

ISSUES IN LAW, RACE AND GENDER

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Family Advocate

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INTRODUCTION

For a number of years now, policy-makers and lawmakers in South Africa have had to address the concerns of the public and of welfare professionals about the prevalence of divorce and, in particular, its effects on children.¹

While it is acknowledged that the law cannot deal with the problems underlying the divorce rate, it is thought that the law can set in place mechanisms to safeguard the welfare of children when their parents' relationship breaks up.

To this end, the Mediation in Certain Divorce Matters Act 24 of 1987 was passed and, once it came into force in 1990, the office of the Family Advocate was established to protect the interests of children affected by divorce. This paper describes the role of the Family Advocate and attempts to highlight some of the difficulties that may be encountered in carrying out that role.

THE FAMILY ADVOCATE AND THE FAMILY COUNSELLOR

Family Advocates are appointed for each division of the Supreme Court by the responsible Minister in terms of section 2 of the Act. They are usually drawn from the public service. They are qualified as advocates and have been involved in or have experience of the adjudication or settlement of family matters.²

They are assisted by Family Counsellors who are appointed for that purpose by the Minister in terms of section 3.³ The statute does not specify what qualifications or experience a Family Counsellor should have but, in practice, only professionals with special expertise and experience in child and family matters are considered eligible. Most Family Counsellors are social

1 See, for example, the Hoexter Commission, Commission of Inquiry into the Structure and Functioning of the Courts RP 78/1983 para 6.22.

2 Section 2(2).

3 Section 3(1).

workers with at least two years' experience. A number of retired teachers and ministers of religion are used on a part-time basis in cases in which their specific skills would be useful. Whatever their background, Family Counsellors are required to undergo a course of intensive in-house training.

Both the Family Advocate and the Family Counsellor are empowered by regulations promulgated under the Act to appoint 'a person or persons to assist [them] with ... an enquiry'.⁴ Such a person is usually a mental health professional and may be a social worker, a psychologist or a psychiatrist. Teachers may also assist here. In certain matters a panel of mental health professionals is used.⁵ These professionals may be appointed in addition to or instead of a Family Counsellor.

III

REASONS FOR CREATING THE OFFICE OF FAMILY ADVOCATE

The Hoexter Commission, which reviewed the structure and functioning of the courts, was of the view that 'family problems that are on the verge of being taken to court, or which have already landed there, call for a special approach'.⁶ It expressed concern that in the vast majority of undefended divorces, there was no proper assessment as to whether the marriage had indeed broken down irretrievably. Nor was there a sufficiently thorough investigation into the adequacy of the arrangements made for the children.⁷ Cases were disposed of in a superficial manner. The only evidence before the court was that presented by the plaintiff.⁸ Only rarely would a legal representative be appointed to speak for a child and consequently, the interests of children would often be subordinated to those of their parents.⁹ In addition, the adversarial system encouraged conflict and so made it difficult to reach a

4 Section 6, *Government Gazette* No. 12781, 3 Oct 1990.

5 J McCurdie 'The Interface Between the Legal and Mental Health Professions with Particular Reference to the Office of the Family Advocate' (1994) 6 *Southern African Journal of Child and Adolescent Psychiatry* 12 at 13. Cf I Schafer 'The Family Advocate in South Africa' in *Frontiers of Family Law* A Bainham and D Pearl (eds) (1993) 32 at 37-8.

6 Commission of Inquiry into the Structure and Functioning of the Courts (note 1 above) para 2.7.

7 Commission para 7.3.1.3.

8 Commission para 8.10.1-2

9 Commission para 7.3.1.4.

settlement sufficiently flexible to stand the test of time. It also gave rise to increased costs.¹⁰

The principal recommendation of the Commission was that a family court be created. There has been some delay in implementing this recommendation but it is anticipated that a new family court will indeed be established in the near future. However, in any event, it was the creation of the office of the Family Advocate that was intended to address the problems relating to children described above. The Commission declared that there was a need, where there were children concerned in a divorce matter, for an approved social agency to carry out an investigation into the welfare of those children and the circumstances of the parties.¹¹ It was of the opinion that an office modelled on the Canadian Family Advocate should be set up to represent the children's interests, to give legal advice, to attempt to resolve issues in the best interests of the children and to instigate investigatory reports.¹²

It was in response to this that Parliament passed the 1987 Act. The debates in the House of Assembly highlight the advantages that were envisaged as a consequence of the appointment of the Family Advocate. Investigations by the Family Advocate would go behind consent papers and reveal hidden disputes as well as concealed imbalances in bargaining power.¹³ The new system would speed up the proceedings and, because of the neutral position of the Family Advocate, it was likely that the parties would accept his or her advice.¹⁴ Most importantly, it was said, the interests of the children would be safeguarded.¹⁵

IV

FUNCTIONS OF THE FAMILY ADVOCATE

The Family Advocate and the Family Counsellor work as an interdisciplinary team to promote the welfare of children whose parents divorce: 'In essence, they are the child's legal team. The Family Advocate is thus the child's

10 Commission para 7.3.1.6.

11 Commission para 8.10.3.

12 Commission para 8.11.5.

13 *Hansard*, 25 May 1987, cols 425, 432-3.

14 *Hansard*, 25 May 1987, col 436.

15 See, for example, *Hansard*, 25 May 1987, col 442.

Advocate and the Family Counsellor is the Family Advocate's expert witness, who would appear as such should the matter go to trial.¹⁶

Section 4 of the Act sets out the kinds of legal proceedings in which the Family Advocate is required to be involved. These are proceedings for divorce or applications to vary, rescind or suspend an order, made under the Divorce Act of 1979, which relates to the custody or guardianship of, or access to, a child. In *Terblanche v Terblanche*,¹⁷ it was held that section 4 should be interpreted as encompassing also applications pending trial for interdicts or for interim custody or access or for payment of maintenance. Rule 43 applications, which are initiated to seek interim orders relating to maintenance, costs, custody or access, therefore fall within the remit of the Family Advocate.

The Act does not spell out in any detail the functions of the Family Advocate and is supplemented by regulations. The role of the Family Advocate has been described as threefold: 'to monitor, to mediate and to evaluate'.¹⁸

(i) Evaluation

The evaluation function is central and predominates over the others.¹⁹ Section 4 of the Act makes it clear that the primary role of the Family Advocate is to determine what is best for the children and to advise the court accordingly. It provides that, when necessary, the Family Advocate must set up an enquiry and that the purpose of this is to enable him or her to furnish the court with a report and with recommendations concerning the welfare of minor or dependant children.²⁰ All the work undertaken by the Family Advocate, therefore, is informed by the demands of evaluating the family with a view to advising the court. In some cases, the Family Advocate may decide, or may be instructed by the court, also to appear in the proceedings and he or she may then lead evidence and cross-examine witnesses.²¹

(ii) Monitoring

This function derives from section 4(2) of the Act and from the Regulations.²² Family Advocates are charged with deciding whether, in any particular case, an enquiry is desirable, even though one has not been requested by the court or a party to the proceedings.

Also, the Family Advocate may, in effect, be called on to investigate as a result of monitoring activity on the part of the court; a request for an enquiry may be made by a court in an undefended case. This tends to happen where 'a party appears in person, no legal representation is involved, and the Court has doubts about the relief sought or the contents of an agreement reached between the parties'.²³

(iii) Mediation

The legislation, despite its title, makes no reference to mediation by the Family Advocate. However, the Regulations state that the manner in which an enquiry is conducted is at the discretion of the Family Advocate; it may be carried out in whatever way he or she deems 'expedient or desirable'.²⁴ As Advocate Bosman, the Chief Family Advocate says, 'the family advocate aims to settle the matter between the parties on terms most favourable to the welfare of the children'.²⁵ To facilitate settlements out of court, the Family Advocate has decided that the enquiry procedure should include mediation in appropriate cases.

Mediation as practised by the Family Advocate differs somewhat from the process that is commonly thought of as mediation and from divorce mediation as it is practised in other countries. The basic elements of mediation have been described as voluntary participation, equality or rough parity in bargaining power, neutrality on the part of the mediator, and confidentiality.²⁶ In contrast, much of the mediation undertaken by the Family Advocate is not voluntary;²⁷ much of the process is directed at establishing facts; the Family Advocate participates actively in the decision-making; the terms of the parents' agreement are not necessarily accepted and are tested against the

16. McCurdie (note 5 above) at 12.

17. 1992 (1) SA 501 (W).

18. F Bosman 'The Family Advocate and Mediation' in *Family Mediation in South Africa* W Hoffmann (ed) (1992) 55.

19. McCurdie (note 5 above) 12.

20. Section 4(1).

21. Section 4(3).

22. Sections 2 and 3(3), *Government Gazette*, note 4 above.

23. Bosman (note 18 above) 56.

24. Section 5(1) *Government Gazette* (note 4 above).

25. Bosman (note 18 above) 57.

26. A Gagnon 'Ending mandatory divorce mediation for battered women' (1992) 15 *Harvard Law Journal* 272, 274.

27. Bosman (note 18 above) 58.

standard of the child's best interests; the Family Advocate evaluates parenting abilities so that there is an element of adjudication in the Family Advocate's activities; and there is no confidentiality.

V

THE WORK OF THE FAMILY ADVOCATE

Once proceedings are instituted, the Family Advocate is immediately involved in monitoring the case to detect problems affecting the children.

Section 2(2) of the Regulations stipulates that, in any divorce action in which there is a claim relating to the custody or guardianship of a child or in relating to access, the plaintiff must deliver to the defendant and to the Registrar of the Supreme Court, together with the summons, an Annexure A form which has been sworn or affirmed. Similarly, in the event of an application for variation, rescission or suspension of an order which was made in terms of the Divorce Act and which relates to a child, the applicant must deliver a completed form together with the notice of motion. The defendant or respondent is given an opportunity to submit a reply in a separate Annexure A form.²⁸ The Registrar in turn is obliged to send to the Family Advocate a copy of the summons or application together with the completed forms.²⁹ This means that in cases where a party seeks a court order relating to children, the Family Advocate sees the legal documents initiating the proceedings and the Annexure A forms.

Annexure A contains questions aimed at establishing whether and by whom the children concerned are being maintained; where and with whom they are to live; who will look after the children; where they will attend school; and what arrangements have been made regarding access by the non-care-taking parent.

The Family Advocate reads the summons or application along with any Annexure A forms to determine whether an investigation is called for. In addition, if a matter is settled, the consent paper drawn up to reflect the agreement must be considered by the Family Advocate before any further steps are taken.³⁰ The reasoning behind this procedure is that it ensures that

28 Section 2(2) *Government Gazette* (note 4 above).

29 *Gazette*, section 2(3).

30 *Gazette*, section 3(3).

the Family Advocate is made aware of proceedings involving children and also of any arrangements that are arrived at without the court's intervention. It is assumed that, on the basis of the information in the papers, the Family Advocate is in a position to judge whether the case warrants investigation.

Should an enquiry be considered necessary, the Family Advocate has to apply to court for authorisation orally or by filling in an Annexure C form, indicating why an enquiry would be desirable.³¹

In *Van Vuuren v Van Vuuren*, the court outlined the kinds of circumstances in which the Family Advocate should take the initiative and intervene to institute an enquiry in terms of section 4(2).³² These are:

- where the form and the particulars of claim suggest that there are serious problems in connection with access;
- where it appears that there is an intention to place young children under the custody and control of someone other than their mother;
- where there is an intention to separate siblings by, say, awarding custody and control of one child to one parent and of the other child to the other parent;
- where there is an intention to award the custody and control of a child to someone other than a parent; and
- where there is an intention to make an arrangement that appears to be contrary to the child's interests.

Some indication of how these instructions may be being interpreted by the Family Advocate can be gained from Appendix A.

Section 4 also provides for other ways in which an enquiry can be precipitated. The Family Advocate is obliged to hold one if requested to do so by the court or by a party to the proceedings. A party to the proceedings who wants an enquiry to be initiated must complete an Annexure B form explaining the reasons for the request.³³

So, an enquiry by the Family Advocate can take place by order of court; at the request of a party; or on the initiative of the Family Advocate, sanctioned by the court.³⁴

31 See sections 4(1) and (2) *Mediation in Certain Divorce Matters Act 24 of 1987* and section 4 *Government Gazette* (note 4 above).

32 1993 (1) SA 163 (T) at 166.

33 Section 3(2) *Government Gazette* (note 4 above).

34 *Bosman* (note 18 above).

Sometimes, the Family Advocate begins the investigation by means of telephonic interviews. These quite often suffice to allay any concern. This would be so particularly in cases where, in the opinion of the professionals, a case is straightforward.

If a full investigation is considered necessary, the Family Advocate will usually endeavour to see the whole family. In addition, he or she may call for affidavits or other documents and may appoint someone to assist with the enquiry.³⁵ Parties to the divorce are asked whether they or their family are known to a welfare organisation or agency, and, if so, to supply the name and area of operation. These agencies are then sometimes used to obtain additional information. They may also give assistance in carrying out tasks such as home visits.

When a family does attend a meeting at the office of the Family Advocate, the parties may be accompanied by their legal representatives. But although lawyers are permitted to be present, strictly speaking they are not supposed to participate in any way other than as observers.

The procedure adopted by the Family Advocate during the enquiry depends on the professionals' initial assessment of the parties, their relationship and the allegations in the papers. The parties are normally seen together for the purpose of explaining matters such as the role and the neutral stance of the Family Advocate as well as the purpose of the enquiry. The parties may then be seen separately if either of them so requests. Alternatively, the Family Advocate may take the view that the allegations in the papers seen in conjunction with the demeanour of the parties suggest that separate interviews are warranted. Also, in cases where the Family Advocate is aware that the relationship has been a violent one, separate interviews might be offered. In such situations, arrangements may be made to ensure that the victim and the abuser arrive and leave at different times to reduce the risk of an attack.

If the case is perceived as amenable to mediation, the parties will normally be seen together for the purposes of discussion and mediation. During the interview, each party's reasons for wanting a particular custody or access arrangement are elicited and discussed. The Family Advocate and the Family Counsellor participate in this discussion, making suggestions, deflecting debate away from the grievances of the parents and focusing on the children's welfare. If they are old enough, the children themselves are also interviewed, either separately, together with the other family members or both.³⁶ Younger

³⁵ Sections 5(2) and 6 *Government Gazette* (note 4 above).

³⁶ Bosman (note 18 above) 59.

children are not normally interviewed but are observed by the Family Counsellor or social worker to ascertain whether they appear happy and well-adjusted and to examine the attachments the child has formed with family members.

If, in the course of an enquiry, the Family Advocate takes the view that any members of the family, or all of them, should be assessed by a psychologist or a psychiatrist, he or she will appoint one. This step may be prompted by concerns about a child or other members of a family arising from the initial evaluation by the Family Counsellor.³⁷ The professional may be paid by the parties (or may do the work without receiving a fee (*pro amico*)) but reports to the Family Advocate. The appointment of a mental health professional by the Family Advocate is intended to prevent the escalation of emotional and financial costs that can occur when parties appoint a succession of mental health professionals in the quest for a favourable report. It is more likely that a professional appointed by a neutral third person will be perceived as neutral than one appointed by an adversary.³⁸ This means that the professional opinion offered may be more readily accepted.

It may be that, in a process akin to mediation, the parents, with some help from the professionals, forge a solution that is acceptable to both of them. In such cases the Family Advocate will endorse the agreement if satisfied that it is in the children's best interests.³⁹ However, sometimes the Family Advocate rejects the arrangements agreed by the parties and often the parties do not manage to reach an agreement at all. So, most commonly, after interviewing the family members, the professionals consult and then the Family Advocate presents the view of the mediation team to the family for discussion.⁴⁰ The parties may well acquiesce and settle the dispute on the basis of the arrangement put to them. Failing this, the case may go to trial.

The Family Advocate may organise an experts' meeting, chaired by the Family Advocate or Family Counsellor, in order to establish which points are in dispute and which are not. At this meeting a further effort may be made to settle the matter. The parties, their legal representatives and the Family Advocate may be present at an experts' meeting.⁴¹

³⁷ McCurdie (note 5 above) 14.

³⁸ McCurdie at 14.

³⁹ McCurdie points out that even if the parties reach agreement with the help of the mediation techniques used by the Family Advocate, the agreement will not be endorsed by the Family Advocate unless he or she is satisfied that it is in the children's best interests (note 5 above, 12).

⁴⁰ Bosman (note 18 above) 59.

⁴¹ McCurdie (note 5 above) 15.

The Family Advocate compiles a report, making recommendations to the court, on the basis of all the information revealed by the investigation, including any reports by the mental health professionals concerned. In the event of a conflict of opinion between experts, the Family Advocate is obliged to put both views before the court.⁴²

VI

ASSESSING THE FAMILY ADVOCATE SYSTEM

While the introduction into the family law system of the Family Advocate represents a laudable effort to better safeguard the welfare of children, there are difficulties in maximising the effectiveness of the new system owing to resource constraints. It also appears that there are a number of more fundamental flaws inherent in the system. Some of the ambitions for the Family Advocate system were never realistically fully realisable, irrespective of the resources available.

(a) The limits of monitoring

It was thought by a number of the parliamentarians debating the legislation that the Family Advocate would be able to detect those instances where agreements are reached and consent papers drawn up which fail to secure the welfare of the children. This can happen, for example, where the agreement is devised to suit the parties rather than to ensure the welfare of their children.⁴³ Alternatively, the agreement may reflect a serious imbalance of power between the parties. It may, as a result, have the effect of serving the interests of the dominant partner rather than those of the rest of the family, including the children.⁴⁴

In reality, situations such as these will not often be readily detected by the Family Advocate. The monitoring function can be effectively carried out only in the most obvious cases. In many cases, the pleadings, Annexure A forms and, sometimes, a consent paper are all that the Family Advocate has on which to base a decision whether to investigate. There may be an enquiry where there is a significant discrepancy between what is contained in a

42 McCurdie 15.

43 *Hansard* (note 13 above) col 442.

44 See, for example, *Hansard* (note 13 above) cols 432-3 and 435.

content paper and the other information available to the Family Advocate.⁴⁵ But in the majority of uncontested cases, it will not be apparent from the papers whether arrangements are contrary to the children's best interests. As one Member of Parliament commented, there is little chance that the Family Advocate will be alerted to problems except in 'those cases where the children are patently being ignored or where one of the parents or both the parents consent to his intervention'.⁴⁶

Generally, it seems that the Family Advocate, like the court, resorts to applying widely accepted but relatively crude rules of thumb such as those enumerated in the *Van Vuuren* case. Indeed, there is evidence that an investigation will not necessarily be carried out even when one of these rules of thumb is violated. In *Van Vuuren*, the court indicated that an agreement giving unrestricted access to a father, who was alleged to use alcohol excessively and to have seriously assaulted the mother, ought to have alerted the Family Advocate to the possibility that the welfare of the children might be jeopardised. Nevertheless, even the known presence of risk factors such as drug or alcohol abuse and domestic violence do not often trigger an enquiry. One informant indicated that allegations of this nature are so prevalent that there are insufficient resources to set up an enquiry in all cases where they are made.

(b) The adequacy of monitoring

While monitoring cannot ensure that all cases where children are at risk are identified, it is thought that in some instances, like those cases where there is violence, discernible risks are being ignored. It is simply assumed that, as long as there is no evidence that the violence is directed against the children, their welfare is unaffected by it.

There is also concern that there is little enquiry into the day to day arrangements for childcare proposed by parents. So, for instance, an Annexure A form might state that the child will be cared for by a grandparent while the parents are at work. There would normally be no enquiry into the adequacy of the care offered by the grandparent. Indeed, in the majority of cases, there might be little point in investigating further as there might be no realistic alternative to the arrangements proposed, however unsatisfactory. In the

45 Schafer (note 5 above) 36.

46 *Hansard* (note 13 above) col 444.

context of widespread poverty and lack of day-care facilities, there is in reality little the Family Advocate can do to safeguard the welfare of children.

(c) Quality of reports

Whether it is often possible to safeguard the welfare of children through the use of law is open to question.⁴⁷ Nevertheless, the Family Advocate system does have the potential to ensure that at least in cases of conflict, when the court has to adjudicate, it has the best possible information on which to base its decision. Certainly, there has been praise for the Family Advocate from the courts.⁴⁸

Yet, lack of the necessary skill and resources can lead to superficial enquiries and, hence, superficial reports. Complaints are being voiced by practitioners suggesting that this is indeed happening in some instances. For example, one practitioner, interviewed in the course of a study,⁴⁹ remarked, 'frankly, they are so loaded with work that the recommendations are not always in the best interests.... Because they deal with children the margin of error should be the absolute minimum.'

Criticism has also been directed at the criteria used by the Family Advocate to evaluate parenting capacity. One practitioner complained that the Family Advocate tends to deploy stereotypical images of mothers and fathers as well as conservative markers of worthiness such as religious observance. It must also be kept in mind that the consideration of the economic circumstances of the parties can disadvantage mothers. This factor should perhaps be treated as significant only in extreme cases; in some instances the relative poverty of women, particularly on divorce, is so pronounced that it inevitably plays a part in assessing the welfare of children (see Appendix A).

(d) Violent relationships and imbalances of power

A further concern about the Family Advocate is one that relates less to the investigative role of the Family Advocate and more to the aim of enquiries and to the way in which they are conducted. The problem lies in the fact that Family Advocates see themselves in many situations as mediators and even more often as facilitating settlement of disputes.

47 See M King and C Piper *How the Law Thinks About Children* (1995) 2ed.

48 See *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504.

49 The Law, Race and Gender Research Unit at the University of Cape Town is carrying out a study on divorce in which practitioners are interviewed.

Fears have frequently been expressed in the past that informal dispute resolution such as mediation, while ostensibly 'empowering' participants, can have the effect of increasing the power of welfare professionals over family members and of denying inequalities in power within the family.⁵⁰ Informal dispute resolution may therefore be unsuitable in many situations, particularly where there is a significant imbalance of power between the parties.

The Family Advocate, the Family Counsellor and the mental health professionals on whom they rely wield very real power which extends even beyond that of divorce mediators in other countries. Not only does the Family Advocate have the kinds of powers that would persuade most parents to participate in the process of evaluation and perhaps mediation, he or she is in a position to mould the outcome, whether directly or indirectly. The parties are likely to feel under pressure to enter into negotiations, to reach agreement and to make that agreement acceptable to the professionals. There is a risk, therefore, that the participant control, which is considered an important advantage of mediation, might be absent while, at the same time, the safeguards for the weaker party provided by formal legal proceedings are also unavailable. The Family Advocate defines the children's interests and controls the outcome but does so largely on the basis of the parties' own, unassisted, representations.

The position of the Family Advocate as advisor to the court can place the parties under considerable pressure to avoid making a negative impression. So a party might feel that, by resisting the wishes of the other and failing to come to an agreement, he or she might be labelled as unreasonable and that this will be conveyed to the court. Not only might the parties feel impelled to reach agreement, the content of the agreement must conform to the views of the Family Advocate. If it does not, he or she will intervene more directly to state what settlement would be acceptable. And if there is no acceptable settlement, the decision of the final arbiter, the court, will be likely to be strongly influenced by the Family Advocate's recommendations, which will be informed by the assessment of the parties.

So a great deal depends on the ability of a party to persuade the professionals that he or she conforms to their image of the good father or the good mother. The success of this enterprise depends, in turn, on how the parties present themselves and how they put their side of the story. Because so much hinges on the assertiveness and articulacy of the parties, both the process and

50 See Nikolas Rose 'Beyond the Public/Private Division: Law, Power and the Family' (1987) 14 *Journal of Law and Society* 61 at 65.

the outcome can be detrimental to the more vulnerable family members if inequality within the family is not acknowledged. The potential for damage is especially worrying in cases of violent relationships.

i) The process

Family members who refuse to participate in the process or to co-operate do so at their peril. They are warned that the court may draw an adverse inference from such conduct.

So, family members are effectively compelled, if they want to obtain custody or access, to attend interviews and explain their point of view. This means that spouses, irrespective of any inequality in their relationship, are often treated as if they are equals. Neither the procedure for assessment nor the process of mediation undertaken by the Family Advocate's office includes any systematic mechanism for detecting or redressing the imbalance of power that frequently exists between the protagonists in the breakdown of a relationship. The parties, without the safeguards of legal procedure and legal representation, may be left to present their case to the professionals, or to negotiate with each other, as if they are equals while, in reality, they are not.

It is true that the parties are permitted to bring their legal representatives with them but, in theory at least, the lawyers are there on a watching brief only and cannot compensate for any imbalance of power. If a legal representative is permitted to speak for a client, as sometimes does occur, this has the potential in itself to create, or to exacerbate, an imbalance of power. Not all parties are legally represented and many of those who are, are not accompanied to the Family Advocate's office by their representatives. This means that one party may be helped to put his or her case by a lawyer while the other has to fend for him or herself.

Problems arising from an imbalance of power may be especially acute in cases where a relationship has been characterised by violence. It is important to note that violence can be used, often together with other measures such as isolation and intimidation, to control victims.⁵¹ It is also important to note that this element of control may be present even in those cases that might appear to involve mutual combat. Differences in the severity and the effects of the violence used by each party may be marked, as the examples in Appendix A demonstrate.

51 See F Kaganas 'Mediation and Domestic Violence' (1995) Issue 7 *Association of Lawyers for Children, Newsletter* 82.

It is in relation to the use of violence to control and dominate that some of the greatest problems can arise in the context of alternative dispute resolution. One of the strategies often deployed by victims, usually women, to avoid violence, is to comply with the batterer's demands.⁵² It is possible, therefore, in interviews or mediation, that the victim might simply capitulate in the face of the perpetrator's insistence.⁵³ The victim might not even be able to articulate her point of view.

This imbalance of power may be so extreme that it is unlikely that a neutral third party such as the Family Advocate can redress it.⁵⁴ The Family Advocate might not even know that the relationship has been a violent one. Without careful screening there may be no way of finding out. The fact that allegations of assault are common in pleadings is by no means a guarantee that all or even most violent relationships can be identified from the documentation. Often attorneys advise their clients not to include allegations of violence in the pleadings.⁵⁵ Nor will interviews necessarily disclose abuse. Perpetrators are unlikely to admit to violence and often present themselves as reasonable and even hard done by.⁵⁶ Conversely, victims may keep silent about their plight for a number of reasons. As Astor says of Australian women, they may fear retaliation, they may feel ashamed or they may not expect to be believed or taken seriously. They may also conceal violence in response to threats of further violence should they reveal abuse.⁵⁷ Pagelow, in the USA, contends that often 'both the woman and the man minimize or deny any violence'.⁵⁸ Many victims do not label themselves as abused, since they do not conform to their own stereotypes of battered women.⁵⁹ So, she reports, women who described their marriages as merely 'bad' or 'unhappy' had experienced 'attacks that were almost murderous'.⁶⁰ While it is not inconceivable that

52 M A Dutton 'Understanding Women's Responses to Domestic Violence: A redefinition of Battered Woman Syndrome' (1993) 21 *Hofstra Law Review* 1191, 1227.

53 See F Kaganas and C Piper 'Domestic Violence and Divorce Mediation' (1994) 3 *Journal of Social Welfare and Family Law* 265, 266.

54 See H Astor 'Violence and Family Mediation: Policy' (1994) 8 *Australian Journal of Family Law* 3

55 Research carried out by the Law, Race and Gender Research Unit, University of Cape Town (1995) - draft paper on file at the Unit.

56 Astor at 13-14.

57 H Astor *Position Paper on Mediation* National Committee on Violence against Women (1991) 21.

58 M D Pagelow 'Effects of Domestic Violence on Children and their Consequences for Custody and Visitation Agreements' (1990) 7 *Mediation Quarterly* 347 at 355. See also K Fischer, N Vidmar and R Ellis 'The culture of battering and the role of mediation in domestic violence cases' (1993) 46 *Southern Methodist University Law Review* 2117, 2139.

59 Pagelow at 8 - 9.

60 Pagelow at 15.

South Africans view abuse differently, it cannot be assumed, in the absence of evidence to the contrary, that South African women as a whole are more forthcoming than their counterparts abroad.

Simple, direct questions frequently do not elicit information about violence. Therefore complex guidelines have been devised in the USA in an effort to identify cases of abuse so that they can be excluded from the mediation process.⁶¹ This effort comes in response to arguments in North America, echoed in Australia and Britain, that mediation is inappropriate in cases of prior or existing domestic violence, at least in cases where the victim's ability to negotiate and assert her point of view is impaired.⁶² Many of these arguments apply equally to the procedures used by the Family Advocate. To require the victim to be in the same room as the perpetrator may cause her great fear and may seriously compromise her ability to negotiate.⁶³ Fischer and her co-authors warn that 'hidden symbols of dominance and control shared only by the couple', such as facial expressions, can be displayed to influence the victim's behaviour.⁶⁴

If the Family Advocate becomes aware of the violence, he or she may see the parties separately and engage in a kind of shuttle diplomacy. Astor, writing about mediation in Australia, acknowledges that this process might remove any immediate threat but contends that the woman's capacity to assert her own side of the story 'will almost certainly still be affected by the violence'.⁶⁵

ii) *The outcome*

Not only does the process raise difficulties, the outcome may be unfair and even endanger the victim and her children. The fact that the Family Advocate checks any settlement to ensure that it is in the child's best interests does not mean that this risk is avoided. The Family Advocate can only assess the child's interests on the basis of the information available. If he or she is unaware of the violence or ignores it as being irrelevant to the welfare of the child, important information may be excluded from consideration.

For example, Family Advocates show a distinct preference for giving 'reasonable', and so undefined access to the non-resident parent. A woman who has been abused may well be reluctant to agree to this. For one thing,

61 See, for example, L Girdner 'Mediation Triage: Screening for spouse abuse in divorce mediation' (1990) 7 *Mediation Quarterly* 365.

62 See Kaganas and Piper (note 53 above).

63 Astor at 6.

64 Fischer et al (note 58 above) at 2169.

65 Astor at 6.

she may fear any contact with her assailant lest she be subjected to further attacks. This fear is not unfounded; research suggests that violence may escalate during and after separation⁶⁶ and many women killed by their partners are killed after they have stopped living together.⁶⁷ A study carried out in Denmark and Britain suggests that the time when children are handed over from one parent to the other can be particularly dangerous.⁶⁸ If there is an interdict against the husband with respect to the wife, or the Family Advocate is aware of violence, emotional abuse or animosity, attempts are often made to restrict contact between the parties while not interfering with the child's contact with the non-custodian parent. For example, arrangements might be made for the child to be fetched at a neutral venue. Yet some of the illustrations in Appendix A suggest that the Family Advocate may, on occasion, be according insufficient significance to the risks. Any challenge to his authority, including a restriction on his contact with his children, may trigger a violent response in the abuser. However, to allow unrestricted contact is to create recurring opportunities for the use of violence and vulnerable victims should not be exposed to this increased risk.

Children may also be put at risk. Children may be adversely affected by witnessing assaults on their mother, they may be accidentally hit, pushed or dropped during the course of a violent episode,⁶⁹ they may be injured at tempting to intervene on behalf of their mother⁷⁰ and they may become the direct target of abuse.⁷¹ Children may also suffer if their mother's ability to care for them is impaired because of fear or the experience of being abused.⁷² In addition, children learn from seeing violent attacks that violence is an appropriate way of resolving conflict.⁷³ Again, Appendix A contains cases where these issues do not appear to have been addressed.

66 L Keenan 'Domestic Violence and Custody Litigation: The Need for Statutory Reform' (1985) 13 *Holstra Law Review* 407, 421; D Ellis and N Stuckless 'Pre-separation abuse, marital conflict mediation and post-separation abuse' (1992) 9 *Mediation Quarterly* 205; Fischer et al at 2139.

67 J Campbell 'If I can't have you no-one can': power and control in homicide of female partners' in J Radford and D Russell (eds) *Femicide: The Politics of Women Killing* 1992 99 at 106; M Mahoney 'Legal Images of Battered Women: Redefining the issue of Separation' (1991) 90 *Michigan Law Review* 1 at 72.

68 M Hester and L Radford 'Domestic violence and access arrangements for children in Denmark and Britain' (1992) 1 *Journal of Social Welfare and Family Law* 157.

69 P Jaffe, D Wolfe and S Kaye Wilson *Children of Battered Women* (1990) 27.

70 Keenan (note 66 above) 420.

71 See M O'Hara 'Domestic Violence and Child Abuse - Making the Links' (1992) 88 *Childright* 4.

72 Keenan (note 66 above) 418.

73 Jaffe et al (note 63 above) 27.

CONCLUSION

The Family Advocate plays an important role in protecting children and ensuring that their interests are given priority in seeking to resolve disputes. The Family Advocate also does valuable work in helping to settle cases, and so enabling the parties to avoid the financial and emotional cost of litigation. It is essential, however, that the Family Advocate, the courts and mental health professionals do not become complacent. There is room for research evaluating the techniques deployed by the Family Advocate and issues such as the fusing of the roles of assessor and mediator should be explored. In particular, consideration needs to be given to the possibility of screening for violence to ensure that victims are not expected to negotiate with assailants whom they fear.

APPENDIX

Introduction

A study of divorce files undertaken recently^{*} gives some idea of the prevalence of violence among divorcing couples and of the way it is dealt with by the Family Advocate and mental health professionals. This Appendix provides a summary of the study, including a number of case illustrations.

A sample of 50 cases was obtained by sifting systematically through divorce files from 1992 onwards until enough with some Family Advocate involvement were found. 1992 was chosen to allow a period during which the Family Advocate's office and its method of operation could become established.

The Family Advocate's criteria for assessment

#L is particularly illuminating in that it is one of only two in the sample in which the social worker set out clearly the factors she felt were important to take into consideration. The Family Advocate, of course, relies to a large extent on the reports of social workers in formulating recommendations. In this case the social worker listed (a) the financial circumstances of the parents; (b) the "emosionele en geestelike geskiktheid" of the parents;^{*} (c) discipline; (d) household circumstances; (e) influence of child-parent relationship; and (f) the parents' support system.

Economic inequality

Women's poverty, which becomes particularly visible on divorce, can disadvantage them severely in disputes over custody and access. So acute is their poverty in some cases that this becomes a determining factor.

#U was one of the saddest cases in terms of the hopelessness of the woman's position. This couple were married in 1977 and had four children, aged nine to twenty. The woman worked as a live-in domestic worker in

* English: "emotional and spiritual appropriateness".

Durbanville, earning R230 per month. Her husband worked as a farm labourer on a Kuilsriver farm and earned R325 per month. The woman listed assault among her reasons for the divorce action. Although not explicit in the papers, it is likely that she lived with her husband on the farm before deciding on divorce.

In her plea the woman asked for custody and maintenance of R200 (presumably in total) for the children, division of the estate and costs. The summons was issued in February and the case appeared on the roll in late April. On that date the case was postponed sine die and the women then completed Annexure B asking that the Family Advocate investigate. She said that she and her husband could not agree on custody and guardianship and "ons wil weet of dit die beste is dat kinders na ma of pa moet gaan".*

The Family Advocate's report noted that preliminary enquiries had already been made previously in the case. The enquiries revealed that the woman was not in a position to have the children with her and would be satisfied with reasonable access. The Family Advocate had addressed a letter with this information to her attorney.

After receiving the Annexure B form, the Family Advocate made further telephonic enquiries. She found that the children were with their father on the farm, happy and well cared for, and that the woman was satisfied and had changed her plea.

The divorce was set down as contested for October, but went through uncontested. The husband was granted custody, and the estate divided. No costs were awarded.

In #26 the wife had originally filed for divorce, and the divorce proceedings were completed in two months. The Family Advocate became involved when the man, a taxi-driver, asked that the order be changed to allow the four children - aged five months to ten years - to be put in his custody rather than that of his unemployed ex-wife. The Family Advocate's report noted that the woman was "very satisfied" and that "sy slegs die beste vir haar kinders wil hê. Sy kan nie in hulle basiese lewensbehoefes voorsien nie, terwyl Applikant daartoe in staat en gewillig is om hulle, met sy moeder se hulp, te versorg".** Although the woman had a house, she had to take in tenants to get income. She herself was sleeping in the passage and there was no room for the children to sleep. To add to her difficulties, the second child suffered from cerebral

palsy and she did not have the necessary transport to take her to the hospital. By the time of the Family Advocate's report the children had been living with their father for seven months.

Violent relationships

Of the fifty women in the sample, 28 - over a half - said they were assaulted by their husbands. Another said her husband had threatened violence and he admitted this. In at least 17 of these cases the women said that they had been assaulted repeatedly. Eight men accused their wives of having assaulted them. Two of them said they were frequently assaulted. In three of these cases the woman also accused the man of assaulting her.

The sample supports the hypothesis that the majority of victims of domestic violence are women. However, it does reveal that some men too seem to be victims of assault. But it is potentially misleading to focus on assaults on men and to see relationships in terms of conflict without investigating further.

#H is a case that illustrates the problem. The Family Advocate confirmed that each party had assaulted the other throughout the marriage. However, although this is not made explicit in the report, there is a strong suggestion that the parties were not equally matched. In September 1991 the SA Police had taken away the man's gun and he was held in custody for two days after holding a pistol against the woman's head and threatening to shoot.

In #42, another case where both parties accused each other of assault, the woman's assault of her husband was serious, but appears to have been committed in a life-threatening situation. The woman had been accused of attempted murder after stabbing her husband in the heart with a knife. Her defence was that she attacked her husband "ter verdediging van die partye se minderjarige dogter was deurdadig Eiser gedreig het om haar om die lewe te bring". The woman was asking that sole guardianship be granted to her, but that the child remain in foster care while she received assistance with an alcohol problem from Alcoholics Anonymous, from Rape Crisis for counselling in connection with the physical abuse suffered at the hands of her husband, and from an ACVV (Afrikaanse Christelike Vroue Vereeniging) parents' group in relation to parenting. The social worker acting for the Family Advocate noted that the woman appeared the "meer bevoegde ouer".**

* English: "we want to know if it is best that the children go to mother or father".

** English: "she only wants the best for her children. She cannot provide for their basic needs, while the Applicant is able and willing to care for them with his mother's help".

* English: "was in defence of the parties' minor child on account of the fact that Claimant threatened to kill her".

** English: "more competent parent".

Response to allegations of violence

Allegations or evidence of assaults on women are not usually taken into consideration by the Family Advocate in making custody and access recommendations. Spousal assault is seen as outside the remit of the Advocate, who is responsible only for the children's welfare.

The wife in #L requested the investigation by the Family Advocate. She said she had left the common home in fear after she was assaulted. She said that the children were living with her husband after he had "stolen" them from her, and that she was afraid to take them now because of her fear of assault.

The husband, in his arguments, said that there were several months during which his wife had no contact with the children. While he implied that this suggested lack of maternal care, the fact that this contact had to be arranged through her lawyer suggests strongly that the woman's fear of her husband was a stronger factor. Since the lawyer's intervention the husband admitted that contact had been regular.

The social worker recommended that the husband have custody. Her chief argument, she said, was that he could provide better physical and material care. What also counted against the woman was that she had not had contact with the children for the period of about a year and that when the children went to the woman for weekends, they often, because of the lack of space, slept out with other family members.

The couple in #Y had six children, aged six to eighteen. The woman instituted divorce proceedings on the basis of several assaults, her husband's failure to maintain the family adequately, and frequent arguments. She asked for custody for herself with reasonable access for her husband.

On the Annexure B form requesting the Family Advocate's investigation, she stated that her husband had assaulted both herself and the children and she therefore wanted restricted access.

The Family Advocate's investigation found that marriage problems had begun five years previously when the woman had resumed employment. The husband's hobby was pigeon flying. One of the serious sources of conflicts was that he expected his wife and children to help with the hobby and said that his wife's work interfered with this.

In April 1991 the husband had taken an overdose and been admitted to Lentegeur Hospital, a psychiatric hospital, after accusing his wife of an affair. The wife denied she had been engaged in affairs and said her husband looked in her panties, spied on her at work, and commented on the state of her breasts in his search for "evidence". She said, however, that it was possible he had

an affair. The Family Advocate's report felt the evidence supported the woman's understanding of events. Lentegeur, too, on discharging the husband from hospital two weeks after the overdose, noted a diagnosis of probable delusional deviation. The hospital, in its report for the Court, also noted that the husband was supposed to continue with treatment on an out-patient basis but did not keep the first appointment.

Two months after the summons was issued the husband left the common home and went to live with a friend. He admitted that there was inadequate room there for the children.

The Family Advocate and the social worker found that the children were scared of their father, having been exposed to a great deal of violence. On one occasion he had apparently pulled down his pants to show the children his venereal disease. They found that he sexually abused his wife by forcing her to have intercourse four or five times consecutively. They found that the husband did not have satisfactory accommodation and should therefore not have the children for weekends.

Three of the children said they wanted to visit their father, but only if it was at home and with their mother. Two children wanted no contact. The sixth child was attached to the father. Both experts nevertheless recommended that the father have contact with his children, but that this should happen without there being contact between the mother and father. They noted that his assaults were more often verbal than physical, and that when they were physical he used his hands rather than weapons. They therefore recommended that the wife be awarded custody, with reasonable access for the husband, while noting that such access would be difficult to define. Lentegeur recommended that the husband be "motivated" to attend outpatients.

A consent paper was drawn up and accepted by the judge. This specified custody and reasonable access. Reasonable access was undefined, but the second clause of the consent paper noted that "the parties undertake to exercise utmost good faith and reasonableness in their dealings in respect of the children and always to act in their best interests".

#35 is one of the more complicated cases. It is unusual as the husband was refusing access to the wife.

The husband in this case was a production manager in a large factory. The woman was a secretary. The couple had three sons, aged 10, nine and six. The couple had been married since 1981 and the woman claimed that her husband had begun to assault her after one year of marriage. When she left the common home, her husband refused to allow her to take the children with her.

At the time the woman instituted divorce proceedings the children were still living with their father. Their mother at first attempted to get custody, so that the boys could live with her, her parents and two sisters. The father refused all access, claiming she abused alcohol, had left the common home, and had engaged in an extramarital affairs. He admitted he hit her, but said he had done so only twice, with an open hand, and only after being provoked. He said that assault was "too strong a word".

The first consent paper provided for the two older children to stay with their father and for the mother to have custody of the younger, together with child support of R150 per month. The Family Advocate's office recommended that this arrangement should not be accepted.

The Family Advocate instituted in-depth investigations in this case, interviewing the older children, grandparents, a social worker, teachers, family acquaintances, the employer, a domestic worker and lawyers. Because of dissatisfaction with the Family Advocate's reports, the woman also employed an independent social worker. The comments and observations from all the investigations are consolidated in this summary.

Lawyers, two work colleagues and the children confirmed that the woman had been assaulted by her husband in their presence. The older children said it was their mother's fault that their father hit her as she stayed out late. One of the reports noted that the father "tried to justify his behaviour and thus influenced his children that it is acceptable for a man to assault a woman". The youngest said he was afraid that his father would kill his mother. However, he liked his father because the latter bought him presents.

The woman spoke of many occasions of abuse. She had over time approached NICRO, Childline, Welfare, and the Family and Child Unit to gain assistance of various kinds. She said her husband had sometimes thrown her out of the house after beating her. On one occasion he undressed her before throwing her out. On another occasion she claimed he pulled off her clothes in public. This particular assault was observed by a lawyer. The lawyer said the man "beat her up so badly it looked like a ... boxing match". The man's explanation was that "during the altercation I happened to grab hold of her clothes and she pulled away ripping the buttons off and leaving her thus largely undressed".

Other interviewees spoke of the man's good attributes. Thus he "assisted her in a remarkable way regarding domestic duties. He is an accomplished cook." The report noted that both looked after the children well. It also noted that the husband worked long hours and admitted he was "never at home".

The social worker reported that the woman had at all times been an "adequate parent" and never left the children unattended. She noted that the mother was "undoubtedly the emotional parent" of all three children. However, she did not always return home at night and had once been brought home by the police after her friends deserted her. The social worker felt she was "irresponsible" in placing her own needs before those of her children. She contrasted this with the "stability" provided by the husband. For his part, the husband argued that the two eldest children were at, or approaching, an age at which "in boys, the father figure becomes particularly important".

The woman said she had not been unfaithful to her husband. Rather she had turned to others for support. She explained the times she returned home late by her dependence on others for transport.

The social worker noted that the husband had resorted to physical abuse, which she "by no means excused". However, she found that the anger which the woman displayed towards the children during the interview "in my opinion is not the behaviour of a mature person".

The social worker recommended that custody of all three children be awarded to the man. He had more suitable accommodation than the woman and a move would uproot them. (This recommendation was made despite the fact that his house was being sold in execution.) When the woman phoned the social worker to ask for an explanation of the decision, she was told "it's a man's world". The woman said that this "made me feel that (the social worker) was unduly sympathetic to my husband simply because he was male".

As a "temporary practical arrangement" the youngest child should be in the woman's physical care as he had an "emotional need" to be with his mother. However, the social worker concurred with the suggestion of the husband that the arrangement should enable him "should it be necessary, to remove the child from the Applicant's care ... (as) it is unlikely that he will abuse his custodial rights and remove the child without good reason".

Custody for the father, and reasonable access for the mother, were incorporated in the consent paper approved by the Family Advocate.

Violence towards children

The Family Advocate will normally investigate if there are allegations of child abuse. In eight of the cases explicit violence towards the children was mentioned.

In #I the Family Advocate took the initiative and wrote to the woman's lawyer suggesting an amendment to the access clause "in view of the serious allegations". These included complaints by the parties' six year old daughter about her father's violence towards her. The amended draft order was accepted by the court. It defined the husband's right of access as every alternate Saturday, from 9 to 6, with supervision by the woman or her designate.

Of course, acts which are alleged to constitute abuse may be viewed very differently by the professionals. In #28 the man was alleged to have assaulted both his previous wife, the current wife, and the children. The children of the second marriage were a girl aged three and a boy of one year. The specified assaults included hitting the children when they cried at night. The Family Advocate reported that according to the father "dissiplinerig op 'n christelike basis [plaasvind] met bespreking daarna en restitusie. Die kinders se reaksie op dissiplinerig is deurgans positief en hulle openbaar liefde daarna."

The Family Advocate's report noted that as the son grew older, he would "al hoe meer 'n vader nodig hê en sal die inset wat Eiser in sy ontwikkeling lewer van baie groot belang wees".** The report noted in connection with the husband's background that his parents were "'boeremense' met gesonde morele en etiese norme en streng dissipline".*** It argued against supervised access, as this was seen as an intrusion on rights and could be justified only by concrete evidence of abuse. While the man had previously received treatment for a nervous breakdown, he seemed "reasonably emotionally stable" and was a devout Christian.

This case with its emphasis on parental rights, suggests that the welfare of the child, instead of being of paramount importance in the Family Advocate's assessment, is sometimes regarded as merely one factor amongst others to be considered.

Allegations of abuse directed at children other than the child in question might trigger an enquiry but do not often seem to result in recommendations for supervised access.

* English: "disciplining [takes place] on a Christian basis, with discussion thereafter and restitution. The children's reaction to discipline is positive and they display love afterwards."

** English: "more and more need a father, and the input which Claimant can contribute to his development will be very important".

*** English: "farming people with healthy moral and ethical norms and strict discipline".

In #V the Family Advocate recommended access for the father despite evidence of assault on a child. The husband in this case was due to appear in court on allegations of sexually assaulting the woman's eight-year old daughter from a previous relationship. The question was still outstanding as to whether the charges would be incest or rape. The Family Advocate's office itself initiated an investigation on account of the allegations of drink, sexual molestation and assault. The Family Advocate recommended that the woman be given custody of their one and a half year old daughter, but that the father have reasonable access as, indeed, had been requested by the mother in her particulars of claim. In explaining the recommendation, the Family Advocate's report noted that the "verweerder het ook geen fisiese leed aan sy eie dogter gedoen nie. Die kwessie van die verkragting op Eiseres se dogter is ietwat onseker".* The judge's order followed the recommendation in respect of custody and access.

In #S the wife claimed that her husband was assaulting both herself and her thirteen-year old daughter from a previous marriage. In this case the allegation of assault against the daughter was not referred to at all in the Advocate's report.

In an interview one practitioner referred to a case in which a man had sexually abused the children, yet was awarded unsupervised access. This practitioner felt that the Family Advocate had "given up" because "judges are as weak as all hell". The attitude of the judges was attributed, at least in part, to the fact that they are predominantly men. "Women might be better.... If you got [a woman judge], she would be tougher."

* English: "respondent did not cause any physical harm to his own daughter. The question of the rape of claimant's daughter is somewhat uncertain".

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