

THE RIGHT OF CHILDREN TO BE HEARD AT THE DIVORCE OF THEIR PARENTS: REFLECTIONS ON THE LEGAL POSITION IN SOUTH AFRICA

JA Robinson
JJ Groenewald

North-West University, Potchefstroom, South Africa, pvrjar@puk.ac.za

Introduction

South Africa has no family court. And despite solemn promises by government, and expensive projects undertaken by various State Departments and other role players, it has become clear that a Family Court in the true sense of the word will not materialize in the foreseeable future.

In this contribution the focus falls on the role of the Family Advocate to further and protect the best interests of children at the divorce of their parents against the background of the lack of a Family Court on the one hand, and the Children's Bill that aims to remedy existing shortcomings on the other.

A.

Position currently in South Africa

Background

Court procedure in South Africa is of an adversarial nature. This leads to various detrimental effects *inter alia*

- heightening of the tension between parties;
- a process of progressively misunderstanding each other;
- promotion of bitterness and propelling the participants towards the point of no return; and
- hampering of the process of adjudication in divorce in that it often results in crucial differences within the family in respect of which the court ought to give a decision being artificially withheld from the court's adjudication.

The Office of the Family Advocate

The Office of the Family Advocate was created by the Act on Mediation in Certain Divorce Matters 24 of 1987 to "[p]rovide for mediation in certain divorce proceedings, ... in which minor or dependent children of the marriage are involved, in order to safeguard the interests of such children; .." The underlying philosophy to the Act was the mitigation of the inability of the adversarial system to safeguard and protect the interests of children at the divorce of their parents. In essence this Act envisages taking children out of the arena of conflict of the parents at the earliest possible stage.

The voice of the child

South African courts are not unanimous in their views on hearing the voice of the child at the divorce of his/her parents. The difference in opinion does not only relate to the issue of whether a child's voice should be heard *überhaupt*, but also

to the question whether chronological age or emotional capacity should be taken into consideration.

Conclusion

It would appear that the current position in South Africa reflects a typical paternalistic approach, or as it has also become known, a *kiddie saver* approach. As such the philosophy behind the recognition of children's rights represents in modern day jargon the first three *p*'s of children's rights – *protection* of children against discrimination and all forms of neglect and exploitation; *prevention* of harm to children and *provision* of assistance for their basic needs. Although provision is made in section 28 of the Constitution for the fourth *p*, the *participation* of children in decisions affecting their own destiny, courts are reluctant to apply the provision. As a result no clear criteria have developed to examine the issue of developing autonomy or how decisionmakers and courts should respond in a meaningful way to the expressed wishes of children who are not yet fully competent. The question whether it should be admissible to have talks with children in chamber that may result in the evidence of professionals being obsolete also begs an answer.

B.

The Children's Bill

Introduction

The Children's Bill, a quasi-codification of the South African law relating to children, which will take effect on a date fixed by the President and which will be called the Children's Act 2005, is clearly an attempt to bring all legislation relating to children in line with the provisions of the Convention on the Rights of the Child, 1989, and to move away from the paternalistic approach that characterises the current position with regard to children.

The concept of child participation together with the principle of the best interests of the child, form the basic framework of the Convention. In similar fashion, the Bill reflects a child-centered approach – one not only clearly encompassing the first three *p*'s but also emphasizing the 4th *p*.

The right of children to participate in the divorce of their parents – an evaluation of the provisions of the Bill

Two aspects will be highlighted in this discussion – the nature of the right of the child to be heard and some practical issues that need to be addressed upon implementation. It goes without saying that courts must be able to hear, understand and give due weight to what children in court are really trying to say.

The Bill recognises that there is a particular relationship between evolving capacity and autonomy and that children have a right to autonomy in those decisions they are competent to make for themselves. It does not address the transfer of the exercise of rights to the child. It rather introduces a right to be involved in a process in which the outcome will be decided by adults but informed

by the views of the child. The child's right to express a view is a right of participation rather than a question of whether the child's preferences will triumph over those of adult decision makers. The right to be heard is therefore essentially a procedural right, the true importance of which is not whether the child's wishes will be decisive, but whether he or she will be treated with respect. What is required by this section is that when a decision is taken, *in casu* the divorce of his or her parents, that he or she will be given the opportunity to participate and that his or her views so expressed be given due consideration.

The Bill is silent on the meaning to be ascribed to participation. By definition it would allow for the voice of the child to be heard directly without an intermediary in that it would include rules that provide for children to be consulted about their opinion. In this sense 'participation' provides for children to interact with the proceedings and to demand certain legal remedies. However, it may also encompass the concept of representation of the child. Representation includes those rules that allow children to instruct legal representatives, to seek legal advice or to have other kinds of adult representation.