CHAPTER 14

THE PROTECTION OF CHILDREN CAUGHT UP IN THE DIVORCE / SEPARATION OF THEIR PARENTS

14.1 Introduction

This Chapter focusses on the care and protection of children who are, or who have been, caught up in the conflict surrounding the divorce or separation of their parents, as a category of children in need of special protection.[1] As these children do have parents who sometimes do go to extreme measures to maintain a relationship with a child, this is one area where we feel a little effort can go a long way to diffuse tension in the family home and improve the well-being of the children involved.

Divorce or separation is invariably traumatic for all concerned, but especially for the children of such a marriage or relationship.[2] The high divorce rate[3] and breakup of other relationships[4] mean that more and more children - and younger children - are experiencing rearrangements in their households. Their parents' remarriages[5] or other new relationships following divorce and separation compound the complexity of these children's lives. A great number of divorced or separated men and women remarry or enter new relationships, so that children from first marriages / other relationships have to develop relationships with step-parents and other children from such (previous and subsequent) marriages / relationships.

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1 The **White Paper for Social Welfare** (p. 41, para 38 and 39) identifies children of divorced and divorcing parents as a vulnerable group that require special attention.

2 Sandra Burman, Lauren Derman and Lizaan Swanepoel 'Only for the wealthy? Assessing the future for children of divorce' (2000) 16 **SAJHR** 535.

3 According to the Central Statistical Service, 31 000 divorces were granted in South African courts in 1995. In the same period, the Office of the Family Advocate undertook 25 000 investigations (i.e. divorces where children were involved). The figures do not include Black divorces. See further 8.2.1 below.

4 In the absence of formal recognition of such relationships, actual figures of the number of persons and children involved are difficult to find.

5 Most South Africans consider divorce to be a right. Adults are free to marry whom they wish, and if one of the partners finds the relationship unsatisfactory, unhealthy, or unsafe, he or she is free to end the relationship through divorce. The Divorce Act 70 of 1979 removed most of the blame from divorce proceedings, and since 1979 South Africa has had, in effect, no-fault divorce.

Although the divorce rate is increasing,[6] it would appear that most divorces are concluded without extensive conflict over parenting arrangements.[7] In such 'low-conflict' divorces, it is claimed that parents are able to dissolve their marriages and make good plans for the children without having to resort to litigation. Since mental health research shows that children are harmed by exposure to continuing conflict between parents, it might seem to follow that low-conflict divorces would not be permanently damaging to children. However, there seems to be general agreement that 'high-conflict' divorces are very damaging to the children and the adults involved.[8]

In terms of section 6(1) of the Divorce Act 70 of 1979 a decree of divorce may not be granted until the court is satisfied that the provisions made or contemplated for the welfare of any minor or dependent child of the marriage are satisfied or at least the best possible in the circumstances, and if the Family Advocate has made an enquiry in terms of the Mediation in Certain Divorce Matters Act 24 of 1987, the court has considered the report and recommendations of the Family Advocate.

In order to enable the court to assess the arrangements regarding the children, it may cause any investigation which it may deem necessary to be carried out, may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.[9] The court may further appoint a legal practitioner to represent a child in divorce proceedings and may order the parties or any one of them to pay the costs of

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6 While the divorce rate in South Africa has been historically high, fewer people are now getting married at an early age. This is linked to the increase in other living arrangements.

7 Referring to a 1990 Canadian Department of Justice study, Professor James Richardson 'Divorce and remarriage' in **Families: Changing Trends in Canada** Toronto: MCGraw-Hill 1996, p. 233 reports that in Canada, well over 90% of divorces are now granted without a formal court hearing. 'As only non-contested divorces can be processed in this way, it is evident that, contrary to popular and media images of divorce, most divorces do not involve bitter and protracted battles over custody and property. Indeed, the evidence from the evaluations is that less than 5% of divorces are contested to the extent that matters must be settled in court. The central issues in these are more often spousal and child support, and division of property, than child custody'.

8 See, for instance, Martin Richards 'Children and parents and divorce' in Eekelaar and Šar_evi_ (eds) **Parenthood in Modern Society** 307; Wanda Stojanowska 'The protection of the child against the negative effects of parental conflict' in Eekelaar and Šar_evi_ (eds) **Parenthood in Modern Society** 317; Marygold S Melle 'Toward a restructuring of custody decision-making at divorce: An alternative approach to the best interests of the child' in Eekelaar and Šar_evi_ (eds) **Parenthood in Modern Society** 325.

9 Section 6(2) of the Divorce Act 70 of 1979. If this is considered necessary in order to enable the court to determine what is in the best interests of the child in a particular case, the court may use expert evidence, such as that of psychologists or psychiatrists, or the evidence of other persons such as school teachers, family members, other care givers, etc. who are familiar with the circumstances and cognizant of the needs of the parents and children. See **Stock v Stock** 1981 (3) SA 1280 (A) at 1296E-J, concerning the role of experts in such proceedings.

this representation.[10]

10 Section 6(4) of the Divorce Act 70 of 1979.

In the absence of a formal (legal) termination process for other living arrangements (other than marriage, that is), it is not surprising that only high conflict separation cases come before our courts.[11] However, it is submitted that the separation of parents or partners who no longer wish to live together is just as traumatic for the children involved.

14.2 The impact of divorce / separation on children

When South Africa joined other countries and moved toward less constraining divorce law in the 1970s, the prevalent assumption held by mental health professionals was that it was better for children to grow up in a divorced family than to grow up in a family where at least one of the parents was unhappy with the relationship. While acknowledging that divorce is a difficult and painful experience for all family members, the prevailing belief was that divorce did not cause long-term harm to children. Clinical literature from that era focussed on the need for preventive counselling for children and it was assumed that if children were given the opportunity to talk about their feelings, long-term emotional complications could be avoided.

The assumption that children would be better off in a divorced family than in a stressed or difficult intact family resulted in a significant shift in professional thinking about divorce. Until the 1970s, divorce often carried a social stigma, but since then it has become more acceptable in South African society. Many articles in the professional literature commented on the relative harmlessness of divorce. Although divorce was recognized as stressful, it was not thought to present any serious emotional dangers for those who experienced it. Happy parents, even if they lived apart, were thought to be able to provide the best environment for their children.

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11 See, for instance, **Fraser v Children's Court, Pretoria North and others** 1997 (2) SA 218 (T); **Fraser v Children's Court, Pretoria North and others** 1997 (2) BCLR 153 (CC), 1997 (2) SA 261 (CC).

In 1989 Judith Wallerstein and Sandra Blakeslee published **Second Chances: Men, Women and Children a Decade after Divorce**.[12] This groundbreaking study followed 161 children from 60 American families for 10 years after a divorce. The study provoked a great deal of reaction from mental health professionals, because the findings challenged the idea that most children are unharmed by divorce. Contrary to the authors' own expectations, most of the children in their study showed severe difficulties in school and in personal and social relationships. There was a noticeable increase in drug and alcohol use and a higher rate of delinquency. The children of divorce showed high rates of depression, aggression and social withdrawal. The study also challenged the idea that helping children express their feelings in therapy at the time of divorce would have long-term preventive benefits. Many were experiencing serious difficulties in their adult relationships. Finally, Wallerstein's research showed that ways had not yet been found to prepare children adequately for the stress of divorce. Therapy and counselling may be helpful at the time, but they do not seem to have long-term preventive effects.

The professional reaction to this work was highly sceptical. Critics argued that Wallerstein's sample was too small and questioned her research methodology. However, almost ten years later, at the 1998 Annual Conference of the Association of Family and Conciliation Courts in Washington, D.C., a panel of sociologists and psychologists argued that Wallerstein's findings were correct, because larger research studies in the United States and Great Britain had subsequently supported them.

Lamb, Sternberg and Thompson[13] wrote about the negative impact of divorce on children in 1997:

> Most children of divorce experience dramatic declines in their economic circumstances, abandonment (or the fear of abandonment) by one or both parents, the diminished capacity of both parents to attend meaningfully and constructively to their children's needs (because they are preoccupied with their own psychological, social and economic distress as well as stresses related to the legal divorce), and diminished contact with many familiar or potential sources of psycho-social support (friends, neighbours, teachers, schoolmates, etc.) as well as familiar living settings. As a consequence, the experience of divorce is a psychosocial stressor and significant life transition for most children, with long-term repercussions for many. Some children from divorced homes show long-term behaviour problems, depression, poor school performance, acting out,

12 Boston: Houghton Mifflin Co 1989.

13 Michael E Lamb, Kathleen J Sternberg and Ross A Thompson 'The effects of divorce and custody arrangements on children's behaviour, development and adjustment' (1997) 35.4 **Family and Reconciliation Courts Review**, p. 395 - 396.

> low self-esteem, and (in adolescence and young adulthood) difficulties with intimate heterosexual relationships.

Amato and Keith[14] analysed 37 divorce studies, involving 81,000 individuals, that investigated the long-term consequences of parental divorce for adult well-being. This analysis showed a significant pattern of problematic after-effects for adults and children. The authors concluded:

> The data show that parental divorce has broad negative consequences for quality of life in adulthood. These include depression, low life satisfaction, low marital quality and divorce, low educational attainment, income, and occupational prestige, and physical health problems. These results lead to a pessimistic conclusion: the argument that parental divorce presents few problems for children's long-term development is simply inconsistent with the literature on this topic.

14 Paul R Amato and Bruce Keith 'Parental divorce and adult well-being: A meta-analysis' (1991) 53 **Journal of Marriage and the Family**, p. 53.

Recent studies on children's attachment patterns also indicate that divorce can cause serious emotional difficulties for younger children (0 to 48 months). Ainsworth and her associates[15] identified four distinctive patterns of childhood attachment to parents, ranging from 'secure attachment' to 'disorganized and disoriented' attachment. Dr Pamela Ludolph and Dr Michelle Viro[16] reported in 1998 that even the normal upset and disorganization caused by a so-called friendly divorce caused young children to slip from secure feelings of attachment to insecure attachment behaviour. In high-conflict cases, secure children were observed to slip to disorganized and disoriented states of attachment with their parents.

It can therefore convincingly be concluded that the impact of divorce / separation on children is significant and potentially harmful.

14.3 Child-parent relationship must survive divorce / separation

A great deal of the professional literature about children and divorce concludes that it is in the child's best interests to have continuing contact with both parents after divorce / separation.[17] The exception to this general rule arises when the child experiences violence by one parent toward the child or the other parent. In these cases, most experts believe that the abusive parent's parenting time should be restricted or supervised and in extreme cases be terminated.

14.4 Problems parents face in divorce / after separation

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15 M Ainsworth, M Blehar, E Walters and S Wall **Patterns of Attachment** Hillsdale NJ: Erlbaum 1978.

16 'Attachment theory and research: Implications for professionals assisting families of high conflict divorce', paper given at the 35th Annual Conference of the Association of Family and Conciliation Courts, Washington, DC, May 1998.

17 See also J M Kruger 'Emigration by a custodian parent after divorce' (2001) 64.3 **THRHR** 452.

° **Gender bias and the 'maternal preference' or 'tender years' rule**

In their experience with the justice system many fathers feel that there is gender bias in the courts against men.[18] There is also a great body of opinion suggesting that divorce affects women unfairly.[19] Until fairly recently, South African courts have tended to apply a so-called 'maternal preference' or 'tender years' principle (namely the principle that the custody of young children - and of girls of any age - should normally be given to the mother in preference to the father,[20] unless the mother's character or past conduct renders her 'unfit',[21] in the court's view,

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18 See also the submissions by CHILDS (Children in Legal Disputes) dated 4 May 2001 and 27 June 2001.

19 See e.g. Elsje Bonthuys 'Labours of love: Child custody and the division of matrimonial property at divorce' (2001) 64 **THRHR** 192 at 193: 'My aim is it . . . show how the interaction between legal and societal expectations structures a situation where women pay heavily for the privilege of custody, while men gain financially'.

20 See, e.g. **Tabb v Tabb** 1909 TS 1033 at 1034; **Dunsterville v Dunsterville** 1946 NDP 594 at 597; **Napolitano v Commissioner of Child Welfare, Johannesburg** 1965 (1) SA 742 (A) at 746C-D; **Schwartz v Schwartz** 1984 (4) SA 467 (A) at 480F-G; **Fortune v Fortune** 1995 (3) SA 348 (A). Cf Rhona Rosen 'Is there any real basis for the preference accorded to mothers as custodial parents?' (1978) 95 **SALJ** 246 and Ellison Kahn 'A note on "Is there any real basis for the preference accorded to mothers as custodial parents?' (1978) 95 **SALJ** 249. On the shifts and developments in judicial decision-making in this regard in the USA, see Mary Ann Mason and Ann Quirk 'Are mothers losing custody? Read my lips: Trend in judicial decision-making in custody disputes - 1920, 1960, 1990 and 1995' (1997) 31 **Family LQ** 215.

21 Thus in **Mohaud v Mohaud** 1964 (4) SA 348 (T) Vieyra J awarded custody of three young children (two of whom were girls) to the father rather than the mother (who had committed adultery on several occasions) in the light of his finding that the mother was 'a person so immature in character, so emotionally unstable, so lacking in discretion, so confused in her moral ideas that despite the youthfulness of the children it would not be in their interests to entrust their custody to her if there exists a better choice' (at 353B). See also **Ngake**

to have such custody, or unless the father's circumstances enable him to make better provision for the needs and well-being of the child). On the other hand, where adolescent boys are concerned, the courts have shown greater readiness to award custody to the father, other factors being equally in favour of both parents.[22]

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v Mahahle 1984 (2) SA 216 (O); **Fletcher v Fletcher** 1948 (1) SA 130 (A).

22 See **Tromp v Tromp** 1956 (4) SA 738 (N) at 746; **Manning v Manning** 1975 (4) SA 659 (T) at 662E-F; **Stock v Stock** 1981 (3) SA 1280 (A); and **McCall v McCall** 1994 (3) SA 201 (C).

Van Heerden et al[23] argue that this 'maternal preference' or 'tender years' principle could be seen as violating the equality clause[24] in the Constitution, 1996 by discriminating between parents on the grounds of gender (although, it is submitted, this would in many instances be justified by courts on the basis of the best interests of the child).[25] As emphasised by Lever AJ in the case of **Madiehe (born Ratlhogo) v Madiehe**,[26] 'the test ... is simply the best interests of the child. It follows that if the father can provide what is in the best interests of the child, he is the proper person to be awarded the custody of the child. Similarly if the mother is better equipped to provide what the child needs, then she has the better claim'.

The common-law doctrine was thoroughly rejected by the Supreme Court of Canada in 1976.[27] Since then, it has occasionally been discussed by judges and replaced by analysis based on consideration of the 'best interests of the child'. Although the tender years doctrine is not part of current Canadian family law or case law, many persons expressed the view that judges still operate on the presumption that mothers are better parents.[28]

° Lack of legal standing

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23 **Boberg's Law of Persons and the Family** (2nd edition), p. 537.

24 Section 9. It may also be argued that, by uncritically favouring mothers over fathers as the custodians of minor children after divorce or separation, courts may well be infringing a child's right to 'family care or parental care' as enshrined in section 28(1)(b) of the Constitution, 1996. See **V v V** 1998 (4) SA 169 (C) at 177B; cf also Brigitte Clark & Belinda van Heerden 'Joint custody: Perspectives and permutations' (1995) 112 **SALJ** 315 at 317-8.

25 See **Van der Linde v Van der Linde** 1996 (3) SA 509 (O). See also **V v V** 1998 (4) SA 169 (C) at 176F-G and 177B; **Van Pletzen v Van Pletzen** 1998 (4) SA 95 (O) at 101D.

26 [1997] 2 All SA 153 (B) at 157f-g.

27 **Talsky v Talsky** [1976] 2 SCR 292.

28 **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1998, p. 9 - 10.

Our law treats married persons differently from unmarried persons.[29] This creates severe difficulties for those persons who married according to religious rites and those involved in other domestic relationships as, according to South African law, any children born of such relationships are regarded as extra-marital. In this regard it has been said that an extra-marital child has a mother but no father[30] or, stated differently, that an extra-marital child is in law related to its mother and her relations, but not to the natural father and his relations.[31] While this kind of generalisation is misleading,[32] it cannot be denied that the unmarried father (or a partner in a same-sex relationship) has a more difficult task in showing the court that he (or she) has a legitimate interest in matters affecting the children in such situations. Since the adoption of the Natural Fathers of Children born out of Wedlock Act 86 of 1997 the biological father stands a better chance of getting access to or custody or guardianship of such children.

° **Unethical Practices by Family Law Lawyers and Flaws in the Legal System**

It is not unusual to find that the custodial parent is using the child as a weapon in the matrimonial warfare and is sabotaging the access visits of the non-custodial parent. This is particularly prone to happen in high-conflict divorce cases where a parent might even go so far as to abduct the children to a foreign country.[33]

More worrisome, however, is the allegation that some lawyers make a practice of escalating the acrimony between divorcing / separating parents. These practices include encouraging their clients to make false claims of abuse and encouraging women to invoke violence as a way to ensure an advantage in parenting and property disputes. For instance, some unethical lawyers are encouraging their clients to apply for protection orders in terms of the Domestic Violence Act

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29 Even married persons are treated differently. Persons married according to customary law only recently received legal recognition of their marriages with the adoption of the Recognition of Customary Marriages Act 120 of 1998. Marriages conducted according the Muslim and Hindu rites, and same-sex partnerships (gay / lesbian marriages) are not recognised in South Africa. The South African Law Commission is considering some of these issues: see Project 59: Islamic marriages and related matters and Project 118 : Domestic Partnerships.

30 Van der Vyver and Joubert **Persone- en Familiereg** (3rd edition) 218; Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 405. See also **F v L** 1987 (4) SA 525 (W) at 526.

31 Spiro **Law of Parent and Child** (4th edition) 450 and 457; Barnard, Cronjé, Olivier **Law of Persons and Family Law** 163.

32 As Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 405 show, the father is liable, jointly with the mother, to maintain his extra-marital child.

33 See 20.3 below on parental child abduction and the Hague Convention on the Civil Aspects of International Child Abduction.

116 of 1998 in order to frustrate the attempts by the non-custodial parent to see his or her children.[34] False allegations[35] also continue to enter divorce proceedings by way of lawyers who place allegations of criminal behaviour in affidavit material, without substantiation from child welfare or police authorities, and without consequence to the accusing parent or lawyer involved.[36] We trust such lawyers are pretty few and far between, but they certainly are there.

In this regard the Commission supports the submission made by Mr Stuart McDonald that lawyers must fully inform their clients of all possible alternatives and the consequences of all legal steps taken in a divorce.

14.5 Improving Outcomes for Children

° Hearing Children's Voices

34 See also Elsje Bonthuys 'Spoiling the child: Domestic violence and the interests of children' (1999) 15 **SAJHR** 308 who argues that women's primary responsibility for childcare renders them uniquely vulnerable to domestic violence by constraining their ability to leave abusive relationships and by limiting their capacity to negotiate divorce settlements to their own and their children's advantage.

35 **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1998, p. 11: 'Perjury is common, but how can we put the custodial parent in jail for lying?'.

36 See, in this regard, the comments in **Van Vuuren v Van Vuuren** 1993 (1) SA 163 (T) at 167C-D.

Since adults are the ones making the decision to divorce, they have some sense of justification for their decision and a sense of confidence that things will work out eventually. Often they also have a support network of family and friends to help them emotionally and practically during the difficult period of adjustment. Finally, adults have direct access to lawyers to help them argue in favour of the arrangement they believe is best for the children. But children are often surprised by their parents' decision to divorce. Some children knew things were tense before their parents separated but they did not expect them to divorce. Children feel they have no say in the decision (to get divorced), and they are left unsure about what to expect in the future.[37] Although in reality an extended support system may be in place, this is cold comfort for the children faced with the disintegration of their immediate support system.

As we have seen,[38] section 6(4) of the Divorce Act 70 of 1979 empowers a court to appoint a legal practitioner to represent a child at divorce proceedings and to order the parties or one of them to pay the costs of such representation. **The Commission would like to see this provision being used more often. The Commission also recommends that section 6 of the Divorce Act 70 of 1979 be amended to give a court the authority to appoint an interested third party, such as a member of the child's (extended) family, to support a child experiencing difficulties during parental separation or divorce in a manner determined by the court. Such support can involve a person being allocated temporary parental rights and responsibilities in respect of the child concerned**.

The need for legal representation does not end with the divorce. Changed circumstances may require changes in the original custody and access arrangements. Without someone to help

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37 **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1998, p. 12: 'Separation and divorce is a traumatic event for children, regardless of age. When they're told of the decision they have fears, worries and questions. What do they worry about? They wonder, Where will I live? Who will I live with? Do I have to leave? What about my friends? Will we still go on holidays? Will I get to see Dad, Grandma? What about the dog? What about the cat? How much time will I spend with people? Can I still have lessons, hockey, skating... These questions speak volumes on children's interests'.

38 See 14.1 above.

give the children an opportunity to speak about their needs and voice their concerns, these sometimes dangerous situations are allowed to continue, and children are put at risk.

The Mediation in Certain Divorce Matters Act 24 of 1987 is another attempt by the South African legislature to safeguard the interests of minor and dependent children involved in divorce proceedings and in certain applications arising from such proceedings.[39] This Act provides for the appointment of one or more Family Advocates[40] and also for the appointment of Family Counsellors[41] to assist the Family Advocate. If requested to do so by any party to divorce proceedings or by the High Court, the Family Advocate must institute an enquiry and furnish the court with a report and recommendations on any matter concerning the welfare of the children concerned.[42] The Family Advocate may also initiate such enquiries mero motu.

While it is one of the key functions of the Family Advocate to canvass and ascertain the genuine wishes of the child and to communicate these to the court,[43] the Mediation in Certain Divorce Matters Act 24 of 1987 does not require the Family Advocate or the Family Counsellor to hear the views of the child. Indeed, the prescribed questionnaire (Form A) is parent-orientated,

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39 Which includes any application for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child made in terms of the Divorce Act 70 of 1979.

40 For a critique of the office of the Family Advocate, see Sandra Burman, Lauren Derman and Lizaan Swanepoel 'Only for the wealthy? Assessing the future for children of divorce' (2000) 16 **SAJHR** 535 at 544 et seq.

41 Although the Act does not specify what qualifications or experience a person must possess in order to be appointed as a Family Counsellor, in practice most are social workers with several years of experience.

42 Section 4(1) of the Mediation in Certain Divorce Matters Act 24 of 1987. See also L Neil van Schalkwyk '**Ex parte Critchfield** 1993 3 SA 132 (W); **Denston v Denston** saakno 287/00 (OK) - Aspekte van die funksie van die gesinsadvokaat in egskeidingsaangeleenthede' (2001) 34 **De Jure** 203.

43 Schäfer **The Law of Access to Children** Durban: Butterworths 1993, p. 53.

rather than child-orientated, and includes no questions concerning the wishes of the child or his or her views in regard to the proposed arrangements.[44] **The Commission believes a simple amendment to the regulations[45] to provide for the canvassing and recording of the child's views, where appropriate and if the child so wishes, would go a long way to solving this problem**. However, special care must be taken to ensure that children are not forced to choose between their parents.

However, it is necessary to understand the distinction between hearing children's views and putting children in the position of having to choose between parents. Many professionals warn that most children want to remain loyal to both parents after divorce; having to choose one parent over the other would create incredible inner conflict for a child. In fact, many a time a child's sudden wish to break off contact with a parent could indicate a major problem, necessitating therapeutic rather than legal intervention. It is therefore necessary to find solutions that would give children the opportunity to be consulted and heard on decisions that affect them without being pulled into an emotionally dangerous situation.

- **Reducing Conflict**

44 Palmer in Keightley (ed) **Children's Rights** 98 at 112 - 113.

45 GN R2385 in Government Gazette 12781 of 3 October 1991, as amended.

Apparently the majority of divorces are resolved without a great deal of conflict between the parents. These so-called 'friendly divorces' are presumed difficult for children, but not necessarily permanently damaging.[46] Unfortunately, a significant number of divorcing parents become locked in bitter and sometimes violent disputes over custody and access arrangements. These situations are truly dangerous for children, and the Commission has attempted to find ways to reduce conflict between divorcing and separating parents,[47] to the benefit of the children. In this regard, **the court should start with the assumption that, in the absence of issues regarding the child's physical, mental or emotional safety, the continued involvement of both parents in the child's life is the desired goal: this involvement ideally will be of the same quality post-separation as pre-separation**.[48] While not excluding the possibility of joint custody (as we now know it), the Commission is not equating the need of the child for the continued involvement of *both* his or her parents in his or her upbringing with the call for joint custody as the presumptive starting point in divorce.[49]

The use of the words 'custody', 'sole custody', 'guardianship', 'sole guardianship' and 'access' in the Divorce Act 70 of 1979 promotes a potentially damaging sense of winners and losers and more neutral language[50] would help reduce conflict and let both parents focus on their

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46 Note, however, the comments above re the damaging effect of divorce / separation on children.

47 Possibilities range from parenting education programs - to make parents aware of their own conduct during and after separation, its impact on their children, and means by which they might change it or at least shield their children from its effects - to non-litigation models for custody and access decision making, such as mediation.

48 See 14.3 above.

49 See also June Sinclair 'From parents' rights to children's rights' in Davel (ed) **Children's Rights in a Transitional Society** 62 at 63.

50 On the issue of language, virtually every jurisdiction that has modernized its law in this area in the last decade or so has recognized that terms like 'custody' and 'access' are not appropriate. Unless you're

responsibilities rather that their rights. This can be an important means of reducing parental conflict by defusing the winner-take-all custody-contest.

A number of jurisdictions can serve as models for new conflict-reducing language. For example, custody and access regimes could be replaced with concepts and terms like 'parental responsibility' (Australia), 'joint parental responsibility' (United Kingdom), 'shared parental responsibility' (Florida), or 'residential placement' and 'parenting functions' (the state of Washington). Custody itself is often replaced by the concept of 'residence' combined with decision-making authority. What is currently referred to as access may be referred to as 'contact', 'visitation' or 'parenting time' in other jurisdictions. The new terminology is often attached to new substantive legal regimes, some of which presume that joint custody or shared parenting - or alternatively some form of shared decision making without equal time sharing - will be the norm.

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familiar with the legal terminology, they're not terms that naturally flow to a parent. They have unfortunate connotations. They're not concepts that capture what parents are actually doing or should be doing, and they are concepts that tend to alienate one parent or indeed both parents: **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1999, p. 20.

The Commission is of the view that a shift to new, less loaded terminology is critical to reducing conflict in divorce.[51] Coupled with our intention to reduce conflict, the Commission feels strongly that the legal regime under the Divorce Act 70 of 1979 must discourage the estrangement of parents and children, and that to do so the Act must ensure that parent-child relationships survive marital breakdown. Therefore, in addition to proposing new language to replace that of custody and access, the Commission concludes that parental decision-making roles should, in most cases, continue beyond divorce.[52]

The Commission concludes that the current Divorce Act terms 'custody' and 'access' should be replaced by the expressions 'care' and 'contact' respectively.[53] By this, the Commission is not recommending a presumption that equal time-sharing, or what is currently referred to as joint physical custody, is in the best interests of all children. The Commission recognizes that the details of time and residence arrangements for children will vary with the family involved. In view of the diversity of families facing divorce in South Africa today, it would be presumptuous and detrimental to many to establish a 'one size fits all' formula for parenting arrangements after separation and divorce.

Several other recommendations flow naturally from this proposed change of language. The Divorce Act 70 of 1979 and the Mediation in Certain Divorce Matters Act 24 of 1987 should be amended to define 'care' and 'contact' as per our formulations in the new children's statute.

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51 See also 8.4.5.2 above.

52 The Alberta Law Reform Institute **Child Guardianship, Custody and Access** (Report for Discussion No 18.4), October 1998, p. 68 -69 cautions, however, against changes in terminology in isolation - 'to be meaningful, they must reflect new concepts or processes'.

53 See 8.4.5.2 above.

Also, with the removal of the concepts of custody and access, the outdated and discredited 'tender years doctrine' or 'maternal preference rule' is clearly no longer useful, and to ensure that it has no further influence, the Commission recommends its rejection.

Under the new regime and terminology formulated by the Commission, in almost all cases both parents will continue, after separation and divorce, to exercise their pre-separation decision-making roles with respect to their children. To ensure that neither parent is excluded unfairly from fulfilling that obligation, the Commission is also recommending change in the way authorities such as schools and doctors provide information to parents. In the event of separation or divorce, unless a court orders otherwise, important information about the child's development and well-being should be provided directly to both parents.

While the South African courts have favoured the use of contempt of court proceedings, when a custodian parent has refused to abide by a court order allowing the non-custodial parent access to his or her child,[54] it is also possible to utilise section 1 of the General Law Further Amendment Act 93 of 1962 against the recalcitrant parent.[55] It reads as follows:

> **Failure to comply with order of court relating to access to children or to notify change of address of parent having sole custody of child**
>
> (1) Any parent having the sole custody of his minor child in terms of an order of court, who contrary to such order and without reasonable cause refuses the child's other parent access to such child or prevents such other parent from having such access, shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand[56] or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.

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54 See, for instance, **Germani v Herf** 1975 (4) SA 887 (A); **Oppel v Oppel** 1973 (3) SA 675 (T).

55 Gerhard van Rooyen 'Non-custodian parents' rights to children : Some comments on the application of the General Law Further Amendment Act 93 of 1962 in the criminal protection of non-custodian parents' rights to their children' (2000) **De Rebus** 23 points out that the provision is not well known and therefore not utilised to its full potential.

56 The effect of the Adjustment of Fines Act 101 of 1991 is that this fine is now R20 000 or one year's imprisonment.

(2) Any parent having the sole custody of his minor child in terms of an order of court whereby the other parent is entitled to access to such child shall upon any change in his residential address forthwith in writing notify such other parent of such change.

(3) Any person who fails to comply with the provisions of subsection (2) shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand.[57]

(4) Notwithstanding anything to the contrary contained in any other law, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this section.

It is important to note that the **sole**[58] custody of the child must have been awarded to a parent in terms of an order of court. Once this is established, such a parent commits a criminal offence if he or she refuses the child's other parent access to the child without reasonable cause. Reasonable cause would depend on the circumstances of each case. However, it must be remembered that the interests of the child and not those of the parent are the most important factor in this regard. The fact that the parents do not see eye to eye or that it is inconvenient for the custodian parent to allow such access will not suffice.

One of the main advantages (for the non-custodian parent) of utilising the above provision is the fact that he or she does not have to institute contempt proceedings in the High Court in order to enforce his or her access rights. Another advantage is that the criminal law option is much cheaper for the non-custodian parent and should also be much faster.

Accordingly the Commission recommends:

° **that where allegations of child abuse surface in divorce cases, whether in the affidavits, in evidence, or as a result of the investigations conducted by the Family Advocate, or otherwise, the Court hearing the divorce matter may, of its own accord or upon application, order that the divorce matter stand down and order a children's court enquiry. This should reduce conflict in divorce proceedings by**

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57 The Adjustment of Fines Act 101 of 1991 is not applicable in this instance because the absence of an alternative maximum period of imprisonment.

58 'Sole custody' implies that the other parent is unfit to have custody. See in this regard **S v Amas** 1995 (2) SACR 735 (N) where the court held that the sanction applies only to a parent with sole custody, while the court in **Botes v Daly** 1976 (2) SA 215 (N) held that it is also applicable to a parent who merely obtained single custody. As sole custody is seldom granted, section 1 of the General Law Further Amendment Act 93 of 1962 can be invoked in very few cases (as per Professor Jacqueline Heaton, letter dated 26 March 2001). See also the submission by Mr Stuart McDonald who recommends that the section be amended by deleting the word 'sole'.

removing the incentive for making false allegations and should provide those children who are at risk of abuse with the protective framework of the new children's statute;

- **that the court, in making an order in respect of the child, attempt to ensure the continued involvement of both parents of the child in that child's life;**
- **that the terms 'custody' and 'access' be replaced with the terms 'care' and 'contact' respectively;**
- **that the Divorce Act 70 of 1979, the Matrimonial Affairs Act 37 of 1953, and the Mediation in Certain Divorce Matters Act 24 of 1987 be amended to add definitions of 'care' and 'contact' that reflect the meanings ascribed to those terms by the Commission;**
- **that the common law 'tender years doctrine' or 'maternal preference rule' be rejected as a guide to decision-making about parenting; and**
- **that both parents of a child receive information and records in respect of the child's development and social activities, such as school records, medical records and other relevant information. The obligation to provide such information should lie with the parent who has care ('custody') of the child, unless ordered otherwise by a court**;
- **that the word 'sole' be deleted in the wording of section 1 of the General Law Further Amendment Act 93 of 1962. This will have the effect of making it a criminal offence for the parent having care of the child to unreasonably refuse the other parent access to their child. It is further recommended that section 1 of the General Law Further Amendment Act 93 of 1962, as then amended, be repealed after having been incorporated in the new children's statute.**

- **Parenting Education**

It has been suggested that parenting education immediately following separation would also help reduce conflict between divorcing spouses.[59] The argument is that mandatory education programs for divorcing parents would help make them aware of how divorce affects children and the damage that can be caused to children by ongoing conflict. It will also help parents cope

59 **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1999, p. 22.

with the issues they will have to face as individuals (e.g. finances, subsequent relationships, depression, loneliness, etc) that, if not addressed, will affect the children.

Parenting education and divorce courses are increasingly available in South Africa, and offer the hope of mitigating the negative effects of divorce on children. Early research on the effectiveness of these programs is beginning to provide some grounds for optimism.[60]

Parenting education programs give participants general information about the separation or divorce process, the legal and financial impact of divorce, and other issues they will face as parents, and how the transition will affect their children. Some go further to train parents in the types of parenting techniques most likely to prevent children from being exposed to parental conflict. In most jurisdictions where parenting education programs are mandatory, special programs are offered to victims of domestic violence.

In Alberta, Canada, a parenting education program entitled Parenting After Separation has become mandatory - parents must attend a course before they can proceed with an application for divorce. In Florida, children also must attend a divorce education program before their parents can proceed with an application to the courts.[61]

In terms of section 6(3) of the Divorce Act 70 of 1979,[62] the court granting a decree of divorce may already make 'any order which it may deem fit'. **The Commission therefore foresees no difficulty in recommending that any parent seeking a divorce participate in an education program to help him or her become aware of the post-separation reaction of parents and children, children's developmental needs at different ages, the benefits of co-operative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution, provided such programs are available**. The Family Advocate is in an ideal position to coordinate such educational programmes. Parents should not be required to attend sessions together. The Commission wishes to emphasise that its recommendation in this regard is not aimed at putting hurdles in

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60 Jack Arbuthnot, Cindy Poole and Donald Gordon 'Use of educational materials to modify stressful behaviours in post-divorce parenting' (1996) 25 **Journal of Divorce and Remarriage** 117; Jack Arbuthnot and Donald Gordon 'Does mandatory divorce education for parents work?' (1996) 34 **Family and Conciliation Courts Review** 60.

61 M Gary Neuman **Helping your Kids cope with Divorce the Sandcastles TM Way** New York: Random House 1998.

62 See also section 5(1) of the Matrimonial Affairs Act 37 of 1953.

the way of those who wish to divorce, but to equip parents to be sensitive to the needs of their children during and post the divorce.

° **Joint custody**

In appropriate circumstances, an award of 'joint custody' of their child to parents who are divorcing or who have separated would serve the best interests of the child concerned.[63] Joint custody can assume many forms and it is therefore difficult to define precisely.[64] A distinction frequently made is that between joint **physical** custody and joint **legal** custody. The former usually involves an arrangement by which actual physical care of the child in question is shared between the parents, with the child spending substantial amounts of time living with each parent.[65] Joint legal custody usually entails the daily care and control of the child being vested in one parent, with the other parent having periodical contact with the child. Both parents, however, share responsibility for major decision-making concerning the child, each having an

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63 See generally in this regard, Erwin Spiro 'Joint custody' (1981) 44 **THRHR** 163; D J Joubert 'Gesamentlike bewaring' (1986) 19 **De Jure** 353; Ivan Schäfer 'Joint custody' (1987) 104 **SALJ** 149, 'Joint custody: Is it a factual impossibility' (1994) 57 **THRHR** 671; M Schoeman 'Gesamentlike bewaring van kinders' (1989) 52 **THRHR** 462; Brigitte Clark and Belinda van Heerden 'Joint custody: Perspectives and permutations' (1995) 112 **SALJ** 315.

64 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 551.

65 Joint physical custody most frequently involves the child or children in question moving between the separate homes of the parents on a regular basis, e.g. spending consecutive weeks or months with each parent in turn or spending certain days of the week with one parent and the rest of the week with the other. See further. Arthur Baker & Peter Townsend 'Post-divorce parenting - rethinking shared residence' (1996) 8 **Child and Family LQ** 217; Caroline Bridge 'Shared residence in England and New Zealand - A comparative analysis' (1996) 8 **Child and Family LQ**; Vivienne Goldberg 'Family mediation is alive and well in the United States of America: A survey of recent trends and developments' 1996 **TSAR** 358 at 362 - 3.

equal voice in the child's education, upbringing, religious training, medical care and general welfare and the right to be consulted over all major decisions in respect of the child. Particularly in cases where, prior to the court order being sought, the parents have worked out the details of a joint custody arrangement between themselves and have successfully implemented this arrangement for some time, a court order incorporating this arrangement would appear to meet the child's need for continuity and stability.[66]

66 This would appear to have been an important factor in the court's decision to award joint custody to the parties in the cases of **Kastan v Kastan** 1985 (3) SA 235 (C), **Venton v Venton** 1993 (1) SA 763 (D) and **Corris v Corris** 1997 (2) SA 930 (W). See also the leading decision of the English Court of Appeal in **A v A (Minors)(Shared residence order)** [1994] 1 FLR 669, discussed by Helen Conway 'Shared residence orders' [1995] 25 **Family Law** 435.

CHILDS[67] asked that the Commission consider recommending a presumption in favour of shared parenting or joint custody.[68] They argued that such a presumption is the only way to ensure that both parents negotiated or participated in mediation in good faith and with the children's best interests as the main focus. Without a presumption of joint custody, the respondent argued, mothers often would not participate in mediation, and the perceived gender bias in the courts would perpetuate the predominance of mothers as the custodial parents. Although the Commission has not recommended establishing a legal presumption in favour of either parent or any particular parenting arrangement, the Commission does see the value of joint custody (or care) and even substantially equal time sharing **where appropriate**. For parents with the emotional and financial resources necessary to make a joint physical custody arrangement work, it is the Commission's view that such arrangements can encourage the real involvement of both parents in their children's lives.

On the other hand, there are various arguments against joint custody awards, irrespective of the form such awards may take. Thus, a key argument against joint physical custody is the perceived danger of instability in the child's life, caused by frequent moves and inconsistency in living arrangements.[69] The risk of a lack of effective communication and of ongoing hostility and conflict between the parents in a post-divorce or post-separation situation is another frequently cited reason against joint custody in any form.[70] However, this notion that it is in the best interests of the child that there is one parent who has the 'final say' as regards the child's upbringing and that this parent's authority should not be undermined by the necessity to consult with or by the 'interference' of the other parent, harks back to the patriarchal legal past of South Africa and assumes that there will always be disagreement requiring resolution by one authoritarian parent.[71]

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67 Children in Legal Disputes, submissions dated 4 May 2001 and 27 June 2001.

68 See also June Sinclair 'From parents' rights to children's rights' in Davel (ed) **Children's Rights in a Transitional Society** 62 at 63.

69 A van Westing 'Faktore vir die verlening van 'n bevel van gesamentlike toesig en beheer na 'n egskeiding' (1995) **TSAR** 605 at 614 - 615 cautions that an award of joint custody will in all probability not be feasible in a situation where one or both of the parents have remarried - in her view, it is clearly not in the best interests of the child to be exposed on a sporadic basis to the different methods of upbringing and discipline prevailing in the 'new' family units, with resultant confusion to the child. See also **Willers v Serfontein** 1985 (2) SA 591 (T); **Grobler v Grobler** 1978 (3) SA 578 (T); **Krasin v Ogle** [1997] 1 All SA 557 (W); **Schmidt v Schmidt** 1996 (2) SA 211 (W); **Chodree v Vally** 1996 (2) SA 28 (W).

70 In fact, in the reported South African cases in which joint custody orders have been refused, it is this argument which appears to have weighed most heavily with the court. See Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 556 and authority cited.

71 As per Foxcroft J in **V v V** 1998 (4) SA 169 (C) at 179D.

> Against the background of the judicial ambivalence as regards joint custody awards, this means in effect that most minor children of unsuccessful marriages will continue to be placed in the custody of one parent, subject to the access 'rights' of the other parent, with both parents retaining residuary guardianship (or guardianship in the narrow sense) over such children.[72]

Internationally, joint custody arrangements involving substantially equal time sharing, when agreed to by the parents through the assistance of a counsellor or mediator, are often spelled out in detail in parenting plans. More elaborate than the traditional separation agreement or court order upon which many couples rely, these agreements specify where the child is to reside throughout the year, how decision-making responsibilities are to be shared by the parents, and the mechanism parents will use to deal with any disputes that arise between them.

With the passage of its Parenting Act in 1987, Washington was the first of several states in the USA to adopt a parenting plan system. The Parenting Act did away with the terms 'custody' and 'visitation', substituting the concept of 'residential placement'. Legislators intended the change of language to shift the focus away from the sometimes acrimonious battle between parents and onto the more important matter of ensuring the best possible parenting arrangements for children.

The basic mechanism for spelling out post-separation parenting arrangements is the parenting plan. All parents separating in Washington must complete detailed temporary and permanent parenting plans. A plan has three parts: a residential schedule; decision-making allocation; and a dispute resolution mechanism. Thinking through the children's post-separation arrangements is intended to help parents develop an understanding of children's complex needs and the importance of co-operating with the other parent in decision making. The long parenting plan forms that have to be filled out make sure that parents consider an extensive list of practical matters to meet the children's needs. The residential schedule must indicate at which parent's home the child will live on given days of the year.

Although it is hoped that the parties will arrive at the terms of the parenting plan by agreement, in the event that they cannot agree, the statute sets out criteria courts can use to impose a parenting plan. The residential provisions must encourage each parent to maintain a loving, stable and nurturing relationship with the child, consistent with the child's developmental level

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72 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 561.

and the family's socio-economic circumstances. However, a parent's residential time with a child must be limited if the parent has engaged in any of the following behaviours: wilful abandonment of the child; physical, sexual or emotional abuse of a child; domestic violence or sexual assault; or conviction for one of several other specified sexual offences.

The Washington law does not refer to joint custody or shared parenting, nor does it create any presumption about the desirability of such an arrangement. Shared parenting under a parenting plan is possible and can even be imposed by a court if to do so would be in a child's best interests.

Any matter can be sent for mediation of the contested issues before or at the same time as the matter is to be heard, unless one of the parties cannot contribute to the cost or would be placed at risk emotionally or physically. There is provision in the legislation for the court to appoint an attorney to represent the interests of a child in proceedings dealing with any aspect of a parenting plan in a marriage dissolution or legal separation matter between the child's parents. The court will order one or both parents to pay the legal expenses of the child's attorney.

The Commission believes the law should encourage parents to enter into consensual arrangements for shared parenting in the form of parenting plans.[73] The use of parenting plans is discussed in Chapter 8 below.

In some cases, of course, parents will be unable to agree on a parenting plan either on their own or in mediation. In that event (a situation which we hope would be exception rather than the rule) and subject to the discretion of the court acting in the best interests of the child to order otherwise, the Commission think it preferable to give one parent sole custody and clear decision-making authority over the child with access to the other parent, as appropriate in the circumstances. This approach is more likely to bring stability to the child's life than continued disagreement between parents under a court order for shared parenting. Reality dictates that where parents are unable to come to an agreement on a parenting plan, then the prospects of joint custody working are equally slim.

Accordingly the Commission recommends:

° **that section 6 of the Divorce Act 70 of 1979, section 5 of the Matrimonial Affairs**

73 See also JMT Labuschagne 'Case discussion: *SF v MD* 751 A2s 9 (Md App 2000) (2001) 34 **De Jure** 210.

Act 37 of 1953, the Mediation in Certain Divorce Matters Act 24 of 1987 be amended to require that parties applying to a court for a parenting order must file a proposed parenting plan with the court;

- **that divorcing parents be encouraged to develop, on their own or with the help of a trained mediator or through some form of alternative dispute resolution, a parenting plan setting out details about each parent's responsibilities for residence, care, contact, decision making and financial security for the children, together with the dispute resolution process to be used by the parties. Parenting plans must also require the sharing between parents of health, educational and other information related to the child's development and social activities. All parenting orders should be in the form of parenting plans;**

- **that the relationships of grandparents, siblings and other extended family members with children be recognized as significant and that provisions for maintaining and fostering such relationships, where they are in the best interests of those children, be included in parenting plans.**