

**Towards being heard: Representations of the child's voice in
custody evaluation reports by the Family Advocate's Office**

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of the degree of MA Clinical Psychology.

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Signature: signature removed Date: 31. March 2009

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This dissertation is dedicated to my late husband, Rakesh Gajjar,
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ABSTRACT

This study outlined the changing social and legal contexts insofar as it relates to children's participation in matters that affect their lives. It set out the debates in the literature on whether or not children should participate in family law matters, specifically custody disputes, and if so, how this participation should take place. It also drew upon research studies which have explored directly children's views on the issue. The challenges involved in custody evaluations were scrutinised, specifically in relation to the Family Advocate's Office, and alternative and/or complementary methods of accessing the child's voice were considered. In South Africa, in all access and/or custody disputes, the Family Advocate's Office is tasked with making recommendations to the court, which are in the child's best interest. The recently promulgated provisions of the Children's Act (2005) also require that the child's views and wishes be taken into consideration. Accordingly, this research study involved a thematic content analysis of 10 Family Counsellor reports, in order to determine how the child's voice is accessed by the Family Advocate's Office. A structural model illustrating how the child's voice was represented in the reports was developed. It showed that the child's voice was represented in three distinct ways, namely: the child's voice is accessed directly; the child's voice is disqualified; and the archetypal child's voice is accessed through a proxy. The findings showed a tendency to rely more on accessing the archetypal child's voice through a proxy, which typically included reporting that was less descriptive and more inferential, interpretive and opinion-laden. A need for more direct, non-disqualified means of accessing and/or reporting on the child's views and wishes was indicated.

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CHAPTER 1

INTRODUCTION

Historically, children became involved in custody and/or access¹ disputes when their married parents divorced, and agreement could not be reached regarding their custody. However, since the rights of both unmarried fathers and children born out of wedlock are now recognised and protected by law (Children's Act, 2005), children are now subjected to custody disputes flowing from either the dissolution of their parents' marriage or from being born to parents who are unmarried and who are no longer in a relationship with each other. The liberalisation of the family law system has resulted in, the demise of the maternal preference rule, the retrospective effect of unmarried fathers' rights and the legal recognition of customary and religious marriages, which potentially escalate the number of custody disputes. In all these cases, the Family Advocate's Office is responsible for an objective assessment of the merits of each party's case and for making recommendations to the court. In so doing, they are now obliged in terms of the law, to take into consideration a child's views and wishes, while bearing in mind that ultimately children's participation has to be balanced against what is in their best interest (sections 7, 10, 31 Children's Act, 2005).

This study reviewed the social and legal reformations which have led to legislative changes in South Africa. It presented the debates for and against children's participation in custody disputes, including children's views on the matter. The challenges facing custody evaluators, specifically at the Family Advocate's Office was discussed and alternative and/or competing methods of accessing the voice of the child was considered.

1.1 Aims of the study

In the light of the recent legislative changes, the current study aimed to explore how the Family Advocate's Office accessed the voice of the child in custody disputes. The

¹ The Children's Act (2005), parts of which were promulgated in 2007, has introduced a number of terminology changes. An over-arching phrase, "Parental responsibilities and rights" replaces terms such as custody, access and care. For ease of reference, in this study the term "custody" refers to disputes involving children's primary residence, access and/or care.

study also had a specific objective to develop a structural model to illustrate how the child's voice was represented in the Family Counsellors' reports.

1.2 *Rationale*

Although research studies conducted at the Family Advocate's Offices in South Africa have explored whether or not children's voices are being accessed in the custody evaluation process (Africa, Dawes, Swartz, & Brandt, 2003; Barrat, 2003; Burman, Derman, & Swanepoel, 2000; Glasser, 2003; Louw & Scherrer, 2004), as yet, there is a paucity of research exploring and describing *how* children's voices are being represented in the reports produced by the Family Advocate's Office. It was therefore necessary and relevant to research this issue, particularly post-2005 following the initial tabling in the Children's Bill (2005) of the Family Advocate's Office's statutory obligations. Accordingly, it was decided that the Family Counsellors' reports, which form part of the Family Advocates' reports would comprise the sample in this study as the Family Counsellors play a key role in assessing the children and making custody-related recommendations, which are submitted to the court (Africa et al., 2003; Burman et al, 2000). Reports are considered to "best reflect child custody practices and procedures" (Bow & Quinnell, 2002, p. 165), instead of self-reports or interviews, which are subjective, and create the potential for respondents/participants to "report on their ideal or best practices, whereas actual practice may vary from case to case (Horvath, Logan, & Walker, 2002, p. 558). Thus, archival data was selected as it represented the actual workings of the Family Advocate's Office as opposed to self-reports or interviews, which may have given a distorted picture of how the child's voice was accessed.

CHAPTER 2

LITERATURE REVIEW

This chapter explores the literature relating to the growing recognition of children as social and political beings, who have over time been given increasing rights which are now protected in international and domestic laws. The implementation of these rights have galvanized academics and experts in the legal, social science and mental health fraternities to debate how these rights should be effectively implemented. While there is a meeting place on some issues, views in this regard vary considerably too. This literature review attempts to summarize the different academic opinions and also includes studies which have researched how children feel about their participation in general, and in regard to custody related matters. The challenges encountered in the process of custody evaluations are discussed, specifically focusing on the Family Advocate's Office. Research which has explored alternative methods of child participation is briefly outlined.

2.1 Children are people too

Since the 1960s, children have increasingly been seen as having rights of their own and not merely as the property of their parents (Davies, 2004). While there has been a definite paradigm shift towards recognizing children as citizens in their own right, it appears from the literature that there is also a mindfulness about the specific qualities of children that make them different to adults. Therefore, on the whole, a more substantive approach, which recognises this difference, has been proposed as a preferred way of protecting children's rights. Thus, Neale (2002) argues in favour of a social model of citizenship which "is closely aligned with children's own thinking, for it grounds the individualized rights of recognition, respect and participation within the relational ethics of care, responsibility and interdependence" (p. 470). Bearing in mind children's playfulness and their need for protection, Jans (2004) advocates a 'children-sized' citizenship which recognises their meaningful participation in society but does not grant them the same (which does not imply less important) rights and responsibilities given to adults. Yet, the appreciation of children as "fully fledged citizens" is crucial in order to avoid "a regression to adult-orientated disputes" (Moloney, 2008, p. 46). According to Taylor (2006) attention has been directed to

children's role as "citizens and social actors with their own views and strategies for active coping within their family and community" (p. 156). With regard to family law matters, there has been a shift in focus from a deficits model, which explores the negatives of divorce on a child and identifies harmful risk factors, to a strength-based model, which instead identifies factors that have been beneficial to children who have successfully come through family change (Flowerdew & Neale, 2003). Thus, there has been a veritable shift from the marginalized and silenced position of children to a "theme of voice" which Thorne (2002) defines as "claiming the right not only to speak but also to be listened to – [which] has become a metaphor for political recognition, self-determination and full presence in knowledge" (p. 251).

Swartz's (2005) paper, "Can the Clinical Subject Speak? Some Thoughts on Subaltern² Psychology", which draws on Spivak's (1993, cited in Swartz, 2005) Subaltern Studies on the "historically muted subject" (p. 505), is apposite in the context of the growing recognition of children as political citizens who have a voice that deserves an unfettered hearing. Swartz's (2005) paper deals more specifically with the 'othering' of the clinical subject, who is spoken for, and not directly engaged with in dialogue. Swartz (2005) argues that clients' voices are often subjugated to the "louder resonances of theories and trainings" (p. 507), which results in stories being "filtered through diagnostic and therapeutic monoculars, and tailored for the record of pre-existing identities" (p. 513). She argues that clinical subjects speak, however they speak under erasure and therefore she cautions that "erasure and professional deafness" should not be conflated with "failure to speak" (p. 520). Thus, Swartz's (2005) argument is particularly compelling in the light of the ongoing research which has been concerned with how children are engaged, whether as research participants or as clients/interviewees, so that they can participate meaningfully *as children*, in the public and private arenas of life, including within the family law context.

Tracing a similar line of argument in essence, Komulainen (2007) cautions against the danger of conceptualizing childhood from a needs perspective, as this leads to "cultural and personal assumptions about children, which are not attributable to children's 'innate' nature as such" (p. 22). Further, she calls for a broader

² The term "subaltern", is a rank given to an officer in the British Army, which is below the rank of Captain (Swartz, 2005). The term has been used to describe "all those systematically excluded from the powerful systems of representations, who as a result, "cannot speak" (Swartz, 2005, p. 507).

understanding of the concept of 'voice' which comprises more than that which is "verbal, textual or linguistic" as this limits and disqualifies 'voices' (for example in the case of young disabled children) that are non-verbal, "even though, sometimes, physical movements (actions) and noises are obviously more important than the use of words" (Komulainen, 2007, pp. 23-24). Komulainen (2007) highlights that communication is complex, and therefore to interpret 'voice' literally potentially silences and negates many groups of people. For these reasons, she advocates that researchers be vigilant of what they expect to hear from participants and how these expectations may impact on adult-child interactions.

In his summary of the results of the Economic and Social Research Council's research programme, which funded 22 projects exploring different aspects of contemporary childhood in the United Kingdom, Prout (2002) noted that the inclusion of children as research participants in many of the research projects showed that engaging children directly, respects and recognises the fact that children have a different standpoint to adults and while they do not form a homogenous group, there are certain commonalities between them which would remain unknown if adults always speak on their behalf.

Hill (2006) found in his study on children's perspectives on methods used in research and consultation, that amongst the many methods used by researchers, there was no consensus amongst the children regarding one preferred research or consultation method and that the children themselves identified that factors such as personality, temperament and literacy, could affect a child's preference for a particular method of participation and therefore the child should be given a choice from a range of options. For example, Edmond (2002, cited in Hill, 2006) gave her research participants a choice regarding how they would like to express themselves and consequently her interviews consisted of talk, and some also included drawings, games and role plays. Even though Hill's (2006) research does not address directly the role of children's participation in family law matters, it is nevertheless analogous as the inter-generational contact between the interviewer/custody evaluator and the child creates a dynamic which can potentially result in the child's voice being mis-heard or negated.

2.2 *Children's rights enshrined*

The movement towards a more progressive way of conceptualising the child, culminated in the way of the United Nations Charter on the Rights of the Child (UNCROC) in 1989. Article 12, which has been referred to as a “landmark in the history of childhood” (Taylor, 2006, p. 160) attracted considerable scrutiny and a plethora of debate regarding its interpretation and applicability. It provides:

1. State parties shall ensure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. (Article 12, UNCROC)

Article 12 makes explicit that all children are independent subjects and it makes a call in general, for their participation (Hart, 1992). In his seminal article, “Children's participation: From tokenism to citizenship”, Hart (1992) refers to “participation” as

“...the process of sharing decisions which affect one's life and the life of the community in which one lives. It is a means by which a democracy is built and it is a standard against which democracies should be measured. Participation is the fundamental right of citizenship. (p. 5)

Thus, children's participation in decision-making is vital for a nation's democracy (Hart, 1992). The significance of UNCROC is that it was the first international instrument that brought together states' obligations with respect to the protection, provision and participation rights of children under the age of 18 years (Taylor, 2006). Moreover, it also reflected the paradigm shift towards recognising the “personhood, integrity, and autonomy” of children (Freeman, 1998, p. 433) from being merely the objects of “paternalistic protection” (Atwood, 2003, p. 650). South Africa ratified

UNCROC in 1995, and is therefore obliged to ensure that children are given the opportunity to express their views in matters and to be heard in judicial and administrative proceedings affecting them (Kassan, 2004).

Commentators have recognised that the right afforded in terms of Article 12 is not absolute and that a child's views will be given weight according to the child's age and maturity (Sloth-Nielson, 1995, cited in Barratt, 2002), while also bearing in mind that "the best interests of the child shall be a primary consideration" (Article 3, UNCROC). Nevertheless, it is also accepted that a decision-maker cannot simply ignore a child's point of view on the basis that he or she lacks the requisite capacity in terms of his or her level of maturity (Barratt, 2002). Article 12(2) recognises that children's participation may not be direct (Atwood, 2003). Generally, Article 12 affords children a right to participate in all areas affecting their lives and therefore by implication, this has been interpreted as protecting the child's voice in custody proceedings (Atwood, 2003).

Closer to home, the first binding regional instrument that affords children participation rights is the African Charter on the Rights and Welfare of the Child (African Charter), which like UNCROC, recognises children as people in need of protection but also as autonomous beings capable of making their views heard in judicial and administrative proceedings (Kassan, 2004). Article 4(2) of the African Charter provides:

In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own wishes, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate laws.

In accordance with the provisions in the UNCROC and the African Charter and following the trend of English and Australian legislation, amongst others, South Africa recently promulgated the Children's Act (2005), which protects children's

rights in general, and requires that a court give “due consideration” to the child’s views (s10 Children’s Act, 2005). Section 10 of the Children’s Act (2005) provides:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

More specifically in relation to custody issues, section 31(1)(a) provides:

Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development. (Children’s Act, 2005)

Thus, there has been a growing respect and recognition for children’s rights within the legal system and also within the context of the family justice system (Kaltenborn, 2001). The international trend towards a greater child-centered approach has led to debates on whether and how children’s views and wishes are to be accessed and ascertained, bearing in mind that ultimately their participation has to be balanced against what is in their best interest. Despite the codification of children’s rights, the meaning of these rights and the extent to which they should be protected continue to be vigorously debated. The United States of America has not ratified the UNCROC which has been attributed to the belief that the recognition of children’s rights would come at the expense of parents’ rights (Davidson, 2006). Davidson (2006) argues that the ratification of the UNCROC will help support policies which will ensure that children’s voices are heard and that their best interests are met, while recognizing both parental authority and respect and dignity of the child.

But even for countries that have ratified the UNCROC (or another international instrument protecting children’s rights), children’s participation rights remain unrealized for many. According to Maundeni (2002), who researched the needs of children in divorced families in Botswana, the protections afforded to children in

terms of Article 12 were viewed as undermining a culture that demands of children that elders be respected, and which upholds the old adage that ‘children should be seen and not heard’. In a recent review of whether children’s views were being heard in a number of European legal systems, Resetar and Emery (2008) found that judges in various jurisdictions (including England, Germany, Sweden, Italy and Croatia) often did not involve children, despite the presence of a legal right to express custody preferences in court. And, in South Africa, an overview of South African case law pertaining to custody and access, reflected that the courts have not given “due regard to the “voices” of the children involved, and have not paid enough attention to the question of children’s participation in decision-making” (Barratt, 2002, p. 557). However, it has been noted that in the recent past, judges have shown a greater willingness to allow children’s voices to outweigh other competing factors (Schäfer, 2007). This, however seems to be in cases where the child is deemed to be sufficiently mature to make a decision (case law, cited in Schäfer, 2007). According to Pillay and Zaal (2005) the current procedural mechanisms that are intended to facilitate the discovery of children’s voices are inadequate and there is “frequently a discrepancy between what ought to happen and what actually happens” (p. 685).

2.3 *The best interest principle*

As set out above, in South Africa, as is the case in other jurisdictions, the best interest of the child criterion is accepted as decisive to the outcome of a case (s9, Children’s Act, 2005; Louw & Scherrer, 2004). The best interest principle, formulated by the legal profession but understood and used widely amongst all professionals working with children, refers to the welfare and needs of a child (Pruett, Bruen, & Jackson, 2000). While its common sense meaning is generally understood and accepted, its interpretation is admittedly, even according to the Supreme Court of Appeal, less definite and determined:

The ‘best interests of the child’ standard is, however, of necessity an indeterminate and relative one as the circumstances of each child within each family unit will vary across a wide spectrum of factors. (*F v F*, 2006, para [8] at 47E-F)

Research has also shown that there is little consensus regarding the interpretation of the best interest principle (Pruett et al., 2000). For example in Pruett et al's (2000) study, the parent and attorney participants differed in terms of the criteria they used to determine what is in a child's best interest, and even fathers and mothers differed on some scores. One explanation offered for the general lack of consensus regarding its interpretation is that the best interest principle is at the mercy of dominant orthodoxies at any point in time and therefore it is a dynamic concept, subject to changing interpretations (Neale, 2002). A further argument is that the best interest principle is beset with two main difficulties: first it is indeterminate in that there is no one truth regarding what is in a child's best interest and what values are important, and second, there is a problem of culture, as the best interest principle cannot be divorced from cultural frameworks and one culture may not accept another culture's version (Thomas and O'Kane, 1998).

South Africa has tried to ameliorate to some extent the uncertainty plaguing the interpretation of the best interest principle by codifying in the Children's Act (2005), the criteria enumerated in the seminal case of *McCall v McCall* (2005), which are to be weighed when considering what is in the best interest of a child. In considering what is in a child's best interest, the courts now have to consider the criteria in section 7 of the Children's Act (2005)³ and at the same time, consider the child's views and wishes in terms of section 31 (Children's Act, 2005). Clearly then, the child's views and wishes are just one of many factors which the court will take into account while upholding the paramountcy of the best interest principle. Some commentators still argue that while a child's wish "may be *just one* factor, it may often be the most indispensable..." (Crosby-Currie, 1996, p. 309). Yet others argue that reliance on the child's preference in order to resolve the indeterminacy of the best interest model, is inappropriate and instead, where necessary, the model of the best interest principle should be revised (Starnes, 2003). Kandel (1994) argues that it is necessary to approach the best interest enquiry from an empowerment/personhood paradigm instead of from a protectionist/patienthood view of the child so that the enquiry begins

³ Section 7 includes an extensive list of criteria which the court *must* take into consideration when considering what is in a child's best interest. Examples of the criteria that the court must consider include: the relationship between the parents and the child, the attitude of the parents towards the child and towards their parental responsibilities, the capacity of the parents to provide for the needs of the child, including emotional and intellectual needs, the likely effect on the child of any change in the child's circumstances and the need to protect the child from any physical or psychological harm.

with the assumption that children are developing, legal persons, and not with a blanket view of children as “delicate, incompetent, and at risk” (p. 376). The law should pose questions to psychology from the empowerment/personhood perspective, in order to avoid undermining the child’s personhood and decision-making powers (Kandel, 2004). Woodhouse (2002) adopts a balanced approach to interpreting the best interest principle while recognising children’s rights, which requires holding in mind both the child’s dependency, and the child’s potential for eventual autonomy.

2.4 *Is the best interest principle, in the child’s best interest?*

Notwithstanding its status as the guiding principle in family law matters involving children, the best interest principle has come under attack for paradoxically being the legal device which legitimately silences children’s voices (James, 2008). According to Neale (2002) exercise of the best interest principle often results in children’s views being relegated as the law presumes to know what is in their best interest. Consequently, “the child of legal discourse has become a somewhat generalized, theoretical child rather than a real, embodied, biologically unique and socially differentiated child” (Neale, 2002, p. 458). Similarly, in the discussion of the effect of the provisions of the Children Act (1989) in England (which includes similar provisions to South Africa’s Children’s Act, 2005) James (2008) argues that parents will inevitably resort to and rely on the “language and the rhetoric of the child’s best interests in order to substantiate and legitimate their respective arguments in relation to residence and contact” (p. 58). As a result, the rhetoric of the best interest principle serves as a proxy for the language of parental rights, and as a consequence, parents’ rights continue to outweigh the rights of their children (James, 2003 cited in James, 2008). Aubrey and Dahl (2006) found that in the pursuit of upholding the best interest principle, certain assumptions in practice (such as the need to have contact with both parents, unless exceptional circumstances exist) overrode the child’s expressed wishes and feelings. It has also been argued that children’s views need to yield to their long term autonomy interests (Barratt, 2002) but questions have been raised about what aspects of the child’s future should be considered (Hemrika & Heyting, 2004). Hemrika and Heyting (2004) argue that the potential for children’s voices to be annulled is increased by references to presumed future damage, which strengthens parental control. According to Neale (2002) the widespread

developmental view that children are “half-baked ‘products’ that will become fully socialized only when they reach adulthood” (p. 457), focuses more attention on how they may turn out in the future rather than on their present day-to-day lives. The literature therefore shows that in practice, the enquiry is not limited to what is in a child’s best interest currently, but is rather more open-ended, and tries to project into the future what will be in the child’s best interest now and into adulthood.

2.5 *Should children have a say?*

There has been considerable debate about children’s participation in legal matters and as yet, there is no universal agreement in the literature regarding the value of eliciting the child’s preference (Luftman, Veltkamp, Clark, Lannacone, & Snooks, 2005). Instead there is a “panoply of positions” ranging from protecting children from the trauma of the court processes to giving them the right to be heard, and in some cases, to make the ultimate decision on custody and visitation (Schepard, 2004, p. 140). According to Warshak (2003), the two rationales for inviting children’s participation are enlightenment and empowerment. Enlightenment suggests that input from children will raise decision-makers’ awareness of the child’s needs, feelings and preferences and empowerment suggests that children will profit by participating in decisions that directly affect their lives (Warshak, 2003). While some academics strongly contend that participation of the child in custody decision-making is “essential” (Kaltenborn, 2001, p. 110), others recognise that “children do not always know what is best for them” (Warshak, 2003, p. 374).

Tisdall, Bray, Cleland & Marshall (2004) raise the concern about whether asking children to express their views can actively work against them for two reasons: firstly, by creating a burden for them and secondly, by undermining parental decision-making powers. Starnes’ (2003) view is that children should not be asked to state a preference in custody interviews if they have not done so voluntarily, and even in cases where they have done so, their preference should not be the deciding factor in the case, except in exceptional circumstances. This is to avoid, further entanglement in their parents’ divorce, children’s unreasonable preferences, and the risk of feeling over-responsible for the custody choice (Starnes, 2003). Asking children to state a preference, would amount to “placing the custody sword in the hands of babes”

(Starnes, 2003, p. 169). James, James, & McNamee (2004), who conducted research into the work of the Child and Family Court Advisory and Support Service (CAFCASS) in the United Kingdom, found that family court advisors adopted a stance that children should be protected from the pressures of having to take responsibility for adult issues. In a Welsh study (Murch, Douglas, Scanlon, Perry, Lises, Bader, & Borkowski, 1999, cited in Taylor, 2006), 30% of solicitors interviewed, held the view that children's participation in family matters could be traumatic for them, that there could be an increased risk of their parents manipulating them, and that it is wrong to expect children to make decisions about custody and access. This view in favour of protecting children from legal processes was endorsed by a later study involving English and Welsh solicitors (Taylor, 2006).

Another argument that has been used against children's participation in custody disputes is parental alienation⁴ (Bruch, 2001), which has led to children's voices being dismissed on the assumption that their minds have been "poisoned" (Timms, 2003, p.165). However, according to Bruch (2001) and Johnston (2003) this theory has been rejected as many other reasons exist for a child's reluctance or refusal to visit a noncustodial parent and that genuine cases of alienation are rare (Johnson, 2003). Gould and Martindale (2007) explore parent-child dynamics where there has been abandonment, poor parenting and abuse in the family and distinguish these relationships from alienation. In the case of alienation though, the child is given a message from the alienating parent that the target parent is emotionally and physically unavailable so that the child avoids seeking contact with the target parent (Gould & Martindale, 2007). Further, the alienating parent behaves in a way that suggests to the child that if he or she does seek out the target parent, the alienating parent will withdraw his or her emotional or physical availability (Gould & Martindale, 2007). Accordingly, the alienating behaviour undermines the attachment process which is not in the child's best interest (Gould & Martindale, 2007). According to Gould and Martindale (2007), an alienated child tends to express their rejection of a parent: "(1)

⁴ Parental Alienation Syndrome (or child alienation) is considered by some experts to be a psychiatric 'disorder' (although not included in the Diagnostic and Statistical Manual of Mental Disorders IV-TR) that arises exclusively within the context of child custody disputes where, "one parent systematically undermines a child's relationship with the other parent" (Gould & Martindale, 2007, p. 317). For a detailed discussion on the history of parental alienation syndrome and a critique of various conceptual models of alienation dynamics, refer to Gould and Martindale's (2007) chapter on "Assessing allegations of child alienation" (p 317).

stridently, and (2) without apparent guilt or ambivalence, and (3) strongly resist or completely refuse any contact with that parent” (p. 338). Where parental alienation is present Warshak (2003) has cautioned against giving weight to the child’s stated preferences and instead recommends relying on the ‘collective voice of children’ (literature informed by clinical and empirical research), which is more likely to be in the child’s best interest. There remains fierce academic debate on the scientific status of the syndrome and its psychological formulation (Clarkson & Clarkson, 2007). The issue is further complicated by gender politics and complex interpersonal processes and therefore parental alienation cannot be reduced to “simple villains and obvious victims” (Clarkson & Clarkson, 2007, p. 275). Clearly the issue is a complicated and complex one, and not easy to ‘diagnose’. An assessment in this regard would therefore require particular expertise to interpret the dynamics occurring in the family system on a case by case basis, in order to avoid a hasty conclusion and an inappropriate or even damaging recommendation and/or treatment plan.

In his study, Kaspiew (2007)⁵ identified an overlap between a history of violence in the family and allegations of alienation/manipulation, which he distinguishes from the parental alienation phenomenon. His research showed that two themes emerged from this overlap: first, alienation/manipulation was a tactic of violent fathers, who manipulated their children against their mothers, and the second theme was that the history of violence left the child feeling ambivalent about the father, which triggered a claim of alienation/manipulation against the mother by the father (Kaspiew, 2007). Further the results of his research showed that where children expressed a need for continuing contact with a father with a history of violent behaviour, their views were questioned to a limited extent, even in extreme circumstances of violence. Accordingly for different reasons, Kaspiew (2007) cautions against relying on children’s expressed preferences, which have not been scrutinized.

⁵Kaspiew’s (2007) research was conducted in the light of the shared parenting philosophy of the Reform Act, 1995 (Australia), which has been found to have curtailed mothers from arguing against paternal contact where there has been a history of violence, in order to avoid being judged as the not ‘good’ mother and risk losing custody. This is relevant in the South African context given the legislatures intention that both parents enjoy full parental responsibilities and rights, which includes care (Children’s Act, 2005).

2.6 *Children should have a say!*

Butler, Scanlan, Robinson, Douglas and Murch (2002) point out that irrespective of whether children participate in divorce proceedings, they are involved, as it is *their* parents who are divorcing. Contrary to views that children need to be protected and thus not engaged in the legal process, Butler et al.'s findings reflected that despite the initial experience of their parents divorce as a crisis, and their resulting emotional turmoil, children showed resilience and a coping capacity. Children's participation in the decision-making process may even allow them to cope better with the inevitable changes brought on by a divorce (Atwood, 2003). Smith, Taylor and Tapp (2003) strongly question the view that children lack competence in decision-making and further that it is an unfair burden of responsibility to involve children in decision-making. According to the authors, children's resilience is strengthened when they are "treated as competent actors and can communicate with the other people making decisions in their lives" (Smith et al., 2003, p. 201). Therefore children should be allowed to do as much as they can on their own, and where they cannot, they should be supported appropriately so to scaffold their growth towards autonomy and adulthood (Smith et al., 2003). Similarly, in their study on how children between the ages of eight and 12 years negotiate moral authority, Thomson and Holland (2002) found that children are "active and creative moral agents" (p. 114) and that their ability to develop and take risks is very much dependent on their access to safe and trusting relationships. Thus, instead of merely declaring a child incompetent, there is an onus on the adults to nurture a child's capacity to make decisions.

While acknowledging that parental authority protects children, Hemrika and Heyting (2004) also contend that "the tendency to endow children only with derived identities can also be detrimental to their welfare" (p. 464). An approach which recognises children as individuals in their own right, will reconcile both the rights and welfare based perspectives (Hemrika & Heyting, 2004). In a similar vein, Melton (2005) argues that the recognition of rights for children, does not imply the loss of rights for parents. Butler et al. (2002) contend that children's and parents' accounts should be weighed equally and that children "are not only relevant and competent witnesses to the process of their parents' divorce, they are also the most reliable witnesses of their own experience" (p. 99). Davies (2004) does not adopt a full liberation or a full

protection approach as he contends that each child is different and many of them are more vulnerable and less capable than adults. He recognises however the dynamic nature of childhood and acknowledges that a child's frailties may lessen or even evaporate along the spectrum of childhood, depending on the child's age or maturity (Davies, 2004). While children may not want to choose between their parents, they will no doubt have opinions regarding how their day-to-day activities may be affected by their parents divorce (Davies, 2004). By eliciting their preferences in this regard, parents and custody evaluators will be assisted in drawing up amenable parenting plans which have a greater success of compliance (Davies, 2004). In recognizing children's right to participate, commentators point out that children should firstly have the right to choose whether they want to participate at all (Atwood, 2003; Taylor, 2006).

Others argue that ascertaining a child's views and wishes is not enough, or in some cases, undesirable and therefore suggest instead that children be encouraged to just speak by inviting a free narrative which is more empowering for the child and will provide information about the child's world from the child's point of view (Smart, 2002; Starnes, 2003). According to Atwood (2003), while social science research on the whole does not support children being the decision-makers in child custody disputes, it does nevertheless support children being heard. It therefore appears that on the whole, the literature supports children having the right to participate in custody disputes, although commentators differ on how the right to participate should be exercised. In summary then, Davies' (2004) assessment of the current state of affairs, is spot on: "The question "*should* a child's voice be heard in custody/access decisions"? has now largely given away to "*how* should that voice be heard?" (p. 21).

2.7 *What are the children saying?*

In their research exploring children's views, feelings and understanding of divorce, Butler et al. (2002) found that children felt that their opinion in respect of residence and contact was important and that even more importantly, their opinions should be solicited. Further, the researchers found that in instances where the child's opinion was sought, there was a higher degree of satisfaction with residence and contact

arrangements (Butler et al, 2002). Research conducted by Tisdall et al. (2004) found that a large majority of children wanted to have a say in decisions that directly affected them and almost all the child participants suggested that children should be more involved in decisions following parental separation. However, they also expressed reservations about being asked to choose between parents (Tisdall et al., 2004). The majority of participants wanted some say about where they were going to live and where they should spend their time (Tisdall et al., 2004). Bretherton (2002) argues for a distinction between participation and choice, the former implying a collaborative engagement with supportive adults, which is what children prefer, rather than having to autonomously make decisions themselves. Thus, children want to participate and they accept that they may have to make some compromises, but they do not necessarily want to have to take responsibility for their decisions (Taylor, 2006). Similarly, the child participants in Neale's (2002) study differentiated between participation and choice, and majority, placed a higher value on the process of decision-making rather than on the right to make autonomous decisions. However, participants who had been subject to neglect or oppression in their family, asserted their right to decide for themselves (Neale, 2002). Ninety-one percent of the child participants in Cashmore and Parkinson's (2008) research said that they should be involved in the decision-making process, although not necessarily making the decisions. Their research on children's and parents' perceptions on children's participation in decision-making post parental separation and divorce found that "children do not feel the need to be protected from involvement in contested matters and that most parents support their participation" (Cashmore & Parkinson, 2008, p. 102). The child participants highlighted three benefits of being involved: "the need to be acknowledged, the belief that this would ensure more informed decisions and better outcomes, and the view that they had the right to determine the arrangements that would affect them most" (Cashmore & Parkinson, 2008, p. 95). The main difference between the children's and parents' perceptions of children being involved in custody disputes, was the concern from the parents that the children may be subject to pressure and/or manipulation from one parent (Cashmore & Parkinson, 2008). While this was a concern for a minority of the children participating in the study, most children were more concerned about "divided loyalty, not being fair, and jeopardizing their relationship with both parents" (Cashmore & Parkinson, 2008, p. 101). In Smith et al's (2003) study in New Zealand, child participants were asked what advice they

would give to parents and the most common response given by half of the children, involved the importance of consulting children. Children want to be listened to, given information and not be forced into unwanted arrangements (Smith et al., 2003). South African researchers Louw & Scherrer (2004) found that 74% of the child participants in their study reported that it is very or absolutely important that counsellors at the Family Advocate's Office hear their (children's) opinions.

In their research on advocacy on behalf of children (in general and not specifically in respect of custody issues) Boylan and Braye's (2006) results indicated that the child participants wanted their case argued from their perspective and not in respect of what is in their best interest. Accordingly, the researchers recommended that child advocates should avoid merely replicating other adult proxies who speak on behalf of the child (Boylan & Braye, 2006).

Even against the backdrop of a traditional, hierarchical social structure, 19 of the 25 children interviewed in Maundeni's (2002) study in Botswana, expressed dissatisfaction with the way in which their mothers (the custodial parent) communicated their parents' divorce and resulting changes to them (Maundeni, 2002). Three types of dissatisfaction were expressed: "inadequate or brief explanations, dissatisfaction with the way in which questions were handled and dissatisfaction with unsought opinions and feelings" (Maundeni, 2002, p. 286). This finding, even though not related to the court process, indicates strongly the desire of children to be involved in family related matters which inadvertently affect them.

There is overwhelming evidence to suggest that children want to be involved in decisions that ultimately affect their lives, and at the same time they show deference towards their parents by not wanting to make the final decision. Yet it appears that in the absence of a trusting parent-child relationship, children prefer deciding on their own fates.

2.8 *Youth and immaturity? Is this really the problem?*

The specific provisions of the Children's Act (2005) are unambiguous that the legislature did not intend for children to have an absolute right to participate in major decisions affecting their lives. Clearly, the right is not an absolute one, and it is tempered by the requirement that the child's age, maturity and developmental stage be taken into account when accessing the child's wishes, views and opinions (s10; s31, Children's Act, 2005). It appears then that a flexible approach to custody evaluations is required and that each matter be decided on a case-by-case basis. In effect, this means that professionals working in the field must have an in-depth, broad-based knowledge of developmental psychology. This potentially creates greater demands on state institutions such as the Family Advocate's Office, which is already "constrained by [its] context and resources from conducting as full an assessment as is necessary to address the needs of vulnerable children (Africa et al., 2003, p. 143).

Effective implementation of these rights therefore poses challenges for welfare organizations such as the Family Advocate's Office (Tisdall et al., 2004). Research conducted by Africa et al. (2003) at the Family Advocate's Office, showed that family counsellors' reports lacked emphasis on the exploration of the child's wishes. However, these findings were interpreted with caution as the examination of the reports showed a significant number of young children on whose behalf custody decisions had to be made (Africa et al., 2003). Thus age is a crucial factor in determining what weight should be given to a child's views and wishes (if any). However researchers have shown that this exercise is fraught with difficulty. Mantle, Leslie, Parsons, Plenty and Shaffer's (2006) findings showed that the age of the child was attributed less significance than it deserved in welfare custody reports. According to the authors "[e]stablishing the wishes and feelings of children for welfare reports makes heavy demands in terms of human and financial resources" as practitioners work with children from a wide distribution of ages, which implies a "broad repertoire of skills" (Mantle et al., 2006, p. 514).

James et al. (2004) found in their study that there was a lack of consensus amongst family court advisors over the question regarding the age at which children will be regarded competent to express and have significant weight attached their wishes and

feelings. Gender was also an important determinant, with girls generally seen to be more mature than boys of the same age (James et al., 2004). Kandel (1994) argues in favour of children's choice, and specifically states that the choice of children six years and older should be legally "dispositive" (p. 301) to their custody in the case where their parents (both fit parental custodians) cannot agree.

In the light of the indeterminacy and cultural difficulties of the best interest principle, Thomas and O'Kane (1998) contend that substantial weight should be given to the part played by children of any age, instead of relying heavily on adult determinations of what is in the child's best interest. In a Welsh study (Murch et al., 1999, cited in Taylor, 2006), over half of the solicitors believed that the views of the children should be ascertained, but 22.5% of this complement limited this to children aged 12 and over.

Aubrey and Dahl (2006) concluded from their analyses of a range of studies that children (even those as young as three, four and five years old) can participate successfully in appropriately conducted interviews. They also found that "young children are not always asked for their views by those making decisions about their lives ... [and] there are still areas where children's voices are absent" (Aubrey & Dahl, 2006, p. 29). Similarly, younger child participants in Butler et al.'s (2002) research, also felt that they had something to contribute to decisions that involved them. According to Smith et al. (2003) a child may be too young or inexperienced to participate formally, however this does not mean that all communication with them should be prohibited, nor should observations of the parent-child relationship be excluded. In respect of the debates relating to the age at which a child is competent to participate in decision-making, Smith et al.'s (2003) argument is cogent:

The issue of children of any age expressing their views is, we argue, not so much one of the child's ability to provide information, as it is of *the adult's competence to elicit (or observe) it in the context of a trusting, supportive and reciprocal relationship.* (p 212)

Thomas and O'Kane (1998) also caution against the child's right to participate being dependent on the competence of professionals.

Thus research suggests that in instances where custody evaluators do not have the requisite skills or the resources to access the voice of the child, the age and maturity proviso, becomes a useful and legitimate way of neglecting to consider and access the child's voice.

2.9 *Custody evaluations under scrutiny*

The most common way of placing the child's views before the court is through a report written by a welfare officer, or an expert retained by the court or the parties to the proceedings (Tapp, 2006). According to Bala (2004):

An assessment carried out by an independent professional is usually the best way to put the child's wishes and views before the court. An assessor can conduct several interviews with the child over a period of time in a relatively relaxed setting and should be able to establish a rapport with the child. In contrast, a child's testimony in court, or even a judicial interview in chambers, is a very stressful environment for a child, and one in which the child is much less likely to reveal his or her true feelings. By interviewing a child on more than one occasion, the assessor can establish whether the child's views are fixed or vary depending on the immediate circumstances. (p. 490)

Hovath, et al. (2002) who undertook a content analysis of evaluation practices in child custody cases, recommended that multiple methods of information gathering is necessary in order to make decisions regarding custody. Such methods should include a combination of family interviews, psychological testing, observations of each parent and child, interviews with other relevant persons, and home visits (Hovath et al., 2002).

The benefit of securing a report from a child psychologist is that it offers the child the opportunity to speak with someone who is trained to communicate with children in stressful situations and who is able to contextualize the child's views and ensure that what the child communicated, is heard correctly (Tapp, 2006). However, there are also concerns that judges rely too heavily on expert testimony, especially when a case is particularly complex and the court is faced with uncertainty and a difficult choice

(Bala, 2004). According to Bala (2004) expert reports/testimony often include aspects which are “predictive and value-based” and the court cannot be certain that the information provided is objective and based on authoritative social science knowledge (p. 7).

Expert testimony in custody disputes has also come under fire in South Africa. Bonthuys (2001) considered the usefulness of expert testimony by critically analysing how it is being used in South African custody cases. Her analysis showed that mental health professionals based their “opinions on a perplexing and seemingly arbitrary array of factors”, which she attributes to insufficient training (Bonthuys, 2001, p. 332).

Bonthuys (2001) further argues that the usefulness of expert testimony is affected negatively by the fact that there is no single theory of human behaviour and pathology that is being used in assessing children’s interests, which invariably results in considerable disagreement amongst mental health professionals. She also comments on the competing functions and different nomenclatures of the legal and mental health fraternities which force mental health experts to reduce and simplify their knowledge in service of the legal process (Bonthuys, 2001). For these reasons (and others) Bonthuys (2001) respectfully criticises those judges who suspend their “critical faculties” (p. 334) and vehemently cautions them against “allowing mental health practitioners to decide difficult cases for them” (p. 346).

In order to address and alleviate the difficulties of custody evaluation, Ramage and Barnard (2005) advocate a standardised set of procedures and processes which are consistently applied, even though they acknowledge that there is often not a perfect fit between an individual practitioner and a set of guidelines. Consistency has two advantages: it creates a sense of comfort for the clinician and it creates credibility for the clinician from the legal profession (Ramage and Barnard, 2005). In Ramage and Barnard’s (2005) opinion, for custody evaluations to be effective, evaluators need to be able to assess individuals and families using different theoretical orientations (for example psychodynamic and family systems models), be skilled in child and adult psychometric measures, and have adequate training and knowledge of developmental psychology, child and adolescent psychology, psychopathology and the issues

pertaining to divorce. Further, according to Fridhandler (2008), there is a responsibility on the evaluator to ensure that the reader of the report knows whether the statements made in the report are “guided by research and, beyond this, in what ways they reflect clinical experience, current thinking among evaluators, or inference” (p. 271). In so doing, the reader can make an informed choice whether to accept, question or reject the statements contained in the report (Fridhandler, 2008).

In United States of America, for example, the American Psychological Association proposed a set of guidelines (APA Guidelines) to assist practitioners involved in custody evaluations (APA, 1994). More recently, a task force appointed by the Association of Family and Conciliation Courts, drafted the Model Standards of Practice for Child Custody Evaluation guidelines (AFCC Guidelines) (Martindale, 2007). The AFCC Guidelines cannot be enforced, nonetheless the intention of the drafters was to “promote good practice; to provide information to those who utilize the services of custody evaluators; and to increase public confidence in the work done by custody evaluators” (s1.1, AFCC Guidelines, 2007). According to Martindale (2007), the task force favoured “clarity and specificity” (p. 60) in order to address the increasing complaints against child custody evaluators. South Africa does not have an equivalent set of guidelines that have been drafted by a professional body such as the Psychology Society of South Africa, nor have regulations been issued under the Children’s Act (2005) to guide custody evaluators employed by the Family Advocate’s Office or in private practice.

2.10 *The Family Advocate’s Office*

In South Africa, the Family Advocate’s Office, which is a creature of statute, came into operation in October 1990, specially created to investigate and report on custody disputes and/or access disputes and make recommendations in a report which is filed with the Registrar of the relevant court (Mediation in Certain Divorce Matters Act, 1987). The Family Advocate’s Office derives its powers and duties from the Mediation in Certain Divorce Matters Act (1987), which was promulgated with the intention to safeguard the interests of minor and dependent children in divorce proceedings and in other applications arising from such proceedings (*Brown v Abrahams*, 2004). The Family Advocate is briefed to protect the interests of minor

children whose parents' are getting divorced or in any matter relating to custody, access or guardianship (Burman & Mc Lennan, 1996). In *Soller NO v G* (2003), the court described the family advocate as a "professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer" (p. 438).

The jurisdiction of the Family Advocate's Office has been extended to include matters arising out of the Natural Fathers of Children Born Out of Wedlock Act (1997), and their catchment area expanded to include the former 'Black Divorce Courts' (*Brown v Abrahams*, 2004). The Family Advocate's Office must follow certain procedural steps set out in the regulations issued in terms of the Mediation in Certain Divorces Act (1987) in order to assess the facts and circumstances in each case (*Brown v Abrahams*, 2004). Each province in South Africa has a Family Advocate's Office, which is staffed by Family Advocates (qualified lawyers) and Family Counsellors (social workers) (Burman et al., 2000). The Family Counsellors carry out investigations into any case where the Family Advocate is concerned about proposed custody arrangements (Burman et al., 2000). An investigation into proposed custody and/access arrangements or into the general welfare of the children, is initiated in one of three ways: at the request of one of the parties; at the request of the court; and if the Family Advocate decides that it will be in the child(ren)'s best interest to do so (van Zyl, 1994; Schäfer, 2007). As part of the referral process, there are a number of preliminary documents that must be submitted to the Family Advocate's Office. This includes a document, Annexure A, "Arrangements regarding dependant and minor children" that must be completed by the parents (Mediation in Certain Divorce Matters Act, 1987). The Family Advocate's Office is directly involved in counterbalancing the competing interests of the parties involved with what is in the best interest of the child. In so doing, they are now also required by law to access the voice of the child (s31, Children's Act, 2005). While the court is required to consider any report filed by the Family Advocate, it is not bound by its recommendations (Schäfer, 2007).

Research conducted at the Family Advocate's Office indicates that there is no rigid procedure which is adhered to when conducting an investigation (Burman et al., 2000; Louw & Scherrer, 2004). Typically though, the parents are interviewed separately or

together (by the Family Advocate and the Family Counsellor), teenagers are interviewed by the Family Advocate or the Family Counsellor, and younger children are usually interviewed by the Family Counsellor only (Burman, et al., 2000). The Family Counsellor will also interview other experts who have been involved with the family, such as social workers and other referees who can provide information about the family and the children (Burman et al., 2000). In some instances, the Family Counsellor will observe the parent-child interactions (Burman et al., 2000). Where the Family Advocate does initiate an enquiry, "interviews conducted are typically too brief and superficial to permit a meaningful opportunity for the child's views to be properly elicited and understood, and very often the staff are insufficiently trained in the requisite skills" (Barratt, 2003, p. 156). Where parents agree to custody arrangements, the Family Advocate will not investigate further (Burman et al., 2000). There are also cases where the Family Advocate will decide that further expert opinion is required and in such cases, the Family Advocate will brief a private practitioner to provide an opinion (Burman et al., 2000). Where the parties cannot afford the cost involved, a state subsidised organisation may be able to provide a report (although rarely), or a private practitioner may provide a report on a reduced fee or for free (Burman et al., 2000). In their research at the Family Advocate's Office, Burman et al. (2000) reported on a number of criticisms levelled against the reports produced by the Family Advocate's Office. These included: indications of a lack of theoretical training, especially in child developmental psychology, the presence of religious, social and moral biases, "superficial, unstructured, and badly presented" arguments, and presentation falling below professional standards (Burman et al, 2000, p. 546). The Family Advocate's Office attributed most of their difficulties to a lack of sufficient funding which has meant that there has been insufficient training for staff members (Burman et al, 2000). This is an on-going and serious challenge facing the Family Advocate's Office (Africa et al., 2003; Barratt, 2003; Glasser, 2003; Louw & Scherrer, 2004).

With regard to accessing the child's voice in custody disputes, research conducted at the Family Advocate's Office suggests that not enough emphasis has been placed on accessing the voice of the child in custody disputes and "it is clear that there is room for improvement in this respect" (Africa et al., 2003; Louw & Scherrer, 2004, p. 30).

The challenges encountered by the Family Advocate's Office are not unique to South Africa. According to Hale (2006) a number of criticisms have been directed at family court advisors in the United Kingdom who write welfare reports for the courts. The first criticism was that the reports focused more on the children's wishes and not on their feelings (Hale, 2006). In this regard Hale (2006) remarks:

...any judge needs to know something about the child's feelings, the quality of the child's attachments to the adults around her. This can be done by methods of communication which are not open to a judge in a court room, however friendly its design. (p.122)

A second criticism was that the welfare officers did not accurately report what the children had said and instead added their own interpretations (Hale, 2006). Based on these criticisms Hale (2006) recommended that CAF/CASS be asked to produce a 'wishes and feelings statement' in order to create a distinction between the child's communication, and the officer's interpretation, so not to limit the expert from giving an opinion. The observation that the child's voice often becomes dulled or warped by expert 'noise', is not an uncommon criticism. Speaking about a different time in history (during World War II), Kandel (1994) described that "... the voice of the child was buried so deep under the mental health expert's opinion that it could not be heard without expert excavation" (pp. 314-5).

2.11 Alternative and/or complementary methods of accessing the child's voice

Other ways of involving children in custody disputes have been explored, either as an alternative to recording their views and wishes in a report, or in addition to a custody evaluator's report.

Even though there has been a general trend against judges interviewing the child in court or in chambers, recently discussions on this issue have resurfaced suggesting that it may be a successful and not necessarily damaging way of securing the child's participation in custody disputes. In her discussion regarding how the legal system in New Zealand can properly give effect to their legislation, which requires that a child's views be taken into account in family court proceedings, Tapp (2006) opined that

each child is unique and has different needs and therefore it is the responsibility of the family court team (which includes the judge, welfare officials and experts) to decide how a child's views and wishes will be put before the court, also ensuring that the child's perspective is understood and that the parents' rights of due process have been protected too. According to Tapp (2006), judges "are human too" (p. 74) and therefore they should be given the opportunity to individually decide on the processes to assist them to connect and empathize with each individual child. In a study which investigated whether there is a role for judicial interviews in addition to independent experts and legal child representatives, Parkinson, Cashmore and Single (2007) found that children involved in contested custody disputes, especially where there were allegations of violence or abuse, wanted to talk to the judge directly. Resident parents also thought that it was a good idea for children to have the option of speaking to the judge and in both instances, the reasons for this preference was related to "children's right to be heard and acknowledged, the value of direct communication and the likely beneficial effect on the decision" (Parkinson et al., 2007, p. 84). In a subsequent study, participant judges agreed that it was useful hearing children's views first hand, and those who had experienced interviewing children, felt that it had improved their decision-making, or their confidence in the decision that they had made (Parkinson & Cashmore, 2007). According to Hale (2006) a number of advantages follow from the court being more willing to see the child. These include: the child being seen as a real person, the opportunity for the court to learn more about the child's wishes and feelings and the child feeling valued and respected (Hale, 2006).

Another way in which children's views can be brought before the court is through the appointment of a separate legal advisor. The Constitution (1996) also provides for the separate legal representation of minor children "in proceedings affecting the child" where "substantial injustice would otherwise result" (s28(1)(h), Constitution, 1996). In *Soller NO v G*⁶ (2003), the court described the role of the legal practitioner as someone who "stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child" (p. 438). Similarly, in Wales, rule

⁶ In this case, after many years of protracted litigation, the fifteen year old minor sought a variation of an order placing him in the custody of his mother. The judge held that his views would be vital to the proceedings and that neither parent would be able to represent their son's views in the proceedings and on this basis she ordered that the minor be separately represented. The judge also explains in detail the role of the legal representative.

9.5 of the Family Proceedings Rules, 1991⁷, provides for the separate representation of children in cases which cause the courts “special difficulty” (Douglas, Murch, Miles, & Scanlan, 2006, p. 186). In investigating children’s and parents’ views on children being separately represented in family law proceedings, the researchers found that most children supported the idea of someone appointed by the court to help them have a say and similarly, majority of the parents were in favour of separate representation and reported that it had a beneficial impact on their children (Douglas et al., 2006).

Ramage and Barnard (2005) recommend that family therapists become involve in child custody evaluations because of their specific training in understanding the family as a system. They propose a systemic model for child custody evaluations that guides evaluators to assess the five levels in the family system: the individuals; the dyad (the parent-child relationship); the nuclear family; the extended family and related social systems such as family and friends; and the community and cultural systems (Ramage and Barnard, 2005). These five levels should be considered within the context of five domains: the cognitive; affective; communication and interpersonal; structural and development; and control, sanctions and related behavioural domains (Ramage and Barnard, 2005). The authors nevertheless caution against rushing into this process as evaluators using this model need to be particularly skilled in various areas (Ramage and Barnard, 2005).

Holland and O’Neill (2006) recommend the family conference model⁸ as a way of allowing children to participate in decision-making in the family. They concluded

⁷ Rule 9.5 provides that: “if in any family proceedings it appears to the courts that it is in the best interest of any child to be made a party to the proceedings, the court may appoint –

- (a) an officer of the Service or a Welsh family proceedings officer,
- (b) (if he consents) the Official Solicitor, or
- (c) (if he consents) some other proper person,

to be the guardian ad litem of the child with authority to take part in the proceedings on the child’s behalf.

⁸ The family conference model was developed in New Zealand (building on Maori tradition) and has been implemented in other countries such as Australia and Canada (Holland & O’Neill, 2006). It involves a meeting convened by an independent facilitator where an invitation to attend is extended by the child and his or her immediate family, to extended family and other significant others (Holland & O’Neill, 2006). The professional sits in on the initial part of the meeting where he or she introduces the purpose of the meeting and allows time for the child to express him or herself, and also expresses his or her views on the current family situation (Holland & O’Neill, 2006). In the second part of the meeting, the professional leaves, and gives the family a chance to decide on a plan, which the professional is obliged to respect, unless it is detrimental to the child or against the law (Holland & O’Neill, 2006).

from their research on children's experiences of family conferences that despite the potential pitfalls, such as being exposed to conflict between the adults or not being listened to, the benefits, such as the resultant feelings of togetherness and seeing significant others with whom there had been little contact, outweighed the difficulties of the model. Accordingly, the researchers contend that the family conference is an innovative way of protecting children's rights within a family context that extends beyond just the nuclear family (Holland & O'Neill, 2006).

In his overview of different methods of participation/consultation, Hill (2006) referred to studies which showed that children respond well to computer questionnaires and in some cases, children disclosed more information in the computer questionnaire than in self-administered paper-pencil questionnaires and individual one-on-one interviews. Researchers have also proposed other methods such in-camera interviews (Atwood, 2003) and child-interactive video recordings (Pillay & Zall, 2005) to ensure that the child's voice is properly put before the court.

This is an abridged discussion of the models and methods that have been proposed in the literature. Nonetheless, it is apparent that there is a smorgasbord of models and methods that can be considered, adopted, or adapted for use in a wide range of contexts which will recognise South Africa's diversity, and respect that "one size does not fit all" (Tapp, 2006, p. 73). Therefore, the benefits and limitations of each method need to be weighed in each particular case, bearing in mind the child (Davies, 2004). Ideally then, what is required is what Neale (2002) refers to as a "responsive mode of provision" (p. 471), which is accessible to children, and that provides for a range of solutions and processes (legal and otherwise) to address the problems facing children.

The presence of a professional facilitator acknowledges that children may be potentially marginalized in an adult-dominated forum and that the "family may be a forum for conflict and oppression as well as care and support (Holland & O'Neill, 2006, p. 107).

CHAPTER 3

METHODOLOGY

This chapter sets out the research design and describes the sample, the sampling procedure, and the analytic process within the context of the theory relating to the thematic content method of analysis.

3.1. *Study Design*

This study employed a qualitative methodology as it provided a framework for exploring the phenomenon of the voice of the child as it was represented in the Family Counsellors' reports (de Vos, Fouché, Delpont, & Strydom, 2005).

3.2. *Sample*

The sample consisted of 10 Family Counsellors' reports, five of which included an annexed report by a clinical psychologist in private practice, who was briefed to provide an expert opinion in the matter. Except for one report, all the Family Counsellors' reports were written by social workers employed by the Family Advocate's Office. In the one exception, a clinical psychologist in private practice was seconded to the matter to act as an *ad hoc* Family Counsellor.

The reports came from two regional Family Advocate's Offices in South Africa. All 10 reports involved cases that were instituted in a High Court between the years 2006 and 2008. All the reports were written in English. The length of the reports varied between 10 and 35 pages, the longer reports being those that included an additional report by a clinical psychologist.

Four criteria were used in selecting the reports for inclusion in the study. The reports were required to be:

1. in respect of matters where the parties did not reach a settlement regarding custody and which therefore had to be adjudicated upon by the court. The reason for this criterion was that the Family Advocate's Office does not access

- the voice of the child, in almost all instances (if not all) where the parents agree on custody arrangements;
2. in respect of a finalised custody dispute where a final order of court was issued and further, where the court had not issued an order directing that the report remain 'under seal'. This was to ensure that the reports had already become public documents and were accessible via the Registrar of the High Court;
 3. in respect of cases post-2005. The reason for this was that the Children's Act (as a Bill) was gazetted in 2005 which formally recognised children's participation in custody disputes and created a responsibility on the part of evaluators to take a child's views and wishes into consideration; and
 4. written in English. This criterion was for the benefit of the researcher who is not sufficiently proficient in Afrikaans.

3.3. Procedure

Convenience sampling was used in this study. Three regional Family Advocate's Offices were approached, based on physical accessibility to the office and/or whether or not the researcher had erstwhile contacts at a particular office. After an initial telephone conversation with the relevant contact person at each office, a detailed e-mail setting out the aims of this research and its proposed methodology was sent requesting access to finalised reports, which met the sampling criteria set out above. The representatives of two of the regional offices responded timeously and were willing to provide assistance. Liaison with the third regional office was abandoned due to long delays in response time (to telephone messages and e-mails). Arrangements were made with the two participating regional offices to obtain copies of the finalised reports. The Family Advocate's Offices were informed that the names of the opposing parties, the children and the relevant professionals, including those employed by the Family Advocate's Office, were not relevant for the purposes of this research study and accordingly all personal details would be omitted. More than 10 reports were received from the two regional offices together. Some reports did not meet the selection criteria (pre-2005 or written in Afrikaans). Those reports were excluded and in the end the latest reports post-2005 were selected from the remaining group.

While the reports received from the two regional offices were not representative of what is being done nationally, there was sufficient data for an initial study of this nature to get an idea of how the voice of the child is being accessed in the Family Counsellors' reports. Qualitative research by nature, "delves in-depth into complexities and processes" in order to describe and understand a phenomenon (de Vos et al., 2005, p. 74). The aim therefore, was not to generalise the findings of this study, and accordingly a representative sample was not required.

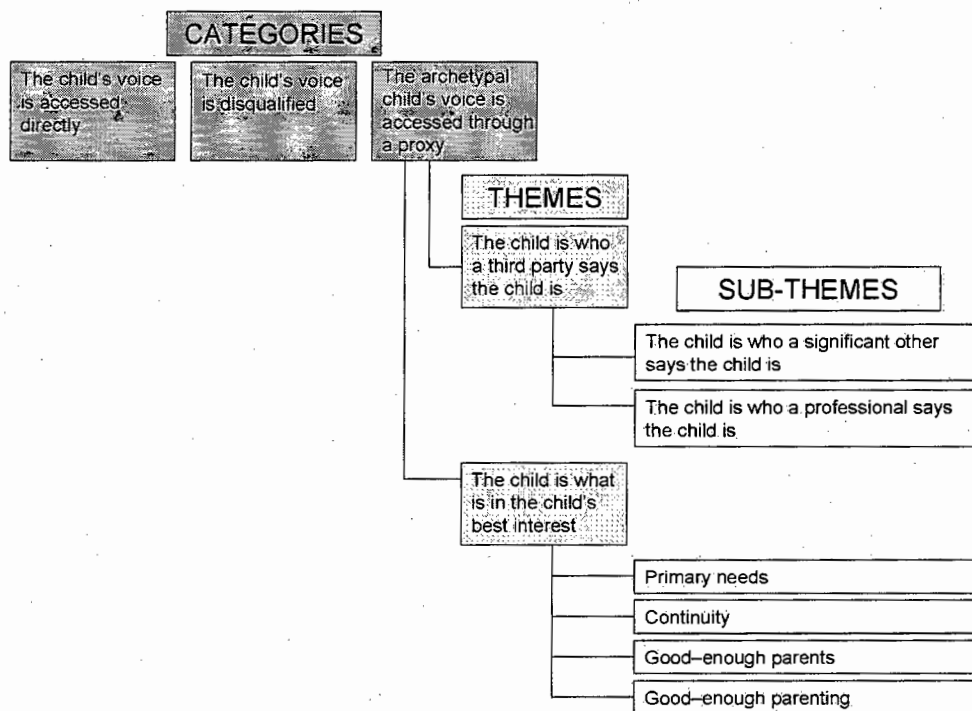
3.4. *Data Analysis*

In order to fulfill the aim of this study, the reports, as existing archival documents, were analysed to extract themes that would describe how the voice of the child was accessed. Thematic content analysis, which is considered to be an "accessible and theoretically flexible approach", was used to analyse the data (Braun & Clarke, 2006, p. 77). Content analysis is a form of secondary analysis which involves extracting main themes from existing formal resources, in most cases, archival material (de Vos et al., 2005). Thematic content analysis is also concerned with "how people seem to understand the meanings and the phrases they use..." (Parker, 2005, p. 99). Accordingly, the content analysis of this research goes beyond the mere enumeration of categories to an examination of the theoretical relevance of the themes used in the compilation of the reports, bearing in mind the context of the Family Advocate's Office and its legal obligations in terms of the Children's Act (2005). Thematic analysis involves a process of encoding qualitative information, which requires a specific code (Boyatzis, 1998). A theme "is a pattern found in the information that at a minimum describes and organizes the possible observations and at a maximum interprets aspects of the phenomenon" (Boyatzis, 1998, p. 4). Themes can be generated inductively from the raw information, or deductively from theory or prior research (Boyatzis, 1998). In this study, the categories were generated deductively and the themes and sub-themes inductively. Prior to generating themes, the contents of the reports were thoroughly perused in order to get a feel for the structure and the style of the documents. Later, each report was carefully read several times, while notes on the content were recorded. The first record of notes on each report included a list of all the topics considered in the report. Further, notes were also made of how the information was accessed, for example whether the Family Counsellor had

conducted an interview or a home visit and, from whom the information was sourced. None of the topics recorded from the 10 reports were abandoned; instead a process of connecting the similarities and differences in the data was followed in order to uncover the themes and patterns in the data (Fereday & Muir-Cochrane, 2006). From this initial list, topics were grouped together under broad themes. Thus, for example a list including topics such as, child safety, school fees and medical care, was grouped together under a sub-theme called, "Primary needs" and later additional sub-themes were created and grouped under a main theme. Accordingly, this part of the analytical process was inductive as the data was coded "without trying to fit it into a pre-existing coding frame or the researcher's analytic preconceptions" (Braun & Clarke, 2006, p. 83). The intention behind the inductive method of coding was to keep as close as possible to the raw information in order to appreciate the "gross (i.e., easily evident) and "intricate (i.e., difficult-to-discern) aspects of the information" (Bozatzis, 1998, p. 30). As the process continued, the analysis became more refined through connecting related themes and consequently the number of themes was reduced and further sub-themes were included to create a more logical structure.

In order to represent who was doing the reporting, categories were created to reflect the way in which the child's voice was being represented in the reports. Through this process, it became evident that the themes and sub-themes that were emerging could all be categorised under one category, which reflected that a number of proxies were used to speak on behalf of children. However, there were two other patterns evident in the data, which also needed to be categorised. The three categories were generated deductively, having regard to existing theory on children's participation in child custody disputes. According to the literature, children's voices are accessed directly, sometimes disqualified (for a number of reasons) and often accessed through the use of a proxy. Based on this knowledge, three categories were generated, namely: the child's voice is accessed directly; the child's voice is disqualified; and the archetypal child's voice is accessed through a proxy. Thematic codes were created following Boyatzis' (1998) structure of a meaningful code. The codes defined and described each theme and category and clearly identified qualifications or exclusions to the theme. The codes were then tested against the data, by finding both positive and negative examples in order to eliminate confusion or ambiguity when coding the categories or themes in the data set.

Colour post-its were used to identify the first two categories and the themes and sub themes under the third category. Once the data set was colour-coded, the data set was analysed again to see whether the data was coded under the correct category, theme or sub-theme and also to identify instances where the categories, themes or sub-themes overlapped. Where necessary, corrections were made. Thus, while appearing to follow a “linear, step-by-step procedure, the research analysis was an interative and reflexive process” (Fereday & Muir-Cochrane, 2006, p. 4). Through this analytic process, a model of how the child’s voice was represented in the reports was developed. The structure of the model is set out below:



Further, a table was created as a visual aid to assist with analysing the data. The table included 10 rows representing the 10 reports and seven column headings: age of child, clinical psychologist’s report, psychometric assessment, direct voice, disqualified voice, sources of information and number of interviews with the child. This visual representation of the data assisted the researcher in accessing information easily and quickly. For example, the table was referred to in order to calculate how many reports included a clinical psychologist’s report or, to determine which reports

included examples of when a child's voice was accessed directly or disqualified. Thereafter, information from the table and excerpts from the data set was extracted for the analysis and discussion in Chapter four.

3.5. *Ethical Considerations*

3.5.1. *Issues of informed consent*

This was not a contentious issue in this study as consent to use the reports was given by the two participating regional offices. Moreover, the matters were not *sub judice* or 'under seal' but public documents accessible to the public.

3.5.2. *Confidentiality*

No identifying details of any persons involved directly or indirectly in the custody dispute or in the evaluation process were included in the study. Further, the names of the two participating regional offices have not been mentioned in the dissertation.

3.5.3. *Reflexivity issues*

The researcher was constantly aware of a potential bias towards expecting a certain outcome in the research findings. Accordingly, this was held in mind and a conscious attempt was made to adopt a neutral and objective stance throughout the analysis. This expectation of a particular finding was also shared with the researcher's supervisor in order to foster transparency in the process and to create an appropriate external check and balance mechanism to avoid the bias from infiltrating the study.

CHAPTER 4 RESULTS AND DISCUSSION

This chapter sets out the findings of this research and discusses it within the context of the literature reviewed in chapter 2. The thematic content method of analysis, described in detail in Chapter 3, was used to analyse the data and to develop the structural model which illustrates how the child's voice was represented in the reports. Three theory-driven categories were deducted for the purposes of this study, namely: 1) the child's voice is accessed directly without qualification; 2) the child's voice is disqualified and 3) the child's voice is not accessed but an archetypal child's voice is accessed through a proxy. Category 3 was divided into two themes and a number of sub-themes, which were developed inductively through a data-driven process of thematic analysis. Each category, theme and sub-theme has been described and supported by quotations from the different reports.

While the model included in Chapter 3, clearly illustrates and distinguishes between the different categories and themes, the results showed that the data extracted from the reports often fell within the ambit of more than one category and/or theme or sub-theme, especially under Category 3. This was expected given the complex nature of custody evaluations and the multiple layers of meaning potentially ascribed to the information recorded in the reports.

The results demonstrated that the child's voice, the disqualified child's voice and the archetypal child's voice accessed through a proxy, originated from different sources. These included, interviews with child's parents, informal and formal interviews with the child, observation of the child with his or her parents, home visits, school reports, collateral sources (caregivers, teachers, friends, extended family, neighbours, psychologists) and psychometric assessments. This multiple approach to gathering information is supported by international commentators on child custody evaluations (Gould & Martindale, 2007; Hovath et al., 2002; Patel & Jones, 2007) and it is included in child custody guidelines (APA Guidelines, 1994; AFCC Guidelines, 2007). The AFCC Guidelines (2007) state that multiple data-gathering methods must be as "diverse as possible" and must "tap divergent sources of data" (p. 79). According to Burman and McLennan (1996), the Family Advocates and lawyers interviewed in their study, reported that investigations undertaken by the Family

Advocate's Office are inconsistent, "especially in relation to which important players in the family saga were interviewed" (p. 77). While the 10 reports in the current study together showed that multiple methods are being used to access the voice of the child, the reports varied in terms of the number and combination of sources utilised in each case. Bala (2004) recommended that there should be at least two interviews with the child, each parent having a turn to bring the child to an interview.

In nine of the 10 reports, the children involved in the dispute were interviewed. In respect of the Family Counsellors' reports, a one hour "informal interview" was conducted with the child. The nature of such an interview was not explained however this manner of description seems to distinguish it from the psychological assessments conducted by the clinical psychologists. Nevertheless, the Family Counsellors conducted one "informal interview" in each case, except in Report 3, which involved a two and half year old child. The five clinical psychologists' reports indicated that the child(ren) were interviewed on one occasion only.

4.1 The child's voice is accessed directly

In this category, the results showed that the child's voice was accessed directly through interviewing the child. The content of what the child said to the interviewer (social worker or psychologist), who was also the writer of the report, was recorded in the report through direct speech using quotation marks or through paraphrased speech which clearly indicated what the child said in the interview. This included (but was not limited to) the child's current state of mind, the child's perception of the parents' character traits and behaviour, the parents' disciplining style, the child's fears or concerns, the child's relationship with each parent, the child's relationship with the siblings and the child's views and wishes regarding custody and access.

Local and international commentators have long been arguing in favour of child participation in child custody disputes (Kaltenborn, 2001; Melton, 2005). Further, research has shown that children, despite generally not wanting to take responsibility for decisions, do want to have their views considered, especially in matters that concern where they are going to live and spend their time (Cashmore & Parkinson, 2008; Louw & Scherrer 2004; Tisdall et al., 2004). However, research conducted at

the Family Advocate's Office (Africa et al., 2003; Louw & Sherrer, 2004; Pillay & Zaal, 2005) suggests that not enough emphasis has been placed on accessing the voice of the child in custody disputes. An overview of South African case law pertaining to custody and access, reflected that the courts have not given sufficient regard to children's voices (Barratt, 2002), however more recent commentary suggests a greater willingness by the courts to allow a child's wishes to outweigh other competing factors (Schäfer, 2007). The procedural mechanisms that are intended to facilitate the discovery of children's voices have been criticised as being inadequate (Pillay & Zaal, 2005). It has been elucidated that it is no longer appropriate to presume that children will think or feel the same way as their parents as research indicates that children "report a widely divergent range of views, experiences and levels of satisfaction" (Taylor 2006, p. 158). Thus, there has been a steady paradigm shift worldwide towards conceiving children as young citizens who have the capacity to be social agents in shaping their own childhood, rather than just passive, incompetent, vulnerable beings in need of protection (Eriksson & Näsman, 2008; Freeman, 1998; Jans, 2004; Kaltenborn, 2001; Melton, 2005; Moloney, 2008; Taylor, 2006).

In line with international trends supporting children's participation in family law matters, legislation was promulgated in 2007 which provides that due consideration must be given to any views and wishes *expressed by the child* (emphasis added) in any matter concerning the child and in all major decisions involving the child (s10, s31(1) Children's Act, 2005). Accordingly, in this study a strict standard of what is meant by "accessed directly" was imposed in order to reflect the intention of the legislature and to determine the Family Advocate's Office's adherence to these provisions.

4.2 *The child's voice is disqualified*

The results indicated that many of the reports reflected the presence of a two-stage process that seems to be occurring in practice: the child's voice is accessed but then, it is disqualified, made insufficient or rendered not good-enough in some way or other. The reports in this study showed that the child's voice was accessed but it was substituted or negated by another voice which was the voice of a third party or a voice espousing a theoretical or clinical position. The example extracted from report 4 was a case in point:

Report 4: ...*[the child] did express sadness regarding her parents' separation and divorce, something that she understood as them having to live in separate houses. The foregoing is not uncommon for children to experience in such circumstances.*

His concerns were mainly those relating to his sibling and when his parents were angry with him for a misdemeanour. However, none of the foregoing was of such a nature as to affect his mental state detrimentally.

In this example, the writer of the report accessed the child's voice by recording how the child felt about his parents' divorce, (*[the child] did express sadness regarding her parents' divorce*), however even though the writer confirmed the child's experience as "not uncommon", the child's voice was still disqualified as it was only considered to be valid based on a presumption that most children of divorcing parents feel this way. Thus an objective standard of what is considered normal substituted the child's voice. In the second paragraph of the example, the writer once again disqualified the child's voice (*His concerns were mainly those relating to his sibling and when his parents were angry with him for a misdemeanour*) by suggesting that the child's voice was considered only on the basis that his mental state was not affected negatively. Therefore this example from report 4 illustrated how the child's voice was rendered insufficient and less important in the face of seemingly objective presumptions of what is considered 'normal', in respect of children's experiences generally (*The foregoing is not uncommon for children to experience in such circumstances.*), and in respect of mental health (*However, none of the foregoing was of such a nature as to affect his mental state detrimentally.*). Another example of this nature is set out below:

Report 7: *The minor children should not be separated in this matter, neither do they want to be separated. They clearly verbalized their preference to be with their mother and to be allowed to continue meaningful relationships.*

After interviewing the children, undersigned is of the opinion that [the daughter] is mature enough for her developmental phase, to be taken seriously and that [the son] should also be heard, although the way he expresses himself, does not really give factual evidence to vary his position. Due to his young age, it is understandable that

he might find it difficult to express his deepest emotional needs of emotional nurturing by his mother.

Thus in Report 7, the disqualifier was the child's age and developmental stage. This implicitly suggested that if in the event a child is not "mature enough for [his/] her developmental phase" then he or she should not be "taken seriously". Similarly, if a child is too young, he or she may find it difficult to express his or her "deepest emotional needs" and on that basis, the child's voice should be rendered insufficient. This is consistent with research findings in other jurisdictions which have indicated that a child's age often determines the extent to which his or her voice is accessed (Crosby-Currie, 1996; Taylor, 2006). Recent research confirms this trend. Cashmore and Parkinson (2008) found that children, especially under the age of 12, had little or no say. Yet, even if a child's views need to yield to his or her long term autonomy interests, "this does not imply that the decision-maker can simply ignore the child's point of view" (Barratt, 2002, p. 559). Mantle et al.'s (2006) research showed that the age of the child was attributed less significance than it deserved in welfare custody reports. The Children's Act (2005) clarifies that the provisions directing that a child's views and wishes be considered are not absolute and in all cases, are subject to the child's age, maturity and stage of development. However, it is unlikely that the intention of the legislature was to permit unwarranted disqualification in instances where the child is assessed and found to be too young and immature to participate. Instead it is more likely that there is an onus on the professional to illustrate with evidence why, in a particular case, a child's age, developmental stage and maturity justify supporting the child's views and wishes, or if the case may be, necessitate a finding that is contrary to the child's views and wishes.

The results also revealed instances where the child's voice was disqualified by a professional opinion and/or clinical experience. Reports 8 and 10 provided examples of this nature:

Report 8: *[The child] loves visiting [her father] and her eldest sister [sister's name]. She also enjoys her stay with [her mother]. Undersigned observed that [the child] was confused and not sure of her true feelings.*

Report 10: *He stated that he was “happy” that his parents were divorced. Throughout the interview, [the child] adhered to uncompromising and obdurately negative descriptions of his father, and with similar lack of differentiation, spoke of his mother with unwavering approbation. He could recall no enjoyable experiences with his father, is not comfortable in his presence, and consequently, does not miss him, or want him in his life.*

[The child] appears to have conceptualized his father as “very strict”, “unfair”, “cross” and “dishonest; someone he is scared of”.

[His mother] is experienced as “caring”, “kind, “fun to be around, “strict – but for our work, not as in giving us hidings”; a mother who “does her best to get what we want”.

In the two examples cited above the child's voice was accessed, however it was disqualified by the writers' professional opinion on the basis of the child's state of mind (*[the child] was confused and not sure of her true feelings*) and apparent lack of judgement, (*[the child] adhered to uncompromising and obdurately negative descriptions of his father*). It is the brief of the mental health professional writing the report to recommend custody arrangements and therefore it follows that they will express a professional opinion based on their professional training and clinical experience. Therefore the concern in these instances is not that an opinion was expressed instead, it is the manner in which the opinion was expressed that deserves careful examination. In these examples, the writer's interpretation was so tightly interwoven with the child's voice that it scuppered any attempt to access the child's voice directly. Swartz's (2005) paper on subaltern voices in the clinical setting is particularly relevant in the context of child custody evaluations where the legislated clinician-client (child) relationship confers upon the professional an almost paternalistic role given children's status as vulnerable beings. This creates, as the examples above illustrated, the potential for children's voices to be “filtered through diagnostic and therapeutic monoculars”, erased or rendered subaltern, even though they may be given an opportunity to speak (Swartz, 2005, p.513).

4.3 *The archetypal child's voice is accessed through a proxy*

In this category, instead of the child's voice being accessed directly, a number of proxies were used. This means that the voice that was accessed, was based on a presumption, namely; that any child placed in the same position of the child involved in the dispute, would have said the same thing. Hence, the concept of an archetype, meaning a "typical example of its class" (Colman, 2006, p. 53), was used to describe the collective experience of children, which cannot be directly represented. Consequently, the archetypal child's voice was accessed through a proxy.

4.3.1 *The child is who a third party says the child is*

The reports illustrated that often, a third party acted as the proxy through which the archetypal child's voice was represented. The proxy represented the archetypal child's voice by providing descriptions and opinions of the state of the child's, physical and emotional well-being, behaviour, relationship with each parent, wishes and views and intellectual and social functioning. Therefore the third party reported on what he or she thought the child's voice would have said (based on an archetype), if it was accessed directly. Two sub-themes emerged:

4.3.1.1 *The child is who a significant other says the child is*

Significant others included parents, neighbours, extended family members, family friends, caregivers or any person who had a relationship with the parents and/or the child. The results showed that from this group, the proxy most consistently used in all 10 reports, was the parents of the child. This was an expected finding given the relationship to the child and their vested interest in the outcome of the dispute. The results revealed that other members of this group were contacted for collateral however their contributions focused mainly on their opinions of the parents involved in the dispute and not on the child. This notwithstanding, there were a few instances where a significant other, other than the child's parents, was used as a proxy for the archetypal child's voice (and evident from the examples below, to ultimately investigate how the parent related to the child):

Report 3: [] the day-care mother of the child, is of the opinion that the involved child is well cared for by [his mother] and does not show signs that he might be exposed to abuse.

Report 10: As [the children's godmother] noted: "The children were never afraid of him; they were often alone with him. He was definitely the stricter parent, and they would chose [sic] to be with [their mother] because they had more fun with her. But they were never afraid of him during the marriage and even for a while after the divorce. He would bring them to us over the weekends when he had them – and there was no fear. I never saw him lift his hand or scold them in a loud voice – he would speak to them seriously."

The parent proxy was mostly used to describe the child's behaviour and report on the child's relationship with the other parent, which was often maligned. In the examples below, the child's behaviour (*stealing, smoking, dishonesty*) or feeling state (*lack of trust and safety, fearful*), was implicitly linked to the other parent's way of being. In each instance, there was a suggestion that, but for the other parent's behaviour, the child would not have been exhibiting the negative feelings or behaviour reported.

Report 1: The [mother] reported that especially [the son] presented with problem behaviour, including stealing from [his father], smoking cigarettes, drinking alcohol, playing with [his father's] fire arm and lighting fires.

Report 2: The [father] emphasised that the minor child, [], is dishonest with [his mother] because a lack of trust and safety in the relationship between him and [his mother]. [The father] points out that he has not experienced the same degree of dishonesty from the minor child [].

Report 4: [The father] mentioned that their daughter was fearful of their mother's temper as she had expressed the foregoing to him on one occasion.

The parent proxy was also used to report on the child's preferences regarding custody and access. In some instances, the parent proxy directly communicated to the writer of the report, the child's wish or preference. This was reflected in report 5. However,

there were also instances when the parent proxy indicated a child's preference indirectly by stating what the child does not want, which invariably amounted to a value-judgement on the child's relationship with the other parent. Reports 8 and 9 provided evidence of this dynamic:

Report 5: *[The father] said that he stayed with the minor children before their mother's death and the children communicated their wish to stay with him.*

Report 8: *[The mother] described [her daughter] as a lady who does not like visiting her father; "it's her decision". She further stated that the children were uncomfortable visiting their father, "who had live-in girlfriends, several different ones".*

Report 9: *[The mother] has confirmed that the Rule 43 Court order allows the child to sleep over at [her father's] place, but the child is reluctant to sleep over at [her father].*

There appeared to be a greater degree of accessibility to the archetypal child's voice when the parent proxy was used to report on or describe, the child's behaviour, the parent-child relationship and the child's preferences, compared to when it was used to comment on the child's relationship with the *other* parent. This was because in the latter case, what was being reported, did not directly involve the parent who was doing the reporting, and was merely an opinion, often motivated by the parent proxy's own agenda. Similarly, the archetypal child's voice was also compromised when an unsubstantiated inference made by the writer of the report was offered. This was illustrated in the example below.

Report 1: *The [father] is of the opinion that the involved children have a closer bond with him than with the mother. He is of the opinion that he cared for them since an early age. It appears that the [mother's relationship] (with her children) strengthened after [the father] received custody of the involved children and she received therapy after a suicide attempt.*

This extract demonstrated how the father's report was diluted when the writer of the report commented on the nature of the mother's relationship with her children (*It appears that the [mother's relationship] (with her children) strengthened...*), without clearly stating whether this information was directly reported by the father, or whether it was an opinion that the writer reached through his or her assessment. Either way, the opinion was not substantiated and the reader was left not knowing how such an inference was reached. This rendered the archetypal child's voice less accessible.

4.3.1.2 The child is who a professional says the child is

This sub-theme referred to instances when the archetypal child's voice was accessed through a professional. The professionals involved in the custody evaluations and whose opinions were included in the reports were, the social worker employed by the Family Advocate's Office, clinical, counselling, or educational psychologists and teachers. Other evaluations may of course include input by other professionals involved in the child's life or who have been briefed to assess the child. Similar to the parent proxy, the professional through whom the archetypal child's voice was represented, reported on, described and offered opinions on the child's behaviour and the parent-child relationship, in addition to commenting on issues within the scope of their expertise. Accordingly, the teachers commented on the child's functioning at school, the social workers described the social circumstances at home and their observations of the child, and the clinical psychologists offered opinions on the child's mental state, the child's developmental stage, the impact of the parents' behaviour on the child and diagnosed a mental illness. Of course, these distinctions are theoretical in nature and the results revealed that there was often an overlap of expertise, especially in respect of the opinions offered by the social worker and the psychologist.

Patel and Jones (2008) recommended that if a child is of school-going age, at a minimum, counsellors need to ascertain and report on the child's school progress for the last few years to assess the child's academic functioning and behaviour and, may choose to contact in person or telephonically, teachers, principals and coaches. One report (report 8) included attached school reports, however even in this case, the reports on both children were current and there was no history of the children's

functioning at school over a period of time. While the reports reflected some input from educators, their contributions were scant.

Report 1: *Schools contacted in the Durban and Port Elizabeth area indicated that they did not experience the child as aggressive or presenting with any problem behaviour.*

Report 8: *The principal is concerned about [the child's] attitude at school. She displays discipline and emotional problems.*

Report 10: *According to their respective class teachers, both attend school regularly, are well cared for and their progress is good. Both boys participate in sport activities.*

As children spend a considerable amount of their day at school, their educators are in a position to provide valuable, insightful information about a child's past and current functioning. Educators are able to impart information about the child's academic performance, the child's performance in sports, drama and other non-academic pursuits, the child's relationships with teachers and peers, the degree of parent-teacher cooperation, the child's current behaviour and state of mind at school and whether there have been any changes in this regard (Carr, 2006). It is an opportunity lost when this proxy is not utilised fully to access the voice of the archetypal child, given that it is a proxy that one hopes and expects will be, objective and free of bias. Therefore, irrespective of whether there is an allegation of poor performance at school, educators' input should be solicited in the evaluation process.

The results confirmed as expected that the most utilised professional proxy was that of mental health workers, namely the Family Counsellor and where seconded to the case, the clinical psychologist. This deference to mental health professionals as proxies to represent the archetypal child's voice is in keeping with the general reluctance of the South African judiciary to interview children directly (*Soller NO v G*, 2003; *F v F*, 2006; Schäfer, 2007). All 10 reports included examples of this sub-theme, which was reflected in a number of ways.

In the first instance, the professional represented the archetypal child's voice through a theoretical lens. Consequently, the child was, what a theory says a child is, which in the two examples below, was determined on the basis of what a theory postulates about the child's age and developmental stage.

Report 1: *From Stahl in "Complex Issues in Child Custody Evaluations" page 112 it would appear that [the child] is in the preschool developmental stage. During this age the child needs predictability, routine and structure in order for the child's needs to be maintained. ...Undersigned is of the opinion that all of the sudden changes in the child's life such as moving from her primary residence, known environment, school, friends and family, might have a negative impact on the child's emotional development.*

Report 4: *Ackerman (2006) describes the years between 6 and 8 as the "age of sadness" which appears to be [the child's] experience: "Children at this age have come to rely on the security of the family structure and interpret disruption of that structure as a collapse of their entire protective environment. Their emotional immaturity prevents these children from protecting themselves against these losses (pg 4)."*

Thus instead of accessing the child's voice directly in order to determine the child's needs, the professionals relied on *Stahl* and *Ackerman* as theorists on child development, to provide an understanding of children's needs generally, during a particular developmental stage, and in so doing, the professional accessed the archetypal child's voice. Along similar lines, *Warshak* (2003) refers to this kind of deference as "hearing the collective voice of children" (p. 377), which is informed by clinical and empirical research on children's attitudes on various aspects of divorce, and children's actual long-term adjustment. Admittedly, this will not satisfy an individual child's wish to be heard but it nevertheless assists decision makers to "understand what children might say with the hindsight of maturity and in the absence of parental pressure, loyalty conflicts, inhibitions, and limitations in perspective and articulation" (*Warshak*, 2003, p. 377). Of course, this would require professionals involved in custody evaluations to be *au fait* with the relevant literature if it is to be "the implicit voice of groups of children" (*Warshak*, 2003, p. 377).

A second way in which the professional represented the archetypal child's voice was through using his or her professional training and work/clinical experience. Hence it was the professional's training and experience which informed who the professional said the child was. In report 8, this was based on what the professional's clinical experience deemed appropriate in terms of interpersonal skills at a particular age and, in report 10, it was based on his or her experience on the effects of parental conflict.

Report 8: *...the psychologist noted that [the child] was severely lacking in interpersonal skills appropriate for her age. "She has the manner and appearance of a lost and disconnected child which has serious implications for her ongoing development in puberty and into adulthood".*

Report 10: *The re-definition of a highly functional and rewarding family unit now includes [their mother] and their much loved maternal grandmother, but excludes [their father] and their much loved paternal grandfather and their paternal cousins, as well as former family friends. This situation has the potential advantage for the boys, of removing them from the emotional distress of the parental conflict. By aligning themselves with one parent, and alienating themselves from the other, it may be that the boys are stating that they need to be free of conflict that they cannot tolerate. There are, however huge costs associated with this strategy of coping.*

While children may be able to describe how they feel or give an opinion on the appropriateness of their conduct, they are not in a position to measure how their behaviour or interpersonal skills compare to other children in their age group, or whether their feelings are appropriate for what they are going through. Nor are children able to know how their parents' behaviour will impact on their long term development and emotional well-being. Accordingly, the professional uses his or her training and experience in the field to inform his or her opinion of who the child is.

The archetypal child's voice was also accessed through the professional utilising psychometric assessments. From the 10 reports, a psychometric assessment was administered to a child in only one case, report 4, which included a clinical psychologist's interpretation of a projective drawing test. Hence in that instance, the archetypal child's voice was represented through the professional's interpretation of

the assessment results. Accordingly, the child was who the professional said the child was based on his or her interpretation of the psychometric assessment.

Report 4: *[The child's] drawings do not indicate any pathological functioning in her mental state. All the drawings are conventional in their depiction of her and the relationships between family members. If anything, the family drawing reflects a somewhat disengaged situation that probably is indicative of the state of the family.*

4.3.2 *The child is what is in the child's best interest*

Under this theme, the results reflected that the best interest principle was used as a proxy for representing the archetypal child's voice. As discussed in Chapter 2, any ruling in respect of custody must be made in terms of the "best interest of the child" criterion, which is enshrined in our Bill of Rights and enjoys statutory recognition in South Africa and internationally (s28 Constitution of the Republic of South Africa, 108 of 1996; s7 Children's Act, 2005; Article 3(1) UNCROC). Since before its codification, its interpretation and application has been debated vigorously.

In order to properly assess a child's needs and consequently determine what is in his or her best interest, it is considered vital that the child's psycho-social history which describes the child's functioning and developmental needs are included in a custody evaluation (Bow & Quinnell, 2002). The results of this study showed that except for stating the child's name and age (but in some cases excluding the child's date of birth), the reports typically did not include the child's psycho-social history and development. Nonetheless, the pre-eminence of the best interest principle in custody disputes ensured that it was otherwise (and not surprisingly) extensively applied in each case by investigating whether certain needs of the child were adequately being met.

The archetypal child's voice was represented by setting out the child's needs, based on what was considered and assumed by, the child's parents, professionals, the law, psychology and the social sciences, to be in any child's best interest. The third party proxy was often used under this theme, nevertheless the significance and centrality of the best interest principle in custody evaluations justified a separate discussion.

The sub-themes which emerged through the analysis of the data, accorded with the APA Guidelines (1994) for custody evaluations. Section 3 of the APA Guidelines provides that the focus of the evaluation should be on the resulting fit between parenting capacity and the psychological and developmental needs of the child, which involves:

(a) an assessment of the adults' capacities for parenting, including whatever knowledge, attributes, skills, and abilities, or lack thereof, are present; (b) an assessment of the psychological functioning and developmental needs of each child and of the wishes of each child where appropriate; and (c) an assessment of the functional ability of each parent to meet these needs, including an evaluation of the interaction between each adult and child.

The values of the parents relevant to parenting, ability to plan for the child's future needs, capacity to provide a stable and loving home, and any potential for inappropriate behavior or misconduct that might negatively influence the child also are considered. Psychopathology may be relevant to such an assessment, insofar as it has impact on the child or the ability to parent, but it is not the primary focus. (p. 678)

The results indicated that the following needs were considered to be in the best interest of the child.

4.3.2.1 Primary needs

The primary needs referred to in the reports included the child's need for physical safety, nutrition, adequate living conditions, financial security, access to health and medical care and access to education. All 10 reports commented on at least one primary need, which in most cases was, the adequacy and/or the suitability of the child's living conditions, such as in report 3.

Report 3: *[The father] resides at (address). The [child] lives with his father, stepmother and two sisters in a three bed-room flat. The flat sufficiently provides in [sic] the needs of the involved child when he comes to visit [his father].*

This implicitly suggested that, at the very least, a child requires a roof over his or her head. Additional reports on primary needs usually only ensued where there were allegations that certain needs were not being met, such as the child's safety, access to schooling and the child's need for access to health care as set out below in reports 8 and 9, respectively:

Report 8: *[The father] views their living conditions as unsafe and unsuitable, is worried about their continued absences from school...*

Report 9: *The child's health and medical needs are of great importance and must not be taken lightly. The parties' personal believes [sic] and preferences should not affect the child in any way. Each party has a responsibility of securing the child's safety whenever the child is at their homes.*

4.3.2.2 Continuity

In divorce cases, children's lives are often disrupted as a result of one parent leaving the family home, parents' relocating to different neighbourhoods, towns, or cities, living between two homes, and in some cases, themselves having to move to a new home, school and/or city. The need for continuity therefore refers to a sense of stability and the lack of disruption in a child's life insofar as it is practical and viable. Referring to the research of a German commentator, Kaltenborn (2001) states that continuity should be maintained in a child's living situation, unless the child is suffering in his or her current environment. This approach is also followed by the South African legal system (Louw & Scherrer, 2003). The results reflected the tendency to favour continuity in a child's life. This point is illustrated in reports 1, 2 and 7:

Report 1: *Undersigned is of the opinion that all of the sudden changes in the child's life such as moving from her primary home, known environment, school, friends, and family, might have a negative impact on the child's emotional development.*

Report 2: *Both minor children give the impression that they are settled and stabilised in their current circumstances and that they are not positive about a possible relocation.*

Report 7: *The [father] is highly concerned about the [mother's] accommodation, employment and resulting school changes, as well as finances. On verifying this, it indeed seems that the [mother] portrays a nomadic pattern, which gives reason for concern.*

The position adopted in these instances was that maintaining the status quo in respect of the child's "known environment" was preferable over a "nomadic pattern" which, even if not stated explicitly, was assumed to have a negative impact on the child. The extracts from reports 1, 2 and 7, provided examples of data that potentially could have been discussed under the theme, "The child is who the professional says the child is" as in each case, the writer of the report makes a negative value judgement about the appropriateness of a "sudden change", "possible relocation" and "nomadic pattern". However, the content of the writer's opinion and/or value judgement was relevant to the discussion under this sub-theme.

4.3.2.3 Good-enough⁹ parents

This sub-theme related to the psychological well-being of the parents, the parents' character traits which impacted on their functioning as parents, the nature of the parental relationship, the parent's insight into their own issues, the presence of help-seeking behaviour in the parents and, how the parents integrated new partners into their child(ren)'s lives. Implicitly, it is in a child's best interest to have parents who are good enough. Therefore the archetypal child's voice was accessed through such an enquiry.

Under this sub-theme, the issue considered most consistently was the personality traits and mental stability of each parent. Research by Bow and Quinnell (2004) found that one of the reasons why judges recommended a mental health evaluation was allegations that a parent was mentally unstable. It has been held that a parent's diminished ability to parent as a consequence of parental distress or poor mental health is a significant factor in children's adjustment difficulties (Johnston, 1995; Sales, Manber & Rohman, 1992, cited in Kaltborn, 2001). According to

⁹ The term "good-enough" was conceived by the psychoanalyst, Donald Winnicott. It refers to the parents' responsibility of adapting to a child's needs and providing a facilitating environment which will give the child a good start in life (Winnicott, 1986). It is within the context of this meaning that the term is used in this study.

Kaltenborn (2001) a parent's psychological problems and/or diminished capacity to parent must be considered within the whole context of the case, while bearing in mind the child's attachments and preferences. Accordingly, a child's preference for contact is not automatically negated where there is evidence of parental psychopathology or poor mental health.

Information regarding the parents' mental health was sourced through interviews with the parents, collateral and the results showed that in five of the 10 reports, the Minnesota Multiphasic Inventory-2 (MMPI-2)¹⁰ was administered to the parents. The MMPI was designed as an "aid to psychiatric diagnosis" and was made up of ten clinical scales that were retained in its revision, the MMPI-2 (Cohen & Swerdlik, 2005, p. 361). Different profiles of scores are associated with different patterns of behaviours (Cohen & Swerdlik, 2005). Added to the MMPI-2 were content component scales, which provided more focused indices of content: For example, the Family Problems content was subdivided into Family Discord and Familial Alienation content (Cohen & Swerdlik, 2005).

In addition to the interviews and clinical observations, it appeared from the reports that the MMPI-2 was also administered to evaluate the personality profile of the parents and to determine whether psychopathology, including substance abuse, was present in either parent.

Report 1: Psychometric test results (MMPI-2) indicate that although [the mother] appears to be adequately psychologically adjusted, it is evident too that she is currently experiencing considerable emotional turmoil that could affect her level of functioning. While there is no evidence of significant psychopathology or serious maladjustment, [the mother] is troubled by feelings of anxiety, tension and apprehension in certain situationally [sic] stressed areas of her life, while at the same time, continuing to function fairly adequately in others.

[The mother] completed the MMPI-2 and obtained a valid profile. Her high score on the Fb-scale suggests that she became fatigued during the assessment. No

¹⁰ The relevance of the MMPI (and other tests of this nature) to custody proceedings has been questioned (Bonnyus, 2001; Otto & Butcher, 1995).

psychopathology is indicated. Her score on the Cynicism scale was also elevated, and the same descriptive explanation as that used for [the father] is also applicable here. Alcohol and/or substance abuse is contra-indicated.

In instances where the MMPI-2 was not administered, the results nevertheless reflected a concern for the mental and psychological well-being of the parents as a necessary component to meeting the needs of the child. This is demonstrated in the extracts from reports 3 and 8 set out below:

Report 3: Regarding [the mother's] alleged emotional instability, she denied that she had ever been diagnosed with or treated for depression or a mood disorder.

Report 8: Judging by the writer's observations, [the father] is certainly the more stable and rational of the two parents. [The mother] was aggressive, hostile, evasive and dishonest. Her mood seemed to fluctuate markedly. She showed poor impulse control, and showed little insight into the needs of her children or the effects of her behaviour on the children. She contradicted herself on a few occasions.

A second way in which the sub-theme good-enough parents was dealt with in the reports was through investigating the parents' relationship with each other. In this regard, there appeared to be an interest in the quality of the relationship between the parents and an investigation into the level of conflict between them. Reports 2, 8 and 10 illustrated the manner in which this was recorded in the reports:

Report 2: It is clear that the [mother] tends to include the minor children in the conflict between her and the [father]. This certainly needs to be frowned upon. The negative influence of them against the [father] is also not in the minor children's best interest.

Report 8: [The father] stated that he feared his ex-wife. She is allegedly always rude and swears at him when he collects the children. She says derogatory things, like: "[the child's name], asshole wants to talk to you".

Report 10: *The [father] confirmed his willingness to co-operate with this process, whilst the [mother] only made notes in her diary and left the office in a hurry the moment the meeting was over. She made no attempt to greet the plaintiff.*

By implication, it is in the child's best interest, to have as little conflict as possible between the parents. While the consequences of separation and divorce may vary for each child, according to Kaltborn (2001), "there is evidence that continuing hostility and conflict between the parents is one of the most detrimental factors for the children" (p. 82). Adams (2007) argues that each parent bears the responsibility of valuing and working with the other parent, irrespective of what the parents think of each other. In Neale's (2002) study, the child participants placed a high value on a relationship of mutual respect and civility between their parents and even though they acknowledged that this may prove to be difficult post-divorce, they hoped that their parents could manage their conflict so to avoid implicating them or expecting them to take sides. Child participants in Smith et al.'s (2003) research also advised that parents should not fight or argue in front of their children, or let their conflict impact on the children. The Family Advocate's Office appears to have adopted the view that less conflict between the parents is preferable and therefore the level of conflict between the parents was examined closely and where a parent was found to be causing conflict in the relationship, disapproval was expressed (*frowned upon*) or it was observed and recorded (*She made no attempt to greet the plaintiff.*).

In evaluating the parents' relationship with each other, parental alienation was also considered. The fervent debates in the literature highlight the complexity of this issue. Questions have been raised about whether children's voices should be accessed where there is evidence of alienation (Bruch, 2001; Johnson, 2003; Timms, 2003). Warshak (2003) urges custody evaluators to rely on the 'collective voice of children' as a more reliable guide than on the stated preference of a child who is suffering from a pathological alienation and is unlikely to know what is in his or her best interest. Two reports considered whether one parent was actively alienating the child(ren) from the other parent.

Report 4: *There were no signs of parental indoctrination or alienation practices. The relationship between the children and parents is positive.*

Report 10: *[The clinical psychologist] and the undersigned are concerned that the alienation between the boys and the [father] is not in their best interest at all. They might one day experience tremendous guilt for alienating themselves from their father as a result of this process of alienation from their father.*

Where parental alienation was considered, the results showed that the children were interviewed and their preferences recorded. The professionals involved in the evaluation exhibited thoughtfulness about the complexity regarding this dynamic and therefore also had regard to academic literature on the topic, often quoting extensively from experts to inform their recommendations, thus seemingly adopting Warshak's (2003) approach.

Domestic violence, as it related to the parents' relationship with each other, was also investigated. This issue arose in several reports, where allegations of domestic violence were made:

Report 1: *While in the custody of both parents the children have been exposed to domestic violence between the parties, as well as domestic violence in the paternal grandparent's home. The exposure to the violence emotionally had a negative impact on the involved children. [The son] acted out aggressively towards his grandmother and; [the daughter and son] could not be disciplined by family members.*

Report 9: *The [mother] informed that she believes the child had been exposed to violence in their family over a long period of time. There was an incident where she was assaulted by the [father] with the child in her arms. The child is scared to be left with the [father].*

Violence between parents has a negative impact on children and may be the determining factor in influencing a decision regarding access rights (Louw & Sherrer, 2003). Where children are exposed to violence in the home, it is even more important to have them participate without a "disqualifying and invalidating investigation" (Eriksson & Näsman, 2008, p. 272). In their recommendations to an Appeal Court (United Kingdom), two eminent psychiatrists made the following recommendation:

In domestic violence, where children have memories of that violence, their wishes should warrant much more weight than in situations where no real reasons for their resistance appear to exist. (Timms, 2003, p. 171)

Accordingly, where there are allegations or evidence of domestic violence greater efforts should be made to access the voice of the child directly in order to explore their views and wishes, or in the instance where a child is too young to directly communicate his or her feelings, at the minimum, the child's interactions should be observed with each parent in their respective environments, and collateral information secured. Further, in support of Kaspiew's research (2007), where there is evidence of domestic violence, a child's preference to have continuing contact with the violent parent should be scrutinized and assessed. It is noteworthy that in both reports 1 and 9, the allegations of domestic violence were not explored with the children, but instead, the professional and parent proxies were used respectively, to represent the archetypal child's voice. Given the alarmingly statistics on domestic violence in South Africa (Vetton, 2005), it may be prudent to explore the presence of domestic violence in each case irrespective of whether or not it is alleged.

A third way in which the sub-theme, good-enough parents was explored in the reports was through considering the parents' awareness of their own issues and whether they displayed any help seeking behaviour. Thus where a parent exhibited behaviour that was potentially harmful to the child, the parent would be somewhat redeemed or given the benefit of the doubt, if he or she showed insight into his or her difficulties and the willingness to seek help in changing the behaviour that was and continues to be detrimental to the child.

Report 1: *[The mother] is aware of her deficiencies in terms of child rearing and is willing to obtain professional support to assist her in dealing with the problem behaviour that the children, especially [the son] is presenting with. She already utilised the services of a psychologist and social worker in the past to assist her to deal with problems that she experiences.*

Report 6: *The [mother] denied allegations that she continues to display her anger in front of family members. She mentioned that she has completed her therapy two years ago for anger management and that behaviour does no longer manifest.*

The writers' attention to the parents' willingness to attend to, and resolve their emotional and/or emotional difficulties, implies an acknowledgement that such help-seeking behaviour will as a consequence have a favourable impact on the child and ameliorate any harm that was caused to the child. According to Moloney (2008), parents have different gifts and challenges (just as in intact families) and therefore instead of rejecting one parent in favour of the superior other, parents should be supported to remain actively involved in their children's lives so that the children can continue to benefit from the qualities of both parents. This holistic approach to evaluating the parents, avoids mental health professionals' reports from being used to conduct a "pathology hunt which often holds the litigating divorced family to a higher standard of mental health than intact and nonlitigating divorcing families..." (Roseby, 1995, p. 98).

South Africa has followed international trends which have shown a steady move from older practises, such as awarding sole custody and access to the so-called winning parent, towards sharing parental responsibility (Davies, 2004). The courts are therefore reluctant to strip a parent of his or her parental rights and responsibilities and will only do so in cases where it is absolutely clear that it is in a child's best interest that he or she have limited or no access to a parent (Schäfer, 2007). It is now a commonly held view that children should have continuing contact with both parents post-separation and/or divorce, and even in instances where there are alleged concerns about the non-custodial parent (such as substance abuse, mental health problems, poor parenting practices etcetera), supervised visitation is often ordered in order to meet the child's needs for having a relationship with the non-custodial parent (Birnbaum & Alaggia, 2006). Nonetheless, cogent arguments have also been made which caution against the assumption that what is in a child's best interest is synonymous with parental contact (Adams, 2007¹¹; Gilmore, 2008¹²). Nevertheless, the right of the child to have access to the non-resident parent is included in Article 9(3) of the

¹¹ Adams (2007) sets out a number of research studies which indicate that the evidence suggesting that contact is good for children is not as strong as assumed.

¹² In his article "The assumption that contact is beneficial: Challenging the 'secure foundation'", Gilmore (2008) critically examines a Court of Appeal Decision (England) which supported a psychiatrist's view that contact benefits most children. He discusses research findings which do not support a general assumption in favour of access.

UNCROC¹³ and the right of both parents to enjoy parental responsibilities and rights has been legislated in South Africa (Chapter 13, Children's Act, 2005). This makes it almost mandatory for the custody evaluators to explore the parents' positive and commendable attributes that mitigate against any failings on their part.

The final issue considered in the reports under the sub-theme good-enough parents, was that relating to the manner in which a parent introduced the child to his or her new partner. While it was not examined in detail in the reports, it was noted and recorded. The results indicated a tendency to favour a sensitive approach, which would scaffold the relationship between the child and the new partner, to avoid disrupting and possibly upsetting the child. This approach is illustrated in report 2.

Report 2: The minor children do not get along well with [their father's] girlfriend. [Their father] exposed the minor children to his girlfriend without preparing them beforehand. The [father] explained that he was placed in a position by the [mother] to expose the minor children to his girlfriend due to the fact that the [mother] told the children that he had an affair with an 18 year old prostitute who was expecting his baby. According to the [father], there is a positive relationship between his girlfriend and the-minor children.

4.3.2.4 Good-enough parenting

Literature and guidelines on custody evaluations state unequivocally that the best interest of the child criterion mandates an assessment of the parents' parenting skills (Horvath et al., 2002). Included in the AFCC Guidelines (2007), is a section providing for the assessment of "the relationships between each child and all the adults who perform a caretaking role and/or living in the residence with the child" (p. 81).

Invariably, each report referred to discipline: the parents' disciplining style (report 7), their ability to discipline (report 4) and the appropriateness and effectiveness of how they discipline (report 8). Where a parent failed in any of these instances, the parent's parenting skills were questioned.

¹³ "Article 9(3) – respect for the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

Report 4: *The [father] questions the parental abilities of the [mother], specifically her skill in disciplining the minor children.*

Report 7: *In the undersigned's opinion, it is that the two parties differ greatly in terms of their personalities and parenting styles. This makes it impossible for them to create a harmonious solution regarding the care of the minor children, without professional help.*

Report 8: *[The child] is smoking and the [father] alleges that the [mother] has no control over her.*

Report 3 also included the results from the Parent Discipline Questionnaire (aside from the MMPI-2, this was the only other assessment measure administered to the parents and only in this report) that was administered to both parents in order to establish their disciplining styles, and most likely motivated by a desire to obtain an object view of how they discipline their children. However, the objectivity of the results was tainted by the writer's inclusion of a clinical observation (*She appears somewhat impatient*) amidst the results.

Report 3: *[The mother] also completed the Parent Discipline Questionnaire. The results indicate a mother who uses, admonishment, removal of privileges, time out and corporal punishment as disciplinary techniques. She appears somewhat impatient. She is consistent and teaches values and moral standards.*

The focus on the parents' ability to discipline in assessing their parenting skills is consistent with academic opinion that good parenting includes an ability to discipline appropriately, as this facilitates healthy psychological development in children (Gould & Martindale, 2007).

Further, in evaluating whether the child received good-enough parenting, the parents' physical and emotional availability to the child, and their involvement in the child's educational and recreational activities was also considered. It was clearly the writers' intention to determine how present a parent was in the child's day-to-day life.

Report 6: *[The mother] mentioned that she would love to stay with the minor child because the [father] is not [in] a position to spend quality time with the child due to*

his wok [sic] commitments. She said that she was afraid that the child might not get the attention he needs.

Report 8: *[The child's] teacher reports that the parties are not involved. "Attempts made to meet with the mother – appointments seldom kept. Work often not collected when [the child] has been absent."* (School report)

Report 9: *It is important that the [father] should participate fully in the school and extra-mural activities so that the child experience having both mother and father involved in these aspects of her life. A predictable schedule of contact with the [mother] will help the child organize her perception, and also will provide her with emotional reassurance.*

Reports 6, 8 and 9 emphasised the need for both parents (not only the mother) to be actively involved in the child's life. This is indicative of the shift towards co-parenting and the rejection of the traditional view that mothers are automatically the primary caregivers. The absence of a parent's emotional and physical availability to a child would imply neglect and in extreme cases, considered to be child abuse. An example of an allegation of child abuse was recorded in report 3.

Report 3: *[The father] alleges that his ex-wife started mixing with the wrong people after their divorce. She allegedly started drinking excessively, and had been ostracised by her mother and sister. He stated [the mother] had treated [the child] poorly, that he been neglected, and that she attended late-night parties with [the child] in the car. She allegedly left him unattended and would not feed him.*

As with domestic violence, child abuse in South Africa is endemic (South African Police Service, 2006) and therefore an investigation into whether a child has been abused should be routine in child custody evaluations, as information of this nature may not spontaneously be volunteered by the parents or the child (Horvath et al., 2002). Where there is evidence of abuse, extra measures should be employed to access the voice of the child directly and alternative procedures explored where the child is too young to express him/herself verbally. Further, collateral sources should be accessed.

Another issue related to good-enough parenting related to the values and morals held by the parents, which usually concerned extra-marital sex, religion or alcohol. Report 3 reflected all three issues:

Report 3: *[The father] stated that he used virtually no alcohol. He takes [the child] to church on Sundays. ... [The father accuses [the mother] of behaving in a sexually immoral way. He appears to be referring to her living with [her boyfriend].*

According to Louw & Sherrer (2003), morality should only be important to the extent that it impacts negatively on a parent's ability to care for the child. Divorce legislation internationally and in South Africa no longer contains provisions regulating adultery and malicious desertion where infidelity was proved (Divorce Act, 1979; Himonga, 2007; Moloney, 2008). Therefore infidelity is no longer a deciding factor in custody evaluations, where previously it was likely that custody would be awarded to the innocent parent (Heaton, Church, & Church, 2006). None of the reports included value judgments and parents' accusations of immorality were considered insofar as it related to the child's well-being.

The last issue that arose under good-enough parenting, was the need to maintain social relations and networks that the child had prior to the divorce. This understandably contributes to a sense of security and familiarity in the wake of experiencing a sense of loss and grief for what used to be. Thus, report 10 illustrated the need for the child to continue having a relationship with loved ones, and implicit in this, was the acknowledgement that parenting ideally involves more than what the parents can offer the child individually, especially in the case of single parenting.

Report 6: *[The father] acknowledged the fact that he does not have[a] support system and agreed that it was best for the child to remain under the [mother's] care wherein his social relations will be strengthened.*

Report 10: *According to the [father], the mother has after the divorce broken all ties with former friends and the paternal grandfather – people who the children used to love, and who played a positive role in their lives.*

Therefore, in making their recommendations, custody evaluators are likely to consider whether the parents have a support network of people on whom they can rely on to

assist with parenting where necessary, and with whom the child can develop and strengthen relationships.

4.4 *How is the child's voice accessed directly without qualification?*

In the process of analysing and describing the results of this research, it became increasingly evident that the Family Advocate's Office relied heavily on the archetypal child's voice represented through various proxies, in their process of evaluation and making recommendations to the court. However, the results also showed that the child's voice was accessed directly, and in some instances, it was accessed without disqualification.

The results indicated that all 10 reports accessed the child's voice to a lesser or greater extent depending, in some instances, on child's age. In other instances, the minimalist approach to accessing the voice of the child, may be explained by the challenges facing the Family Advocate's Office such as the volume of work, time pressures, lack of resources and lack of training in child psychology (Barratt, 2002). Mostly however, the extent of the child's input was directly related to the age of the child. Therefore, in the case of an older child, the details of the interview were generally recorded more fully in the report. For example, in report 2 which concerned the custody of two adolescent children, ages 13 and 15, the report included information about their feelings about their mother's alcohol abuse, their mother's behaviour when she was intoxicated and their views regarding residential arrangements. An extract from the report is set out below:

Report 2: [The children] explain that [their mother] used to consume alcohol only during the weekends, but now also on weekdays, especially in the evenings. According to the minor children, [their mother] would consume a bottle of wine in an evening.

The plaintiff becomes aggressive when under the influence of alcohol. She is inclined to influence the minor children negatively against [their father] when she is under the influence of alcohol. She also places guilt on the minor children, accusing them of taking sides with [their father]. The [son], [name], confirms that his mother inclined to be physically and verbally aggressive towards him. He also confirms that he has been chased out of the house on several occasions by [his mother].

[The son] feels caught in the middle in the context of the conflict between the parties. He wants to please both parties.

[The son] is concerned that he will loose [sic] his friends if he relocates to [his father]. He is also concerned about changing schools and leaving [his mother] all alone.

[The daughter] verbalised that it will be difficult for her to leave [her mother] in order to reside with [her father]. She explained that she has been living with [the mother] apart from [her father] for almost two years now and that she is used to being apart from [her father].

In this extract the children's voices were directly accessed. However, greater inclusion of direct speech would have assisted the reader in developing a stronger sense of the child's views and wishes as spoken by the child. In report 7, which involved two children, ages 13 and seven, the report included under separate headings, the views and wishes of each child, in substantial detail compared to the other reports. An extract of the report is set out below:

Report 7: [The child] is happy and according to her doing very well at her new school. She did like her previous school as well, but likes the current one more and already made new friends. Living with her dad, she described as "ok", but it is not the same as living with her mother. She perceives (emphasis added) her mother as being more understanding of her favourite things like horse riding and visiting her grandfather...

About her relationship with her father, she is ambivalent. Sometimes they do not get along well. He sometimes says nasty things. He is strict and will talk, shout or smack as ways of disciplining her.

In this report the child's voice was accessed directly for the most part, however the tendency to slip into speaking on behalf of the child crept in with the use of words such as, "perceives" which suggested that this was the writer's opinion and not the child's. In the case of younger of children, it was often unclear whether it was the child's voice that was being accessed, even in the presence of apparent direct speech.

This lack of clarity regarding whose voice was accessed was illustrated in report 3, where the child involved was two and a half years old.

Report 3: *He is eager to spend time with all the adults in his life. [The child] is advanced and well adjusted to his school. He socialises well and is happy. His mother is described as "excellent", very caring and conscientious.*

The writer of the report did not at any stage indicate who reported this information to her. Further, by writing in the passive voice, (*His mother is described as "excellent", very caring and conscientious.*), it remained unclear whether the child communicated his views and feelings directly, especially in the light of his young age.

It is particularly problematic that most of the reports failed to identify whether it was the child or someone speaking on behalf of the child that was reporting the information. In most cases, the reader was left having to assume who the speaker was based on a previous sentence or a paragraph heading, such as "The minor children". In most instances however, there was no indication of when the writer was reporting on his or her interview with the child. As a result, the reader had to extricate the child's views and wishes from a paragraph containing multiple voices which rendered the child's voice barely a whisper. Hence, constant vigilance is needed about protecting the child's voice from interference so that it is heard clearly and without ambiguity.

In reports 4 and 8, the content of the interviews with the children was constantly interrupted by either the parent's or professional's opinion of the child, even though the ages of the children ranged from five to 17 years old. For example:

Report 8: *[The child] is seventeen years old and she feels that she cannot be forced to stay with [her father]. She is smoking and [her father] alleges that [her mother] does not have control over her.*

Report 4: *Her relationship with either parent is close and positive. There were no signs that she was alienated from either parent. ...She had no complaints regarding her school experience and seemed to have a positive social involvement. Her emotional assessment revealed no concerns, fears, anxieties or securities.*

Thus, even though children may be old enough to participate in an interview and share their views and wishes, the potential exists for their voices to be lost in translation, between the process of being heard in the interview, and the process of interpreting and recording what was heard in the report. The results indicated that the five reports which did not include reports by clinical psychologists, included the most uncontaminated information, directly accessed from the child(ren). While the additional expertise is useful in particularly complex cases, there is a danger of children's voices inadvertently becoming disqualified by professional opinion. Notwithstanding, there were instances in the clinical psychologists' reports where the child's voice was accessed directly and without qualification. Report 10 provided an example where this was done successfully:

Report 10: *[The child] spoke of the angry feelings he has towards his father arising out of the circumstances of attempted contact: he does not like it when his father is present at school rugby matches ("I get angry because he is stalking me, looking for me"), when his father sms's him ("I get very cross with him, it irritates me, bothers me"), or is in any physical proximity to him ("I am not comfortable with him in the room with me,...no, I don't want to see him under any circumstances").*

Another instance in which the child's voice was heard clearly and which also succeeded in reflecting the age of the child (4 years) was in report 9:

Report 9: *...she mentioned that she only wants to visit "daddy" but does not want to sleep over. She is afraid to sleep at "daddy's" place at night. She said her "mommy" said the court said she must go and sleep there. The child mentioned that she plays with [...], daddy's friend. She is a nice lady. She said daddy is always tired and likes taking walks with the dog. She said that daddy and [his girlfriend] like painting. She mentioned that she has her own room and sometimes sleeps in daddy's room, when her room does not have lights. She does not like it when it is dark.*

It is fair to say that in this study, the professionals involved in the custody evaluations were cognisant of their legislative responsibility to access a child's views and wishes, and they attempted to meet this obligation by interviewing the child. This is a step in the right direction. However, there is room for improvement, especially with regard to the manner in which the child's voice was recorded in the reports. The limited use

and sometimes complete absence of, direct speech, paraphrased speech written in the active voice and an identifiable speaker, made it difficult to ascertain a clear account of the child's views and wishes. Further, at a substantive level, where the child's voice was accessed, the results reflected that the views and wishes of the child sometimes amounted to no more than a shopping list of statements, which left the reader with many unanswered questions. For example, in report 1, where the child reported that "[her mother] was able to assist her in situations where she felt vulnerable", the reader wanted to know, "vulnerable situations such as?" An answer to this question would have provided greater substance to what the child was saying, and would also have offered the interviewer information which he or she could have explored further with the child and/or his or her parents and collateral sources. Thus when the child reported that "it will be difficult for her to leave [her mother] in order to reside with [her father]" (report 2), an exploration of the reasons behind this wish would have shed light into the child's decision-making process. There were many examples in the reports where further investigation would have been beneficial to the enquiry. Typically, statements made by the child appeared not to have been explored in any detail and therefore despite the child having been given an opportunity to be heard, there was a sense that a lot remained unsaid and/or unrecorded in the reports. However, in the light of the previous research findings that showed that not enough emphasis is being placed on accessing the voice of the child (Africa et al., 2003; Louw & Sherrer, 2004; Pillay & Zaal, 2005), the results of this research indicated a positive, appreciable shift towards accessing the voice of the child directly.

CHAPTER 5 CONCLUSION

5.1 *Summary of main findings*

Generally, the results of this study showed that the Family Advocate's Office is cognisant of its legislative obligation to access the views and wishes of children involved in custody disputes. There was evidence in some of the reports that the child's voice is being accessed directly through the reporting of the child's views and wishes through direct quotations or paraphrased speech. However, even where this was done, the child's contribution was lacking in depth and breadth, which is most likely indicative of the limited, once-off Family Counsellor's or clinical psychologist's informal interview/interview respectively, with the child. Older children had a greater say in the evaluation process, yet in many cases, their voices were also disqualified by what Swartz (2005) referred to as the "louder resonances of theories and trainings" (p. 507). Interestingly, this occurred more frequently in the clinical psychologists' reports where there was a stronger theoretical emphasis on understanding and interpreting the individual and family dynamics. In the case of younger children, their participation was limited often on the basis of their age and lack of maturity. The results showed an overwhelming tendency to rely on proxies to represent the archetypal child's voice. Therefore, the reader had more of a sense of Warshak's (2003) 'collective voice of children' rather than the actual child's voice. Moreover, where proxies were used, their contributions were dominated by inferences, opinions and interpretations, rather than providing a detailed description of their observations of, and interactions with the child. The best interest principle was the most frequently and extensively used proxy which may be indicative of the legal profession's insistence that it is the guiding principle in matters affecting the child. Even though it is essential and prudent to employ the best interest principle as a proxy in some cases, the Family Advocate's Office is cautioned against over-relying on it as this may inadvertently circumvent accessing the child's voice directly (Aubrey & Dahl, 2006; Hemrika & Heyting, 2004; James, 2008). A concerted effort was made to access the child's voice, yet adult voices still remained dominant, speaking on behalf of the child, or overriding what the child said. Consequently the authenticity of the

child's voice and of his or her experience of the world was somewhat lost in the reports.

5.2 *Limitations of study*

The sample size in this study was small, a limitation created by the research design. Therefore the results are not statistically meaningful and cannot be generalised. Nevertheless, this is a preliminary study, which has yielded descriptive, analytical results about themes which have not been researched before.

5.3 *Significance of study*

This study highlighted that in spite of the archetypal, universal characteristics of children as theorised, each child is nevertheless an individual, with specific needs and preferences, which will be silenced if assumptions regarding what is in their best interest are too heavily relied upon. As a group, they may be homogenous in some ways, but they are also idiosyncratic. Accordingly, greater strides need to be made to access the child's voice directly, bearing in mind in the future Komulainen's (2007) argument against a narrow interpretation of the concept of 'voice', so that all children are 'heard' and their rights protected.

It is encouraging that the child's voice was present in all the reports, albeit not always direct and uncontaminated. Nevertheless, it is now evident where improvements can be made. While some challenges may persist because of inadequate funding at the Family Advocate's Office, substantive transformation is possible by simply adhering to clearer formatting and stylistic changes, which can easily be introduced into report writing. It may be judicious to include a section in the report dedicated to the child's psycho-social history in order to provide a description of the child as a whole. The Family Advocate's Office may consider creating a pro forma document, which will guide the custody evaluators through the evaluation process and standardise the reports in a way that does not constrain their creativity.

Accordingly, in providing a detailed description of how the child's voice was represented in the reports, this study may create a greater awareness of the practices

that prevent a child from participating meaningfully, without “erasure and professional deafness” (Swartz, 2005, p. 520).

5.4 *Implications of findings for future research and clinical practice*

The findings of this study may lend itself to further empirical research on specific issues such as children’s views on how they would prefer to participate in custody disputes, for example, an exploratory study on alternative and/or complementary methods of participation, which are not mutually exclusive (Davies, 2004). This could take into account children’s preferences bearing in mind individual and/or special needs and different social and cultural issues in South Africa. Other role players such as judicial officers, lawyers and parents can be interviewed regarding their perceptions of children’s involvement in the legal process and to suggest alternatives.

Research can also be done on how the legislative provisions such as age, maturity and developmental stage, could be operationalised. Further, the operationalisation of “views and wishes” to include non-verbal means of accessing the child’s voice should also be investigated.

A comparative study across the regional Family Advocate’s Offices in South Africa can be done in order to compare how the child’s voice is being accessed nationally.

The findings of this study are also relevant in terms of policy change. For example, it may be relevant to consider the child’s views and wishes in matters where parents agree on custody arrangements so that these children are not excluded from participating. In this regard, Annexure A, may be revised in order to include a ‘Wishes and Feelings’ statement made by the child (Hale, 2006), irrespective of whether or not there is consensus between the parents. Another policy change which may be investigated is a shift away from the more adversarial approach to a greater emphasis on psycho-legal education for parents and children (Adams, 2007; Douglas, et al., 2006). Further, there may be room for exploring the adoption of a recognised set of custody evaluation guidelines.

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