are employed by the Department of Justice, whilst family counsellors are seconded from the Department of Social Development. Due to a lack of cooperation between the Departments, the Offices of the Family Advocate across the country continue to experience a shortage of family counsellors. This issue is evident also in the literature (Glasser, 2002: 114)

Abro, Chairperson for the Law Society of South Africa, also raises this lack of manpower (Whittle, 2002: 31), in her description of the Office of the Family Advocate as "overburdened, understaffed and under funded". Van Zyl (Whittle, 2002: 31) reports in the same article that despite many new legislation having impacted on the work of the Office of the Family Advocate, they are still expected to function with the "same staff complement they started off with ten years ago.

2.4.2.4 Current practice and procedures: Conducting an enquiry in terms of the Mediation Act (1987)

There is no set or prescribed format according to which inquiries are conducted, and procedures vary from one Province to another. The Regulations to the Act allows for the family advocate holding an enquiry 'in such a manner, as he may deem expedient or desirable' (Van Heerden, 1999: 521). This allows for flexibility to deal with each case according to its own requirements or merits. This flexible approach is seen to have its advantages and disadvantages. In the literature, the disadvantages are linked to the shortcomings of an undefined proceeding (Van Zyl, 1997: 124). The current practice of how an enquiry takes place is described by Bosman (1992: 58) as having no set rules, but encompasses the following:

- The parties are requested to attend an enquiry at the Office of the Family Advocate, together with the minor children. The family advocate acts as chairperson and the role and function of the family advocate and counsellor is explained to the parties. On the day of the enquiry, the family advocate and family counsellor interview both parents and ascertain their circumstances. The suitability of parents' current circumstances including accommodation, financial circumstances, and support systems are investigated.

- Bosman (1992: 59) further advises that an understanding of older children's needs form a good basis for the prompt solution of the dispute. Interviews conducted with the children discussions center on the children's care arrangements, daily routines, and reliance upon either parent for specific tasks. The family counsellors, who are skilled in interview techniques, usually conduct interviews with the children. Skafte (1985, 95) reports that any mental health professional who does custody work should have previous experience with children in a therapeutic setting. She confirms the stance of family advocates and –counsellors at the enquiry, that in evaluation, the principal duty is 'information gathering and assessment, and not therapeutic intervention'. She further bears out the researcher's earlier assertion that time

is of the essence and that 'We do not have the luxury of weeks or months of sessions with a youngster' (Skafte, 1985: 96).

- With very young children there is the added difficulty of a lack of verbal skills and maturity that compounds the already complex task of obtaining information from such children. Alternative methods of obtaining information, such as observation need to be utilized when dealing with young children. Fawcett (1996, 3) states that 'skilled observers gather information in a systematic, detailed and precise way, while recognizing their own inevitable subjectivity.' This type of observation requires time and resources.
- As children are often much less adept at language skills than adults, direct questioning does not always yield the desired results, and alternative means of obtaining information have to be utilized. Anderson (1997, 18) is of the view that this dilemma makes the interviewer turn to more accessible version of children's views, given by others e.g. parents and teachers. This factor clearly poses an obstacle to children's meaningful participation in matters that affect them directly. Here, the use of play therapy techniques can be useful in the assessment process. According to Van der Merwe (1996, 7) children's method of communication is different from adult's in that non-verbal communication is significant and emerges through play. The assessment techniques utilized in different cases at the Office of the Family Advocate takes this factor into consideration and the methods used in any given case usually depend on the age and responsiveness of the child concerned. Assessment techniques therefore include e.g. three wishes technique and island game. (Skafte, 1985: 96) Some of the assessment techniques are however time-consuming.
- Bosman (1992: 57) reports that "the procedure at the Office of the Family Advocate allows for participation of the children depending on their ages as well as their intellectual and emotional maturity" In making recommendations

to the courts in both custody and access decisions, both family advocates and family counsellors take the above factors into consideration. The stance adopted by professionals and the court is aptly described as follows: "Age would not necessarily be the main criterion; other important factors would be the level of understanding of the children, their maturity and ability to rationalize a preference one way or the other." (Schäfer, 1993: 59)

- In some cases there is a need for further investigations and liaison with other professionals who know the family better and has had previous dealings with them. This is done in terms of the Regulations 5 and 6 of the Mediation Act, as mentioned earlier. Bosman (1992: 57) describes the role of the family counsellor as prominent in the evaluation process. She further states that the family advocate relies heavily on the family counsellor on issues such as parenting and interpersonal relationships.
- Teamwork is an important feature of the process of the enquiry. According to Regulation 5(3), the report of the family advocate has to be submitted within 15 days after the completion of the enquiry. This report is described by Robinson as not enjoying 'a particular status or evidentiary value, although the Divorce Act requires the court to consider the report before making a decision' (Robinson, 1997: 64).

2.5 Children's participation in custody and access disputes

2.5.1 The position in a foreign jurisdiction: Scotland

Most countries accept the notion that children need to participate in proceedings during the traumatic time of divorce, as decisions made ultimately impacts on them. This is however, easier said than done and there is a need to ponder how this concept of participation is best achieved here in South Africa. Some foreign jurisdictions, like Scotland, appear to have given this issue much thought. Examining how the Scottish Law Commission has dealt with this same issue could prove useful.

In order to bring their legislation in line with Article 12 of the United Nations Convention on the Rights of the Child, the Scottish Law Commission has done extensive work in this field of Family Law. This culminated in the introduction of the Children (Scotland) Act 1995, which in three separate Sections 6, 11(7) and 16 of the Act, make provision for children's participation in issues that affect them. It also grants children legal representation, which allows for children's wishes, as opposed to their interests, to be represented (Edwards, 1999: 52). These sections are dealt with individually, as the focus in each is different, yet equally important.

1. Section 6 – Children (Scotland) Act 1995: In Scotland, as in South Africa and most countries, the majority of residence (custody) and contact (access) arrangements for children, are negotiated and arranged by parents themselves. In such cases, children are able to influence the outcome of such decisions, with the help of Section 6. It provides that: A person shall, in reaching any major decision which involves-
 - (a) His fulfilling a parental responsibility; or
 - (b) His exercising a parental right or giving consent by virtue of that section, have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity... a child of 12 years or more shall be presumed to be sufficient age and maturity to express a view'. (Children (Scotland) Act 1995)

Edwards raises the point that this legislation places the onus on parents to consult with children before concluding residence or contact arrangements. The courts however have no way of knowing whether parents in fact do so. The author further highlights the difficulty of enforcing this section, without invading family privacy (Edwards, 1999: 49). Most importantly however, is that it creates awareness, in parents regarding the need to consider the child's views.

2. Section 11(7) - Children (Scotland) Act 1995, provides for the court to consider three aspects when making an order relating to residence or contact arrangements at the time of divorce or thereafter, These include: -
 - The welfare of the child is paramount.
 - The minimum intervention principle.
 - Allow the child to express his / her views (Edwards, 1999: 40).

3. Section 16(2) - Children (Scotland) Act 1995. This Section is specifically aimed at children involved in care proceedings, and provides that:

‘Children must be given the opportunity to express their views and have them taken into account where sufficiently mature. There is a presumption in favour of children aged 12 or over having such maturity.’ (Griffiths et al, 2000: 286) This Section relates to child protection matters.

Including all of the above Sections in the legislation pertaining to children indicates Scotland’s commitment to children’s participation. Many countries, including South Africa show this type of commitment only to matters around the other three pillars of the UN Convention, namely children’s right to protection, provision and prevention. In South Africa, participatory rights of children have yet to be given this form of legislative commitment.

2.5.2 The position of children’s participation in South Africa currently

South African law has traditionally, shown little interest in engaging children, even in issues that affect them directly. The fact that the child’s right to ~~be heard~~, (even subject to certain limitations), is not contained in Section 28 of the Constitution indicates that it is considered a less significant right and is therefore excluded from the supreme law of the country. To date, children are often not included in consultations as role players in their own right, even by the legislature. Hollamby (Principal State Law Advisor, South African Law Commission), suggests the reason for this is clear: ‘children do not vote’

(<http://www.gu.edu.au/center/flru//hollamby/doc>). Children's rights organizations in South Africa continue to advocate for such participation.

This trend of policy decision-making being the domain of adults, continue unabated, even in the field of family law. An example of this trend is evident in matters such as custody and access, where the rights of parents appear to be afforded more weight than the rights of children. With regard to access, there has been extensive debate on whether unwed fathers should be granted an inherent right of access (South African Law Commission Report: Project 79). This reflects society's perception that both custody and access are still viewed as parental rights. Olmesdahl (1999: G25) argues persuasively that any inherent entitlement to access should be that of the child, rather than the parent's. This approach appears more in line with the best interests of the child principle. Human states aptly in this regard, '... that children should be treated as people in their own rights, and not as the property of their parents' (Human, 2000: 165).

Boyden and Ennew, as quoted by McNeish (1999: 191) lists the potential benefits of participation as follows:

- It contributes to self-esteem, which in turn affects physical and mental well being.
- It contributes to people feeling more in control of their lives and their welfare.
- It leads people to being more likely to access the information and skills they need to lead successful lives.
- It leads to people being more assertive with services and increasing the likelihood of services being responsive to their needs. (McNeish, 1999: 201)

Some progress is however being made in South Africa with regard to children's participation in issues that affect them directly. An example of this is the South African Law Commission recent task to review current of the Childcare

legislation. Realizing the need to consult with children on legislation that affects them, and in line with Article 12 of the UN Convention, the Commission put together a child participation process. Consultations were arranged with children in the different Provinces. The response from children was clear; they wish to be 'consulted, listened to and respected by adults, on issues that affect them'. According to Hollamby, children are not usually consulted in law reform processes, and resistance was even encountered from within the SA Law Commission. He also reports that children's participation is a costly process (<http://www.gu.edu.au/center/flru//hollamby/doc>).

2.5.3 Culture as an obstacle to children's participation

Himonga (1998: 95) reports that customary law is the law that influences the decision-making regarding children in Zambia. She raises a further concern peculiar to Africa in that children's participatory rights is further complicated by the fact that in customary law, age has no relevance in determining childhood or adulthood. Other factors, e.g. attainment of puberty and fulfillment of corresponding initiation ceremonies rather than 'the number of years a person has lived' are relevant in this context. She further concludes that in traditional African society, children were not included in decision-making processes and that this was the domain of the adults in the group (Himonga, 1998: 102).

In South Africa, customary law and practices continue to impact on children's lives, whether they were born in a marriage or not, and also when parents divorce. Children born of a marriage are according to customary law, regarded as belonging to the paternal family while children born out of wedlock are regarded as belonging to the maternal family. Divorce and subsequent custody arrangements therefore need to consider issues of customary law and the child's best interests. In order to address this concern, Section 8(3) of the Recognition of Customary Marriages Act (1998) places a duty on the court to ensure that the arrangements made for the children are in their best interests. All aspects pertaining to custody, access and guardianship of the children born of the

marriage will be governed by the Mediation in Certain Divorce Matters Act 24 of 1987. This means that the only consideration in determining these issues will be the best interests of the child. The issue of custody of the child in customary law is largely determined by whether lobolo has been paid. The issue of guardianship is also dealt with in this manner in Botswana presently. Molokomme (1998, 182) reports that the guardianship of a child will vest in the father, if *bogadi* (similar to *lobola* in South Africa) has been paid for the child.

This belief that 'children cannot be left to make decisions concerning his / her own life' is according to Rwezaura (1998: 57) also the current position in Tanzania. He reports that this notion is further reflected 'not only in the cultural conception of the child and childhood generally, but also in the traditional law and customs of many communities.' Ncube (1998: 11) mentions the important aspect that people's ideas of what is in children's best interests, their rights, duties and obligations within their families, are largely based on 'historical, social, economic, traditional and cultural dynamics of any given society'. One therefore needs to be mindful of the role played by culture in the context of children's participation at the time of divorce.

2.6 Conclusion

It is evident that divorce is a painful process that brings stress and some trauma to the lives of all involved. At least parents are able to draw on their families, support networks and attorneys during this time. For children, the very people on whom they are supposed to rely during this traumatic time are often at war with each other. Children whose parents are in the process of divorce are faced with many challenges, amongst others, exposure to conflict, their sense of security within the family being disrupted and they are often faced with dividing loyalties (Hart, 1991: 44). Policy makers and practitioners are becoming increasingly aware of children as 'critical participants in family breakdown' (Douglas, 2001: 373). Much of the literature paints a bleak picture for children after parental separation or divorce. On the other hand, some authors, view divorce as a

'transformation of family relationships' (Arditti & Prouty, 1999: 63). An important aspect of participation is providing information and an understanding of the processes involved.

It is said that 'The present fragmented judicial system contributes to the demise of family, undermines communities, and has repercussions for the future of the country' (ChildrenFirst, 11/1999: 19). It is thus of utmost importance that procedures, policies and practices that impact on the lives of children be scrutinized to ensure that the State does more than pay lip-service to children's participatory rights. Despite the approach adopted, there appears to be consensus amongst the professionals involved in such matters, that the effects of divorce can be mitigated by appropriate post-divorce arrangements, in which children are able to make input and express their views. It is therefore necessary that any statutory or judicial service, aimed at achieving this goal, be appraised in terms of whether it facilitates children's participatory rights as set out in Article 12 of the UN Convention.

It is said that the most common form of non-participation that involves children, center on the issue of tokenism. Hart reports that tokenism occurs when adults are keen to give children a voice but have not thought through the implications sufficiently (Hart, quoted by McNeish, 1999: 192). This research hopes to begin a process of considering children's participation as a priority for which all duty-bearers should take collective responsibility.

Chapter 3

Data analysis and discussion

3. Introduction

This chapter contains the analysis and discussion of both methods of data collection, namely the content analysis and the focus group interview. The contents of forty case files from the Office of the Family Advocate were analyzed. The researcher completed a content analysis schedule on each of the forty files. A focus group interview was also conducted with family advocates and family counsellors. They were considered the ideal focus group participants with whom to raise issues the issues pertinent to this study. The findings of this research will be depicted using graphs, tables and discussion.

3.1 Demographic information:

3.1.1 Age and gender

Demographic data was obtained in respect of the seventy-five children whose case files were analyzed in this study. The children ranged in ages from ten to twenty years and the sample was representative of both genders. Table 1 below sets out the ages and genders of the children concerned.

Table 1: Children's Ages and Gender

Age group	Males	Females	Total	%
10 – 13	21	22	43	57
14 – 17	12	12	24	32
18 – 20	3	5	8	11
Total	36	39	75	100

The age group ten to thirteen had more than half of the total percentage of children involved. This is to be expected, as parents are more likely to have a dispute regarding younger children, in this study, the ten to thirteen year age group. Statistics South Africa's statistical release (PO307, Marriages and divorces: 1998) indicates that more parents of children in the age group ten to

fourteen are divorcing, than parents of children aged fifteen to nineteen years of age.

3.1.2 The link between age and children's participation

In this study the views of all but one of the children were persuasive and influenced the decisions made by the family advocate and family counsellor. Family advocates and family counsellors in the focus group interview were unanimous that emotional maturity rather than a child's chronological age impacts on the weight attached to a child's views. The example was also made of younger children who are able to provide valuable input with regard to their own needs. Children's participation in the enquiry process therefore takes cognizance of each child as an individual, and considers that child's level of maturity, understanding and experience of their situation.

Each case is dealt with and considered on its' own merits. The literature and case law supports the view that emotional maturity rather than children's age determines children's participation in the decision-making process (Schäfer, 993: 59). This approach is also observed in the case of *Märtens v Märtens* (1991 (4) SA 287 TPD), where the court considered the maturity of the children (twins, aged 11years) rather than their chronological age. (Robinson, 2000: 82).

3.1.3 Children's level of education

The children's educational levels in the content analysis ranged from grade four to grade twelve for those children who attended school, with grade seven being the average grade for both genders. One child aged eleven years attended a special educational facility, while seven children (four males and three females) attended tertiary institutions. An eighteen year old female did not attend school and had her own child. This indicates that some of the children, although regarded by the law as minors, were in positions where they were making important decisions such as career choices and in the case of the eighteen year old with the child, child rearing choices.

3.1.4 Children's preferences

Seventy-four of the seventy-five children involved had definite preferences in terms of which parent should be awarded custody or access. This indicates that most children have definite views about their own needs and their required care arrangements. Only one child reported that he had no preference with regard to the dispute and simply wanted to remain with the parent that was going to reside in the matrimonial home. Although this child is not stating a preference in terms of wanting to be cared for by a specific parent, he prefers that his home circumstances remain unchanged. The seventy-four children were also able to provide reasons why they preferred a specific outcome. Their reasons are depicted in the table below. Some children indicated more than one reason for their preference.

Table 5: Children's reasons for specific preference:

Reasons provided by children for their preference	Number of children
I share a close bond with this parent	29
I am happy and settled in my present environment	27
All my needs are/will be adequately met by this parent	18
I am able to discuss problems and issues with this parent	13
My relationship with my other parent or their partner is strained	13
My school and friends are here	8
I have been physically or sexually abused by my other parent	5
I am not happy in the care of my other parent	5
Substance abuse affects my care negatively	2
My other parent shows little/no interest in me	2
Financial reasons	1

All, except one of the recommendations made by the family advocate and family counsellor reflected the wishes of the children. In the one case where the child's expressed wish was not decisive, the team involved focused more on the issue of best interests of the child, than her expressed wish. This seventeen-year-old expressed a preference to live with her father because she felt that he would refuse to maintain her or pay for her school fees if she lived with her mother. The implications of such a placement meant that she would have been separated from her siblings. The family advocate and family counsellor concerned were of the view that her father had a duty to maintain her, irrespective of whether she lives with him. They were also of the view that such a placement would be contrary to her best interests, as a close bond existed between the siblings.

Gollop et al (2000, 384) researched children's involvement in custody and access arrangements and raise the concern that children's points of view have traditionally been ignored, as they are thought to lack competence. Barrat (2002: 21) is of the view that Article 12 of the UN Convention on the Rights of the Child calls for the children to be involved in decision-making in matters that affect them and that the child's views be to be "given serious consideration" (Barrat, 2002: 21). Those entrusted with the role of ensuring children's participation therefore have a duty to consider this factor. In this study the Office of the Family Advocate did consider the children's wishes and preferences. This indicates a shift in mindset from previous practices.

3.2 Factors that facilitate children's participation

3.2.1 Procedure involved in conducting an enquiry

As set out in the literature review, Section 4(1) of the Mediation in Certain Divorce Matters Act allows for the Office of the Family Advocate to institute an enquiry in certain instances. There is no set procedure on how to conduct an enquiry, in the Mediation in Certain Divorce Matters Act (1987), or the Regulations thereto. Van Zyl (1997: 123) reports that a flexible approach in such a new service has its advantages, but also comments on the drawbacks of

assessing an “unspecified procedure” (Van Zyl, 1997: 124). The advantage to there being no prescriptions in terms of the Mediation Act, can also be viewed as positive with regard to children's participation, as each child is different and may require a different approach. The team can therefore address the needs of various children e.g. the disabled child or the reluctant child, by adapting the procedure accordingly and thereby ensuring the child's participation.

3.2.2 Language preference

Fifty percent of the inquiries were conducted in English, while forty-five percent were conducted in Zulu. Five percent of inquiries were conducted in Afrikaans.

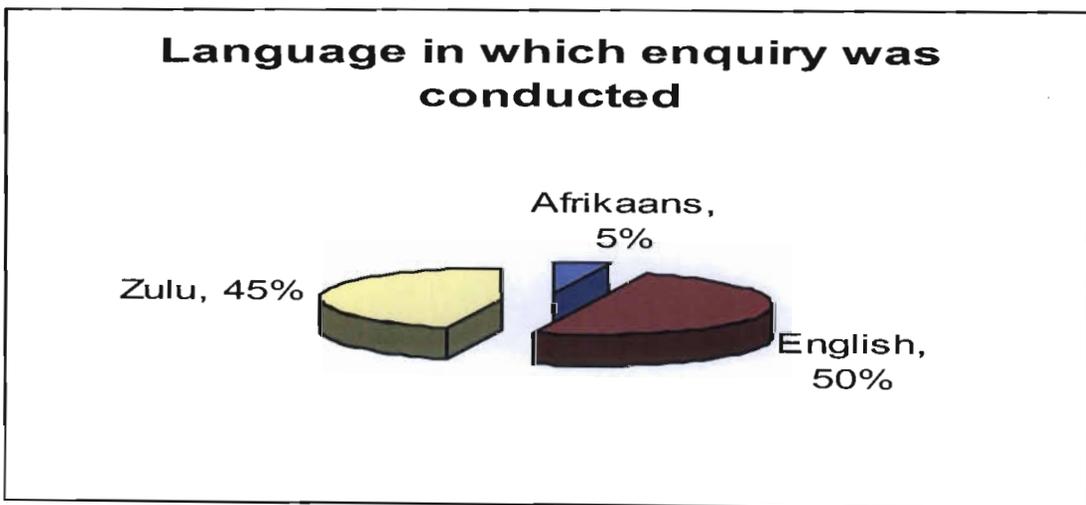


Figure 1

At present language is one of the most important considerations in allocating cases to family advocates and family counsellors in KwaZulu-Natal. It is important that parents and children are able to express themselves in the language, with which they are most comfortable and proficient, especially when emotive issues are being discussed. The issue of language promotes participation and is of particular significance when interviewing children. Children's ability to communicate verbally is often less sophisticated than that of adults. Anderson (1997: 18) mentions that children's lack of language skills, their limited capacity for introspection and their lack of personal motivation for help are all factors which make an individual interview with a child very complex.

There is an awareness at this Office of the Family Advocate of the benefits in ensuring that the language and / or cultural of the parties and the family advocate and family counsellor corresponds. The extent to which language and cultural differences between children appearing in courts and adjudicators impact negatively on children is further supported by a recent field study at South African courts by Zaal (2002: 25). He opines that these two factors also impact on whether the adjudicator reaches the correct decision and proposes that 'urgent steps be taken to reduce cultural and linguistic dissonance in our courts' (Zaal, 2002: 28). This attentiveness to issues of culture and language at the Office of the Family Advocate, KwaZulu-Natal bodes well for children's participation and involvement in the enquiry process.

3.2.3 Children's inclusion and participation in the enquiry

A concern raised in this study by the professionals revolves around parents failing to bring children to the enquiry, thereby excluding them from the process. Children's inclusion in the enquiry process at the Office of the Family Advocate, provides children with the only the opportunity in the South African family law process, to have their views placed before the court. According to Gentry (1997: 311) the inclusion or exclusion of children as participants is a topic that is receiving much consideration from divorce mediators. She further reports that "Mediators with a mental health background appeared more likely to involve children and did so with greater frequency and comfort than did mediators with law backgrounds". (Gentry, 1997: 311)

3.2.4 Enquiry conducted by a Family Advocate and Family Counsellor- The team approach

As mentioned earlier in the literature review, the Manual for Family Counsellors compels the legal / social disciplines to conduct the enquiry as a team. (Manual for Family Counsellors: 20) These two professionals, with their different training, bring different skills and knowledge to the mediation and evaluation process. Francis Bosman (1992: 55) describes the functions of the Office of the Family

Advocate in terms of the Mediation in Certain Divorce Matters Act as threefold, namely to monitor, mediate and evaluate. She further opines that the 'family advocate relies very heavily on the family counsellor for the evaluation of interpersonal relationships within the family and the parenting abilities of the parties' (Hoffman, 1992: 57).

A team conducted most enquiries in this study. Only one member of the team, either a family advocate or family counsellor, conducted three of the forty enquiries. This difficulty occurs due to a lack of staff and is also prevalent in other provinces as set out in the literature review. Glasser's research into the role of the family advocate and modus operandi of the Offices of the Family Advocate in the Eastern Cape and the Western Cape found similar difficulties experienced in the Western Cape Office. (Glasser, 2003: 114) She further states that "the Western Cape office has never been staffed with equal ratios and at times the ratio has become as low as five advocates to two counsellors". (Glasser, 2003: 114) This also reflects the current situation in KwaZulu-Natal and has repercussions for children's participation in the enquiry.

The participants in the focus group interview also raised this lack of staff, especially family counsellors as a continuous problem. The fact that Family advocates are employed by the Department of Justice, while family counsellors are seconded from the Department of Social Development, has its own challenges, as discussed. This and other difficulties are alluded to in the literature review. (Chapter 2, 30)

3.2.5 Involvement of other professionals

The Office of the Family Advocate consults with parties usually once or twice as can be seen from the information above, and does not get in-depth knowledge of the family dynamics and functioning. For this reason Regulations 5 and 6 of the Mediation in Certain Divorce Matters Act (1987) allow for obtaining other professionals' input. In terms of Regulation 5.2 information can be requested

from professionals who have had previous dealings with the family e.g. a psychologist, general practitioner or teacher. The advantages of this practice are that the information is obtained in a less obtrusive and often more cost-effective manner, often from a professional who has known the family for a while. In the content analysis conducted, most recommendations were made without obtaining additional reports from other professionals.

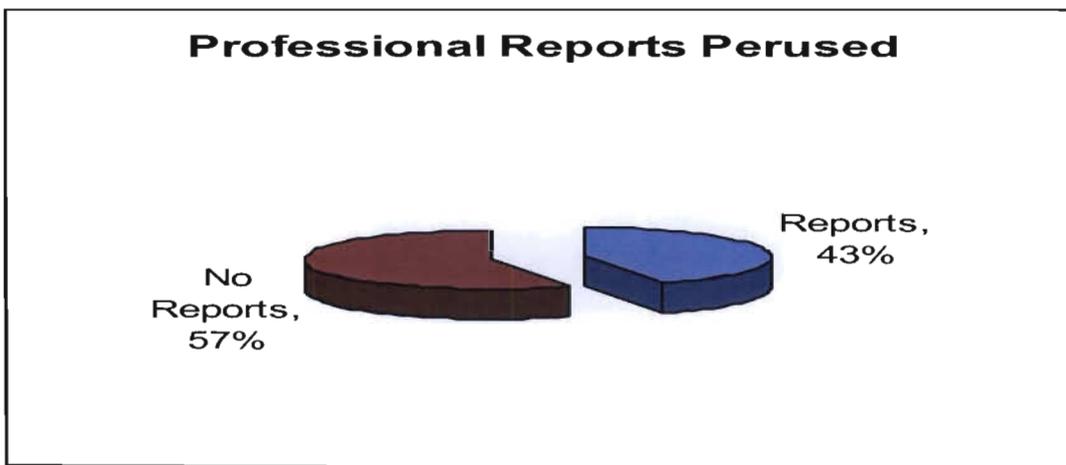


Figure 2

The above pie chart illustrates the percentage of cases where additional professional reports were requested and perused. In most cases (twenty three out of forty), no reports were obtained. This further illustrates the importance of having a family advocate and family counsellor involved in each case, as most recommendations are made with only the information obtained at the enquiry.

O' Gorman (1991: 28) raises the difficulty of long delays in obtaining reports from State mental health professionals. This leads to parties involved in disputes paying for the services of private experts. Van Zyl (1997: 121) also raises this concern, with particular reference to the disadvantage this situation poses to those who are unable to afford such private services. Considering the level of poverty in South Africa currently, this issue undoubtedly affects the vast majority of divorcing couples.

The seventeen cases, in which further professional reports were obtained, were further analyzed to ascertain which professionals were involved. The following pie chart illustrates this. Most reports (thirty five percent) were from Psychologists, closely followed by Social Workers (thirty one percent), Teachers (twenty four percent), Doctors (seven percent), and Psychiatrists (three percent).



Figure 3

3.2.6 Number of inquiries held in each case

A total number of fifty-nine inquiries were conducted in the forty cases included in the content analysis. In most cases, only one enquiry was conducted, before recommendations were made to the courts. In sixteen of the forty cases, two or more inquiries were conducted in the same case. During the focus group interview, family counsellors expressed concern with regard to children's ability to participate meaningfully in just one enquiry. Participants felt that children are expected to open up to total strangers, about sensitive family matters, in mostly a single enquiry. Family counsellors also feel that they need more time to put unresponsive children at ease. They further mentioned that some children are easy-going and responsive; others come to inquiries with certain fears and anxieties, such as the fear of being removed from the parent they are currently living with. These fears and anxieties can pose an obstacle to children's

participation. These difficulties in interviewing children were also evident from the literature review. (Chapter 2, 32)

3.2.7 Parents' involvement in the enquiry process

An observation made by the researcher in this study, is that case files often contain lengthy documents solely concerned with the claims, interests and rights of parents, rather than the interests of children. Parents' perceptions of their children's involvement in the enquiry process are important as it impacts on children's participation, either directly or indirectly. In this study the most frequent reasons provided by parents are that they considered themselves primary caregivers to the children and better custodians. This is in line with the adversarial stance parents adopt in such disputes.

Table 4: Reasons for parents' claim for custody or access

Reasons provided by parents	Mothers	Fathers	Total	%
I am the child's primary caregiver	20	3	23	57,5
I will be a better custodian	7	8	15	37,5
The other parent shows no interest	6	3	9	22,5
I can provide financially		8	8	20
Child needs me	8		8	20
I share a close bond with children	4	4	8	20
Access to children is problematic	2	5	7	17,5
Other parent abuses substances	2	4	6	15
Physical / sexual abuse	3	2	5	12,5
I provide discipline/guidance	3	1	4	10
I have stable accommodation		4	4	10
Other parent is irresponsible	3	1	4	10
Child wants to live with me		4	4	10
Child unhappy with other parent		3	3	7,5

Interestingly in this study, only ten percent of parents considered the child's wishes as an important reason. All other reasons were based on parents' own needs. This disregard for the importance of children's participation in the enquiry could also be the reason some parents fail to bring children to the Office of the Family Advocate in certain instances.

3.3 Attitudes of family advocates and –counsellors towards children's participation

3.3.1 Consideration for children's views

The significance attributed by family advocates and family counsellors to children's wishes is evident from the content analysis. The views of all but one of the seventy-five children were persuasive and influenced the decisions made in these matters. The issue of children's preferences and when they should be considered instrumental was discussed extensively in the focus group interview. The participants agree that they get a "better feel for the matter" when they interview the children.

Participants remarked that "Children give a fresh, honest perspective", "Children are the most meaningful part of our work" and "They make our job worthwhile". The focus group participants agree that one is unable to make an informed decision without the child's input and participation.

3.3.2 Weight attached to children's views

The group was unified on the issue that they never totally disregard the views of a child. They report that they rather attach less weight to the wishes of the child in certain instances E.g. such as where children's preferences and their best interests do not correspond.

Examples of these instances are listed below:

- "When there is indoctrination or parental alienation on the part of a parent." The child's refusal to have any dealings with the other parent will therefore be viewed in light of this factor. The group reported that they would attempt to

address the damaging effects of parental alienation by e.g. referring the child for psychological intervention prior to making final recommendations.

- “A child who is unable to corroborate a preference”. Most participants did not agree with this. Thirty percent of participants agreed with this statement.
- “When a child is inconsistent”. Fifty percent of participants agreed with this statement
- “If a child’s preference is linked to protecting a parent’s feelings”, e.g. if child wants to be split from siblings (split custody) so that one parent does not live alone”. It was felt that a split custody arrangement should be in the child’s best interests, rather than the parents’. Seventy percent of participants agreed with this statement.
- “When a child is immature”. Eighty percent of participants agreed with this statement.
- “When a child’s preference would place them at risk”, e.g. if a child wants to remain in the custody of a parent who has sexually abused or harmed the child”. Eighty percent of participants agreed with this statement.
- “When an interim recommendation is made”. Only the one participant who made this statement supported it.

Family advocates and counsellors also reported that when their recommendations are contrary to the expressed wishes of the child, they explain the reasons for this in their reports to the court. The reasons why the child’s best interests should over-ride the child’s expressed wishes are then clearly articulated in the evaluation report compiled by the family counsellor. This indicates that even in cases where the child’s wishes do not correspond with the recommendations made, cognizance was taken of the views expressed by the child.



3.3.3 Reasons for recommendations made by family advocates and family counsellors

Family advocates and family counsellors advanced various reasons for making certain custody and access recommendations. This issue has been the focus of some studies, (Africa et al, 2003) but will be dealt with briefly here, with specific focus on the child's participation. In most of the forty cases, several reasons were relied upon to substantiate the decisions made in a particular case. In this study, various reasons were advanced, for the recommendations made by the staff at the Office of the Family Advocate. The prevalence and frequency of certain reasons is illustrated in the chart below.

Table 6: Reasons for recommendations

Reason for recommendation made	Cases	Percentage
This is the child's expressed wish	25	62,5
Child is happy and settled in his/her present care	16	40
The child shares a close bond with this parent	15	37,5
This parent is the more capable custodian	14	35
This parent's circumstances are more suitable	12	30
This parent is the child's primary caregiver	6	15
The child is sufficiently mature to decide	2	5

From the above it is evident that the reasons that mostly influenced family advocates and family counsellors recommendations in this study, centered on

the following broad issues: The circumstances and suitability of the parent, the wishes of the child, the bond between parent and child, and continuity of care. This question of what the most important considerations, as seen by family advocates and family counsellors are, was also posed to the participants during the focus group interview. The participants deliberated on this question at length and reached consensus on this question.

1. The suitability of the parent, which also encompasses personal and home circumstances, accommodation, environment, finances, stability and in the case of custody, the ability to provide for the day- to- day needs of the child. Parents must therefore meet certain requirements in order to be able to fulfil their custodial duties e.g. be able to provide (shelter, food) and protect (from harm, abuse).
2. The parent-child bond is instrumental in ensuring the emotional and psychological well being of the child. It also ensures the smooth running of the parent-child relationship. It was felt that this factor often leads to the next, as children who share a significant relationship with a specific parent will usually express a wish to live with or have regular access to that parent.
3. The child's preference, depending on the age and maturity of the child. It was emphasized that the child's preference is never seen in isolation, but in the context of the other circumstances and each case on its own merits. The importance of this factor was also raised in light of the fact that this is the only place the child is given a voice in the reigning custody ad access dispute.

The group reached consensus on the above factors and also insisted that the child's preference must be coupled with the suitability of the parent. It was agreed that if for example child expresses the wish to live with a parent whose circumstances are not suitable (e.g. substance abuse), the child's well being or best interests would receive priority. Cohen and Shnit report that few studies

have looked at the considerations that influence professionals' custody recommendations, and that the findings in these studies have been inconsistent. They further mention the study by Schindler that found that custody recommendations were often based on the following:

1. Continuity of parent-child relationship
2. The child's emotional welfare
3. Parental support systems
4. The child's wishes
5. Parental agreement. (44(3): 313)

The above issues were also in this study found to play a significant role in the allocation of custody and access when there is a dispute between the parents.

3.4 Obstacles to children's participation in the enquiry

3.4.1 An adult-centered or child-centered enquiry

The parties were divided on whether the enquiry process is adult centered or child-centered. The following three views were expressed by participants.

The enquiry is adult-centered

Four participants are of the view that inquiries at the Office of the Family Advocate are adult-centered. Those who argued that the enquiry is adult-centered, provided the following reasons for their views:

- "Parents are interviewed first and family advocates and family counsellors form a *prima facie* view before interviewing the child".
- "More time is spent with parents than with children".
- "If the process were more child-centered, more liaisons would take place with schools and those who render services to the children"
- "Time constraints mean that less time is spent with the children, who are in essence the client"
- "We are stronger in mediation than in evaluation".

The enquiry is child-centered:

One participant was of the view that the enquiry at the Office of the Family Advocate is child-centered.

- She opined that the basic premise of the enquiry is the best interest of the child. "All information gathered from the child and parents is used for towards ensuring the best interest of the child".

The enquiry is both adult- and child-centered:

Five participants were of the view that the enquiry is both adult- and child-centered. Their reasons for this view are as follows:

- "Both parent and children are consulted".
- "If either child or parent is not interviewed, it is difficult to make a recommendation".
- "Parents can sometimes provide more information than children" and "Children provide valuable information".

As can be seen by the responses of participants, there is no consensus on whether the enquiry at the Office of the Family Advocate is in fact child-friendly. This is an indication that in the minds of some participants, more can be done to ensure a child-friendly enquiry and better participation by children. It is therefore important that policies, practices and procedures be constantly evaluated to ensure that services aimed at ensuring children a voice in judicial matters, are in fact doing so.

3.4.2 Family advocates and family counsellors views of obstacles to children's participation

The question of how best to ensure children's participation at the enquiry was put to the family advocates and family counsellors at the focus group interview. The following common themes were raised by family advocates and family counsellors

- “Time constraints impact negatively on children’s participation at the enquiry”. The problem of insufficient staff members, especially family counsellors and an increase in the number of cases requiring intervention, are said to contribute to this difficulty. This issue is also evident in the literature. Van Zyl expresses concern that since the inception of the Office of the Family Advocate, the role and function of the office has been extended with the promulgation of new legislation, but with no concomitant increase in posts. (Whittle,2001: 21)
- “Children are expected to open up to total strangers, about sensitive family matters, in mostly a single enquiry”. Family counsellors also feel they need more time to put unresponsive children at ease.
- “Some children are easy-going and responsive; others come to inquiries with certain fears and anxieties”. The fear of being removed from the parent they are currently living with was also raised as a source of anxiety. These fears and anxieties can pose an obstacle to their participation.
- “Parents sometimes fail to bring children to inquiries”. Although most parents are co-operative and bring children to inquiries, there are cases where reports have to be concluded without the children’s input. This lack of mechanism to compel parents to bring children to inquiries also poses an obstacle to children’s participation.
- “More time is spent with parents than with children”. The group however concluded that information from parents form an important part of the information gathering process.
- A lack of resources and an office setting that is conducive and takes into account the needs of children.
- Lack of on-going training in various areas including assessment methods and play therapy techniques that can be utilized to contribute to children’s participation. Training in cultural diversity is also required.
- The Family Advocates were further of the view that they do the best they can, in their current situation.

3.4.3 Suggestions on ensuring children's participation:

Participants of the focus group mentioned the several issues as requiring attention if one is to ensure a more child-friendly approach and thereby increase children's participation at the enquiry. These issues will be discussed under the following four broad categories:

Office environment:

- There was consensus amongst the participants that the office environment needs to be more child-friendly and –appropriate.
- The waiting area should offer children welcome distraction from their anxieties such as colouring-in activities with a divorce-related theme for younger children.
- Interviewing rooms for children, where the furniture does not comprise of furniture more appropriate adults, as does family advocates' offices at present.
- An observation room with a one-way mirror where children can be observed interacting with their parents, without the intrusive presence of a family advocate or family counsellor.

In a recent field study and evaluation of South African courts involved with child-related matters, Zaal (2002: 172) lists this issue of a 'child- appropriate environment' as being the highest recommended practical solution and was given the most responses by participants. It highlights the important function fulfilled by such an environment in relaxing children and thereby "improving the quality of their evidence" (Zaal, 2002: 172).

The workload:

- The number of cases set down in the central diary per day should allow adequate time for further investigations.
- More time should be allowed so that staff does not feel pressurized to conclude and finalize cases. There is a feeling that allowances need to be

made for time to consult with people significant in the life of the child, such as schoolteacher, child minder and other collateral sources.

This issue of high caseloads and limited staff is raised by Africa et al as some of the constraints faced by the Office of the Family Advocate (Africa et al, 2002: 138).

Staff shortage, burnout and stress

- More staff is required to cope with the increasing numbers of divorcing couples, and the subsequent custody, access and guardianship disputes.
- The shortage of staff leads to professionals feeling over-burdened and the shortage of family counsellors needs to be addressed urgently.
- Due to the stressful nature of the work, participants were of the view that staff requires regular debriefing and support. Built-in mechanisms for assistance in complex cases. Staff members currently resort to case discussions with each other, to alleviate some of the burden of difficult decisions they have to make.

Gerhard Van Zyl, Family Advocate reports that many new Acts have impacted on the workload of the office, but that many offices still function with the “same staff complement they started off with ten years ago” (Whittle, 2001: 31).

On-going training

On-going training must be provided to all staff members. In order for staff to function effectively, exposure to updated information and courses relevant to their work, including interviewing techniques with children. Zaal raises the need for court staff who works closely with children, to receive training with regard to issues pertaining to developmental stages and behaviour of children, in his recent study of South African courts (Zaal, 2002: 175). The need for training of staff at the Office of the Family Advocate is raised by Glasser (2002: 116). She further raises the view of private social workers and psychologists in the Eastern and Western Cape (as set out by Burman et al) that a lack of training in psychology and developmental issues has led to inappropriate decisions being made. The issue of capacity building is acknowledged by government as an

important factor in improving service delivery and good governance. In order to improve services to children and their families, training should remain a priority. Glasser (2003: 116) reports that funds are currently available in the Department of Justice's budget and that it is hoped that training on relevant issues be undertaken throughout the country.

3.5 Conclusion

The importance of giving children a voice in the enquiry process is evident from the data presented in this chapter. The only forum currently available to children to do so is the enquiry at the Office of the Family Advocate. There are also many constraints and factors that impede on children's participation. There is therefore a need to consider how best to take these forward in the form of recommendations. This will be done in the next chapter.

Chapter 4

Children's participation at the enquiry: Implications, recommendations, and conclusions

4. Introduction

One of the major aims of this research was to explore the issue of children's participation and the extent to which it is facilitated at the Office of the Family Advocate. As alluded to in the literature review, Africa et al (2002: 152) view Article 12 of the UN Convention, as "essentially a procedural right", and one that is only significant if appropriate procedures are in place that allows for children's participation. This study was therefore aimed at ascertaining what practices and procedures are currently in place to ensure children's participation when parents divorce. Data collection methods included a literature search, a content analysis of forty case files and a focus group conducted with family advocates and-counsellors at the Office of the Family Advocate. This chapter presents the conclusions and recommendations of the study.

4.1 Main findings of this research

4.1.1 Policies, legislation and practices

An overview of the literature in this study has found that practices and procedures regarding children's involvement in the enquiry process at the Office of the Family Advocate are influenced by legislation, case law, and the UN Convention on the Rights of the Child (1989). The profound influence of the UN Convention on procedures relating to children's participatory rights is documented in the literature review. South African case law and the judiciary have played a major role in guiding professionals by setting out criteria the courts consider relevant in custody and access matters. "The wishes of the child" has emerged in case law as one of the relevant factors to be taken into account. The Divorce Act (1979) read together with the Mediation in Certain Divorce Matters Act (1987) have influenced the manner and climate in which custody and access disputes are concluded in South African courts. It also lays the basis for a new atmosphere and outlook regarding the needs of children at this time. The need

for this shift was identified by the Hoexter Commission (1983) on the Restructuring of Courts, as discussed in the literature review (Chapter 2, 23) The bringing together of two professions assists in setting a new tone and perspective in custody and access disputes. The pertinent issues regarding policies, practices and procedures are set out below.

4.1.1.1 A more conciliatory approach to family law issues required

In this study it has been found that custody and access arrangements are still concluded in an adversarial climate, as alluded to by Mowatt (1987, 612). The review of the literature on children's participation in decision-making when parents divorce, indicate that more needs to be done if children's interests are to prevail. Despite the recommendations made by the Hoexter Commission (1983) on the Restructuring of Courts and the emphasis on the need for more conciliatory procedures when dealing with family law issues, little progress has been made in this regard (Loots, 2002: 1). Our present adversarial procedures and adult-centered practices and -focus need to be reviewed. Until a more conciliatory approach in dealing with Family law issues is employed, as envisaged by the Hoexter Commission's Report (1983) and the Department of Justice's task team on family court projects, the current adversarial method of dealing with family law issues will continue to impact negatively on the lives of children.

It was illustrated in the content analysis that only a small percentage of parents consider the wishes of the children as a significant factor in their claim for custody or access. In this study, parents focused more on the inadequacies and blaming the other parent. A conciliatory approach, as opposed to the present adversarial approach, will ensure a more conducive climate for children's participation. It will also assist in contributing to change of attitude by parents, less concerned with winning or losing and more focused on the needs of the children. This will involve fewer traumas for the child. The Mediation in Certain Divorce Matters Act (1987) is also criticized for offering its assistance and

intervention in this adversarial environment, when parties are less likely to accept guidance (Mowatt, 1987: 612). The need for earlier intervention is further conveyed by Mowatt.

4.1.1.2 The team approach

The content analysis conducted in this study, indicates that in three of the forty cases the team approach was not utilized and only one team member conducted the enquiry. The intention of the legislature when drafting the Mediation in Certain Divorce Matters Act (1987) is clear; inquiries should be conducted by a family advocate and family counsellor. In practice however, this is not always the case, as revealed in this study. As set out in the literature review, the Act compels the two disciplines to work together towards a common goal, the best interests of the child. This shortcoming relates directly to a lack of staff, particularly family counsellors. This is a common problem in Offices of the Family Advocate in South Africa, and requires urgent intervention. The safeguarding of children's interests is an onerous responsibility that should ideally not only rest with one person, be that a family advocate or family counsellor. It is imperative that a family advocate and family counsellor team conduct every enquiry, as mentioned by the professionals. Family counsellors' training assists them to be more responsive to children's needs and their interviewing techniques invaluable in ensuring children's participation.

In this study, most cases were concluded without obtaining reports from other professionals such as psychologists or psychiatrists. The advantages of obtaining such reports is that it can assist in overcoming some of the emotional problems of the child's participation, in that a relationship usually exists with such a professional.. The assessment or evaluation at the Office of the Family Advocate is mostly a once-off contact, at a very traumatic time, as set out in Chapter 3, 48.

The current system rightfully dictates that when parents are divorcing, the court has a duty to ensure that the best possible decision regarding the children's care is made. The need for a psychological or psychiatric assessment and report pose a problem, unless the parties are able to pay for it themselves. The vast majority of South African parents involved in divorce disputes are unable to afford such services and this could in turn impact negatively on the recommendations made for the children. Barrat (2003: 155) confirms that such assessments are costly, and available 'only to the wealthy', as quoted by Burman et al. The small percentage of cases in which psychologist's reports were obtained, in this study, points to this difficulty.

4.1.2 Attitudes of family advocates and family counsellors towards children's participation at the enquiry

4.1.2.1 Children's participation at the enquiry

The value of children's participation was imperative, as depicted in the literature (Chapter 2, 36). This was clearly articulated by the family advocates and family counsellors in the focus group interview, and was evident in practice, from the content analysis. Seventy-five children's responses were recorded in the content analysis and seventy-four of these children expressed a definite preference in terms of the desired outcome of the enquiry. All seventy-five children were afforded the opportunity to participate in the enquiry. The views of all the children were considered and all but one child's wishes were influential in the eventual recommendations made by the family advocate or family counsellor. Participation of the child and hearing the child involved were significant factors, but the child's best interests remain paramount as set out in the literature review (Chapter 2, 20)

Only one child conveyed that he had no specific preference and would remain with whichever parent was going to remain in the matrimonial home. In this case, the child's best interests were considered more significant, than her expressed wishes. The family counsellor justified in her report the reasons why the

preference expressed by the child would be contrary to her best interests. This indicates that children's views are given considerable thought. The fact that there is no set procedure to conduct an enquiry, as set out in the literature review (Chapter 2, 30), further facilitates children's participation, in that it allows for each case to be dealt with on its own merits.

4.1.2.2 The expressed wishes of the child at the enquiry

As is evident from the content analysis, most children of ten years and older had definite views of what outcome they wanted the outcome of the enquiry process to be. The children who expressed preferences were all able to substantiate or justify these decisions, which indicate their capacity to make such decisions. Interestingly, in South African law (notably the Childcare Act), the age where a child's wishes are considered significant in adoption matters, is ten years.

In this study children viewed a significant relationship with a custodian parent and for that parent to be approachable, over and above meeting their daily needs, as important factors that influenced their preferences. This view is shared by the participants of the focus group, who listed the three most influential factors in determining best interests, as:

- The parent's suitability to attend to and meet the day to day needs of a child.
- The bond between parent and child.
- The wishes of the child.

There was consensus amongst the family advocates and family counsellors in the focus group, that children's participation in the enquiry forms a significant component of the entire procedure. As discussed in the literature review, the best interests' concept and participation have to encompass each other for either to be meaningful. As the participants verbalized it; "We are unable to make an informed decision without the child's participation." "Children give a fresh, honest perspective." "Children are the most meaningful part of the enquiry." Robinson

(2000: 82) is of the view that family advocates, with the assistance of family counsellors are ideally placed “to canvass the genuine wishes of the child”.

The professionals were unanimous on the view that the child’s wishes are always regarded in conjunction with other factors. The child’s emotional maturity rather than his / her chronological age was noteworthy here. They further opined that children’s wishes and feelings are never totally disregarded, but rather that less weight is attached to the child’s views under certain circumstances, such as e.g. when protecting the child is a priority or when the child is not sufficiently mature.

4.1.2.3 Ensuring a child-centered approach

In this study the results show that the participants considered it their duty to consider the wishes of the child, as this enquiry is often the only place where children are given a voice in the divorce proceedings. They emphasized that a child’s wishes are never viewed in isolation, but is considered in the broader context. Whether the Office of the Family Advocate is doing enough to ensure children’s participation was debated at length in the focus group. The stance of the family counsellors was clear and unanimous; that not enough is being done to ensure children’s participation. The views of family advocates were divided. Most participants were of the view that the enquiry is both child- and adult-centered.

The results in this study indicate that case files are full of documents focusing on parents, and time spent with children was deemed insufficient. A factor that ensured a child-centered approach was the introduction of family counsellors with specialized training to deal appropriately with children in the enquiry. Despite the differences in opinion by the participants, most agree that there is an element of child-centeredness in the inquiries conducted. This is indicative of a change in mind-set of the professionals, which lays the basis for organizational change with regard to children’s participation.

4.1.3 The enquiry process

The issues of language and culture were taken into consideration in the inquiries conducted. This is essential if children were to meaningfully participate in the enquiry process. The participants of the focus group raised the need for training in cultural diversity as an important issue. Children form an important part of the enquiry held at the Office of the Family Advocate and as mentioned, this is often the only opportunity children are afforded to air their views regarding the dispute. The need for both a family advocate and family counsellor to be involved in the enquiry, time to establish rapport with the child and the need for an appropriate, child-friendly environment are some of the key issues identified as requiring attention in the enquiry process.

The focus group participants were of the view that even though most parents are cooperative and bring children to inquiries, there are instances where parents fail to do so, despite several arrangements being made. There should ideally be a mechanism in place to compel parents to bring children to the enquiry, in order to facilitate children's participation in the process.

The participants of the focus group detailed some of the obstacles to children's participation as follows:

- Time constraints, as children need time to be put at ease and establish rapport in the enquiry.
- The need for a child-friendly environment
- Children's own anxieties about their situation and future
- The lack of mechanism to ensure children are brought to the enquiry to safeguard their participation
- Resources and training to assist staff with assessments processes.
- An understanding of cultural issues

4.2 Recommendations

The area of children's participatory rights is one that is often overlooked and is probably the one sphere where children's rights are breached most frequently. If one looks at Van Beuren's (2000: 203) groupings of children's rights, it contains four fundamental rights of children, namely: protection, provision, prevention and participation. Society's focus with regard to children's rights feature mostly issues of protection, provision and prevention. The following recommendations are made to ensure that children's participation in matters that affect them directly is enhanced.

4.2.1 The State's duty to ensure children's right to participation

Having ratified the UN Convention on the Rights of the Child as well as the African Charter, the State has a legal and moral responsibility to ensure that children are afforded the opportunity to express their views and participate in judicial and administrative proceedings that affect their lives. This study indicates that there is a need to re-look current practices and procedures in order to ensure the State meets its obligations in this regard. In order to pay more than lip-service to the needs and interests of children, appropriate budgets need to be allocated to such portfolios concerned with children's well-being. Appropriate finances need to be allocated by the State, to ensure the implementation of adequate staff to promote a team approach and acquire equipment and resources necessary in the assessment process.

The current adversarial climate in which custody and access arrangements are concluded continue to impede on children's participation and encourages the war in which children are used as weapons. A more conciliatory approach will go a long way in ensuring children's needs and well being are paramount. There is also a need to make available to the public, family and divorce education programs that can provide guidance to parents and children at an early stage, prior to the acrimonious atmosphere of the divorce.

4.2.2 Towards a more holistic approach to services

The present fragmented system of dealing with families experiencing divorce requires reform and a more holistic approach is required. Ideally, a more comprehensive service to divorcing couples and their children should take the form of a one-stop facility, as initially envisaged by the concept of Family Courts. Apart from addressing unnecessary delays, this approach will ensure that psychological assessments and counseling services are within reach of all, and not reserved for those who can afford such services. Also, all children who attend the enquiry process should have the benefit of a family advocate and a family counsellor team, to ensure a more holistic approach to the well-being of the child.

4.2.3 The need for on-going training

It is evident from the study that both Family Advocates and – Counsellors acknowledge the need for on-going training in areas such as interviewing and assessment techniques as well as cultural diversity topics. The benefits of language and cultural matching were alluded to in the literature review. This needs to form part of a broader policy decision in all provinces in order to ensure that issues such as language and culture do not pose an obstacle to children's participation in the enquiry.

4.2.4 Adequate staff ratios

As was indicated by the participants in the focus group interview, this difficulty currently poses a major source of stress to all at the Office of the Family Advocate. It is also not in children's best interests that complex decisions, that could have life-long repercussions on their lives, are made by one individual. Considering the weight the courts attach to the report submitted by this office, as mentioned earlier, this is an onerous responsibility. This factor undoubtedly poses an obstacle to children's participation in the enquiry process, and needs to be addressed by either closer collaboration or Department of Justice needs to

employ Family Counsellors on its own staff establishment. The issue of ratios will then be easier to monitor and rectify.

4.3 Suggestions for future research

As this research has shown, there is a need to be mindful of children as bearers of rights and individuals with their own views and preferences. This reality needs to be kept in mind by those delegated the responsibility of safeguarding children's best interests. Future research could focus on:

- Are there potential benefits to early intervention in custody and access disputes?
- Assessment techniques that prove most appropriate in assisting children to participate meaningfully in the enquiry at the Office of the Family Advocate.
- Policy guidelines for children's participation at the enquiry
- The link between culture and children's participation in indigenous African communities.

4.4 Conclusion

There are many advantages to including children in participatory processes, some of which includes teaching them "useful skills for taking responsibility, empowers them to be effective citizens and strengthens their feelings of personal identity" (Gollop et al, 2000: 384). There are also the difficulties associated with children's participation namely, the fear that it places children in 'a loyalty bind', the child's well being requires priority, and participation can be a costly process. These are some of the issues and dilemmas that require further evaluation. In the spirit Article 12 of the UN Convention on the Rights of the Child, this research would not be complete, without some consideration of how children view this complex issue of children's participation.

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Appendix

Letter to focus group participants – Invitation to participate A

Focus group guide.....B

Content analysis schedule.....C

To all participants: Family Advocates and -Counselors

Focus group - Children's participation: Practices and Procedures at the Office of the Family Advocate.

I hereby wish to invite you to voluntarily participate in a focus group discussion on children's participation at the enquiry conducted by the Office of the Family Advocate. Your knowledge of and familiarity with the procedures and practicalities at the Office of the Family Advocate constitutes a valuable resource, which can assist in evaluating existing and formulating improved mechanisms aimed at enhancing children's participation.

A focus group is a qualitative method that allows the researcher to interview several people at the same time, on a particular topic. "Thus, the focus group enables members of a group to share their experiences and to reach some kind of consensus about the topic of research." (Bless & Higson-Smith, 1995: 113)

The aims and objectives of the study can be summarized as follows:

1. To assist with the formulation of more focused policy with regard children's input at the enquiry conducted at the Office of the Family Advocate.
2. To make a contribution to the growing body of knowledge on how to improve on children's participation in Family Law proceedings.

The focus group will be conducted in the Boardroom, at the Office of the Family Advocate, Durban on Tuesday 23rd September 2003 at 9h00.

Your cooperation in ensuring a "Children First" approach in our service rendering is appreciated.

Kindly sign this request as an indication that you voluntarily participate in this research. All information will be treated as confidential.

Full Name

Signature

Contact details: Felicity Williams

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Your cooperation herein is appreciated.

Felicity Williams

Focus group guide: Office of the Family Advocate

Question 1

What do you consider the 3 most influential factors in determining the best interests of a child in custody or access disputes and why?

Question 2

When do you allow the views and wishes of the child to influence the outcome or recommendation in a disputed matter?

Question 3

Under what circumstances would you disregard a child's views?

Question 4

- (a) Do you consider children's participation at the enquiry as important as their parents' participation?
- (b) Provide reasons for your views

Question 5

- (a) Is the Office of the Family Advocate doing enough to ensure children's participation?
- (b) If yes, provide reasons for your views. If no, what are the obstacles?

Question 6

- (a) Would you describe the enquiry at the Office of the Family Advocate as more adult-centered or more child-centered?
- (b) Provide reasons for your choice.
- (c) How can one ensure a more child-centered approach and thereby improve on children's participation at the enquiry?

Content Analysis of case files: Office of the Family Advocate

A) Identifying details: Child

1. Case reference number:

2. Children involved:

	1	2	3
Child			
Age			
Gender			
Education			

3. Parent with whom child is living at present

Father	Mother
--------	--------

:

4. Language in which enquiry was conducted:

English	Afrikaans	Zulu
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5. Nature of the dispute:

Custody	Access
---------	--------

B) Identifying details: parents

6. Age of mother:

7. Age of father:

8. Mother's main reasons for her claim:

9. Father's main reasons for his claim:

C) Child's participation:

10. Were the children interviewed individually or together?

Individually	Together
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11. Number of enquiries conducted in this matter

One	Two	Three	Four	Five
-----	-----	-------	------	------

12. Is the child stating a preference?

Yes	No
-----	----

a) If yes, what are the child's wishes / views regarding the dispute?

b) Reasons provided by the child for his / her preference:

D) Information regarding the enquiry at the Office of the Family Advocate:

15) Did a team of Family Advocate and Family Counsellor conduct the enquiry?

Yes	No
-----	----

13. Were reports from other professionals requested or perused?

No	Yes
----	-----

If Yes, which professionals?

Social Worker	Psychologist	Teacher	Medical Practitioner	Other (Specify)
---------------	--------------	---------	----------------------	-----------------

14. What recommendations did the Family Advocate or –Counsellor make?

15. Reasons for the recommendations made:

16. Did the recommendations differ from the child's expressed wishes?

Yes	No
-----	----

If yes, what are the reasons provided for the discrepancy?