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Is the emotional security of children adequately safeguarded in South African divorce law and procedure?

An appraisal of how divorce law and procedure in South Africa can be adjusted to fully cater to and protect the emotional security of children during divorce proceedings.

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Abstract

Children, defined as those below the age of 18 by article 1 of the 1989 United Nations Convention on the Rights of the Child (CRC), are a particularly vulnerable group as a result of their limited legal capacity and autonomy. As a consequence of this, legal rules and procedure in domestic jurisdictions as well as internationally have been developed to specifically protect the interests of children in any and all matters involving children. Divorce, while ordinarily an action involving those with full legal capacity, can be a matter involving children should there be children of the dissolving marriage. Therefore, there is an obligation grounded in the best interests of the child principle, (provided for by article 3 of the CRC), to develop divorce law and procedure in a manner that highlights and protects the best interests of children. The best interests of the child, as per the CRC 2013 General Comment no. 14, is a multifaceted principle, rule, and independent right involving various elements. Given that an expected and significant effect of divorce on the children of divorce is an emotional toll and a state of emotional insecurity, the focus of this research is the development of divorce law and procedure highlighting and protecting the best interests of the children with a specific focus on the emotional security interest of the child. The main argument of this paper asserts that current divorce law and procedure in the Republic of South Africa does not adequately protect the emotional security interest of children on the threshold placed by international law standards, by the South African constitution, and by domestic South African legislation.



Dedication

To my siblings, Nathan and Wodabwitsa. At the time of my writing of this dissertation, there have not been any people I have loved more. It is my love for you both, and my robust interest in your well-being that has prompted the inspiration of this dissertation. We may have grown up in an environment that did not value or safeguard our emotional security but always know that as your big sister, I have and will always strive to protect and promote your emotional security. I love you both, now and always.

To my parents, I have and will always appreciate the sacrifices you have made that have enabled me to achieve all that I have achieved. We most definitely have our issues but the both of you are still the people who've birthed me and made sure I was able to reach the academic heights I have aimed for. For that I will always be grateful.

To myself, I am so proud of all you have managed to achieve. Despite all the heartache, all the struggle and all the persistent blows to your sense of self, you have managed to live your life on your own terms while achieving accolades those who've pitted themselves against you could only dream of. Well done.



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Chapter 1

1 Introduction

1.1 Context

It is generally accepted that in any matter in which children are involved, the best interests of the child shall receive primary consideration. This is reflected *inter alia* in article 3 of the Convention on the rights of the child¹, and in s28(2) of the South African Constitution². Divorce, while primarily the focus of two parties, i.e., the spouses, should there be children of the marriage/union, is a matter that involves children. A concerning supposition however on a prima facie evaluation of divorce law and procedure, particularly within the South African context, is that while divorce may be a matter involving children, the best interests of the children are not of primary consideration. Should this supposition be proved supported by the discussions of law in later chapters, it would be contrary to the paramountcy given to the best interests of the child in the Constitution. This is highly problematic seeing as based on the most recent available divorce statistics in South Africa, more than half of the divorces, i.e., 56.6%, involved children below the age of 18 years old. Furthermore, 42.5% of divorces were from marriages that did not pass the 10-year anniversary mark, an inference from this statistic is that in instances where there were children in those marriages, it is likely that they were below 10 years old³. It is within this context that motivation for this dissertation is found. Divorce in South Africa, in the majority of the divorce cases, is a matter that may affect three parties, i.e., the parties to the marriage to be dissolved and the children from that marriage. Due and adequate consideration of the protection of children's rights in divorce proceedings is therefore necessitated. The rights of children *inter alia* can be found in the Children's Act, in the Convention on the rights of the Child, and in s28 of the South African constitution. These rights as currently outlined are what should be drawn on in divorce legislation and

¹ United Nations *Convention on the Rights of the Child*, adopted 20 November 1989

² The Constitution of the Republic of South Africa, 1996

³ Statistics South Africa. *Statistical Release P0307 Marriages and divorces*, 2021 page 6-8

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procedure to safeguard emotional security as an extension of the best interests of the child, however this paper has found said law wanting in this respect. The best interest of the child is a principle, right, and rule of procedure⁴ that encompasses a host of factors that require equal levels of satisfaction. However, in appreciation of the emotional toil of divorce on children, (e.g., appreciation of the increased anxiety and depression, aggression and conduct problems, academic difficulties, poor peer relations etc...⁵), the emotional stability/emotional security factor of the best interest of the child is the central focus of this paper in advocating for the protection of children's rights in divorce. This is not to suggest that emotional security is the most important factor/element of the best interests of the child, nor that it should be elevated above all other elements.

It should be noted that all references to the emotional security interest of children as an *extension* of the best interests of the child do not purport to suggest that emotional security is an extension of the best interests of the child rather this phrasing is used to highlight that emotional security, as a *contributing factor* of the best interests of the child, is the focus of this paper.

1.2 The emotional hardship of divorce on children

Through the research conducted in order to give weight to the central argument of this paper, i.e., that the protection of the emotional security of children during divorce proceedings is inadequate in terms of South African law, two ways in which South African divorce law and procedure are detrimental to the emotional security interest of children of the dissolving marriage have been discovered. Firstly, as mentioned above, divorce is typically viewed as a legal action directly involving two parties, i.e., the spouses to the marriage. Acknowledgment of the children of the dissolving marriage as independent parties to the divorce, independent parties with rights that may perhaps require separate

⁴ General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14

⁵ H Grych & FD Fincham (2001) '*Interparental conflict and child development: Theory, research and applications*' New York: Cambridge University Press page 9-30

○ automatic and mandatory legal representation, is lacking. That is, while divorce changes the legal status of only the spouses to the dissolving marriage, it affects another party i.e., the children of the dissolving marriage.

Parents are given the responsibility of safeguarding their children's best interests, including their emotional security interests. It is generally understood that because of the parent-child relationship, parents will always act in accordance with this responsibility⁶. Divorce, by its nature of disrupting family structures and relationships, threatens the dedication to the full undertaking of this responsibility because typically multiple interests are at play. These multiple interests could include but a not limited to; one of the spouses of the dissolving marriage wanting larger maintenance payouts⁷, vendettas where one of the spouses of the dissolving marriage purposefully seeks custody of the children merely to hurt the other spouse, or even desperate attempts by one spouse to ensure interaction with the other spouse continues even after the marriage is dissolved through obtaining custody of the children⁸. In effect these multiple interests and lack of acknowledgment of children of dissolving marriages as independent parties to the divorce reduces the children to assets to be used to obtain other assets⁹. Not having children of a dissolving marriage acknowledged as independent parties to the divorce leaves children vulnerable to misrepresentation and inadequate protection of their best interests and by extension, their emotional security interest.

This is why divorce proceedings, require intervention by the courts or by legislation to protect the best interests, and by extension the emotional security interest, of the children of the dissolving marriages as independent parties to the divorce separate of the spouses

⁶ G Paquin '*Protecting the interests of children in divorce mediation*' (1987-88) *Journal of Family Law*, University of Louisville School of Law 26 page 282

⁷ Kirshner '*Child Custody Determination. The Rights of the child: legal and psychological perspectives*' (1985) J.S Henning ed page 129-30.

⁸ DL Chambers '*Rethinking the substantive rules for custody disputes in divorce*' (1984) *Michigan Law Review* 83 page 558.

⁹ RJ Podell '*The 'Why' behind appointing guardians ad litem for children in divorce proceedings*' (1973) *Marquette Law Review* 57 page 103 & 107

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of the marriage. Such intervention by the courts and legislators has proven to result in children that fair better following the conclusion of divorce proceedings¹⁰.

It should be noted that by stating that the protection of the emotional security interests of children, during divorce proceedings requires the intervention of the courts and legislation, emphasis is being placed on the recognition of children as independent parties to divorce. Such recognition *inter alia* may necessitate automatic, separate, and mandatory legal representation of children during divorce, (this will be expounded on in later chapters). Stating that intervention by the courts and legislation is required to safeguard the emotional security interest of children during divorce proceedings therefore does not by any means imply that thus far courts and legislation have completely failed to do anything in this regard. Section 7(1)(h) of the Children's Act 38 of 2005 *inter alia* specifically dictates that in determining the best interests of the child, (e.g., when purporting to safeguard said best interests), the factors to be considered include the emotional security and emotional development of the child. This shows that legislation has recognised the emotional security interest of children as valuable in determining the best interests of the child. This paper simply purports to extend that recognition by stating additional ways/intervention both courts and the legislature can more adequately/fully promote and protect children's emotional security during divorce.

Secondly, divorce changes the organisation of a family and has the potential of disrupting family bonds, a disruption that while definitely present in the short term, may very well go further and develop into a long-term circumstance. The repercussions of this on the emotional development of children from families that underwent the entire divorce process is extensive. An acknowledgment of this and proactive steps taken that not only significantly acknowledge the emotional trauma specific to the fallout from divorce but also protect the emotional security interest of children during divorce proceedings is necessitated.

¹⁰ SJ Bahr 'An evaluation of court mediation: A comparison in divorce cases with children' (1981) Journal of Family Issues 2 page 39



Elaborating on the first way in which divorce proceedings through a lack of acknowledgement of children as independent parties to a divorce compromises the emotional security interest of children, it is worth note that the assumption that parents will look out for their child's best interest is not without merit. "The assumption that the parents will protect the child's interest is instrumental in a policy of preserving family integrity and privacy. There is a reluctance on the part of the courts to assume child protection functions that impede the autonomy of the family unit unless the danger to the child is obvious¹¹." This right of parental autonomy when it comes to decision making safeguarding the best interests of one's children is echoed in article 5 of the UN Convention on the rights of the Child and section 18(2)(c) of the South African Children's Act.

Art 5 of Convention on the Rights of the Child: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention¹²."

Section 18(2)(c) of Children's Act: "The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right to act as guardian of the child¹⁶."

This assumption that parents will always look out for the best interests of their children, along with parental autonomy to make decisions regarding the best interests of one's child, however, is problematic in the realm of divorce proceedings. "...The court is in a

¹¹Paquin (n 6 above) page 282

R Mnookin '*Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*' (1975) L & Contemp. Probs 39 page 226, 264-70

¹² (n 1 above) art 5

¹⁶ Children's Act 38 of 2005 section 18(2)(c)

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poor position to protect the child from the financial insecurity and emotional trauma caused by divorce when receiving information only from the advocates of the parents¹³.” This is because one of the issues typical of divorce proceedings is the custody of children. A dispute over child custody is an exception to this assumption because alternate motives may inform parents decision as to with whom their children live. Other considerations, for example considerations of family assets and how they are to be distributed, may influence child custody arrangements and because of that may not be in the best interests of the child. “The courts and legislatures generally recognize that parents in dispute over the custody of their minor child are not in a position to protect the child's interests¹⁴.” This therefore compromises the protection of the best interests of children during divorce proceedings and by extension their emotional security interests. It should be noted that the court in *Van Vuuren v Van Vuuren*¹⁵ tried to address this issue by imploring legal representatives to look out against such childcare arrangements, however this paper asserts that while commendable, this is not adequate. The legislature also needs to step in creating specific provisions in legislation that would guard against motives alternate to the best interests of the child influencing childcare arrangements post-divorce. This would assist lawyers in their instruction, as per the court in *Van Vuuren vs Van Vuuren*¹⁶, to guard against concessions by the financially weaker party being made re childcare arrangements post-divorce.

Moving forward to the second way divorce law and procedure are detrimental to the emotional security interest of children, i.e., the lack of significant acknowledgement of the emotional trauma specific to children put through divorce proceedings and the impact it has on the child's emotional development. “The central hazard of divorce is the adverse effect on the children's development¹⁷.” Divorce is a noteworthy life event, the effects of which are often lasting and unpredictable in the form they will take. The emotional

¹³ Paquin (n 6 above) page 286

¹⁴ Paquin (n 6 above) page 282

¹⁵ *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T) par 22

¹⁶ (n 15 above)

¹⁷ M Pendidikan ‘*The impact of divorce on children: implications for counselling*’ (2007) Jilid 30(2) page 162

○ hardships divorce causes to children of the dissolving marriage, particularly the minor children of that dissolving marriage, are multifaceted and the subject of high interest for those in the field of psychology. Such profound and lasting implications necessitate investigation even in fields such as law in order for a well-rounded and full protection of children's best interests.

Divorce disturbs the family structure and organization, depending on the age and development of the minor children of the dissolving marriage, the children may lack the necessary cognitive and emotional toolkits to navigate such a disturbance¹⁸. Comprehending, and attempting to comprehend the emotional consequences of divorce on minor children is key for parents, guardians, and professionals who deal with children to safeguard the emotional security of children as an extension of a child's best interests.

According to a Wallerstein et al¹⁹. study some of the short-term effects that can be expected to present in children of dissolving marriages are emotional distress, behavioural changes, and an impact on the academic life of the child. Soon after children are made aware of the divorce, a surge of emotions, typically negative can be expected. These feelings include *inter alia* confusion, anxiety, depression, and anger. "Children of divorced parents tend to become more depressed, aggressive and have more learning difficulties and problems with peers than children from intact families²⁰." "Children whose parents are divorcing usually pay a high emotional cost. They suffer from a variety of symptoms such as depression, acting out, decreased school performance and intense anger toward their parents²¹." These emotions can easily overwhelm the children of a dissolving marriage leading to withdraw into themselves and express anti-social behaviour or aggression. As a result of this emotional turmoil, a drop in academic performance and the quality of relationships between children of dissolving marriages and their peers can be expected.

¹⁸ Pendidikan (n 17 above) page 161

¹⁹ Wallerstein et al (2002) '*The unexpected legacy of divorce: A 25-year landmark study*' Bostin Satin page 4-30

²⁰ Wallerstein et al (n 19 above) page 4-30

²¹ J Wallerstein & J Kelly (1980) '*Surviving the break-up: How parents and children cope with divorce*' page 215



The way a child of a dissolving marriage may react to the divorce is influenced by a number of factors. These include the age of the children, the severity of parental conflict present during the divorce proceedings and the support systems in place. Children younger in age may have difficulty grasping the reasons for the divorce seeing as according to Piaget and Inhelder younger “children are unable to see others' point of view; they believe everyone thinks the same way as they do ... They are unable to focus on more than one aspect of a problem as well²².” According to Cohen younger children may blame themselves for the dissolution of their parents’ marriage, may act out, develop a fear of abandonment and have nightmares²³. Older children on the other hand may struggle with issues centred around sense of self and self-worth. “Feelings of being unloved, powerless and disappointed are some characteristics faced by children²⁴.” The presence of support systems may mitigate these emotional hardships and reactions.

This is why intervention is vital. “...children need adults' discussion of emotion in order to gain self-understanding of social experiences²⁵”. Intervention can start from closer to home by way of discussions between parent/spouse and child, going up to counselling by professionals in the field of psychology, and even further to intervention by the government in the creation of legislation and policy aimed at safeguarding the best interests of the children of dissolving marriages. According to Dunn these kinds of intervention can readjust children of dissolving marriages and facilitate their emotional wellbeing²⁶. This is concurred by Norton who asserts that the long-term emotional wellbeing of children can be readjusted for the better by good intervention²⁷.

²² Pendidikan (n 17 above) page 161

²³ G J Cohen (2002) *‘Helping children and families deal with divorce and separation’* American Academy of Pediatrics 138 page 1-9

²⁴ Pendidikan (n 17 above) page 165

²⁵ Pendidikan (n 17 above) page 162

²⁶ J Dunn *‘Understanding children’s family worlds: Family transitions and children’s outcomes’* Merrill-Palmer Quarterly 50 page 224-235

²⁷ C Norton *‘After a century, we’ve produced the stressed, cooped up battery children of today’* (1999) The Independent page 3



Long term effects of divorce on the children of the dissolving marriages can include future relationship problems, skewed perceptions of the institution of marriage, lingering psychological issues such as anxiety and depression, and impaired educational achievement.

1.3 Counter argument.

It is this paper's main contention that divorce proceedings at every stage have the potential to have extensive negative ramifications on the emotional security interest of children of the dissolving marriage. The main argument of this paper further posits that current South African divorce law and procedure is inadequate in protecting the emotional security interest of children of a dissolving marriage and therefore advocates for the active intervention of courts and legislators to remedy this. While this argument is the main focus of this paper, in order for a critical appraisal and comprehension of the discussions put up in its defence, it is at this juncture that this paper will engage in discussion of a potential counter argument.

Certified in both clinical psychology and clinical child and adolescent psychology, Dr Sol R. Rappaport is a highly qualified expert regularly called upon as an expert witness in these fields by courts of law and consulted by attorneys at every stage of litigation processes²⁸. In his article "Deconstructing the Impact of Divorce on Children²⁹", he brings forth an argument that on prima facie examination would seem to undercut the premise on which the main argument of this paper is built. It is his contention that the general assumption that divorce in itself is a psychologically traumatising experience on children of the dissolving marriage bound to result in significant negative emotional development, is flawed.

He argues that for a long time, much academic literature and investigation on this topic put forth and continued to reinforce the notion that divorce was definitely bad emotionally

²⁸ The Steve Frankel Group, LLC. <https://www.sfrankelgroup.com/sol-rappaport-phd-abpp.html> [accessed 29 January 2024]

²⁹ S.R Rappaport 'Deconstructing the impact of divorce on children' (2013) Family Law Quarterly 47 page 353-378

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and psychologically on the children of the divorce, however the research that backed up these assertions was methodically flawed and thus led to erroneous findings³⁰. The precise details of how Dr R. Rappaport asserts that the research backing up the notion of divorce being detrimental to a child's emotional security may require a deep understanding of the methods of scientific research and therefore falls outside of the scope of discussion for the purposes of this paper. What can be ascertained however about the basis of his critics is that *inter alia* the feedback from spouses to a marriage on how their children were faring after the dissolution of their marriage formed a big part of the notion that divorce was emotionally detrimental to children even though such feedback was prone to significant bias that did not reveal the true nature of the effect of divorce³¹.

Furthermore, Rappaport goes on to state that studies on which this notion was built did not adequately consider all relevant factors. For example, studies such as those on single parents did not consider how that situation came to be, be it from divorce, from death, or from imprisonment of the other spouse. Rappaport goes on to assert that because of a lack of understanding on the fundamentals of scientific research by professionals in other fields, this notion has attained widespread acceptance as a valid assumption on which further academic literature and developments in other fields has been built. Rappaport's main argument is that it is not the divorce itself that is responsible for detrimental effects on the psychological and emotional state and development of children put through divorce processes. "...it is argued that it is not the divorce itself that causes significant emotional difficulties post-divorce, but five other factors that may be present concurrent with divorce³²."

³⁰ Rappaport (n 29 above) page 354

³¹ B Berg & R Kelly 'The measured self-esteem of children from broken and accepted families' (1979) *Journal of Divorce* 2(4) page 363 & 367

³² Rappaport (n 29 above) page 354.



Considering the social, political, cultural, and religious structures during the time when early research on the effects of divorce of children emerged, Rappaport's argument that the very foundations of the notion of divorce being detrimental to the emotional and psychological development and state of children are flawed holds *some* water. It can be understood that a patriarchal background that dismissed the mere mention of divorce preferring to keep parties to a marriage trapped in less-than-ideal marriages would propagate the message that divorce negatively affected the emotional development and state of children and that in order for children to thrive they needed to belong to two parent families³³. An alternative hypothesis is provided by Rappaport. According to his hypothesis there were other reasons why children from families that underwent the divorce process presented more challenges regarding emotional and psychological state than children from families where there was no divorce independent from divorce and its procedures themselves³⁴. Factors such as parental conflict along with other things that change the dynamic or organization of a family may unfavourably influence the effect divorce has on children from divorced families³⁵. "...children whose parents stay married despite a high-conflict relationship perform just as poorly as children in divorced families purportedly do³⁶."

In defence of his argument that it is not the divorce itself that proves emotionally detrimental to children of divorce but other factors, Rappaport argues that as the social, political, and cultural climates have evolved, the view of divorce and its effect on children has evolved as well. Divorce nowadays is more readily sought, and has become more socially, politically, and culturally acceptable. This means the stigma of divorce that may have contributed to negative emotional development and state of children from divorced

³³ E.M Heatherington & M Stanley-Hagan *'The adjustment of children with divorced parents: A risk and Resiliency Perspective'* (1999) *Child Psychology & Psychiatry Journal* 40 page 129-130

³⁴ Rappaport (n 29 above) page 357.

³⁵ P.R Amato *'The consequences of divorce for adults and children'* (2000) *Marriage & Family Journal* 62 page 1269

³⁶ T.L Hanson *Does parental conflict explain why divorce is negatively associated with child welfare?* (1999) *Social Forces* 77 page 1283-1285

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parents has decreased over time. Rappaport goes on to assert that after the initial readjustment pains immediately following the divorce, should there not be other factors present, (factors like e.g., parental conflict), children of divorce tend to reacclimate and do well psychologically and emotionally in the long term. According to Rappaport, there is a difference between how children from a divorce that was rife with parental conflict and other stressors, (perhaps things like financial insecurity), acclimate emotionally and psychologically compared to children from divorce in which there were no additional factors or stressors³⁷. “In fact, as children adjust to the divorce, they do better as compared to children of high conflict, nondivorced families³⁸.”

The five factors that facilitate emotional and psychological distress in children of divorce other than the divorce itself, according to Dr S.R Rappaport, are; level of conflict between spouses to the marriage, the mental health of the spouses to the marriage, the level of involvement of the non-main caregiver, the financial repercussions of the divorce on the family and finally, the perception of the events of the divorce by the children of the dissolving marriage³⁹. Marital conflict as a separate factor/stressor to a divorce not only concerns the level of marital conflict but also involves how much of that conflict the children of the dissolving marriage witnessed, whether or not those children were made party to the marital conflict, and how those children saw the marital conflict get resolved.⁴⁰ Regarding the mental health of the spouses to the marriage as a separate factor/stressor negatively affecting the emotional security of children on divorce, “It is not the diagnosis that causes the problems, but the impact the disorder has upon parenting⁴¹.” The division of assets that is typical of divorce may result in financial stress, and financial distress should one of the spouses to the marriage be financially dependent of the other spouse or should the household rely on both incomes of the spouses to stay financially afloat. Financial distress can negatively affect lifestyles of the children of the dissolving marriage

³⁷ Rappaport (n 29 above) page 358-359

³⁸ Heatherington & Stanley-Hagan (n 33 above) page 133

³⁹ Rappaport (n 29 above) page 361

⁴⁰ Rappaport (n 29 above) page 361

⁴¹ Rappaport (n 29 above) page 366

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and therefore lead to emotional insecurity. A key factor that influences how a divorce will affect a child is how the child her/himself manages stress, perceives any marital conflict present, and that child's own temperament. "Children with better coping and stress management skills and a better temperament are likely to have less difficulty post-divorce than children with less developed skills and a more challenging temperament⁴²." Following Dr S.R Rappaport's argument, should divorce in itself in fact not be the main reason for emotional insecurity of children involved in divorce proceedings, then tackling the five factors mentioned might be more of a solution. This would fall outside the scope of law makers, courts and law practitioners and would in effect propose that this paper's argument that law makers and courts need to develop divorce law and procedure in order to adequately protect the emotional security interest of children during divorce proceedings could be mute.

The following are the ways in which Dr S.R. Rappaport's arguments appear to undercut the main arguments of this paper. Firstly, he highlights that other professionals in other fields, professionals such as lawyers, judges and lawmakers in general, do not comprehensively understand scientific methods of research and therefore do not catch the methodological flaws that informed the research serving as a premise for the notion that divorce is detrimental to the psychological and emotional development of children. A logical following of that train of thought could then infer that this lack of comprehensive understanding means that developments in other fields speaking to the potentially negative emotional and psychological effects of divorce on children should not be undertaken with gusto. However, this paper contends that the opposite effect is true. It is because of this shortcoming of in depth understanding of scientific methods of research that professionals in other fields, such as the field of law, should undertake to do a deep dive into informing themselves of the true repercussions of divorce, (perhaps through

⁴² Rappaport (n 29 above) page 367

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their own methods of research), and seek developments in their field that preserve and protect the emotional security interest of children during divorce proceedings.

Secondly, another way Dr S.R Rappaport's argument would prima facie seem to undercut this paper's main argument is by the assertion that it is not the divorce itself that is psychologically and emotionally harmful to children of divorce but the addition of other factors and stressors along side the divorce. It is paper's contention that this argument does not have any bearing on the need for development in divorce legislation actively seeking to protect the emotional security interest of children put through divorce proceedings. This is because ascertaining if they are other factors and additional stressors in any significant depth in every single divorce filed in courts may not only fall out of the responsibilities of courts and legislators, but also involves a massive undertaking in which the resources needed may not be available in every jurisdiction. An undertaking of that magnitude may result in some divorces slipping through the cracks, and some children from divorce, even when the divorce has other factors and stressors, not having their emotional security interest protected. Law makers and law practitioners are not psychologists trained to interpret the inner workings of relationships, this paper asserts that, that does not mean that the field of law should step back and not engage developments to protect interests more adeptly understood in the field of psychology. Whether or not divorce in itself is emotionally detrimental to children of divorce is the subject of much discussion and varying opinions, Dr Rappaport's argument that divorce alone is not emotionally detrimental to children of divorce is but one expression of the varying opinions on the matter. Law makers and law practitioners are not tasked with settling the matter with any certainty, rather law makers and law practitioners are tasked with safeguarding rights and interests protected by law should there be a possibility that those interests are vulnerable, however remote that possibility is. Since the emotional security interest of children is something provided for in South African legislation under the best interests of the child principle, its protection is necessary. This paper does not argue that the emotional security interest of children of dissolving marriages lacks *any* protection, rather it argues that the current protection is not adequate and therefore

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development in that area is necessary. Whether or not other factors or stressors are present in a divorce responsible for the emotional insecurity of children of dissolving marriages does not change the legal mandate to protect the emotional security interests of children as expressed by the best interests of the child nor the legal mandate to continuously develop law.

The emotional security of children of marriages facing divorce in light of all that has been discussed above is therefore at risk. The emotional impact, the emotional trauma is complex, lingering, and unfolds over an undeterminable amount of time. As discussed, short term emotional impacts of divorce on children can include emotional distress, behavioural problems and academic challenges. Long term the short-term issues can grow and linger morphing into mental health issues such as anxiety and depression, as well as limited long term educational achievement. This paper contends that the parties to a divorce are not solely the spouses to the marriage, but also the children of the dissolving marriage. This is because the children of dissolving marriages have a vested interest in the issues decided on during the divorce proceedings. Those children's emotional development and emotional security interest are significantly affected by the outcome of the divorce proceedings⁴³. It is because of the severity of these emotional effects of divorce on children that the focus of this paper is the emotional security of children during divorce proceedings.

1.4 Problem statement and research objectives

General Comment No 14 to the Convention on the Rights of the Child, states that "emotional care is a basic need of children". It also states, in paragraph 35, that "...States may not exercise discretion as to whether the children's best interests are ... ascribed the proper weight as a primary consideration primary consideration means that the child's best interests may not be considered on the same level as all other consideration⁴⁴." It is upon this basis that this paper contests that the current South

⁴³ Paquin (n 6 above) page 314

⁴⁴ General comment No. 14 (n 4 above)



African divorce laws and procedure do not adequately cater to the emotional security of children, nor do they adequately satisfy the requirements of the 'primary consideration' characteristic of the best interests of the child.

Emotional security is not a term unique to law and legal definition, it is a term well established in psychology and so an appraisal of emotional security in the field of psychology and/or a multidisciplinary approach in trying to grasp the definition and scope of emotional security, is necessitated in the aim of developing divorce law and procedure to adequately cater to the emotional security interest of children.

The emotional security interest of children, as described and relied on in this paper, finds its basis in the Emotional Security Theory (EST). The emotional security theory, originally hypothesised by Davis and Cummings (1994), is premised on the idea that there is a link between a child's mental health, (both long and short term), and that child's appraisal of the conflict and hostility between parents⁴⁵. This means that there is a correlation between a child's mental stability and the stability of the relationship of that child's parents as witnessed by the child. If the child witnesses a toxic interparental relationship, prone to conflict and hostility, the impact on that child's mental health is likely to be negative. The emotional security theory, while consistent with the attachment theory (i.e., that emotional bonds to an available and responsive caregiver are necessary for the establishment of emotional security in children⁴⁶), adds an additional lens through which to focus. This additional lens is the interparental relationship⁴⁷.

Divorce directly affects the interparental relationship, and should the divorce be rife with disputes then that affect may be an interparental relationship of conflict and hostility. As

⁴⁵ P Davies & M Martin 'The reformulation of emotional security theory: The role of children's social defense in developmental psychopathology' (2013) 25 *Development and Psychopathology* page 1435

⁴⁶ J Bowlby 'Attachment and loss: Retrospect and prospect' (1982) *American Journal of Orthopsychiatry* page 664-678

⁴⁷ EM Cummings & LE Miller-Graff 'Emotional Security Theory: An emerging theoretical model for youth' psychological and physiological responses across multiple developmental contexts' (2015) 24 *Current Directions in Psychological Science* page 208

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such, it is in this way too that divorce can have a negative impact on the mental stability of a child. This paper asserts that mental stability involves emotional stability. For emotional stability to be achieved, there must be emotional care, and attention to emotional needs and emotional development. The terms emotional care, emotional needs and emotional development are not individually synonymous with emotional stability, rather they are contributing factors to its establishment. Reference to emotional needs in paragraph 71 and 72 of the above-mentioned general comment, emotional care in paragraph 72 and emotional development in paragraph 83, highlight the consideration given to emotional stability as an important factor in determining the best interests of the child. This paper posits that emotional stability and emotional security are interchangeable terms. Emotional security is thus defined by this paper as the establishment of short- and long-term mental stability through the attention to and satisfaction of emotional needs, the requirements of emotional care and emotional development.

Defined by Mark Cummings and Patrick Davies, “emotional security is a latent construct that can be inferred from the overall organization and meaning of children’s emotions, behaviours, thoughts, and physiological responses and serves as a set goal by which children regulate their own functioning in social contexts, thereby directing social, emotional, cognitive, and physiological reactions⁴⁸.” Based on an inference from this definition, defined using other words, emotional security can be understood to being a positive psychological state that regulates a child’s reaction to “immediate social contexts” such as an interparental conflict in the form of divorce. The consequences of a full appreciation and safeguarding of the emotional security need of children at all levels of divorce law and procedure highlight a gap/shortfall in law. Existing divorce law and procedure therefore need to be amended to address this gap/shortfall. Thus, by motivation of this study, the following must be realized:

⁴⁸ EM Cummings & P Davies ‘Emotional security as a regulatory process in normal development and the development of psychopathy’ (1996) 8 *Development and Psychopathology* page126



1. Which areas of divorce law and procedure leave children most vulnerable to emotional insecurity?
2. What adjustments can be implemented in current South African divorce law and procedure to fully cater to/address the present gap/lack of protection re the emotional security need of children?
3. What would the possible pros and cons be from the addition of such adjustments?
4. Is there a foreign jurisdiction/international child law that has implemented adjustments to divorce law and procedure to address the current gap in South African divorce law and procedure that can be drawn from?

1.5 Research methodology.

Critical

The research objectives outlined above will be realized by a critical analysis of relevant primary and secondary legal sources, journal articles, and case studies. This is necessary in order to identify the gaps that give rise to the problem statement and to develop a logical thought process as to solutions.

Multidisciplinary

Considering the development of the term 'emotional security' especially in regard to children in the field of psychology, the research objectives will be realized by way of a multidisciplinary approach, gathering and merging information from the field of both psychology and law. This will be done through desktop research as no empirical work will be undertaken.

Doctrinal/Black letter



Current South African law, and legislation will be scrutinized with specific focus on divorce law and procedure in order to satisfy the research objectives of this dissertation.

Comparative

The current legal protections to safeguard the emotional security of children in South African divorce law and procedure will be weighed against international child law. Legal policy in the United States of America will be looked at to determine what legal reform in divorce law and procedure in the Republic of South Africa can be introduced to address the aforementioned shortfalls. The choice of jurisdiction, being the United States of America, has been based on the author of this paper's admiration for the strides in legal policy re promoting and protecting the emotional security interest of children of divorce.

1.6 Limitations

- 1) Emotional security is but one facet of a host of factors that make up the best interests of the child. In advocating for the best interests of the child to be given primary consideration in divorce proceedings that involve children but only zeroing into emotional security of children, this paper has limited its scope. This is however necessary in light of an appreciation of the trauma of divorce on children that may result in emotional insecurity, as well as the need for the further development of the emotional security interest of children in domestic South African legislation and its applications in divorce law and procedure.
- 2) A true understanding of emotional security and the consequences of emotional insecurity can be drawn more adeptly from the field of psychology. By virtue of this paper being a legal paper, written by a legal professional, limitations with regard to an in-depth analysis of emotional security are foreseeable. However, since this paper is



an academic research paper aimed at inspiring law makers to take cognizance of the importance of the emotional security of children in specific reference to divorce proceedings and therefore inspire further research, this limitation is not insurmountable.

1.7 Structure/Chapter outline.

1. Chapter 1: A synopsis of the legal context that gives rise to the problem statement of this research thesis. An overview of the research objectives of this paper is also included in this chapter.
2. Chapter 2: Protection of children's emotional security in international law versus domestic South African law.
3. Chapter 3: An evaluation of national legislation on divorce law/procedure and potential shortfalls re the protection of the emotional security of children.
4. Chapter 4: Proposed recommendations in solving the research problem.
5. Chapter 5: A succinct summation and conclusion of everything discussed.



Chapter 2

2.1 Children's Emotional Security in International and Domestic law

In appreciation of the central argument of this paper asserting that current South African divorce law does not adequately safeguard children's emotional security in divorce proceedings, this second chapter will discuss the legal provisions that give rise to the protection of children's emotional security, internationally and domestically. The objective is to identify the ways in which South African divorce law is inadequate re the problem statement to provide a foundation for this paper's central argument.

2.2 Relevance of International law

In arguing that a specific aspect of domestic legislation is lacking when compared to international law, a question arises as to the importance of international law and its relevance in a domestic law context. Following the atrocities that led to World War 2 and its aftermath, atrocities with regard to *inter alia* mass genocide based on racist ideals and biased prejudicial science (i.e., the holocaust, eugenics), the global community acknowledged the importance of having globally assented to human rights standards and international laws with universal application to prevent a repeat of such tragic history. The United Nations, and the United Nations Charter its founded on, was born to create an international body through which global/universal human rights standards and international laws could be determined and expressed. It was from this that various international law treaties addressing various specific human rights and international laws were created. While customary international law, i.e., international law rules that have widespread and consistent general state practice⁴⁹, is binding on States automatically,

⁴⁹ MC Wood "Second report on identification of customary international law by Michael Wood, Special Rapporteur" (2014) United Nations page 169-170

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the applicability of international law codified in international treaties/international legal instruments in domestic jurisdictions relies for the most part on the ratification of said international legal instruments by domestic jurisdictions.

In the Republic of South Africa, in reference to customary international law, the South African Constitution in s232 states:

“Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament⁵⁰.” This means that should customary international law align with the South African constitution or domestic legislation expressed through Acts of the South African parliament, then that customary international law is automatically authoritative and binding on South Africa.

Concerning international legal instruments/treaties however, there is a process that needs to be satisfied before that international legal instrument/treaty is binding law in South Africa. The international treaty has to be approved by resolution by both houses in parliament unless the treaty is of an administrative, technical, or executive nature in which case all that’s needed is entry by the national executive and tabulation in both houses of parliament within a reasonable time⁵¹.

S231(2) of the South African Constitution states:

“An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)⁵²”.

S231(3) of the South African Constitution states:

⁵⁰ The Constitution (n 2 above) s232

⁵¹ The Constitution (n 2 above) s231(2)-(3)

⁵² The Constitution (n 2 above) s231(2)

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“An international agreement of a technical, administrative or executive nature or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without any approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time⁵³.”

Furthermore, s231(4) of the South African Constitution states:

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament⁵⁴.”

The Constitution of the Republic of South Africa, in s39(1)(b) puts an obligation on courts of law, tribunals and forums to interpret the rights in the Bill of Rights with consideration of international law. This obligation is echoed in s233 wherein there is an obligation on courts of law within the country to ensure harmony between binding international law and domestic law by requiring consistent and reasonable interpretation of domestic legislation congruent to international law.

S39(1)(b) of the South African Constitution states: “When interpreting the Bill of Rights, a court, tribunal, or forum must consider international law⁵⁵.”

S233 of the South African Constitution states: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law⁵⁶.”

⁵³ The Constitution (n 2 above) s231(3)

⁵⁴ The Constitution (n 2 above) s231(4)

⁵⁵ The Constitution (n 2 above) s39(1)(b)

⁵⁶ The Constitution (n 2 above) s233



Comprehension of all the above establish the relevance and importance of international law in the development of South African domestic law and provide a basis for the discussion of international law relevant to the development of South African divorce law and procedure in supporting the arguments and research objectives of this paper.

2.3 International law as it pertains to children and the emotional security interest of children.

As discussed above, codified international laws find expression *inter alia* in various international law instruments/international treaties. While there are international law instruments with general application, such as the Universal Declaration of Human Rights, these treaties are often centred around specific subject matters. The subject matter could be women's rights, civil and political rights, social and economic rights etc.... The international law instrument most explicitly catering to the rights and protections of children is the United Nations Convention on the Rights of the Child (CRC).

The UN Convention on the Rights of the Child contains various specific rights afforded to children, however none of these rights explicitly refer to the emotional security interest of children. It is because of this that this second chapter engages in a discussion of the four fundamental principles of the CRC to determine under which principle the emotional security interest of children is best applied and protected. The CRC is one of the more prominent international child law instruments. In addition to all the other functions it serves in outlining the rights and protections of children according to international human rights standards, the four principles of the CRC are rights, (that according to this paper), establish the child as an individual, with rights and protections separate from that of caregivers, all the while celebrating childhood and acknowledging the evolving capacities of the child. This is emphasised in paragraphs 83 and 84 of CRC General Comment No 14 (2013).



According to the CRC Committee in General Comment No 12⁵⁷, the fundamental principles of the CRC are the right to respect for the views of the child provided for by article 12 of the CRC, the right to life, survival and development outlined in article 6 of the CRC, the right to non-discrimination in article 2 of the CRC, and the best interests of the child in article 3 of the CRC.

2.4 The right to respect for the views of the child and the emotional security interest of children.

Article 12 of the CRC states that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child⁵⁸.”

The effect of this provision is that it allows the child to be an active participant in matters that affect him or her, whether the impact is direct, indirect, marginal or significant. A child having a say so in a matter that affects him/her reinforces the ideal of a child as an individual with independent rights and protections separate from that child’s legal guardians. The provision that a child’s views be given *due weight* demands that said views are respected and considered when determining the outcome of a matter affecting the child.

“... the CRC Committee has stated clearly that ‘in cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts’ and that ‘all legislation on separation and divorce has to include the right of the child to be heard by decision- makers and in mediation processes⁵⁹.’”

⁵⁷ General Comment No 12 (2009) The Right of the Child to be Heard’ par 2 CRC/C/GC/12

⁵⁸ (n 1 above)

⁵⁹ General Comment No 12 (n 57 above) par 51 & 52



“Meaningful participation can also increase children’s confidence and communication skills and contribute to their... emotional development thus contributing to the implementation of both article 6 (the right to development) and article 29 (the realization of a child’s full potential)⁶⁰.

Being an active participant with views that are respected and considered in a matter that affects you may contribute to emotional security. Therefore article 12 of the CRC contributes somewhat to the emotional security interest of children. This contribution however, in view of the main argument of this paper, is not the best vehicle through which the emotional security interest of children during divorce proceedings can be best protected. This is because while the scope of article 12 extends to all matters affecting children, which would include divorce matters⁶¹, article 12 is impeded by the provisions that requires due consideration to the views of the child subject to that child’s age and maturity. An acceptable logical train of thought could be that should a child’s age and maturity be found wanting and thus not warranting significant consideration, whatever emotional security benefit gained by being an active participant will be forfeited.

Another reason the fundamental principle in article 12 may not provide the best application and protection of the emotional security interest of children during divorce proceedings is because while a child’s active participation in his/her parents’ divorce may impact decisions like with which parent the child resides, visitation arrangements etc..., active participation alone without other interventions, (i.e., the interventions recommended in chapter 4), is not enough. The granting of the divorce has the potential of leaving children in a state of emotional insecurity. The creation of support structures reinforcing the emotional security interest of children at all stages of divorce proceedings

⁶⁰ J Tobin *‘The UN Convention on the Rights of the Child: A commentary’* (2019) Oxford University Press page 399-400

⁶¹ Tobin (n 60 above) page 420

“The Committee has emphasized that article 12(2) ‘applies for all relevant judicial proceedings affecting the child without limitation, including for example, separation of parents.”

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may go beyond a child's right to have his/her views respected and thus beyond the scope of article 12.

Additionally, the *due weight* threshold set in article 12 means that should a low weighting be given to a child's views whether as a result of young age and immaturity or because the consideration of other views and factors is deemed to have heavier weighting, the emotional security benefit a child would get from having his/her views respected would be diminished. Article 12 does not set a child's views as the determinative factor in matters affecting children, it simply demands *due* consideration of the child's views. "Article 12 makes it clear that children's views are not necessarily determinative in matters affecting them⁶²."

It is worth mentioning that the caveat in article 12 speaking to the impact the age and maturity of children will have on the level of consideration the views of the child is given also aligns with the supposition that as a result of a child's age and maturity, his or her views might not be in the child's best interest. Inadequate life experience, maturity, and comprehension skills may result in a child's take on a matter being contrary to that child's best interests and therefore long-term emotional security. "...many children will lack the knowledge, wisdom, and experience to sufficiently understand the implications of their views on some matters affecting them. Thus, one consequence of article 3 of the Convention is that decisions that conflict with the views of the child may be justified where they are necessary to secure the child's best interests⁶²." While children may be capable of forming a view, they may not be equipped to deal with the consequences of that view. This possibility further highlights the inadequacy of article 12 to be the legal ground on which the emotional security of children is protected during divorce proceedings.

The way a child's view is obtained in order to satisfy article 12 is also worth significant consideration. In considering most of the ways in which a child's view may be obtained, whether *inter alia* through separate legal counsel allocated to the children of a dissolving

⁶² Tobin (n 60 above) page 403

○ marriage, in chamber meetings between the children of a dissolving marriage and the judge overseeing the divorce, or perhaps open testimony by the child in court during the divorce proceedings, it may be revealed that while article 12 of the Convention on the Rights of the child may be satisfied, it may clash with article 3 of the same convention safeguarding a child's best interests and by extension, emotional security interest. This is because while the spouses to a marriage may be at odds with each other seeing as the nature of divorce proceedings typically has spouses on opposing sides, children of the dissolving parents may not be at odds with one or both of the opposing parties. "Since the child will most likely continue to have some relationship with both parents after the dispute, it is generally thought to be harmful to the child to have to indicate a preference in open court, in front of the parent whom they would prefer not have custody or visitation⁶³." While qualitative hard evidence gathered to prove the extensive emotional trauma open testimony of a child that negatively affects the case of either of that child's parents during divorce proceedings is lacking, the general acknowledgment of this psychologically detrimental approach to attaining a child's view is widespread along with the perception that any such testimony would not of inferior quality⁶⁴.

Finally, article 12 encompasses a right, as such it does not impose a duty or obligation on children to make their views known in order for them to be available for consideration. "...the child must never be placed under pressure to express their views and should be in a position to choose whether to exercise the right to be heard⁶⁵." A child can very well opt out of participating actively in a matter affecting him/her, a child may opt not to actively participate in his/her parents' divorce. Should that be the case, article 12 may not find application, this paper asserts that it would be morally and legally indefensible for a child's refusal to put forth a view to preclude that child from emotional security protection.

⁶³ Paquin (n 6 above) page 295

⁶⁴ GB Melton '*Developmental Psychology and the Law: The State of the Art*' (1984) *Journal of Family Law* 22 page 467

⁶⁵ General Comment No 12 (n 57 above) par 22



2.5 The right to life, survival, and development and the emotional security interest of children

Article 6(1) of the CRC states “States Parties recognize that every child has the inherent right to life”, and article 6(2) follows it up with “States Parties shall ensure to the maximum extent possible the survival and development of the child.”

Typically, and traditionally, the right to life speaks to the prohibition of arbitrary interference from the State that results in the loss of life of the private citizen. In addition to this traditional conception of the right to life, there is a contemporary view that speaks to a life with dignity wherein the dignity arises from the holistic protection of human rights standards. “...the right to life is vast and extends not only to *protection against* any factor that would arbitrarily interfere with the ability of a child to live his or her life but also the *provision or creation* of conditions that would allow a child to live a life of dignity⁶⁶.” The right to life in the CRC *inter alia* protects children in situations of armed conflict, protects children from harmful cultural practices and protects children from violence. It is possible to link the contemporary conception of the right to life to the emotional security interest of children in that the holistic protection of human rights standards and thus dignity would promote a child’s emotional security. However, such a link is indirect and far stretched making the right to life inappropriate as the main instrument safeguarding the emotional security interest of children during divorce proceedings.

Survival in terms of article 6 of the CRC relates to “...the right to have positive steps taken to prolong the life of the children⁶⁷.” Positive steps can include *inter alia* measures such as food outreach programmes in poverty-stricken areas, breastfeeding campaigns, child immunization drives, family planning initiatives etc... This has little to do with the emotional security interest of children. The promotion and protection of the emotional

⁶⁶ Tobin (n 60 above) page 196

⁶⁷ Tobin (n 60 above) page 221

○ security interest of child can perhaps be made to fall in with the right to survival in article 6 perhaps in correlation with the prevention of suicide in children who are emotionally insecure. However, the emotional security of children, promoted and protected in this manner can take various forms that may not necessarily deal with safeguarding the emotional security of children during divorce proceedings as per the main argument of this paper.

“The CRC Committee has explained that ‘development’ must be understood ‘in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development’⁶⁸. “...the right to development under article 6(2) is very much on the personal development of a child as broadly understood⁶⁹.” The personal development of a child may very well include the development of a child’s mental state and capacity and therefore the development of a child’s emotional security. However seeing as the CRC committee has explained that the development of children is catered to by specific rights protections in other provisions of the CRC and that the right to development can “only be implemented in a holistic manner through the enforcement of all the other provisions of the convention⁷⁰”, the right to development is not the best way to ensure a child’s emotional security during divorce proceedings especially since emotional security is not explicitly mentioned as a right in the CRC.

2.6 The right to non-discrimination and the emotional security interest of children

Article 2 of the CRC states “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or her or his parent’s or legal guardian’s race, colour, sex,

⁶⁸ General Comment No 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child’ (para 12) CRC/GC/2003/5

⁶⁹ Tobin (n 60 above) page 223

⁷⁰ Tobin (n 60 above) page 228

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language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

A right to non-discrimination is a very important, fundamental right, through which all other rights find expression and general application to all the people in a State. It is a right that enables open access by all peoples to all the other rights. As such, should the emotional security interest be developed and protected on the level of rights, the right to non-discrimination would act as an enabling right allowing equal access to the promotion and protection of the emotional security interest of all children during divorce proceedings. Such open access would supersede any potential barriers of *inter alia* race, sex, language, religion, political affiliation, nationality, disability, ethnicity etc.... The right to non-discrimination on its own however, would not give the most benefit to the promotion and protection of the emotional security interest of children during divorce proceedings as per the main arguments of this research.

2.7 Best interests of the child and the emotional security interest of children

As stated in the introduction to this paper, the best interests of the child are of primary importance in all matters concerning children. It is within this best interest principle, right, and rule of procedure that the emotional security of children is highlighted.

The emotional security of children is not provided for as an explicit independent right internationally or domestically, rather it is provided for by application of the best interest of the child principle, rule of procedure and right. The best interest of the child is a “threefold concept⁷¹”. Functioning as a right, the best interests of the child applied means that when conflicting interests are present, should the matter involve a child or children, the child/children have the right to have their best interests taken as a primary consideration. This right is justiciable, meaning it can be brought before and defended in a court of law. As a rule of procedure, the best interests of the child is applied to evaluate

⁷¹ General comment No. 14 (n 4 above)

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all possible outcomes of a decision in a matter involving children to determine the long impact that decision has on the children involved. As a rule of procedure, the best interests of the child require decision makers to show that they have taken the best interest of the child as a primary consideration, that they have considered the long- and short-term impact of their decisions on the children concerned. Finally, as a legal principle, the best interests of the child determines that should the matter involving children be open to legal interpretation, the interpretation to be made must be the one that best serves the best interests of the child⁷².

The best interest of the child is most popularly cited from and provided for in article 3 of the United Nations Convention on the Rights of the child. “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration⁷³”.

However, multiple international legal instruments provide for the best interest of the child. This *inter alia* includes:

Article 5(b) and article 16(1)(d) of the United Nations Convention on the Elimination of All forms of discrimination against women.

“To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, *it being understood that the interest of the children is the primordial consideration in all cases*⁷⁴ – Article 5(b)

⁷² General comment No. 14 (n 4 above)

⁷³ (n 1 above)

⁷⁴ United Nations *Convention on the Elimination of All forms of Discrimination Against Women*, adopted 18 December 1979



“The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; *in all cases the interests of the children shall be paramount*⁷⁵ - Article 16(1)(d)

Article 4(1) of the African Charter on the Rights and Welfare of the child, “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration⁷⁶”.

Article 1(a) of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. “To establish safeguards to ensure that intercountry adoptions take place *in the best interests of the child* and with respect for his or her fundamental rights as recognized in international law⁷⁷.”

The above provisions discuss the best interests of the child as *a primary consideration*, as *paramount*, as *the primordial consideration* and as *the primary consideration*. In a general comment to the article 3 provision of the United Nations Convention on the Rights of the child, the best interests of the child is further expounded on to give further expression to the above listed provisions. In explanation of the weight with which the best interest of the child should be given, the general comment stated that *a primary consideration* means it cannot be weighed equally to other interests, rather it requires a heavier weighting. “...the use of the word ‘primary’ means that children’s interests are to be considered ‘on the same level’ as other considerations, that when weighing children’s interests against those of others, ‘larger weight’ must be given to what serves the child

⁷⁵ (n 74 above)

⁷⁶ Organization of African Unity *African Charter on the Rights and Welfare of the Child*, adopted 11 July 1990

⁷⁷ Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry*, adopted 29 May 1993

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best; and that there must be ‘willingness to give priority to those interests in all circumstances⁷⁸’.

“...the right of a child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and are not just one of several considerations. Therefore, according to the Committee, ‘a larger weight must be attached to what serves the child best⁷⁹.’”

With regard to the fact that the best interests of the child is applied in *all matters concerning children*, the general comment goes on to state that this means the State does not have discretion as to when it applies this principle⁸⁰. “The phrase ‘concerning’ is generally interpreted by the CRC Committee as synonymous with ‘affecting⁸¹’. “...the principle applies to measures that *have an effect* on an individual child, children as a group or children in general even if they are not the direct targets of the measure⁸²”. Should any matter involve a child, directly or indirectly, the best interests of the child immediately find application. Drawing this back to the central focus of this paper, this provides basis for the assertion that seeing as divorce involves children, the best interests of children should be a primary consideration. The emotional security of children as part of the best interests of the child therefore finds the best application and protection through article 3 of the CRC.

The general comment to article 3 of the Convention on the Rights of the child provides a non-exhaustive and non-hierarchical list of elements that comprise the best interests of the child. “The Committee’s list of elements, which is selective in the sense that it does not refer to every right under the Convention, should not be used to ignore or overlook those rights which the Committee has not listed. As the Committee itself has stressed, its

⁷⁸ General comment No. 14 (n 4 above) par 37, 39, & 40

⁷⁹ General comment No. 14 (n 4 above) par.39

⁸⁰ General comment No. 14 (n 4 above) par.1

⁸¹ Tobin (n 60 above) page 78

⁸² Tobin (n 60 above) page 78

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list is flexible and the ‘ultimate purpose of the child’s best interests should be to ensure the full and effective enjoyment of [all] the rights recognized in the Convention⁸³’.

The CRC committee’s listed elements are “The child’s views; the child’s identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; situation of vulnerability; the child’s right to health and the child’s right to education⁸⁴.”

Under the care, protection and safety of the child element, the emotional security of children is promoted by the emphasis on emotional care, emotional needs, and emotional development. It is worth note that while this element relates directly to the emotional security interest of children, all the elements under the best interests of the child contribute to a child’s emotional security. This reinforces the appropriateness of the best interests of the child being the instrument through which the emotional security of children is safeguarded during divorce proceedings.

The CRC committee in its general comment no.14, under the care, protection and safety of the child element of the best interests of the child states that “emotional care is a basic need of children” and that if that need is not being catered to, then action must be taken to ensure it is⁸⁵. Action in the context of the central argument of this paper would be action taken by legislators, courts of law, and the State to review and amend domestic divorce laws and procedures to cater to the emotional security interest of children during divorce proceedings.

Purporting to safeguard the emotional security interest of children as an extension of the best interests of the child during divorce must not only happen on the legislative level but can also be emphasized by court rulings in which judges take up the mandate of securing

⁸³ General comment No. 14 (n 4 above) par 5

⁸⁴ General comment No. 14 (n 4 above) par 52 - 79

⁸⁵ General comment No. 14 (n 4 above) par 1

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emotional security of children during divorce. “The operation of the best interests principle at an ‘agenda- setting’ level need not occur only in the formulation of administrative and legislative proposals. It can also occur as an aspect of judicial decision- making⁸⁶.”

2.8 State Obligation re the best interests of the child (International law)

Article 3(2) – (3) of the United Nations Convention on the Rights of the child, speaking to the best interests of the child, provides:

“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures⁸⁷.” – Article 3(2)

“States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision⁸⁸.” – Article 3(3)

On an appreciation of these provisions in regard to the best interest of the child and with specific reference to the emotional security interest of children, States have an obligation under international law to ensure institutions, services and facilities within their domestic jurisdictions comply. The institutions of concern to the central argument of this paper relate to those within the public sphere that deal with divorce. This includes family courts, child courts, maintenance courts, the office of the family advocate, social welfare services etc.... The State, in this case the South African State, has the obligation to ensure that

⁸⁶ Tobin (n 60 above) page 82

⁸⁷ (n 1 above)

⁸⁸ (n 1 above)



every institution, facility, and/service handling divorce proceedings promotes and protects the emotional security of children as an element of the best interests of the child.

“Article 18(2) ... obliges states to take measures to assist parents in the fulfilment of their responsibilities by ensuring ‘the development of institutions, facilities and services for the care of children’. Centred around emotional security, this could be interpreted to mean the State has an obligation to make available to parents, whether through services, facilities, and institutions, the means by which to safeguard their children’s emotional security even during divorce proceedings.

Furthermore, there is an obligation on States to develop domestic law so it conforms with the provisions in international legal instruments such as the provisions relating to the best interests of the child. The State has to ensure that legislators and courts of law give real life expression to these provisions. Domestic divorce law, therefore, both in legislation and in court enforcement, needs to reflect an appreciation and protection of the best interests of the child and thus the emotional security interest of children.

2.9 Best interests of the child (Domestic law)

In the South African context, the best interests of the child is the standard against which conduct, law and procedure can be measured and as a justiciable independent right in the Bill of Rights in the Constitution. According to the Children’s Act⁸⁹, the best interests of the child is a of paramount importance.

⁸⁹ Children’s Act 38 of 2005



S9 of the Children's Act states: "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied⁹⁰."

This has been established in s28(2) of the South African Constitution which provides:

"A child's best interests are of paramount importance in every matter concerning the child⁹¹."

The provision in the Constitution, while echoing the paramountcy of the best interests of the child, serves a second function establishing the best interests of the child as an independent right of children have under the Bill of Rights. This was laid out in *Minister for Welfare and Population Development v Fitzpatrick & Others*⁹². The Constitutional Court in this case stated that section 28(2) of the constitution contains a right independent of the specific rights outlined in section 28(1) of the constitution. This means that the best interests of the child is not merely a general standard in matters concerning children but rather it means that when there are conflicting interests in a matter concerning a child, the child's best interests should be given paramount importance.

The elements to be considered in a determination of the best interests of the child can be found in s7 of the Children's Act 38 of 2005. S7(1)(h) of the Children's Act 38 of 2005 provides that: "Whenever a provision of this Act requires the best interests of the child standard to be applied the following ... must be taken into consideration where relevant ... the child's physical and emotional security and his or her intellectual, emotional, social and cultural development." The above section therefore explicitly incorporates the emotional security of children as part of the best interests of the child.

⁹⁰ (n 89 above) section 9

⁹¹ The Constitution (n 2 above) section 28(2)

⁹² *Minister for Welfare and Population Development v Fitzpatrick & Others* 2000 11 BCLR 713 (CC) par 17



In further understanding what exactly is meant by *paramount importance* in South African jurisprudence, the courts have expounded on the matter. The courts have stated that paramount importance is not equal to superseding importance over every other interest. This position was held when the court in *S v M*⁹³ stated that in giving the best interests of the child paramount importance, the way forward is by applying the “paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests”. While thus not a superseding interest, this paper suggests that in applying the paramountcy principle meaningfully, the best interests of the child, (and by extension the emotional security interest of the child), in divorce legislation requires explicit safeguards that address the shortfalls in current divorce legislation discussed in chapter 3.

2.10 State obligation re the best interests of the child (Domestic law)

According to s7(2) of the constitution “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.” Additionally, s8(1) of the constitution goes on to state “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Furthermore s8(2) of the Children’s Act 38 of 2005 provides “All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.

As established above, the best interest of the child is an independent right in the Bill of Rights as per the constitutional court in *Minister for Welfare and Population Development v Fitzpatrick & Others*⁹⁴. This means the s7(2) obligation in the constitution on the State to respect, promote, protect, and fulfil the rights in the Bill of Rights, extends to the best interests of the child. Not only is there an obligation on the State, but there is also an obligation on the legislature, the executive, and the judiciary. In appreciation of the scope

⁹³ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par 25

⁹⁴ (n 92 above). par 17

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of this paper, this means there is an obligation on these institutions to promote and protect the best interests of the child and by extension the emotional security interest of the child.

This chapter has established the importance and relevance of international law in relation to the research objectives of this paper. Thereafter, the United Nations Convention on the Rights of the Child was established as the main international legal instrument protecting the rights of children. An in-depth discussion on the fundamental principles of the CRC followed in order to determine the most appropriate vehicle through which the emotional security interest of children is best expressed and protected. The best interests of the child as per article 3 of the CRC was identified as that vehicle. Finally, there were discussions of various international and domestic legal provisions giving life to the emotional security interest of children as an extension of the best interests of the child.



Chapter 3

3.1 National Divorce Law and the Emotional Security Interest of Children

This chapter will continue with legal analysis, however with a focus on domestic South African divorce legislation and procedure. South African divorce law and procedure will be unpacked, delving into discussions on said law's impact on the emotional security interest of children as an extension of the best interests of the child. The aim is to clearly map out the specific ways in which South African divorce law is inadequate in protecting the emotional security interest of children as per this paper's central argument.

3.2 Domestic Divorce law and Procedure

Regardless of under which Act a couple gets married, be it under the Marriage Act⁹⁵, Customary Marriages Act⁹⁶, or Civil Unions Act⁹⁷, divorce proceedings are kick started by the filing and serving of a combined summons on the defendant. After service of the combined summons, which includes a summons and a particulars of claim, the defendant has 10 days to issue a notice of intention to defend. There are three grounds of divorce that are codified in Divorce Act⁹⁸ recognized by courts. These are irretrievable breakdown of marriage, mental illness, and continuous unconsciousness. Should there be minor children of the marriage undergoing divorce proceedings, the office of the family advocate can be brought in to determine the best interests of the child.

In divorce proceedings it is the family advocate's office that is responsible for safeguarding the best interests of the child, and by extension the emotional security interest of the child, by instituting an investigation into the same. According to the

⁹⁵ Marriage Act 25 of 1961

⁹⁶ Recognition of Customary Marriages Act 120 of 1998

⁹⁷ Civil Unions Act 17 of 2006

⁹⁸ Divorce Act 70 of 1979 section 3

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Mediation in Certain Divorce Matters Act⁹⁹, there are three instances in which the family advocate's office engages in divorce proceedings wherein there are minor children. Firstly, if either of the parties to the divorce reaches out to the family advocate's office for a best interest of the child determination, then the family advocate is involved¹⁰⁰. Parties to a divorce usually engage the family advocate when there is a dispute concerning parental rights and responsibilities. Secondly, the family advocate's office can also be engaged by the court itself should it deem a best interest determination of the best interests of the child is necessary¹⁰¹. Finally, should the family advocate him/herself deem it in the interest of the minor children involved, the family advocate can apply to the court handling the divorce proceedings for an order authorizing an investigation into the best interests of the child by the family advocate's office¹⁰².

Thankfully with regard to the option of the family advocate to *mero motu* apply to the court for an order authorizing a best interest of the child investigation, Regulation 2 of the Regulations under the Mediation in Certain Divorce Matters Act¹⁰³ makes the process straightforward. It requires the plaintiff in the divorce, (but also gives the option to the defendant), to complete the form in Annexure A, deliver it to the other party and file two copies with the Registrar. It is this form in Annexure A that gives the family advocate the information to know if such an investigation is necessary.

The investigation by the family advocate's office in determining the best interests of the child in divorce proceedings involving minor child typically culminates in a report that serves as a recommendation to the court. Unfortunately, that is all it is, a recommendation. The court is under no legal obligation to act in accordance with the recommendations made by the family advocate. The court has the discretion to take courses of action contrary to the report by the family advocate. In *P v P*¹⁰⁴ the court's discretion to act

⁹⁹ Mediation in Certain Divorce Matters Act 24 of 1987

¹⁰⁰ (n 99 above) section 4(1)

¹⁰¹ (n 99 above) section 4(1)

¹⁰² (n 99 above) section 4(2)

¹⁰³ Mediation in Certain Divorce Matters Regulations 1990 regulation 2

¹⁰⁴ *P v P* 2007 (5) SA 94 (SCA) par 12

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contrary to the recommendations of the family advocate's office was illustrated. The appeal in this case concerned the custody of children post-divorce. In the trial court primary custody was given to the mother of the children even though the recommendation by the family advocate's office was to give primary custody to the father. The family advocate's office had originally been directed by the trial court, in terms of section 4(1) of the Mediation in Certain Divorce Matters Act 24 of 1987, to conduct a best interest of the child investigation. Subsequently the family advocate's office employed the assistance of a social worker, clinical psychologist and family counsellor to aid in the investigation and to serve as expert witnesses in presenting their recommendation to the court. The judge was not satisfied with the expert testimony and stated that there was a lack of objectivity as the experts accepted the allegations of the father of the children against the mother on face value. The trial judge therefore ruled contrary to the recommendations from the family advocate's office. The court of appeal found the actions of the trial judge sound and therefore dismissed the appeal, thus upholding the decision in the trial court.

Two issues have been identified as cause for concern from a holistic reading of the above case. Firstly, that a recommendation into what is in the best interest of the child from the family advocate's office may in fact not be in the best interest of the child because it may be compromised due to bias in favour of one party to the divorce proceeding. Secondly, that such an investigation by the family advocate, whether sound or unsound, may not be effective in protecting the best interest of the child seeing as it ultimately comes down to what the presiding officer makes of all the evidence adduced before the court. The first issue concerning bias is something that falls outside the scope of this paper and its arguments because this paper will not purport to know how to root out bias completely. Bias and inarticulate premises are a problem at every level of the legal process and have been a point of academic study. This paper will not engage a discussion on rooting out bias in the legal system in this context. Moving on to the second issue, while the decision to act contrary to the recommendations of the family advocate's office in *P v P*¹⁰⁵ may have been sound, this discretion of the court means that even in the case of sound

¹⁰⁵ (n 104 above) par 12

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recommendations preceded by a sound investigation, should the court decide to not follow the recommendations from the family advocate's office, the best interests of the child, as expressed in the report by the family advocate's office, may thus not be protected. By extension this means that the emotional security interest of children in cases like what is described above will not be protected. This vulnerability is an example of how current divorce law and procedure is inadequate in protecting the emotional security interest of children during divorce proceedings.

Furthermore, delving into the grounds of divorce listed in the Divorce Act, the mental illness and continuous unconsciousness grounds of divorce are problematic to the protection of the emotional interest of children during divorce. This is because the family advocate's office is engaged to determine the best interests of the child with specific regard to parental rights and responsibilities. When only one parent/spouse is legally capable of handling said parental rights and responsibilities, then the services of the family advocate may not be deemed necessary. This means no best interests of the child investigation may be made, therefore leaving minor children vulnerable to emotional insecurity. Additionally, should the grounds of divorce indeed be either mental illness or continuous unconsciousness, that poses additional trauma and emotional hardship on minor children of the marriage. There is no office or body that is legally mandated to step in in the interests of the minor children in the cases where the grounds of divorce are mental illness or continuous unconsciousness. This obviously leaves the emotional security interest of children as an extension of the best interest of the child in these specific instances unprotected.

In the cases where the ground for divorce is irretrievable breakdown of marriage, should the court deem there is a reasonable possibility of reconciliation between the parties to the marriage through marriage counselling, treatment or reflection, the court may postpone the divorce proceedings so the parties may explore those options¹⁰⁶. This may

¹⁰⁶ (n 98 above) section 4(3)

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be problematic depending on what stage of the divorce proceedings the parties were at before the court decided to postpone proceedings. Should it be the case that the divorce proceedings have passed the point where the minor children have been made aware of the divorce, and/or where the minor children have been involved in a best interest investigation instituted by the family advocate's office, the minor children would have already been exposed to the risk of emotional trauma and hardship. While the parties to the marriage are undergoing marriage counselling, treatment, or reflection, there is no mechanism for a therapy/social worker service to be available to the minor children. Say the investigation by the family advocate's office has been instituted, a postponement of divorce proceedings would also postpone that investigation dead in its tracks at whatever stage it had reached. This does not adequately safeguard the best interests of the child and by extension the emotional security interest of the minor children of a marriage facing divorce.

The law as discussed in chapter two, in South Africa, sets the threshold of consideration of the best interests of the child to paramount importance¹⁰⁷. Leaving the engagement of the family advocate's office up to the discretion of the parties, the court, or even the family advocate's office itself does not apply the best interests of the child meaningfully as required by the paramountcy principle. The high threshold of importance requires immediate application of the best interests of child as a function of law independent from the actions of parties the moment a divorce matter involves minor children. This would mean an automatic and immediate investigation into the best interests of the child should there be minor children of the dissolving marriage.

The lack of automatic application of an investigation into the best interests of the child in divorce proceedings involving minor children is also contrary to international law standards. Article 3 of the United Nations Convention on the Rights of the Child puts the best interests of the child to be a primary consideration in all matters concerning

¹⁰⁷ (n 2 above) section 28(2)

○ children¹⁰⁸. Furthermore, the general comment to that convention expounds on the article 3 provision by stating that primary consideration means it has higher weight than other interests, highlighting its importance. It goes on to state that in every matter concerning children means States may not exercise discretion as to when it considers the best interests of the child when the matter involves children¹⁰⁹. This means should minor children be involved; international child law requires automatic application of the best interests of the child with the significant weight ascribed to it. Divorce law as it currently stands violates this international child law provision by not making an investigation into the best interest of the child determination automatic, mandatory and immediate the moment divorce proceedings involve minor children.

¹⁰⁸ (n 1 above)

¹⁰⁹ General comment No. 14 (n 4 above)



Chapter 4

4.1 Recommendations on how South African divorce law and procedure can further promote the emotional security of children

As per the main argument of this paper being that current South African divorce law and procedure does not adequately protect the emotional security of children of dissolving marriages, this next chapter shall put forth recommendations as to how South African divorce law and procedure can be adapted to fully secure the emotional security of children in divorce. Five recommendations are put forth by this paper; 1) the inclusion of mandatory parent education programmes/parent classes before a divorce can be granted, 2) mandated therapeutic programmes for children of divorce, 3) mandated separate counsel for children during divorce proceedings, 4) additional certifications/training for legal professionals in divorce matters involving children, and finally 5) increased awareness and certainty of divorce procedures by spouses of the dissolving marriage. An in-depth discussion of each of these recommendations will thus follow.

4.2 Mandatory Parent Education Programmes.

With divorce typically being centred around the spouses to the dissolving marriage dividing up assets, arguing about child custody and visitation rights, the focus on the effect the divorce has on the children of the dissolving marriage is minimized. Parents may be too wrapped up in the other spouse to the marriage and the divorce processes, especially if the divorce is contested and adversarial, to fully comprehend the effect divorce has on the children of the marriage and make adaptations to mitigate these negative effects. A page to be taken from a trend in states across the United States of America is the institution of legislation that mandates parent education programmes in divorces with children before a divorce can be granted. The main objective of the legislation requiring these parent education programmes is to inform parents about the

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negative impact divorce has on children and to equip parents with the tools needed to limit said negative impact¹¹⁰. In the United States of America, twenty-seven states have statute requiring mandatory parent education programmes (e.g., Alabama), five states that have mandatory parent education programmes through county and district mandates and three states in which mandatory education programmes are left to judicial discretion¹¹¹. (E.g., In Arizona all parties in divorce, separation, annulment, paternity proceeding where parenting time is an issue are required to go for mandatory parent education programmes as per the Arizona Marital and Domestic Relations Act¹¹², in Colorado all parties to a divorce or separation must attend a mandatory parent education programme¹¹³, in the District of Columbia mandatory parent education programmes are subject to judicial discretion, etc...).

By instituting parent education programmes, the focus from the spouses of the dissolving marriage determining which asset or which right goes to who shifts, bringing forward the detriment of divorce on the emotional security interest of children and how better said emotional security interest can be safeguarded.

These parent education programmes, although a mandated step before a divorce is granted, are not created as an obstacle to divorce, therefore being a barrier to access to courts, rather they're there to offer as much protection as can be given to facilitate the promotion and protection of the emotional security interest of children during divorce. The aim is children's well-being, inclusive of emotional well-being, through the education of spouses to a marriage on how to relate with themselves and with the children of the marriage during and after the processes of divorce¹¹⁴.

¹¹⁰ T Schaefer *"Saving children or blaming parents? Lessons from mandated parenting classes"* (2010) Columbia Journal of Gender and Law 19 page 492

¹¹¹ SL Pollet & M Lambreglia *'A Nationwide Survey of Mandatory Parent Education Programmes'* (2008) 46 Family Court Review page 375

¹¹² Ariz. Rev. Stat 25-351, 25-352, 25-353, 25-355

¹¹³ Coro. Rev. Stat. 14-10-123.7 (2007)

¹¹⁴ Schaefer (n 110 above) page 491 - 494



The effectiveness of this measure in promoting and protecting the emotional security interest of children during divorce can be ascertained by the sanctions imposed should there be non-compliance on the part of the spouses to the marriage. In the United States non-compliance with these parent education programmes influence custody arrangements of the children to the marriage, visitation rights relating to said children, and even imprisonment should the non-compliance be of a grave nature that such sanction is required¹¹⁵.

As mentioned earlier in this paper, in order to maximise the protection of the emotional security of children during divorce, there must be cooperation and engagement between multiple fields, especially those of social science and psychology. This is because the emotional security interest of children during divorce may be more understood or more researched in other disciplines separate to law. Mandatory parent education programmes can reflect this cooperation between disciplines by way of having the compulsory element arising by legislative imperatives, and by having the instructors of the actual parenting education programmes come from professionals specialising in issues of child psychiatry and mental health¹¹⁶. This interplay between disciplines is necessary so that the actual content of the parent education programmes can be developed with the necessary expertise. The United States of America has implemented parent education programmes that involve in person classes, information tutorials via video, and written text materials¹¹⁷. Perhaps in instituting parent education programmes as a means to safeguard the emotional security interest of children during divorce, similar methods can be applied.

A critic, however, of mandated parent education programmes is that their success is currently not being accurately depicted and so its effectiveness is questionable. This flows from the methodologies used to determine the effectiveness of mandatory parenting classes. Reports from the parents who underwent the mandatory parenting education

¹¹⁵ Schaefer (n 110 above) page 496

¹¹⁶ Schaefer (n 110 above) page 497

¹¹⁷ Schaefer (n 110 above) page 499

○ programmes are the main vehicle through which effectiveness is determined. This is problematic since the reports from these parents are susceptible to bias from parents desperate to have a divorced finalized or even from parents embellishing on the reality of their behaviour and/or parenting¹¹⁸. Furthermore, “studies have failed to employ additional data sources like teachers’ and children’s reports, diaries, or other timely and frequent self-reporting devices¹¹⁹.” This critic, however, does not take away from the merit parent education programs have in educating parents of the ways divorce is emotionally detrimental and how to mitigate that detriment therefore safeguarding the emotional security interest of children during divorce. If methodology proving the accuracy of parent education programs is flawed, then all that needs to be done is to introduce new more accurate methodology. In depth discussions on the form of such methodology is unnecessary and falls out of the scope for the purposes of the main arguments of this paper.

Another critic of parent education programs falls in line with Dr Rappaport’s argument that, as discussed above, would prima facie seem to undercut the premise on which the main argument of this paper rests. Like Dr Rappaport, some critics of parent education programs argue that the widely accepted assumption that divorce is emotionally detrimental to children of divorce is flawed on the grounds of inaccurate research methodology¹²⁰. Critics belonging to this school of thought argue that if the premise that divorce is emotionally harmful to children is flawed, then the need for mandatory parent education programs is questionable. To this, this paper responds that methodologies of research vary across disciplines and consensus on accurate methodology, even within the same discipline, is hard to find. This does not discredit the implementation of parent education programs in so far as it purports to protect the emotional security interest of

¹¹⁸ Schaefer (n 110 above) page 503

¹¹⁹ J.D Hans & M.A Fine “*Children of Divorce: Experiences of children whose parents attended a divorce education program*” (2001) *Journal of Divorce and Remarriage* 36 page 1 & 22

¹²⁰ S J Bahr “*Social science research on family dissolution: what it shows and how it might be of interest to family law reformers*” (2001) page 9-10 [<https://ssrn.com/abstract=269091>]

○ children during divorce, rather inspires further developments and research in these fields in order to prove the original premise.

4.3 Mandated therapeutic programmes for children of divorce.

As previously mentioned, while the typical primary focus of divorce proceedings are the spouses to the dissolving marriage, the children of the dissolving marriages are one of the most affected parties to the divorce with their emotionally security being severely threatened. Negative emotions triggered by divorce proceedings, expressed in different ways depending on age, temperament, other factors aggravating the divorce and the child's own perception of the circumstances of the divorce, can compromise the emotional security of children of dissolving marriages. These negative emotions can include *inter alia* anger, stress, resentment, guilt, sadness etc....How long these emotions persist, and their level of severity can be greatly mitigated by intervention by way of therapy and counselling for children put through the divorce of their parents¹²¹. Therapy can serve as an outlet for children of divorcing parents to explain their feelings, have someone to validate those feelings and give them tools on how to cope with said feelings. The emotional security challenges that come with divorce are more understood and dealt with within the field of psychology rather than law. While legal practitioners can work to make therapy for children of divorce an essential step in the divorce process, there is need for multidisciplinary engagement that involves mental health professionals as well as legal practitioners. Therapeutic intervention within the divorce process may be helpful in mitigating short and long-term negative consequences for the emotional security state of children of divorce.

The year 1982 saw the development of "the Children of Divorce Intervention Program (CODIP) in the United States of America. Acknowledging the specific emotional harm that children of divorced parents undergo during the divorce process as well as after the proceedings are finalized, a school-based program that made use of group therapy

¹²¹ J Pedro-Carroll et al "Assisting children through transition: helping parents protect their children from the toxic effects of ongoing conflict in the aftermath of divorce" (2001) Family Court Review 39 page 377

○ techniques was created. Children of divorced parents were brought together, encouraged to interact with each other by sharing their own experiences with the divorce process, revealing whatever common stressors they had and being taught the tools needed to overcome said stressors¹²². Such a program can be looked to when it comes to creating something similar in South Africa in pursuit of more adequately securing the emotional security interest of children of divorce. The group therapy structure may offer a more affordable alternative to one-on-one therapy with each and every child of divorce should the question of available resources arise.

Therapeutic intervention in-built within divorce legislation and procedure can provide a much-needed lifeline to children of divorced parents. Having a structured, safe and supportive space to not only express any and all feelings that come with having one's parents' divorce but to also receive the coping mechanisms that could be helpful in dealing with those feelings would be a few steps closer in adequately safeguarding the emotional security interest of children, as an extension of the best interests of the child, during divorce proceedings.

4.4 Mandatory and automatic separate legal counsel for children during divorce proceedings.

Typical of divorce proceedings is separate legal representation for the spouses to the dissolving marriage. What is not typical however, is automatic and mandatory separate legal representation of the children of the dissolving marriage. Section 28(1)(h) of the South African Constitution gives every child the right to “have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child if substantial injustice would result.” In *Soller NO v G*¹²³ and in *Ex parte Van Niekerk: In re Van Nierkerk v Van Niekerk*¹²⁴, this provision has been used to give children the right to legal representation in post-divorce disputes. Arguably this right can also be used during

¹²² Pedro-Carroll et al (n 121 above) page 378

¹²³ *Soller NO v G* 2003 (5) SA 430 (W) par 27

¹²⁴ *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T).par 5

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divorce proceedings. The shortfall, however, that this paper argues results in the inadequacy of current divorce legislation in safeguarding the best interest of the child is that there are no explicit provisions that facilitate the justiciability of this right by means of automatic and mandatory application. In order to facilitate the justiciability of rights in the Bill of Rights, subsidiary legislation needs to create legal procedure. The right to have a legal practitioner assigned to a child by the state in matters affecting the child should have legal procedure that facilitates automatic and mandatory application especially in the realm of divorce proceedings.

Section 14 of the Children's Act 38 of 2005 provides for access to court for children by stating that "every child has the right to bring, and be assisted in bringing, a matter to a court provided that the matter falls within the jurisdiction of that court". The right to assistance in bringing a matter before a court of law can be interpreted to having a legal practitioner be the person providing said assistance. The same argument discussed above re the shortfall in divorce legislation in applying s28(1)(h) of the constitution extends also to this provision in the Children's Act, i.e., there needs to legal procedure added to divorce legislation that facilitates the justiciability of this right.

According to section 6(4) of the South African divorce Act, it is at the discretion of the court to appoint separate legal representation for any children of a dissolving marriage.

Section 6(4) of the Divorce Act states: "For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation¹²⁵."

It is therefore this paper's recommendation that in purporting to adequately safeguard the emotional security interest of children, as an extension of the best interests of the child, legal procedure in divorce legislation needs to be enacted to facilitate the automatic and mandatory separate legal representation of minor children of a dissolving marriage. Drawing back to earlier discussions in this paper of conflicting motivations/interests of

¹²⁵ (n 98 above) section 6(4)

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divorcing spouses that may lead to them using children of the dissolving marriage as pawns to be exchanged in the pursuit of other goals, this paper argues that the full and adequate protection of a child's best interests, and by extension their emotional security interest, during divorce proceedings is best served by separate mandatory and automatic legal counsel for the child. "Experience has shown that counsel for the children is not apt to be appointed where such merely is permitted but not mandatory¹²⁶."

Separate legal representation for children of a dissolving marriage means, a) the children of the dissolving marriage are seen as independent parties to the divorce, separate from their parents and from other interests therefore highlighting and protecting their best interests, b) the information brought before a judge regarding the best interests of the child would provide a clearer, perhaps more accurate, picture of what is truly in the child's best interests as the attorney for the child would only be advocating for the child's best interests without any conflicting interests/motivations from the spouses to the dissolving marriage, and c) in the cases of a divorce granted on the basis of mental illness, continuous unconsciousness, or imprisonment of one spouse, separate counsel ensures that the children to the dissolving marriage are not automatically placed under the sole guardianship of the one spouse simply because the other is mentally ill, continuously unconscious, or in prison.

This paper argues for mandatory and automatic separate legal representation for minor children of a dissolving marriage and not for the mandatory and automatic installation of a guardian ad litem. This is because in order to establish a good rapport with the children of the dissolving marriage in pursuit of the protection and promotion of their best interests and by extension their emotional security interest, there needs to be trust. Separate legal representation means client/attorney privilege. i.e., a basis on which the trust needed can be built. "The guardian ad litem is an officer of the court and as such has a duty to report to the court the basis of any findings or recommendations of the

¹²⁶ H.H Foster *Divorce Reform and the Uniform Act* (1973) Family Law Quarterly 7 page 179 & 199

○ guardian ad litem. This duty destroys any privilege of confidentiality the guardian ad litem could possibly claim in relation to the child 'client'¹²⁷.

A potential vulnerability to automatic and mandatory separate legal counsel for the children of a dissolving marriage, and therefore a critic of this recommendation, is that there is a potential for the attorney's perception/interpretation of the child's best interests being advocated for rather than the reality of those interests. This is because the age and maturity of children of a dissolving marriage varies, should the child be of an age or level of maturity that requires discernment on the part of the attorney interacting with the child, there's a risk that a less than accurate depiction of that child's wishes, and that child's best interests might reach the court¹²⁸. This potential vulnerability is however mitigated by the fact that what makes a good attorney is the ability to ascertain the wishes of your client and advocate them to the best of your ability before court, an attorney who is willing to give their best to ascertain the interests and wishes of the children of a dissolving marriage as their client, makes the pursuit of mandatory and automatic separate legal representation of children of dissolving marriages a worthwhile endeavour.

4.5 Additional certification for legal professionals dealing in divorce involving children.

A divorce involving spouses without any children of the dissolving marriage is different from one with children. This is reflected in the legal provisions that make specific mention to the involvement of the Family Advocate's office should the divorce have children of the marriage and should there be disputes regarding custody and other parental rights and responsibilities. The specific reference to possible other steps and/or the involvement of

¹²⁷ W.D Horn *Mandating appointment of an attorney for children in divorce* (1993) Family Law Quarterly 27 page 479; ABA centre on children and the law, lawyers for children (1990) 43, page 47

¹²⁸ Horn (n 127 above) page 480

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other legal authorities based simply on the presence of minor children to a dissolving marriage implies that there is an extra skill set needed when children are involved. It is on this basis that this paper recommends that in purporting to adequately safeguard the emotional security interest of children in divorce, the legal representation involved, (including but not limited to the legal practitioners possibly serving as separate representation of the children of the dissolving marriage), undergo extra certification that sensitizes them to the needs, specifically the emotional security needs, of children of divorce. The shape/format of the certification process is an area that inspires research, and while this paper implores professionals, (be it in the legal field or otherwise), to take up said research, it falls outside the scope and purposes of this paper.

In research undertaken by the University of Arkansas at Little Rock Law Review by means of a questionnaire to legal professionals, “eighty percent of the respondents recommended that professionals should be trained by attending workshops and seminars¹²⁹” with regard to the need for legal practitioners dealing in divorce involving children. “It is noteworthy that at least half of the respondents said they have had no training specifically to deal with divorce involving children. Special training is recommended for all professions who deal with high conflict divorce, and yet, we are not aware of any requirements for professionals that do this work¹³⁰.”

While this is but one study, the results of which comprising of the opinion of a select group of professionals, it shows that additional certification for legal professionals dealing with children in divorce is something that has already been considered. This paper implores

¹²⁹ H.P Stern et al *‘Professionals’ perceptions of divorce involving children’* (2000) University of Arkansas at Little Rock Law Review 22 page 596

¹³⁰ H.P Stern et al (n 129 above) page 598

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law makers, courts, and legal practitioners to build on this in order to adequately safeguard the emotional security interest of children during divorce proceedings.

4.6 Increased awareness and certainty of divorce procedures.

Another recommendation on how to mitigate the negative emotional effects divorce has on children may be by making parents more aware of divorce mechanisms and procedures. This paper asserts that more certainty and confidence in the legal divorce processes may mitigate negative feelings parents divorcing may have and therefore may contribute to a more positive interaction with children during the divorce proceedings which promotes those children's emotional security. Legal professionals can facilitate this by taking their time to make sure spouses to a dissolving marriage are not only aware of every step of the divorce process but are also confident in their grasp of such knowledge. Legal professionals should endeavour to refrain from simply taking over the entire divorce process, only interacting with spouses to the dissolving marriage when they need documentation, a signature, or for them to show up in court. "...psychologists have shown that uncertainty prolongs and exacerbates the negative feeling that a negative event provokes¹³¹." This paper asserts that exacerbated negative feelings on the part of spouses to a dissolving marriage may negatively impact interactions between the spouses that can spill over into negative interactions between the spouses of the dissolving marriage and the children of the dissolving marriage. Should spouses to a dissolving marriage experience prolonged negative feelings as a result of uncertainty with the processes of divorce, that may translate into prolonged emotional insecurity in children who are exposed to parents with prolonged negative feelings.

¹³¹ Y Bar-Anan et al "The feeling of uncertainty intensifies affective reactions" (2009) Emotions 9 page 123



4.7 Implementation Limitations

All of the above recommendations have been implemented in a foreign jurisdiction with socio-economic contexts and resources different to South Africa. As such, in recommending implementation in South Africa, consideration should be given to its specific socio-economic context and its available resources. South Africa is a third world country, in Africa, as such, its resources and capabilities are limited. These limitations on the full implementation of the above recommendations include *inter alia*, limited human resources, limited skills in public departments, longer time frames for finalising divorce wherein there are minor children, budgetary constraints in public departments etc... This might be an obstacle in the full implementation of the above recommendations. However, this paper is not proposing an instantaneous remodification of divorce law and procedure with interventions that may further stretch already overstretched reasons. As mentioned in chapter 1, one of this paper's goals is to encourage further legal research into the importance of the emotional security interest of children of divorce that could eventually be used to adopt and adapt policy and divorce legislation and procedure. This paper understands that this will not happen overnight while still encouraging legal professionals to begin pushing the needle forward.



Chapter 5

5.1 Summary and Conclusion

In the beginning of this paper, the premise on which the main arguments of this paper rests was established. It was stated that in about 56.6% of divorces, they are children of the dissolving marriage¹³². From this it was determined that although traditionally divorce is thought to be a matter only concerning the two parties to the marriage, (i.e., the spouses), should there be children of the dissolving marriage then there is a third party, the children. A third party means separate interests that this paper argues requires separate legal representation and separate legal protection. Considering the significant emotional toil specific to children of divorced parents, the focus of this paper was set to be the full consideration and protection of the emotional security interest of children as an extension of the best interests of the child. The general assumption that parents will act in the best interests of their children based on the bonds of parental care was critiqued and argued to not apply in cases of divorce where multiple interests are at play. This highlighted the need for courts, legislation, and *inter alia* legal practitioners to step in and protect the best interests of child and by extension the emotional security interests of children during divorce proceedings.

Thereafter the emotional trauma specific to children as a result of their parents' divorce was expanded on. Emotional distress, behavioural changes, an impact on the academic life of the child, anger, depression, substance abuse, skewed future outlooks on love and marriage, long term mental instability etc..., were among the negative emotional consequences on children of divorce discussed. In order to mitigate these negative emotional consequences on children of divorce, intervention was suggested especially in

¹³² (n 3 above) page 6-8

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cooperation with those in the field of psychology (e.g., therapists, counsellors, psychologists etc...).

Penultimately a counter argument was analysed in critic of the main argument of this paper that current South African divorce law and procedure does not adequately safeguard the emotional security interest of children of divorce as an extension of the best interests of the child. The counterargument would prima facie seem to undercut the main argument by attempting to cast doubt on the very possibility that the emotional insecurity children of divorce experience is as a result of the divorce itself. Dr Rappaport was cited as a key proponent for the argument that the emotional insecurity of children of divorce usually attributed to the divorce is not due divorce itself but to other factors that aggravate the divorce. In response to this counter argument, this paper established that whether or not the emotional trauma children of divorce experience is due to the divorce itself or to a culmination of other factors aggravating the divorce is beside the point. The source of emotional insecurity is highly contested, this paper finds it irrelevant to delve into conversations aimed at pinpointing the source. Whether emotional insecurity in children of divorce is caused by the divorce itself or other factors does not take away from the fact that developments in fields such as law attempting to safeguard the emotional security interest of children of divorce is a worthwhile endeavour. Finally, the end of chapter one outlined the problem question and the research objectives of this paper.

Chapter two of this paper concerned itself with engaging in a juxtaposition of international law and domestic in relation to answering the research question of whether or not South African divorce law and procedure adequately safeguard the emotional security interest of children as an extension of the best interests of the child. Chapter two therefore involved a comparative as well as critical analysis of international and domestic law. The relevance of international law, and international law standards within the South African context was the point of departure. Jus cogens, i.e., customary international law, was said to apply authoritatively within South Africa automatically while the processes through which international law codified in international law instruments becomes binding law in the republic was explained. Next the United Nations Convention on the Rights of the Child

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(CRC) was established as the international law instrument with the most relevant protections of children, including protection of their emotional security interest, for purposes of this paper's main argument and research objectives.

The United Nations Convention on the Rights of the Child does not explicitly refer to the emotional security interest of children and so the fundamental principles of the CRC were discussed in order to determine under which fundamental principle the emotional security interest of children is best expressed and protected. The fundamental principles of the CRC are the right to respect for the views of the child provided for by article 12 of the CRC, the right to life, survival and development outlined in article 6 of the CRC, the right to non-discrimination in article 2 of the CRC, and the best interests of the child in article 3 of the CRC.

The right to respect for the views of the child was discredited as the most appropriate vehicle through which the emotional security interest of children is best expressed and protected because *inter alia* an inference from a caveat in article 12 posits that should a child's age and maturity be found wanting in terms of expression of that child's views, then there is no obligation to give due weight to that child's views. This would prevent the enjoyment of full protection of the emotional security interest of children should that child be of an age or maturity that is found wanting if article 12 is used as the vehicle through which the emotional security interest of children of divorce is safeguarded. Additionally, the threshold of importance ascribed to a child's views under article 12 is simply that *due consideration* must be given. This means that a child's views will not be determinative. A higher threshold is put in article 3 which places the best interests of the child to be a *primary consideration*.

Article 6 on the right to life, survival and development was discredited as the most appropriate expression and protection of the emotional security interest of children because the committee on the convention of the rights on the child stated that article 6 finds clearer expression and protection via other articles in the CRC. Article 6 is therefore



to be applied holistically in conjunction with other articles and as such cannot be the sole vehicle through which the emotional security interest of children is safeguarded.

Article 2 of the CRC speaks to the right to non-discrimination which means should the promotion and protection of the emotional security interest of children be present at various levels of law, article 2 will act as an enabling right but not as the main foundation for the right to emotional security of children.

Finally, article 3 of the CRC was established as the most appropriate vehicle through which the emotional security interest of children can be promoted and protected. This is because article by virtue of the threshold of importance put on the best interests of the child would place the emotional security interest of children on the same high threshold of *primary consideration* by extension. Also, article 3 applies to all matters involving children, which would include divorce and as such make sense as the main vehicle through which the emotional security interest of children is safeguarded for the purposes of this paper. International and domestic legal provisions expressing and explaining article 3 the best interests of the child and therefore by extension the emotional security interest of children were analysed.

Chapter 3 involved a critical analysis of South African divorce law and procedure piggybacking on the discussions in chapter two that juxtaposed international law and domestic law re the best interests of the child, and by extension the emotional security interest of children. A foundation was laid as to the domestic legislature as per Acts like *inter alia* the South African Divorce Act and the Mediation in Certain Divorce Matters Act. The Acts under which a marriage is concluded as well as the Acts that pertain to the divorce of those marriages were discussed. The grounds of divorce as per the South African Divorce Act were discussed along side the role of the family advocate and all that entails. The ways in which South African divorce law and procedure were found wanting placed against international law standards and other arguments of this paper are that the recommendations made by the family advocate's office, even when they are considered by the court, serve merely as a recommendation. The court has the discretion as to



whether or not to give orders in alignment with the family advocate's office. The rest of chapter 3 continues to unpack domestic divorce law and procedure and the ways it is inadequate in fully securing the emotional security interest of children in divorce.

Winding up the arguments of this paper, chapter four concludes by listing recommendations put forth by this paper as to how the deficiencies in South African divorce law and procedure discussed in chapter three can be addressed. Five recommendations are put forth by this paper. 1) the inclusion of mandatory and automatic parent education programmes/parent classes before a divorce can be granted, 2) mandated therapeutic programmes for children of divorce, 3) mandated separate counsel for children during divorce proceedings, 4) additional certifications/training for legal professionals in divorce matters involving children, and finally 5) increased awareness and certainty of divorce procedures by spouses of the dissolving marriage.

The arguments of this paper have been as follows; a) there are three independent parties affected by a divorce wherein there are children of the dissolving marriage, (divorce while typically centred around two parties, i.e., the spouses to the dissolving marriage, involves three parties should there be children on the marriage), b) divorce comes with negative emotional consequences leading to a state of emotional insecurity for children of divorce, c) current South African divorce law and procedure does not adequately safeguard the emotional security interests of children of divorce as an extension of the best interests of the child, and d) the courts, law makers and legal practitioners at large need to actively intervene in order to endeavour to adequately safeguard the emotional security of children of divorce as an extension of the best interests of the child. The third argument listed is the main argument of this paper. Through all the above discussions, in all the above chapters, it is this paper's contention that the premise stating that divorce is emotionally detrimental to children of divorce has been established and that the main argument positing that current South African divorce law and procedure does not adequately safeguard the emotional security interest of children as an extension of the best interests of the child, has been sufficiently defended.

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