Suggestions for a divorce process truly in the best interests of children (2)*

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5 PROPOSED NEW COURT PROCESS

5 1 Introduction

No amount of pre-court processes will ever do away with the need for the court process.[188] Although it is proposed that agreements reached in mediation or collaborative divorce proceedings and subsequently endorsed by the office of the family advocate should automatically be made orders of the court without judicial oversight,[189] difficult and dysfunctional families will continue to need the attention and protection of our courts. However, as was demonstrated above,[190] the current court process does not comply with the peremptory provisions of section 6(2)(a) of the Children's Act[191] – it does not protect, promote and fulfil children's rights, the best interests of the child and the principles set for child-related proceedings. Consequently, a new process specific to family law matters, especially those where children are involved, needs to be established.[192] The new process must be conducive to conciliation and problem-solving and less confrontational – it specifically needs to address the heightened risk factors and the other problems inherent in the current court process and incorporate the voice of the child in a child-friendly manner. In this regard, there have been calls for a significantly simplified, briefer, and low-cost process for making decisions in difficult and high-conflict family cases which cannot be resolved through pre-court processes.[193]

In some countries less adversarial models have been piloted, while in others statutory proceedings specific to family law matters have been adopted. As an example of the first category, reference can be made to New Zealand's Parenting Hearings Programme, which is based on an inquisitorial rather than an adversarial

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* See 2018 *THRHR* 48 for Part 1.

188 Kourlis *et al* 2013 *Family Court R* 368.

189 As in the case of certain jurisdictions in Canada. See *idem* 369 371.

190 See 3 above.

191 See 2 above.

192 Botha (2015) 8; Moyo 2015 *SAJHR* 178.

193 In *Cunningham v Pretorius* unreported case no 31187/2008 (T) (21 Aug 2008) para 8 Murphy J advocates for a new framework "arising from the reformulation of the entire body of law affecting children", which in the judge's view "obligates courts adjudicating disputes concerning children to engage in a value based method of appropriate dispute resolution and to order the proceedings before them in a manner minimizing adversarial litigation and delays". See also Parliament of the Commonwealth of Australia para 4.121.

model.[194] The process embraces the legal and the psychological complexities of family separation, reduces delays and enables parents to speak directly to the presiding judge.[195] An example of the second category is Germany, where the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction 2008 came into force on 1 September 2009. Book 2 deals with proceedings in family matters. Under the general provisions in Part 1 of Book 2, section 113 provides that various sections of the Code on Civil Procedure shall not be applicable to marital matters and family disputes.[196] Terms such as "plaintiff", "defendant" and "party" are respectively replaced with more neutral terms such as "applicant", "respondent" and "participant".[197] Part 2 of Book 2 deals with proceedings in marital matters, divorce matters and ancillary proceedings, and Part 3 covers proceedings in parent and child matters, including custody (care) and contact.[198] In terms of section 156, entitled "Facilitation of Agreement", the court is obliged in parent and child matters concerning *inter alia* parental custody (care) and rights of contact upon divorce or separation to facilitate agreement of the participants at every phase of the proceedings, when this is not contrary to the best interests of the child. The court may also order that the parents individually or jointly participate in a free informational interview concerning mediation or other options for out-of-court conflict resolution with a person or agency named by the court. A similar provision also applies to spouses in other family matters.[199]

Of particular importance in both categories is Australia, which first piloted the Children's Cases Programme (CCP) in two registries[200] and then adopted the less adversarial trial into legislation on 1 July 2006 with the intention of reducing adversarialism and increasing the child focus in child-related matters.[201] As I believe that this innovative reform of the trial process might be a viable option for South Africa, it will be discussed in more detail next.

5 2 Less adversarial proceedings in Australia

5 2 1 Introduction

The less adversarial trial (LAT) is a supportive court process for divorcing or separating parents where the object is to maximise early and effective dispute resolution, without full adversarial armoury.[202] In effect, it adopts inquisitorial techniques for adjudicating parenting disputes.[203] For the judicial officer presiding

194 Goldson 5.
195 *Ibid*.
196 This includes aspects such as the prerequisites for modification of the lawsuit; the determination of the form of procedure; the effect of admissions before a court; acknowledgement; and the consequences of ignoring or refusing to provide explanations concerning the authenticity of documents.
197 S 113(5).
198 S 151.
199 S 135.
200 Ie Sydney and Parramatta.
201 Kaspiew *et al* 19; Bryant in Family Court of Australia ii; McIntosh *et al* 2008 *Family Court R* 125, 127.
202 McIntosh and Long "The Child Responsive Program, operating within the Less Adversarial Trial: A follow up study of parent and child outcomes" (2007) 4 available at https://goo.gl/mHHLJi (accessed on 3 May 2017).
203 McIntosh *et al* 2008 *Family Court R* 125; O'Ryan "Background to the less adversarial trial" in Family Court of Australia *Less adversarial trial handbook* (2009) vi available at

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over a matter this entails far greater control over and active verbal participation in the process to ensure a focused consideration by all of the children's needs.[204] For the parents' legal representatives it entails a new and less prominent role – they need to guide their clients to focus on their children's future rather than on past grievances and to disengage from damaging adversarial processes.[205] For the parents the LAT process means having the courage to reflect honestly on their relationships with their children and their former partner and to tell the judge what the difficulties in those relationships are.[206] Very importantly, the LAT process also involves facilitation and direct consultation by a mediator, known as the family consultant, who gives children a voice in the process and helps their parents and the court to understand the issues for the children throughout the process.[207] The LAT is therefore very much a collaborative process.[208]

5 2 2 Legislative framework

The legislative framework for the LAT process can be found in Division 12A, entitled "Principles for conducting child-related proceedings", of Part VII (dealing with children) in the Family Law Act 1975 and chapter 16 of the Family Law Rules 2004. Section 69ZN(3) to (7) of the Family Law Act sets out the following five core principles of the LAT:

(a) Principle 1 provides that the court is to consider the needs of the child concerned and the impact that the proceedings may have on the child in determining the conduct of the proceedings.

(b) Principle 2 states that the court is to actively direct, control and manage the conduct of the proceedings.

(c) Principle 3 provides that the proceedings are to be conducted in a way that will safeguard the child concerned against abuse, neglect or family violence and also the parties to the proceedings against family violence.

(d) In terms of Principle 4 the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

(e) Principle 5 states that the proceedings are to be conducted without undue delay and with as little formality, legal technicality and form as possible.

Mechanisms available to presiding officers to minimise the formality and legal technicality of proceedings in terms of Principle 5 may include modifying the layout of the court so that parties can sit next to their legal representatives and other support persons; doing away with the formal and intimidating clothing of presiding officers and legal representatives; speaking directly to parties using accessible language; giving the parties an opportunity to speak directly to the

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https://goo.gl/6sZYVV (accessed on 20 March 2017). The process is modelled on the inquisitorial nature of child proceedings in Germany and France.

204 Bryant in Family Court of Australia ii; O'Ryan in Family Court of Australia vii; McIntosh in Family Court of Australia 7.

205 Bryant in Family Court of Australia ii; O'Ryan in Family Court of Australia vii; McIntosh in Family Court of Australia 5; Parliament of the Commonwealth of Australia para 4.40.

206 Bryant in Family Court of Australia ii.

207 McIntosh in Family Court of Australia 5 7.

208 Bryant in Family Court of Australia ii.

judge; explaining proceedings and legal terminology and expressions in readily-understandable terms; and creating separate waiting rooms for children in the unlikely event that they need to appear before the presiding officer.[209]

The overriding control of the presiding officer is advanced in section 69ZQ(1) where the general duties of the court to give effect to the core principles of the LAT process are set out. These include:

(a) asking each party whether he or she considers that he or she or the child concerned has been or is at risk of being subjected to family violence;

(b) deciding which of the issues in the proceedings requires full investigation and hearing and which may be disposed of summarily;[210]

(c) deciding the order in which the issues are to be decided;

(d) giving directions or making orders about the timing of steps that are to be taken in the proceedings;

(e) in deciding whether a particular step is to be taken, considering whether the likely benefits of taking the step justify the cost;

(f) making appropriate use of technology;

(g) if the court considers it appropriate, encouraging the parties to make use of mediation or family counselling;

(h) dealing with as many aspects of the matter as it can on a single occasion; and

(i) dealing with the matter, where appropriate, without requiring the parties' physical attendance at court. [211]

It further transpires from section 69ZR of the Family Law Act that the presiding officer is able to make a finding of fact, determine a matter and make an order at any time during the proceedings. In stark contrast to the adversarial legal process which entails a single hearing,[212] the LAT involves a discontinuous trial and comprises a succession of intermittent events over the course of which facts and issues are defined and determinations are made.[213] In terms of rule 16.08(2) of the Family Court Rules the same judge must preside over the entire trial.

Section 69ZT(1)(a) to (c) of the Family Law Act deals with evidence. It provides that the following rules of evidence do not apply to child-related proceedings:

(a) general rules about giving evidence, examination in chief, re-examination and cross-examination;

(b) rules which deal with documents and other evidence; and

(c) rules which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character.

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209 Moyo 2015 *SAJHR* 178; Family Court of Australia 16 18 44.

210 This is achieved through the use of questionnaires, a children and parents' issues assessment by the family consultant (mediator) and by speaking directly with all parties: Family Court of Australia 17.

211 There is therefore a greater opportunity to conduct proceedings via alternative mechanisms such as telephone link, closed-circuit television or in chambers: Family Court of Australia 17.

212 See 3 3 above.

213 Family Court of Australia 16–18.

The court may, however, decide to apply one or more of the above rules of evidence if the court is satisfied that the circumstances are exceptional and the court has taken into account aspects such as the importance or probative value of the evidence and the nature of the proceedings.[214]

Subsection 69ZX(1)(a) to (e) set out the court's general duties and powers relating to evidence and provides that the presiding officer may

(a) give directions or make orders about the matters in relation to which the parties are to present evidence;

(b) give directions or make orders about who is to give evidence;

(c) give directions or make orders about how evidence is to be given;

(d) if the court considers that expert evidence is required, give directions or make orders about the matters in relation to which an expert is to provide evidence, the number of experts and how the evidence is to be given; and

(e) request evidence or the production of documents or other things from parties, witnesses and experts on matter relevant to the proceedings.

In terms of section 69ZX(2), the presiding officer may further give directions or make orders

(a) about the use and length of written submissions;

(b) limiting the time for oral argument and the giving of evidence;

(c) that particular evidence is to be given orally or by affidavit;

(d) that evidence in relation to a particular matter or of a particular kind not be presented by a party;

(e) limiting, or not allowing, cross-examination of a particular witness; or

(f) limiting the number of witnesses who are to give evidence in the proceedings.[215]

It is clear that the presiding officer will consider what approach is best suited to serving the best interests of the child and to maintaining a fair process.[216]

Very importantly, section 69ZS of the Family Law Act makes provision for the court to designate a family consultant at any time during the proceedings. The family consultant has the functions described in section 11A. These include assisting and advising the court and the people involved in the proceedings, helping people to resolve disputes and facilitating referral to other organisations for ongoing support.[217] In practice, the family consultants are mediators or social science specialists.[218] In terms of section 11F the court may order parties to attend or arrange for a child to attend appointments with a family consultant.

Simultaneously with the introduction of the LAT, the Child Responsive Program (CRP) was instituted in Australia as a new entrance to court for all

214 S 69ZT(3).

215 The judge will therefore prevent parties from calling evidence which he or she considers to be unhelpful.

216 Family Court of Australia 40.

217 These may include anger management courses, external counselling and private mediation.

218 Family Court of Australia 22; McIntosh *et al* 2008 *Family Court R* 130; McIntosh and Long 5.

families[219] – all parents are required to participate in the CRP as their first contact with the court.[220] In terms of the CRP, each family is assigned a family consultant who uses child-inclusive mediation and remains a constant presence for that family throughout the process.[221] After the viewing of a parent education DVD, each parent has an individual session with the family consultant to discuss the history and current concerns related to the dispute and the children's well-being and future care.[222] For purposes of preparing a child assessment for the parties, their legal representatives and the court, the family consultant explores each parent's personal views and their respective needs, intent, maturity and capacity to focus on productive dispute resolution.[223] The family consultant also interviews the children concerned during a private consultation early in the pre-court assessment,[224] but only if the children have not already been interviewed in the course of the pre-court processes.[225] During the brief assessment the family consultant explores the psychological adjustment of each child, the children's attachment relationships and their feelings about different care options.[226]

The aim of the CRP is described as assisting families to resolve their disputes without resorting to the LAT, and where agreement cannot be reached, assisting judicial decision making by complementing the work of the LAT.[227] Once the LAT commences, the family consultant continues to accompany the matter, providing informal and expert evidence as needed, and following through with more detailed family reports if requested by the presiding officer.[228] In terms of section 69ZV(2) of the Family Law Act any meetings with the family consultant are admissible as evidence. It therefore appears that family consultants provide a mediation input and a social science perspective to the LAT.[229]

The Family Law Rules further make provision for the various stages of the LAT process. The first stage consists of the trial management hearing at which

(a) issues in dispute between the parties are discussed and identified;

(b) interlocutory issues or interim applications are heard and decided (or appropriate arrangements for the decision of these applications are made);

(c) the available evidence, including the child assessment by the appointed family consultant, is heard; and

(d) a plan for the remainder of the trial is drawn up.[230]

The next stage is the continuation of the trial which includes

(a) further days before the judge with the purpose of further identifying the issues for which evidence is required;

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219 McIntosh *et al* 2008 *Family Court R* 127; McIntosh and Long 4–5.
220 McIntosh *et al* 2008 *Family Court R* 133.
221 McIntosh *et al* 2008 *Family Court R* 127, 133; McIntosh and Long 5.
222 McIntosh and Long 5.
223 *Ibid*.
224 McIntosh and Long 5–6.
225 See 4 3 2 and 4 4 2 above in relation to child-inclusive mediation and collaborative divorce.
226 McIntosh and Long 6.
227 McIntosh *et al* 2008 *Family Court R* 127, 133; McIntosh and Long 5.
228 McIntosh and Long 6.
229 Family Court of Australia 22.
230 Rule 16.08(1). It therefore appears that the child's voice is represented much earlier in the process in the LAT.

(b) making procedural orders about the filing and exchange of all remaining evidence; and

(c) allocating dates for any further appearances before the judge and the trial.[231]

The final stage is the trial, which takes place on the day or dates allocated and at which the judge will hear the evidence and receive submissions.[232] The judge will give the parents an equal opportunity to present their proposals for the children and focus them on identifying solutions that are in the best interests of the child in the immediate future and in the longer term.[233]

5 2 3 Advantages of the process

From various qualitative research studies of the LAT and CRP, as well as the CCP pilot, it is apparent that the process ameliorates most of the risk factors of divorce for children, makes provision for children to participate and their views to be considered in the process and addresses various of the problems experienced with the adversarial court process.

In the first place it appears that the less formal setting – in which parties can speak directly to the judge and feel that they are being heard, are kept informed and have ownership in the outcome of their hearing – has reduced anxiety and lessened conflict, distrust and hostility between parents.[234] Parents involved in the LAT were significantly more likely to report lower levels of verbal conflict, fewer angry disagreements, less frequent derogation by or of the other parent and overall better management of their conflict.[235] It was reported that the whole process militates against attack and counterattack processes by parents and their legal representatives.[236] There was also greater awareness among parents of the impact of their conflict on their children and the parents reported significant gains in their ability to protect their children from their conflict.[237] In addition, the fact that parents reached effective and satisfactory agreements increased the chances of orders being adhered to and might lessen conflict between the parents in future. The primary risk factor of divorce for children, namely, ongoing conflict between their parents, therefore is addressed thoroughly in the LAT and CRP process.

Secondly, it appears that co-parenting relationships suffer less in the process.[238] Parents are more willing to try to cooperate with the other parent after hearing from the family consultant about their children's experience of their conflict.[239] Furthermore, the CRP intervention promotes cooperative parenting in the

231 Rule 16.09.
232 Rule 16.10.
233 Family Court of Australia 32.
234 McIntosh in Family Court of Australia 3; Family Court of Australia 44; Kaspiew *et al* 19; McIntosh and Long 6.
235 McIntosh in Family Court of Australia 3; McIntosh *et al* 2008 *Family Court R* 130–131, 133; McIntosh and Long 22.
236 McIntosh *et al* 2008 *Family Court R* 132.
237 McIntosh in Family Court of Australia 3; McIntosh *et al* 2008 *Family Court R* 133−134; McIntosh and Long 23.
238 McIntosh in Family Court of Australia 3; McIntosh *et al* 2008 *Family Court R* 130.
239 McIntosh in Family Court of Australia 6; McIntosh *et al* 2008 *Family Court R* 133; McIntosh and Long 6.

years that lie ahead.[240] The process therefore can help to reinforce good inter-parental relationships and good parenting[241] and counter the second risk factor of divorce for children.

Similarly, the LAT and CRP process also addresses the third risk factor of divorce for children and it appears that parents' relationship with their children suffers less in this process – in fact, most parents attributed improvements in their relationship with their children to the process.[242] Both parents and children involved in the LAT group were significantly more satisfied with care and contact arrangements than parents and children from the adversarial trial group.[243] Contact visits also seemed to have been less of a problem between parents in the LAT group.[244] Very importantly, a significant and dramatic increase overall in the amount of time that children spent with their father was noted.[245] In addition, the LAT process impacted significantly on parents' perceptions of their relationships with their children, one of the core factors in the long-term well-being of children in high-conflict divorce.[246]

As regards the child's voice, it is clear that the LAT in combination with the CRP encourages a more active focus on children's needs and views and facilitates a stronger voice for children in proceedings that affect them.[247] Specifically, the early hearing of the child's voice through the family consultant has the advantage of allowing the presiding officer to use information about the child's wishes to help define the issues and confine the evidence to such issues with a focus on the best interests of the child rather than on parental grievances.[248] The impact of the nexus between the presiding officer and the family consultant as mediator is also very valuable in effecting resolution between the parties.[249] Parents found the role of the family consultant to be supportive and helpful and saw the opportunity for their children to be seen and heard as one of the most valuble aspects of the time they spent in court.[250] Legal representatives also valued the social science input of family consultants.[251] In the LAT and CRP process there is also clarity on how the views of children should be brought into the process, namely, through the family consultant or mediator.

Lastly, as the rules of evidence generally do not find application in the LAT, the risk of the truth or the best interests of the child being obscured by such rules is neutralised. In addition, matters are dealt with promptly due to the discontinuous trial and the proactive case management of matters by the presiding officer. Parents involved in the LAT group felt that they had been spared lengthy court processes and reported greater levels of emotional well-being in their children

240 McIntosh *et al* 2008 *Family Court R* 127.
241 McIntosh and Long 23.
242 McIntosh in Family Court of Australia 4; McIntosh *et al* 2008 *Family Court R* 133; McIntosh and Long 22.
243 McIntosh in Family Court of Australia 2; McIntosh *et al* 2008 *Family Court R* 130; McIntosh and Long 6.
244 McIntosh *et al* 2008 *Family Court R* 131.
245 McIntosh *et al* 2008 *Family Court R* 134; McIntosh and Long 22.
246 McIntosh *et al* 2008 *Family Court R* 134; McIntosh and Long 23.
247 McIntosh *et al* 2008 *Family Court R* 125.
248 Family Court of Australia 23; McIntosh *et al* 2008 *Family Court R* 127.
249 Goldson 17.
250 McIntosh *et al* 2008 *Family Court R* 133; McIntosh and Long 6.
251 Kaspiew *et al* 20.

post-court than parents in the adversarial trial group.[252] It can therefore be concluded that the LAT helps to give children a central place in the resolution of family disputes, contains harm and supports children's adjustment upon divorce.[253]

5 3 Conclusion

When considering the discussion of the negative effects of our current court process,[254] there is no escaping the fact that we need to significantly change our approach to the adjudication of children's cases and set about establishing a new model that merges less adversarial procedures from other legal systems into our court process. As it is clear that specifically the LAT process in Australia creates far better outcomes for parents and children than the adversarial legal process,[255] we should pay serious attention to this model. Pivotal to the introduction of a less adversarial model of this kind would be the training of judicial officers in the psychological impact of high-conflict divorces on children, child development and dispute resolution.[256] In lieu of a family court, another suggestion would be to allow only judicial officers who have specialised training in and the desire to handle family law matters to rotate into such matters.[257] Lastly, it should be noted that it is beyond the scope of a less adversarial court process to make serious inroads into very-damaged parental relationships, and referral to post-court therapeutic and support services, such as parenting coordination, will be necessary for many parents and families.

6 PROPOSED POST-COURT PROCESSES

6 1 Introduction

Ongoing parental conflict after divorce significantly adds to the existing developmental risk for children of divorce.[258] Such conflict might be aggravated by various factors which include a postponement of patrimonial claims and the actual division of assets between parents to a date after the divorce order. It often happens that the determination and finalisation of accrual claims[259] and the division of the joint estate are postponed and then determined and finalised by a liquidator or receiver.[260] These post-court financial processes are often fraught with

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252 McIntosh in Family Court of Australia 4. They reported that their children fared better on four key symptoms, ie (1) fewer worries; (2) less tearful, unhappy or downhearted; (3) less fearful; and (4) less anxious.

253 McIntosh in Family Court of Australia 2; McIntosh *et al* 2008 *Family Court R* 129 134.

254 See 3 above.

255 McIntosh and Long 4.

256 Jolivet 2011 *American J of Family L* 181; Kourlis *et al* 2013 *Family Court R* 368; Parliament of the Commonwealth of Australia para 4.32.

257 Jolivet 2011 *American J of Family L* 181; Kourlis *et al* 2013 *Family Court R* 368.

258 McIntosh in Family Court of Australia 1.

259 Especially after the decision in *AB v JB* 2016 5 SA 211 (SCA) paras 17–21 where the Supreme Court of Appeal held that the date for the determination of the accrual in parties' estates is the date of the divorce and not *litis contestatio* (as was held in cases like *MB v NB* 2010 3 SA 220 (GSJ); *MB v DB* 2013 6 SA 86 (KZD); *KS v MS* 2016 1 SA 64 (KZD)).

260 De Jong "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" 2012 *Stell LR* 228.

conflict as and when accusations are made that not all assets have been discovered or that assets have been diminished or squandered.[261] Another consequence of such postponement is that parents might get divorced without having any idea what their financial position will be after the divorce,[262] which uncertainty may cause further anxiety and acrimony and inhibit the parents' parenting ability. The postponement of accrual claims and the division of the joint estate might well be detrimental to the children in that it would be very difficult for the court to make a ruling on issues such as primary residence and children's maintenance if the court has no idea what the financial position of the parents will be after the divorce.[263] It should be borne in mind that accrual claims and the division of the joint estate are intrinsically linked to other issues bound up in the divorce decision.[264] Therefore, if all patrimonial claims are not dealt with before or upon divorce, it might be impossible for the court to consider all the relevant factors that must be taken into account when a child's best interests are at stake. Another consideration is that the risk of a decline in the child's standard of living is exacerbated by such postponement. Although a discussion of possible ways to rectify this situation is beyond the scope of this article, it would suffice to say that until such time as legislation requires the determination and finalisation of accrual claims and the division of the joint estate before or upon divorce, liquidators or receivers should be conscious of the need to follow a process that is conducive to conciliation and problem-solving and to ensure that the best interests of children are taken into account in the process. If the current undesirable position continues, these post-divorce, out-of-court processes need to be properly regulated.

Another factor which might aggravate the ongoing conflict between parents after divorce is the specific focus of the Children's Act on the importance of both parents' continued involvement in their children's day-to-day lives.[265] For example, section 30(2) read with section 31(2)(a) of the Act imposes a duty on the co-holders of parental responsibilities and rights to consult each other before making major decisions involving their children. In terms of section 33(1) and (2) these co-parents are further expected to agree on and enter into a parenting plan for the purpose of regulating their respective responsibilities and rights in respect of their children.[266] However, even before the Children's Act came into operation, it was foreseen that section 30(2) would probably lead to many disputes between co-parents when one parent considered a decision in respect of a child to be relatively unimportant, and one which could be made without consulting the

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261 De Jong 2012 *Stell LR* 232–233.

262 *Idem* 231–232.

263 *Idem* 229.

264 See McEwen *et al* "Bring in the lawyers: Challenging the dominant approaches to ensuring fairness in divorce" 1994-1995 *Minnesota LR* 1340−1341; Burman *et al* "The new family court in action: An initial assessment" 2000 *SALJ* 123; De Jong and Kruger "The postponement and separation of children's issues upon divorce – Quick relief or a glaring mistake? K v K 2008 5 SA 431 (W)" 2010 *THRHR* 155; De Jong "The cut-off date for determining accrual claims – A cruel decision and a better decision" 2011 *THRHR* 477.

265 See *PD v MD* 2013 1 SA 366 (ECP) para 12 where Goosen J states that "[a] reading of the Act indicates that it seeks to accord to parents equal responsibility for the care and wellbeing of their children, and that it seeks to ensure that, as far as may be reasonably possible, parental responsibilities and rights are exercised jointly, in the best interests of children".

266 In terms of s 33(3).

other co-parent, and the other sees it as a major decision about which he or she should have been consulted.[267] Furthermore, although parenting plans are supposed to specify in detail the terms governing post-divorce parenting arrangements, these plans are often not sufficiently specific, thus resulting in frequent disputes between co-parents.[268] It is also a fact that no parenting plan, no matter how detailed it may be, can anticipate every situation that will arise and that there is a need for fluidity and flexibility in parenting arrangements.[269] Parents are therefore often in disagreement about parenting arrangements and decisions that have to be taken after divorce. However, because of time constraints on our overcrowded courts and financial implications for the parents, they cannot take every parenting dispute after divorce back to the court.[270] Consequently, a new alternative dispute resolution process, namely, parenting coordination, has been developed to assist them.[271] The manner in which parenting coordination should be applied to ensure that children's best interests are taken into account and their input is obtained is discussed next.

6 2 Parenting coordination

6 2 1 Introduction

Parenting coordination can be defined as a child-centred process in which a mental health or legal professional with mediation training and experience assists high-conflict co-parents to create or implement parenting plans, comply with court orders and resolve post-separation parenting disputes without delay in a non-adversarial, court-sanctioned, private forum.[272] The aims are to minimise the impact of parental conflict on children, to improve the quality of parenting in the period following divorce and separation, to protect and sustain parent-child relationships and to avoid further court proceedings in relation to parenting disputes.[273] In terms of the process, a parenting coordinator will first attempt to facilitate resolution of the parenting disputes by agreement of the parties, but if this attempt fails, the parenting coordinator has the power to make directives regarding the disputes which are binding on the parties until a competent court directs otherwise or the parties jointly agree otherwise.[274] It is apparent that a parenting

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267 Heaton in Davel and Skelton (2013) 3–30.

268 Montiel "Is parenting authority a usurpation of judicial authority? Harmonizing authority for, benefits of, and limitations on this legal-psychological hybrid" 2011 *Tennessee J of L and Policy* 395.

269 Kourlis *et al* 2013 *Family Court R* 360.

270 *Ibid*.

271 Martalas "Child-participation in post-divorce or -separation dispute resolution" in Liefaard and Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (2016) 895; De Jong "Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa" 2015 *PER* 149.

272 De Jong 2015 *PER* 152; De Jong in Heaton (2014) 615.

273 Martalas in Liefaard and Sloth-Nielsen (2016) 898; De Jong in Heaton (2014) 615; Henry *et al* "Parenting coordination and court relitigation: A case study" 2009 *Family Court R* 683, 684; Kirkland and Sullivan "Parenting coordination (PC) practice: A survey of experienced professionals" 2008 *Family Court R* 628; Hastings "Dispute resolution options in divorce and custody cases" 2005 *New Hampshire Bar J* 57.

274 SALRC Issue Paper 31, Project 100D (2015) para 3.13.1; AFCC Task Force on Parenting Coordination "Guidelines for parenting coordination" 2006 *Family Court R* 171.

coordinator's role includes the multiple functions of assessment, parent education, coaching, facilitation, intensive case management, mediation and decision-making.[275] Parenting coordinators therefore have to assess the situation; educate the parents regarding child development, family dynamics and the harm their ongoing conflict is doing to their children; facilitate communication between the parties and with other persons involved with their children; monitor and oversee the case *inter alia* by referring the parties to other professionals; mediate the disputes; and, as a last resort, issue directives where the parties cannot reach an agreement.[276]

6 2 2 Importance of obtaining the voice of the child in parenting coordination

Just as children would like to have a say in the parenting plans and living arrangements developed by their parents during pre-court processes or by the court during the court process, they also expressed the wish to be able to talk more freely about how the arrangements are working for them, and to make suggestions for changes in the post-court process when they considered this necessary.[277] Birnbaum pertinently mentions parenting coordination as a mechanism for encouraging the voice of the child in Canada,[278] but indicates that child participation in the process varies depending on the issues presented and the level of skill of the parenting coordinator.[279] Martalas who explored facilitation, as parenting coordination is currently known in the Western Cape in South Africa,[280] also indicates that a recent survey conducted among facilitators has revealed that while 100 per cent of them had facilitated disputes around contact, only 25 per cent indicated that they had spoken to children directly.[281] If parenting coordinators are trained and have the necessary experience to do so, they are permitted to have direct contact with the child. Otherwise, they can ascertain the voice of the child through the child's teachers, therapist or other relevant persons, such as the child's parents. It is therefore possible that the facilitators in the survey conducted by Martalas had relied solely on the opposing views of the parents in order to resolve parenting disputes.[282] This is unacceptable, however, and it is pointed out that direct consultation with a child, coupled with obtaining collateral information from other

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275 Hayes "'More of a street cop than a detective': An analysis of the roles and functions of parenting coordinators in North Carolina" 2010 *Family Court R* 698−699; Henry *et al* 2009 *Family Court R* 683; Coates *et al* "Parenting coordination for high conflict families" in Singer and Murphy (eds) *Resolving family conflicts* (2008) 286; Hastings 2005 *New Hampshire Bar J* 57.

276 Martalas in Liefaard and Sloth-Nielsen (2016) 898; Fieldstone *et al* "Training, skills, and practices of parenting coordinators: Florida statewide study" 2011 *Family Court R* 809; Hayes 2010 *Family Court R* 699, 702; Coates *et al* in Singer and Murphy (2008) 289; Kirkland and Sullivan 2008 *Family Court R* 628.

277 Kelly and Kisthardt 2009 *J of the American Academy of Matrimonial Lawyers* 323.

278 Dept of Justice, Canada, Research Report by Birnbaum 3 49 61.

279 *Idem* 21.

280 See *Schneider v Aspeling* [2010] 3 All SA 332 (WCC); *M v V (Born N)* [2011] JOL 27045 (WCC) (also reported as *MM v AV* [2011] ZAWCHC 425 (16 Nov 2011)); *CM v NG* 2012 4 SA 452 (WCC). In Gauteng and the Eastern Cape parenting coordination is also known as "case management": see *H v H* (SGJ) unreported case no 06274/2012 (10 Sept 2012); *Central Authority v TK* 2015 5 SA 408 (GPJ); *LM v Goldstein* 2016 1 SA 465 (GPJ) and *SW v SW* 2015 6 SA 300 (ECP).

281 Martalas in Liefaard and Sloth-Nielsen (2016) 899.

282 *Ibid*.

people such as teachers, therapists and parents, provides the best opportunity to hear the child's views accurately – unencumbered by parental alienation, adult or peer pressure, fear and/or misplaced loyalty to one parent.[283] It is therefore of cardinal importance that only parenting coordinators who have undergone specific training in the parenting coordination process and possess the necessary background knowledge and experience should be appointed in this role. In this regard, the Guidelines on the Practice of Parenting Coordination in South Africa which were recently drafted by a task team of the National Accreditation Board for Family Mediators (NABFAM)[284] provide that a parenting coordinator must have a mental health or legal professional qualification,[285] be an accredited family mediator,[286] have specific training in the parenting coordination process, have seven years' professional experience in family dispute resolution and belong to a professional body.[287]

As it has been shown that children are more likely to talk to a person who is noticeably involved with their parents,[288] parenting coordinators are particularly well placed to interview children – by the time they interview the child they already know the parents, and are familiar with the dynamics of the parents' interpersonal interactions and the background to the dispute.[289] Information from the interview with the child should thereupon be made available to the parents so that it can be discussed in the mediation process and also inform any agreements that are negotiated. If no agreement can be reached, the parenting coordinator will be able to make a directive on the dispute "and the information gleaned from the child helps the facilitator [the parenting coordinator] to make a decision that is in the best interests of the child".[290] In this regard Martalas illustrates how obtaining the voice of, or observing the child in three case studies assisted the parenting coordinator in surprising and unexpected ways to successfully mediate post-divorce or post-separation disputes between the parents, or alternatively issue a directive that was in the best interests of the child.[291]

6 2 3 Advantages of the process

One of the greatest advantages of parenting coordination is that it manages and/or reduces parental conflict to which children would otherwise have been exposed.[292] Although it is difficult to restrict conflict which has become

283 *Ibid*; Moyo 2015 *SAJHR* 175; Marumoagae 2012 *De Rebus* 38.

284 The guidelines provide detailed guidance for parenting coordinators concerning minimum qualifications, ethical obligations and conduct, practice and procedure, and children's participation in the process. They are available at http://bit.ly/2wLwTsR (accessed on 15 June 2017).

285 At NQF level 7 or higher.

286 By complying with the accreditation requirements set by NABFAM.

287 Guidelines 1.1–1.2.

288 Goldson 7 cited in fn 130 above.

289 Martalas in Liefaard and Sloth-Nielsen (2016) 905.

290 *Ibid*.

291 Martalas in Liefaard and Sloth-Nielsen (2016) 901–905.

292 De Jong 2015 *PER* 153−154; Carter and Lally "Charting the challenging path toward establishment of parenting coordination's efficacy" in Higuchi and Lally (eds) *Parenting coordination in postseparation disputes: A comprehensive guide for practitioners* (2014) 249; Sullivan "Parenting coordination: Coming of age?" 2013 *Family Court R* 59; Fieldstone *et al* "Perspectives on parenting coordination: Views of parenting coordinators, attorneys and judiciary members" 2012 *Family Court R* 442.

entrenched in the post-court stage, the parenting coordination process endeavours to move parents into parallel co-parenting, where engagement between the parents is minimised and the parenting coordinator acts as a functional link between them in respect to their parenting.[293] As conflict is dependent on engagement, reducing parents' engagement with each other simultaneously lowers the opportunity for conflict.[294] It further appears that over time the different phases of the parenting coordination process equip high-conflict parents with integrated tools, skills and insight for resolving their parenting (and even other) disputes more constructively.[295] The findings of research which explored the degree to which the number of court applications changed one year after parenting coordination was implemented with high-conflict parents indicate that these parents do in fact file significantly fewer court applications when utilising the services of a parenting coordinator.[296] It can therefore be said that the parenting coordination process educates the parents on ways to avoid or resolve future conflicts on their own.[297] Furthermore, parents who participated in parenting coordination reported satisfaction with the process and less conflict with the other parent.[298]

In the long run parenting coordination trains parents to function better and leads to an improvement in their communication with each other.[299] As indicated above, one of the aims of the process is to protect and sustain safe, healthy and meaningful parent-child relationships. In addition, it gives parents a more timely and accessible and less costly alternative means of dispute resolution than returning to court with their parenting disputes or developmentally appropriate changes in parenting schedules after divorce.[300]

As parenting coordination continue to address many of the risk factors of divorce for children, it may improve children's adjustment in the post-divorce process. Although guidelines for the practice of parenting coordination in South Africa have been developed, South Africa needs clear legislation which fully integrates this process into the official family-law system and properly regulates the post-divorce process.

7 CONCLUSION

To minimise the chances of children being put at risk upon or after divorce, the family law system should edge towards a different model – one which is conducive to conciliation and problem-solving and deals with matters promptly. It should be responsive to the realities of divorcing or separating families and the goals of the system should be to support families in functioning more effectively during the difficult transition period and keep both parents safely and positively involved in their children's lives to the fullest extent possible.[301] In order to do so

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293 De Jong 2015 *PER* 153−154; Sullivan 2013 *Family Court R* 59.
294 Sullivan 2013 *Family Court R* 59.
295 Mandarino *et al* "Co-parenting in a highly conflicted separation/divorce: Learning about parents and their experiences of parenting coordination, legal, and mental health interventions" 2016 *Family Court R* 570; Fieldstone *et al* 2011 *Family Court R* 813.
296 Henry *et al* 2009 *Family Court R* 689.
297 Montiel 2011 *Tennessee J of L and Policy* 373, 401.
298 Kirkland and Sullivan 2008 *Family Court R* 635.
299 Carter and Lally in Higuchi and Lally (2014) 249; Sullivan 2013 *Family Court R* 61.
300 De Jong 2015 *PER* 153−154; Montiel 2011 *Tennessee J of L and Policy* 372 400–401.
301 Kourlis *et al* 2013 *Family Court R* 359 362.

the family law system should respond by building mandatory parent education and child-informed mediation or collaborative law into the pre-court process, by making the court process less adversarial and more inquisitorial and by recognising conciliatory post-court processes such as parenting coordination and the finalisation of patrimonial claims as part of the system. There should also be recognition that helping families through the transitions of divorce requires the skills of multidisciplinary professionals, "as the transitions do not present simply a legal problem, an emotional problem, a parenting problem, or a financial problem, but a combination which varies from family to family".[302] Rather than conducting interventions informed by opposing philosophies, there should be support for pre-court, court and post-court processes in which both legal and social science input are focused primarily on the best interests of the child and on assessing and responding to the dynamics of family relationships.[303] A vital element in such a response is obtaining children's input in an appropriate manner in all the various processes to ensure that all arrangements made are appropriate to children's best interests and do not put their short or long-term well-being at risk.[304] As pointed out above, the pre-court, court and post-court processes discussed in this article have the potential to accomplish all these goals.

There should, however, be continuity between the pre-court processes, the court process and the post-court processes and families who move from one part of the family law system to another should not be required to start all over again.[305] Neither should children be subjected to repetitive interviews[306] – nonetheless, they must be seen and heard and be the focus of all negotiations and decision-making in the pre-court, court and post-court processes. Understanding the parameters of developmental psychology and being able to engage with children in such a way as to obtain their true voices, unencumbered by parental alienation or fear, is a skill that requires extensive training and relevant experience[307] and all those who interview children in the various processes, including the mediator, the child specialist, the presiding officer and the parenting coordinator, should comply with these requirements.

Ensuring that the best interests of children are the focus in all pre-court, court and post-court processes will represent a sound investment in family stability and productivity despite the occurrence of divorce and conform to the relevant provisions of the Constitution and the Children's Act.

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302 *Idem* 359.
303 Moloney 2013 *Family Court R* 220.
304 Kaspiew *et al* 26.
305 *Ibid*.
306 Yasenik and Graham 2016 *Family Court R* 189.
307 Martalas in Liefaard and Sloth-Nielsen (2016) 899.