Comparing parenting plans and child custody procedures in Namibia to serve in the best interests of the child

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Promoter: Prof. P. Rankin

November 2016

It all starts here ™

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DECLARATION BY THE RESEARCHER

Hereby I, Alta Maria Vorback, declare that:

Comparing parenting plans and child custody procedures in Namibia to serve in the best interests of the child: Potchefstroom Campus is my own work, and has been language edited. All the sources that I used or quoted have been indicated and acknowledged by means of complete references.

Signature: Date: 15 November 2016

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LANGUAGE EDITING

This is to confirm that I, Talita Christine Smit, assisted Alta Maria Vorback (22725717) with the language editing of her doctoral thesis, *Comparing parenting plans and child custody procedures in Namibia to serve in the best interests of the child*, while she was preparing the manuscript for examination. I went through the entire draft, making corrections and suggestions with respect predominantly to language usage. A second follow-up round followed in which some outstanding issues were clarified. Given the nature of the process, I did not see the final version, but made myself available for consultation as long as was necessary.

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ABSTRACT

Parenting plans as a concept is new for mental health and legal professionals working in the field of child custody and control within the Namibian context. The new Child Care and Protection Act (3 of 2015) makes provision for parenting plans as an alternative to child custody and control evaluations. The Act has, however, not yet been implemented, due to regulations that need to be completed before implementation and training can start. Namibia is, therefore, in a transitional phase with many uncertainties regarding roles and responsibilities of professionals, as well as how parenting plans will be implemented and who will be responsible. Participants' viewpoints are also mostly based on how they envision the process and what challenges might be experienced during the process.

The main aim of the research was, therefore, to –

- compare and contrast current child custody investigations and proposed parenting plans as mechanisms in serving the best interests of the child in Namibia;
- establish, ascertain and discuss the views and perceptions of key professionals in the field of child protection in Namibia as far as the best interests of the child, child custody and control, as well as mediation, are concerned;
- make suggestions on the implementation of the parenting plan.

This was done through an explorative approach by means of –

- a description of the principles regarding the best interests of the child as practised in Namibia;
- a description of child custody and control investigations and reporting as conducted in Namibia;
- a description of the process of developing parenting plans as envisaged in Namibia;
- a comparison between child custody and control investigations and reporting, with the development of parenting plans as mechanisms in serving the best interests of the child;

- the formulation of recommendations regarding child custody disputes in cases of divorce;
- the formulation of recommendations regarding the implementation of the proposed parenting plan in Namibia.

A combination of descriptive and explorative research was used. A literature review regarding the best interests of the child, children's rights, child custody and control, mediation and parenting plans was conducted. The literature review for this study served to explain the theoretical underpinnings of the research study and also as a background for the interpretation of the qualitative data.

The research was structured as follows: Article 1 comprises a comprehensive literature study on determining and defining the best interests of the child within the Namibian context. Article 2 comprises a comprehensive literature study on child custody and control evaluations as practised in Namibia. The researcher looked at the process of child custody and control in Namibia, but also highlighted the challenges. Article 3 comprises a comprehensive literature study on mediation and parenting plans as an alternative for Namibia. A comparison was made between parenting plans and child custody in the Namibian context. Article 4 describes the process in which child custody and control investigations were undertaken in Namibia. It, furthermore, presents an understanding of the possible challenges for professionals serving the best interests of the child in order to provide them with comprehensive recommendations regarding child custody and control, as well as parenting plans.

The dominant research approach was qualitative, because the phenomena of child custody investigations and the envisioned parenting plans within the Namibian context were described and explored in depth. Non-probability purposive sampling was used. A wide variety of participants working in the field of child custody and control were chosen because wide-ranging consultation was regarded as necessary in view of the parenting plans as a new venture in Namibia. Seventeen research participants were selected for the purposes of the research. They consisted of three social workers in private practice, three social workers from the Ministry of Gender Equality and Child Welfare, one social worker from the Church Board of

Benevolence, four lawyers (of whom three were also court-appointed mediators), one Commissioner of Child Welfare, one person from the Legal Assistance Centre (LAC), three psychologists and one advocate.

An interview guide for semi-structured interviews was developed after preliminary discussions with one member from each of the groups; these semi-structured interviews were subsequently conducted with individual members of the same group. Data gathered from the discussions were used as guidelines for individual interviews. Respondents were asked to discuss their views of child custody and control reports pertaining to the best interests of the child as these are currently done in Namibia, and to compare the process with the envisioned parenting plans according to the new Child Care and Protection Act (3 of 2015). This Act will be implemented as soon as the regulations have been completed.

Article 4 gives details of the recorded and transcribed interviews of the participants, as well as an analysis of the data that were discussed. From the data collected challenges were identified and recommendations were made to implement parenting plans in the best interests of the children of Namibia. The author is, therefore, of the opinion that Namibia is attempting to make provision for children's rights and best interests. Proof of this can be seen in the legislation already in place and the new Child Care and Protection Act (3 of 2015).

In divorce disputes in Namibia there are still a variety of challenges that need to be overcome to make children's best interests of paramount importance, or to act according to the Namibian Constitution and the various international and national laws regarding children in Namibia. A general concern from respondents was the implementation of the new Act, as well as parenting plans, as part of a small fraction of a comprehensive and complex Act.

Services in the field of child custody and family laws are still fragmented and mainly focused on parents' rights. Services are presumably child-focused, but rarely child-inclusive. Lack of training and knowledge in the field of children, as well as cultural beliefs and perceptions regarding children, play a huge role in how children are dealt with in Namibia. Professionals are not networking but rather are working against

each other. Furthermore, the fact that there is no standardisation or guidelines to assist professionals with child custody disputes and parenting plans complicate this even more. The challenges in this study were that opinions gathered were mostly about how respondents experienced child custody evaluation as practised in the past, with views on parenting plans and the new Child Care and Protection Act that had as yet not been implemented at the time of the research.

Key words: *Namibia, child custody investigation, mediation, parenting plans, best interests of the child, children's rights, legislation*

OPSOMMING

Ouerskapsplanne is ‘n nuwe konsep vir professionale persone wat werk binne die velde van geestesgesondheid en wetgewing met betrekking tot toesig- en beheer-ondersoeke in die Namibiese konteks. Die nuwe Child Care and Protection Act (3 of 2015) maak voorsiening vir ouerskapsplanne as ‘n alternatief tot toesig- en beheer-ondersoeke. Die nuwe wet is egter nog nie in werking nie. Regulasies moet eers voltooi word voordat die wet in werking kan tree en alvorens opleiding rondom die wet kan plaasvind.

Namibië is dus in ‘n oorgangsfase wat veskeie onsekerhede rondom rolle en verantwoordelikhede van professionale persone, sowel as hoe ouerskapsplanne geïmplementeer gaan word en wie daarvoor verantwoordelik gaan wees na vore bring. Deelnemers se sieninge is dus grootliks gebaseer op wat hulle voorsien as moontlike struikelblokke binne die proses van ouerskapsplanne. Die hoofdoel van die navorsing was dus om –

- ‘n vergelyking te tref tussen die huidige toesig- en beheer-ondersoeke en ouerskapsplanne as ‘n meganisme om die kind se beste belang in Namibië te dien, en
- om voorstelle te maak rondom die implementering van ouerskapsplanne.

Dit is gedoen vanuit ‘n verkennende benadering deur –

- ‘n beskrywing van die beste belang van die kind beginsel soos binne die Namibiese konteks;
- ‘n beskrywing van toesig- en beheer-ondersoeke soos gedoen binne die Namibiese konteks;
- ‘n beskrywing van die voorgestelde proses en ontwikkeling van ouerskapsplanne binne die Namibiese konteks;
- ‘n vergelyking tussen toesig- en beheer-ondersoeke en die ontwikkeling van ouerskapsplanne as ‘n meganisme om die beste belang van die kind te dien;
- die formulering van aanbevelings rakende toesig- en beheer-ondersoeke;
- die formulering van aanbevelings rakende die implementering van ouerskapsplanne in Namibië.

‘n Kombinasie van beskrywende en verkennende navorsing is gebruik. ‘n Literatuurstudie rondom die beste belang van die kind, kinderregte, toesig- en beheer-ondersoeke, mediasie en ouerskapsplanne is gedoen. Die doel van die literatuurstudie was om die teorie onderliggend aan die empiriese studie te verduidelik as agtergrond vir die interpretasie van die kwalitatiewe data. Die navorsing is as volg gestruktureer:

Artikel 1 bevat ‘n omvattende literatuurstudie om die beste belang van die kind binne die Namibiese konteks te bepaal en te definieer. Artikel 2 bevat ‘n omvattende literatuurstudie om toesig- en beheer-ondersoeke binne die Namibiese konteks te beskryf. Die navorser het na die huidige toesig- en beheerproses in Namibië gekyk, maar ook die struikelblokke uitgelig.

Artikel 2 bestaan uit ‘n omvattende literatuurstudie rondom mediasie en ouerskapsplanne as alternatief vir Namibië. ‘n Vergelyking is daarna getref tussen ouerskapsplanne en toesig- en beheerverslae binne die Namibiese konteks.

Artikel 3 beskryf die proses van toesig- en beheer-verslae soos gedoen in Namibië, asook die moontlike struikelblokke wat professionele persone kan ervaar in die handhawing van die beste belang van die kind. Aanbevelings is daarna gemaak op grond van toesig- en beheerverslae en ouerskapsplanne.

Deur ‘n verkennende benadering het die navorser ‘n begrip gekry van die moontlike struikelblokke wat professionele persone kan ervaar rondom die beste belang van die kind binne egskeidingsprosesse. Die navorser kon daardeur omvattende aanbevelings maak vir professionele persone rondom toesig- en beheer-ondersoeke en ouerskapsplanne.

Artikel 4 gee ‘n samevatting van die verwerkte onderhoude van deelnemers. Die data is geanaliseer en word in Artikel 4 bespreek. Uitdagings is geïdentifiseer en aanbevelings is gemaak rondom die implementering van ouerskapsplanne in die beste belang van die kind in Namibië. Die skrywer is dus van mening dat Namibië tog pogings aanwend om voorsiening te maak vir kinderregte en die beste belang

van kinders. Dit word bewys in wetgewing wat reeds in plek is en die nuwe Child Care and Protection Act (3 of 2015).

Die dominante navorsingsbenadering was kwalitatief omdat toesig- en beheer-ondersoeke en die voorgestelde ouerskapsplanne binne die Namibiese konteks in diepte beskryf en ondersoek is. Nie-waarskynlike steekproefneming is gebruik. ‘n Wye verskeidenheid deelnemers binne die veld van toesig en beheer is gekies. ‘n Wye reeks konsultasies was noodsaaklik omdat die konsep van ouerskapsplanne as ‘n nuwe rigting in Namibië gesien word.

Sewentien deelnemers is vir die doel van die studie gekies. Hulle het bestaan uit drie maatskaplike werkers in privaat praktyk, drie maatskaplike werkers van die Ministry of Gender Equality and Child Welfare, een maatskaplike werker van die Church Board of Benevolence, vier regsgeleerdes (van wie drie ook hofaangestelde mediators was), een kinderkommissaris, een persoon van die Legal Assistance Centre (LAC), drie sielkundiges en een advokaat.

‘n Onderhoudsriglyn vir semi-gestruktureerde onderhoude is gebruik om voorlopige besprekings met een deelnemer uit elk van die groepe te hou. Dié riglyn is weer gebruik vir onderhoude met individuele deelnemers van die geïdentifiseerde groepe. Data is ingesamel deur individuele besprekings met deelnemers. Deelnemers is gevra om hul siening rondom die huidige proses van toesig- en beheer-verslae in Namibië te bespreek in die lig van die beste belang van die kind. Deelnemers is daarna gevra om dit te vergelyk met die voorgestelde ouerskapsplanne soos vervat in die nuwe Child Care and Protection Act (3 of 2015). Hierdie wet sal egter eers geïmplementeer kan word wanneer die regulasies voltooi en goedgekeur is.

In egskeidingsgedinge in Namibië is daar steeds verskeie struikelblokke wat oorkom moet word om kinders se belange as hoof oorweging te sien, of om volgens die Namibiese grondwet en die verskillende nasionale en internasionale wette wat in Namibië van toepassing is, tot voordeel van kinders op te tree. ‘n Algemene bekommernis onder deelnemers was die toepassing van die nuwe Wet, sowel as ouerskaps- planne, wat maar ‘n klein deeltjie uitmaak van omvattende en komplekse wetgewing.

Dienste in die toesig- en beheerveld en gesinswetgewing is steeds gefragmenteer en fokus hoofsaaklik op die regte van ouers. Dienste is na bewering gefokus op die kind, maar sluit selde die kind in. ‘n Gebrek aan opleiding en kennis rakende die gebied van kinders, sowel as kulturele sieninge rondom kinders, speel ‘n groot rol in hoe kinders in Namibië hanteer en gesien word. Professionale persone netwerk nie met mekaar nie, maar werk eerder teen mekaar. ‘n Gebrek aan gestandaardiseerde riglyne om professionele persone binne toesig- en beheer-ondersoeke te lei, sowel as ouerskapsplanne, kompliseer die proses nog verder. ‘n Groot uitdaging in die studie was die feit dat sieninge van respondente grootliks verkry is van hoe hulle toesig- en beheer-ondersoeke in die verlede ervaar het, met sieninge van ouerskapsplanne en die nuwe Child Care and Protection Act (3 of 2015), wat nog geïmplementeer moet word.

Sleutelwoorde: *Namibië, toesig- en beheer-ondersoek, mediasie, ouerskapsplan, beste belange van die kind, kinderregte, wetgewing.*

PREFACE

This manuscript is submitted in article format and edited articles will be presented for possible publication to the Professional Journal Social Work/Maatskaplike Werk.

Author guidelines

The Journal publishes articles, book reviews and commentary on articles already published from any field of social work.

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TWO AUTHORS: SHEAFOR, B.W. & JENKINS, L.E. 1982. Quality field instruction in social work. Program Development and Maintenance. New York: Longman.

COLLECTION: MIDDLEMAN, R.R. & RHODES, G.B. (eds) 1985. Competent supervision, making imaginative judgements. New Jersey: Prentice-Hall.

ARTICLE IN COLLECTION: DURKHEIM, E. 1977. On education and society. In: KARARABEL, J. & HALSEY, A.H. (eds) Power and ideology in education. New York: Oxford University Press.

JOURNAL ARTICLE: BERNSTEIN, A. 1991. Social work and a new South Africa: Can social workers meet the challenge? Social Work/Maatskaplike Werk, 27(3/4):222-231.

THESIS: EHLERS, D.M.M. 1987. Die gebruik van statistiese tegnieke vir die ontleding van gegewens in maatskaplikewerk-navorsing. Pretoria: Universiteit van Pretoria. (M tesis)

MINISTRY FOR WELFARE AND POPULATION DEVELOPMENT 1995. Draft White Paper for Social Welfare. Government Gazette, Vol. 368, No. 16943 (2 February). Pretoria: Government Printer.

NEWSPAPER REPORT: MBEKI, T. 1998. Fiddling while the AIDS crisis gets out of control. Sunday Times, 8 March, 18.

INTERNET REFERENCES: McKIERNAN, G. 1998. Beyond bookmarks: schemes for organising the Web [on line]. Rev. 18 June. Available: http://www.public.iastate.edu/CYBERSTACKS/CTW.htm

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LIST OF ABBREVIATIONS

AACAP	American Academy of Child and Adolescent Psychiatry
ACPF	African Child Policy Forum
AFCC	Association of Families and Conciliations Courts
LAC	Legal Assistance Centre
MGECW	Ministry of Gender, Equality and Child Welfare
MOHSS	Ministry of Health and Social Services
OAU	Organisation of African Unity
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNCRC	United Nations Convention on the Rights of the Child
UNICEF	United Nations International Children's Emergency Fund

SECTION A: OVERVIEW AND INTRODUCTION

OVERVIEW AND INTRODUCTION

1. INTRODUCTION

This research comprise a comparison between parenting plans and child custody and control processes in serving the best interests of the child in Namibia.

2. ORIENTATION AND STATEMENT OF THE PROBLEM

Currently the mechanism used to assist courts in Namibia to come to decisions regarding the custody of children in cases of divorce, is the child custody and control report, submitted to the Supreme Court by either a social worker or a psychologist. A child custody and control evaluation can be described as "*a thorough, scientifically sound evaluation of a family in order to help the court determine what living arrangements and parenting plan would best meet the needs of the children*" (Rohrbaugh, 2008:3). Although child custody and control reports are important in providing information to the court and the family about the best psychological interests of the children, they can be emotionally damaging to a family. Child custody and control reports are invaluable to the court and families in determining what would be in the best interests of the children involved. However, many families feel that the evaluation process is intrusive and exposes the family's "dirty laundry" (Buchanan in Ackerman, 2006:62; Stahl, 2011:3). This, again, has an emotional and painful impact on the family, as well as between the family and the family's support system (which is often employed for collateral information).

Currently in Namibia, with no guideline or protocol for child custody evaluations, families are passed from one evaluator to the next by lawyers, especially when the original custody and control report has been rejected by one of the parties involved. This, according to Stahl (2011:3) and Turkat (2005:8), leads to prolonged custody battles and huge expenses, with the children left in the middle of the process without their interests being considered. Courts and lawyers accept that social workers and psychologists are capable of conducting investigations and making recommendations on the mere basis of their qualifications. Diffusion of roles and the

lack of a framework, in which each can function, create confusion. Couples who can afford it, mostly go through lawyers, where they either decide preliminarily who will be given child custody and control, or, after months of fighting, allocate any professional available to do a custody and control evaluation, where very basic recommendations are made with no guidelines on dealing with issues regarding the children concerned. When a court date has finally been set (this can be after two years of constant conflict), various professionals have already been involved, which leads to even more complications. The children, their rights and what is in their best interest are influenced by each professional's perception of the case and the views of the parent. The child custody and control investigation becomes a battleground with the focus on past negative behaviour of the parties and their opposing legal rights and obligations (De Jong, 2010:516). This process at times undermines communication, creates further hostility and puts children in the centre of their parents' disputes. According to De Jong (2010:517), the nature and intensity of these disputes can seriously undermine parenting abilities and cause significant stress to children.

According to Stahl (2011:5), perhaps only 20% of custody and control cases involve high-conflict families. These families are unable to agree to a parenting plan and cannot make decisions or focus on the needs of their children, due to their own mutual differences and pain. Not all families can thus be referred for mediation and the development of parenting plans. High conflict cases or cases where there are allegations of possible sexual and/or alcohol abuse or domestic violence could benefit to a large extent from child custody evaluations.

In present-day Namibia each child custody dispute is done according to the individual professional's own criteria in determining the outcome of an investigation, as well as criteria for the best interests of the children involved. This makes it difficult to –

- compare investigations with regards to second opinions or re-evaluations as part of the recommendations by a court and especially when different professionals are involved;

- apply uniformity and consistency in terms of what should be taken into consideration during such a dispute;
- determine each professional's viewpoint of what is "in the child's best interests". Although the Child Status Act (6 of 2006), Art. 3(1) and (2) defines "the best interests" of the child, many professionals are unaware of this;
- provide the best possible service to families in the long term;
- provide families with an alternative process in the form of the parenting plan, especially where there is low to medium conflict.

According to De Jong (2010:517), the time has come for a new or alternative approach to the resolution of divorce and other family disputes. Parenting plans, as well as the mediation process, are currently new concepts in Namibia and will form part of the new Child Care and Protection Act (3 of 2015). According to the new Child Care and Protection Act (3 of 2015), a parenting plan is an agreement that can cover any aspect of parental authority. It is intended to –

- help prevent disputes;
- make decisions before problems occur;
- reduce the potential for conflict;
- protect the best interests of the child.

Although the new Child Care and Protection Act (3 of 2015), within the Namibian context, provides limited guidelines for parenting plans, no provision has yet been made with regards to a structure or the content of this process. In Namibia, lawyers, social workers and psychologists are not trained in mediation, and few are aware of parenting plans as an option.

Namibia is currently moving through a transitional process regarding its child care legislation. The time has thus come for inputs into these processes. Western countries, including South Africa as Namibia's neighbour, have gone through these processes, and serve as valuable sources of experience in this regard.

Although no definition of parenting plans is suggested, Part 3 of the South African Children's Act (38 of 2005) describes in detail the processes and procedures to be

followed in the development of a parenting plan. It also suggests what should be considered when regarding the welfare of the child in completing the parenting plan.

In view of the tentative nature of suggestions regarding parenting plans proposed in the new Child Care and Protection Act (3 of 2015) of Namibia and the problems experienced with the present child custody procedures, it was deemed necessary to explore the nature of parenting plans and compare them with the present child custody investigation procedures. Such an exploration can assist in developing guidelines and an alternative process in order to overcome the current challenges in child custody and control investigations. This process could be helpful in attempting to unite parties in seeking solutions and recognising that the responsibility of caring for their children is an ongoing process with the best interests of the children as the paramount consideration.

Research questions:

- What are the differences between the current child custody investigations and the proposed parenting plans in Namibia and the possible advantages of the latter in relation to the best interests of the child principle?
- What are the views of the relevant professional role players on the envisaged parenting plans as proposed in the new legislation pertaining to the protection of children?

3. AIMS AND OBJECTIVES

3.1 Aim

The main aim of the research was to –

a) compare and contrast current child custody investigations and proposed parenting plans as mechanisms in serving the best interests of the child in Namibia;
b) establish the views of the relevant professional role players regarding the envisaged parenting plans as proposed in the new legislation pertaining to the protection of children;

c) make suggestions on the implementation of the parenting plan.

3.2 Objectives

The aim was envisioned to be served by the following objectives:

1. An exploration of the principle of the best interests of the child as practised in Namibia.
2. An exploration of child custody and control investigations and reporting as practised in Namibia.
3. A comparison between child custody and control investigations and reporting and the development of parenting plans as mechanisms in serving the best interests of the child.
4. The formulation of recommendations through mediation regarding child custody disputes in cases of divorce.
5. The formulation of recommendations regarding the implementation of the proposed parenting plan in Namibia.

4. CENTRAL THEORETICAL ARGUMENT

It will be in the interest of the Namibian child if the most effective practice and implementation of the standard of the best interests of the child can be investigated and established, as well as to compare child custody and control investigations with parenting plans as mechanisms to serve the best interests of the child, because –

- child custody and control investigations tend to look into the past, have negative emotional effects on the family and children, and do not necessarily serve the best interests of the child;
- parenting plans are more future-orientated and can build and strengthen families by taking the best interests of the child into consideration;
- parenting plans currently form part of the South African legal system and Namibia can draw on literature from, and experiences of, South Africa with regards to the implementation of parenting plans.

5. METHOD OF INVESTIGATION

The general purposes of the research were a combination of description and exploration (Rubin & Babbie, 2010:134-135), because both the systems of current child custody investigations and proposed parenting plans were described, and the differences between the two systems were explored. The experiences and views of the relevant professionals concerned with the two systems were, furthermore, explored and established.

5.1 Literature review

A literature review regarding the best interests of the child, children's rights, child custody and control, mediation and parenting plans was conducted. Resources that were used were documentation and reports regarding child custody and control, legislation in Namibia, the internet, books, professionals working in these fields in Namibia, ISAP and EbscoHost. The researcher relied mainly on Western literature, something that was also reflected in the proposal. The rationale was that the concept of parenting plans was still a new venture in Namibia, and examples from countries which were already practising parenting plans seemed to have been incorporated in the reviewed literature.

The literature review for this study served to explain the theoretical underpinnings of the research study and also served as background for the interpretation of the qualitative data. The theoretical framework that was employed in this research is the concept of the best interests of the child relating to the rights of the child as formulated in the Convention on the Rights of the Child (UNESCO, 1998).

5.2 The research approach

The dominant research approach was qualitative because the phenomena of child custody investigations and parenting plans were described and explored in depth (Rubin & Babbie, 2010:34). The alternative would have been to conduct a document analysis; however, when one keeps in mind that parenting plans are not yet done in

Namibia, it becomes clear that no documentation in this regard was available at the time of the research.

5.3 Research design

The research design employed was phenomenological (Cresswell, 2007:59; Fouché & Schurink, 2011:307), because it was regarded as the most suitable design, considering the purposes of description and exploration of child custody investigations and parenting plans.

5.4 Research participants

Seventeen research participants were selected for the purposes of the research. The sample consisted of three social workers in private practice, three social workers from the Ministry of Gender, Equality and Child Welfare (MGECW), one social worker from the Church Board of Benevolence, four lawyers (three of whom were also court-appointed mediators), one Commissioner of Child Welfare, one staff member of the Legal Assistance Centre (LAC), three psychologists and one advocate.

5.5 Sampling procedures

A non-probability sampling method, namely availability sampling, was used. According to Chambliss and Schutt (2010:122), availability sampling is used when a researcher is "exploring a new setting and trying to get some sense of prevailing attitudes …". Respondents are, therefore, selected because they are available or easy to find. This sampling method is also known as a haphazard, accidental or convenience sample. It is important for the researcher to mention that in qualitative research, with the available method, it does limit the researcher's ability to generalise.

For this study, according to the availability method, the researcher tried to have at least one member from each of the following that dealt with custody and control

investigations in Namibia, and, therefore, had the probability to deal with parenting plans:

- Social workers in private practice;
- Social workers from the Ministry of Gender Equality and Child Welfare (MGECW);
- Social workers from the Church Board of Benevolence;
- Lawyers;
- Commissioners of Child Welfare;
- Legal Assistance Centre (LAC);
- Psychologists;
- Advocates.

It was the assumption that the above research participants would be able to provide the information necessary for the purposes of the research. A wide variety of participants were chosen on availability, because wide-ranging consultation was regarded as necessary in view of the fact that parenting plans were still a new venture in Namibia. For practical reasons, only respondents residing in Windhoek, Namibia, were chosen. Seventeen respondents from of the mentioned groups, were available and willing to participate in the research.

5.6 Measuring instruments

An interview guide (Neuman, 2003:279) for a protocol for semi-structured interviews was developed from preliminary discussions with one member from each of the following groups; subsequently, interviews were conducted with individual members of the same group: social workers in private practice, social workers from the Ministry of Gender Equality and Child Welfare, psychologists, lawyers and Commissioners of Child Welfare. Data gathered from the preliminary discussions were used as guidelines for planned focus group discussions. Unfortunately, professionals, especially those in private practice, were not able to attend a workshop or focus group discussion due to time restrictions and workloads. Respondents were thus interviewed individually. Respondents were asked to compare the two systems to be investigated.

5.7 Procedures

- A literature review was conducted.
- An interview protocol for the semi-structured interviews was developed, tested and finalised.
- The individual members of the identified groups were contacted and given an explanation of the nature of the research.
- Time slots were agreed upon according to respondents' availability for interviews.
- The data were analysed and the report was written.
- The scientific and ethical integrity of this study was assessed by the scientific committee of the Africa Unit for Transdisciplinary Health Research, Facility of Health Sciences.
- At the time of the research that was done in Namibia, no information could be found regarding research ethics committee application requirements for Human or Social Sciences in Namibia. It appears that such requirements do not exist yet.

5.8 Data analysis

Interviews with the participants were recorded by means of a voice recorder, and transcriptions were made afterwards. The electronic data and transcriptions are locked away in a cabinet in the office of the researcher for safekeeping. The data were analysed by making use of the open coding system whereby "the researcher locates themes and assigns initial codes or labels in a first attempt to condense the mass of data into categories" (Neuman, 2003:438). This was done with the assistance of a second person to verify the labelling process.

6. DEFINITIONS

6.1 The best interest of the child

Using the best interest of the child standard in parenting disputes is a challenge due to the vagueness of the term as a legal concept (Anderson & Spijker, 2002; Bekink & Bekink, 2004; Heaton, 2009; Semple, 2011; Zelechoski, Fuhrmann, Zibbell, and Cavallero, 2012). There is thus little consensus regarding what constitutes the standard as far as the best interest of the child is concerned. Ramolotja (1999:10) also states that what is in the best interest of a specific child cannot be determined with any degree of certainty. Worldwide, however, various constructs or principles have emerged as primary factors that courts can consider when making child custody decisions (Zelechoski *et al.,* 2012:464).

The objective of the best interest of the child is to determine which arrangements will best fulfil the needs of a specific child. The benefit of this is that it places a "judicial magnifying glass" on children, making them the most important part of the process (Fung & Yiming, 2008:309).

The best interest of the child, especially in divorce cases, can, therefore, be interpreted in a variety of ways, ranging from financial suitability to psychological attachment. The best interests of each child should thus be considered in the child's context.

6.2 Child custody evaluations

A child custody evaluation can be defined as a comprehensive assessment of the social, psychological, mental, physical and economic circumstances of a family as it relates to the issue of custody (Barth, 2011:157).

According to the Association of Families and Conciliations Courts (AFCC, 2006:6), child custody and control evaluations can be defined as a *"process that involves the*

compilation of information and the formulation of opinions pertaining to the custody or parenting of a child and the dissemination of that information and those opinions to the court".

According to the Namibia Paralegal Association (2012:47), child custody is defined as "*the questions of whether a child will live with their mother or father and whether the other parent will have certain rights to visit the child. Custody also involves the rights of mother and father to make decisions about their children."*

6.3 Mediation

According to the Legal Assistance Centre (2000), divorce mediation can be defined as "*a process whereby spouses who intend to divorce, or are in the process of divorcing, attempt to reach agreement on practical issues relating to the divorce, such as the division of property, custody and access to children and maintenance".*

Gauvreau (2012:4) defines mediation as a "*process where divorcing parents meet an impartial 3rd party who assists the divorcing parties to identify, discuss and resolve disputes resulting from the divorce"*.

Uugwanga (2010:48) defines mediation as *"assisted negotiation between the two parties that are in the process of divorce".* O'Leary (2014:3) refers to Haynes who defines mediation as *"the management of other people's negotiations …".*

6.4 Parenting plans

According to Section 119 (6) of the Child Care and Protection Act (6 of 2015), a parenting plan within the Namibian law "*may determine details relating to the exercise of parental responsibilities and rights, including –*

- *where and with whom the child is to live*
- *the maintenance of the child*
- *contact with or access to the child by –*
    - *any of the parties to the plan, or*

- *any other person*

- *the responsibility for any costs associated with the contact contemplated in paragraph (c)*
- *the schooling and religious upbringing of the child, and*
- *responsibility for medical care, medical expenses and medical aid coverage".*

7. ETHICAL ASPECTS

The following ethical aspects were attended to:

- Voluntary participation and informed consent (Rubin & Babbie, 2010:76). None of the participants were forced in any way to participate in the research. The nature and purposes of the research were explained in detail to the participants after which they were free to decide whether they wanted to participate or not.
- No harm to the participants (Rubin & Babbie, 2010: 78). The nature of the research limited the possibility of, specifically, emotional harm to the participants to the absolute minimum in view of the opportunity of the participants to withdraw at any stage. This also took care of the principle of deception of subjects.
- Privacy, anonymity and confidentiality (Neuman, 2006:106). The participants were assured that information given would not be linked to anybody, and that the data would be kept confidential.

8. TRUSTWORTHINESS

According to Lincoln and Guba (1985:290), the main issue in relation to trustworthiness is how an enquirer *"... persuades his or her audiences (including self) that the findings of an enquiry are worth paying attention to, worth taking account of*".

The trustworthiness of this research project was taken care of in the following ways:

- Particular care was taken to describe the research methodology as accurately and clearly as possible.
- The research group, the topic and the area of research were clearly demarcated.
- The way in which the data were analysed, was described in detail.
- Provision was made for the verification of the interpretation of the data by a second person.
- The principles of the best interests of the child and the rights of the child were used as a norm against which the data were evaluated.

9. STRUCTURE OF THE DOCUMENT

The research is presented in article format in the following way:

Article 1: Determining and defining the best interests of the child within the Namibian context.

Article 2: Child custody and control investigation in Namibia: The process, challenges and loopholes.

Article 3: The context of the parenting plan and mediation as a future process in Namibia.

Article 4: A comparison between the parenting plan and the child custody report within the Namibian context: Recommendations.

10. LIMITATIONS OF THE RESEARCH

The following limitations with regards to the research were identified:

- Participants could only be interviewed on an individual basis due to limited time and the availability of participants; this was especially true for participants in private practice. Focus groups did not realise due to the unavailability of participants.

- Only participants in the Windhoek area of Namibia were used due to distance and costs involved.
- The new Child Care and Protection Act (3 of 2015), for a large part of this study, was only available in bill format. Although the Act had been gazetted, regulations still needed to be written before it could be implemented. Only then could training start. Many respondents were still unsure or lacked knowledge regarding the content and impact of the Act.
- Due to the small number of respondents available in the field of child custody and control, as well as the relative smallness of Namibia, protecting respondents and their views was a challenge.
- Many participants' views were based on how they envisioned the new Child Care and Protection Act and parenting plans as an alternative for child custody and control reports.

It is not expected that these limitations will have a negative effect on the research results because the information gained can be put to good use in planning and safeguarding the best interests of the child within the system unfolding in Namibia.

BIBLIOGRAPHY

Ackerman, M.J. 2006. Clinician's guide to child custody evaluations. New Jersey: John Wiley & Sons.

Acts **see** Namibia

Acts **see** South Africa

AFCC (Association of Families and Conciliation Courts). 2006. Model Standards of Practice for Child Custody Evaluation. http://www.afccnet.org/About/About-AFCC Date of access: 4 March 2010.

Anderson, A. & Spijker, A. 2002. Considering the view of the child when determining her best interest. *Obiter:* 365-372.

Barth, L. 2011. Consultant conduct in anticipation of a child custody evaluation: Ethical and social dilemmas and the need for neutral parent education. *Family Court Review*, 49(1):155-169.

Bekink, B. & Bekink, M. 2004. Defining the standard of the best interests of the child: Modern South African perspectives. *De Jure*: 21-40.

Chambliss, D.F. & Schutt, R.K. 2010. *Making sense of the social world: Methods of investigation*. 4th ed. Thousand Oaks, CA: Pine Forge Press.

Child Care and Protection Act **see** Namibia

Children's Act **see** South Africa

Child Status Act **see** Namibia

Creswell, J.W. 2007. *Qualitative inquiry and research design: Choosing among five approaches.* 2nd ed. Thousand Oaks, CA: Sage Publications.

De Jong, M. 2010. A pragmatic look at mediation as an alternative to divorce litigation. *Tydskrif vir die Suid-Afrikaanse Reg:* 515-557.

Fouché, C.B. & Schurink, W. 2011. Qualitative research design. (In De Vos, A.S., Strydom, H., Fouche, C.B. & Delport, C.S.L. eds. *Research at grass roots: For the social sciences and human service professions*. 4th ed. Pretoria: Van Schaik. p. 307–328).

Fung, D.S.S. & Yiming, C. 2008. Primer of Child and Adolescent Psychiatry. 1st ed. Singapore: World Scientific Publishing Company.

Gauvreau, D. 2012. Mediation versus litigation: Examining differences in outcomes amongst the children of divorce. http://www.riverdalemediation.com/wp-content/uploads/2009/07/Gauvreau-Mediation-vs-litigation.pdf Date of access: 5 June 2014.

Heaton, J. 2009. An individualized, contextualized and child-centered determination of the child's best interest, and the implications of such an approach in the South African context. *Journal of Juridical Science*: 34(2): 1-18.

(LAC) Legal Assistance Centre. 2000. Summary of proposals for divorce law reform in Namibia. http://www.lac.org.na/projects/grap/Pdf/divlawref.pdf Date access: 4 March 2010.

Lincoln, Y.S. & Guba, E.G. 1985. *Naturalistic Inquiry*. 1st ed. USA: Sage Publications.

Namibia. 2015. Child Care and Protection Act 3 of 2015.

Namibia. 2006. Children's Status Act 6 of 2006.

Namibia Paralegal Association. 2012. Access to justice: Paralegal Manual Namibia. http://www.namibiaparalegals.org/assets/03527_New%20Perimeter_NPA_Legal_Manual_v13.pdf Date of access: 5 March 2015.

Neuman, W.L. 2003. *Social research methods: Qualitative and quantitative approaches*. 5th ed. Boston, Mass: Allen & Bacon.

O'Leary, J. 2014. *Mediation in family & divorce disputes*. 1st ed. Cape Town: SiberInk.

Ramolotja, M.A. 1999. Determining the best interest of the child. *Codicillus*, XXXX (1): 10-14.

Rohrbaugh, J.B. 2008. *A comprehensive guide to child custody evaluations: Mental Health and Legal Perspectives*. New York: Springer.

Rubin, A. & Babbie, E. 2010. *Research methods in social work.* 7th ed. Belmont, CA: Brooks/Cole.

Semple, N. 2011. The "Eye of the beholder": Professional opinions about the best interest of a child. *Family Court Review*, 49(4): 760-775.

South Africa. 2005. Children's Act 38 of 2005

Stahl, P.M. 2011. *Conducting child custody evaluations: From basic to complex issues.* 1st ed. Thousand Oaks: SAGE Publications.

Turkat, I.D. 2005. On the Limitations of Child-Custody Evaluations. Court Review, 42(2): 8 -13 http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1034&context=ajacourtreview Date of access: 4 March 2010.

UNESCO (United Nations Educational, Scientific and Cultural Organisation).1989. United Nations Convention on the Rights of the Child.

http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf Date access: 4 March 2010.

Uugwanga, C. 2010. The law on divorce and dissolution of marriages in Namibia: A reform analysis of the types of marriages found in Namibia and the divorce laws pertaining to such marriages. Windhoek: UNAM. (Dissertation – LLB). http://wwwisis.unam.na/theses/uugwanga2010.pdf

Zelechoski, A.D., Fuhrmann, G. S. W. Zibbell, R.A. & Cavallero, L. M. 2012. Case report – Evaluation for child custody: Using best practices in a worst case scenario. *Journal of Forensic Psychology Practice*, 12(5): 257-470.

SECTION B: THE ARTICLES

ARTICLE 1: THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD AS CONDUCTED IN THE NAMIBIAN CONTEXT

A. Vorback

P. Rankin

ABSTRACT

This article focuses on a description of the principle of the best interest of the child as understood in the Namibian context. The author will discuss children's rights in general, how they are defined, as well as the content and challenges in dealing with children's rights. The author explored the principle of the standard of best interest of the child, together with various definitions of the construct. Guidelines for what is in the best interest of the child, as well as the process in determining the child's best interest, are also discussed.

The focus is on child participation, which forms an integral part of a child's rights. A summary of legislation pertaining to children's rights and the best interest of the child is provided with the focus on international law, as well as on Namibian legislation.

Keywords: *Child, best interest of the child, children's rights, child participation, legislation*

> *What distinguishes child welfare from other fields of social work is that child welfare is based upon the central philosophical premise that the needs and interests of the child are paramount. In any conflict between a child and an adult, parent, or other person, the social worker automatically becomes the child's advocate and defends the child's interest and welfare against the interest of any adult* (Duke in Rankin, 2001:2).

1. INTRODUCTION

This is the first article in this document pertaining to the system of parenting plans and mediation versus child custody and control procedures in serving the best interests of the child in Namibia. It deals with related concepts regarding the rights of the child, and includes definitions of a child, the principle of the best interests of the child, the participation of the child in deciding on his or her best interests, as well as legislation and documents pertaining to the best interests of the child. These concepts are all ingredients or components of the process, and which lead to conclusions regarding the way that the best interests of the child may be served. The authors will, firstly, define and discuss the concept of the rights of the child and how these are operationalized specifically in Namibia.

Secondly, the standard of the best interests of the child will be described and explored while pointing out ways in which the child could participate in determining his or her best interests. Lastly, national and international legislation and documents pertaining to the best interests of the child will be introduced and discussed.

2. PROBLEM FORMULATION

In many ways and settings, children are still seen as objects subjected to their parents' rights, and, therefore, not as bearers of their own rights (Anderson & Spijker, 2002; Lloyd, 2002; Mailula, 2005). In Namibia, according to the researcher's experience as a social worker (working for the government, as well as in private practice), it is still widely believed that children are to be seen and not heard. As a result, their views and interests often do not matter and are not regarded seriously. Even if adults proclaim that children's views do matter, there remains confusion of how, where and when children's views matter. These and other beliefs about the status of children in Namibia have left them vulnerable, not only regarding protection from abuse, but also in divorce disputes (Dausab, 2009; Mitcham-Smith & Henry, 2007). Glasser (in Anderson & Spijker, 2002:365) describes these children as "voiceless members of society who are at times the innocent victims of divorce". The

author has experienced that parents' voices are heard more consistently than those of their children, if these are heard at all. Professionals will often make an effort to listen to children, but frequently children's voices will pale against those of their parents when their views actually need to be implemented.

The potentially harmful effect of divorce on children, especially in high-conflict divorce cases, have been revealed through research (Bernardini & Jenkins, 2002; Dueck, 2004; Stahl, 2011; Turkat, 2005). Parents are often very focused on their own pain, needs and "fairness" which escalate into ongoing conflict due either to their fear of losing their children or their desire to 'get back' at each other. It has the effect that the needs of the children are often forgotten. O'Kelly (2014:10) refers to research that shows that persistent conflict can –

- have an impact on the quality of parenting;
- result in harsh styles of discipline;
- reduce maternal availability to children;
- threaten children's emotional stability;
- undermine attachment relationships;
- lead to disruptive behavior, depression, self-harming and sometimes suicide in children.

Divorcing parents are often so engrossed in their own troubles that they are not always fit to make decisions about their children or are unable to reach an agreement that is truly in the best interests of their children; indeed, they often have to seek outside help to resolve the issue. Often the court system itself prolongs conflict between parents, especially if lawyers lose sight of the children in the process or if children's voices are ignored or not taken seriously.

At present, in cases of divorce, the child custody and control report presented to the supreme court of Namibia is the end result of a process of deciding on the best interests of the child. These child custody and control reports are submitted by either a social worker or a psychologist to the Supreme Court, and are the mechanisms used to assist the courts in Namibia to come to decisions regarding the custody of children in cases of divorce. Unfortunately, each child custody dispute is done according to the individual professional's own criteria in determining the outcome of

an investigation and criteria for the best interests of the child. No uniform standard is adhered to in determining children's rights and the best interests of the child in these cases of divorce, because the children's rights and what is in the best interest of the child are influenced by each professional's perception of the case, as well as the view of the parents. Although legislation in Namibia makes provision for guidelines regarding the principle of best interest of the child, professionals involved somehow do not work from this guideline (Child Status Act (6 of 2006)). The author is of the opinion that various factors, such as different professional education frameworks, confusion of roles, overlapping of roles, lack of training, among others, may contribute to a lack of uniformity when dealing with child custody disputes.

Legislation (international, as well as national) exists, but seems to be under-utilized, not utilized at all or not acknowledged as a framework for the best interest of the child (Convention on the Rights of the Child (1989), Child Status Act (6 of 2006), Child Care and Protection Act (3of 2015)).

In view of the situation outlined above, there are indications that the rights of the child, together with his or her best interests, are compromised in divorce disputes. This will have serious implications on the welfare of the child. It is thus important that the need for respect regarding the rights of the child and the importance of the proper utilization of the best interest of the child principle be clarified. This is also of specific significance in developing parenting plans.

The question to be answered in this article is as follows: What is the nature of the practice regarding the principle of the best interests of the child in Namibia?

3. THE AIMS AND OBJECTIVES OF THE ARTICLE

3.1 The aim of the article

In order to compare parenting plans with child custody and control processes in serving the best interests of the child in Namibia, the aim of this article is to discuss

and explore the principle of the best interest of the child as conducted in the Namibian context.

3.2 The objectives of the article

The following objectives were pursued with this article:

- To define and discuss the rights of the child;
- To explore and discuss the standard of the best interests of the child;
- To describe the participation of the child in the process of determining the best interests of the child;
- To analyse national and international legislation and documentation pertaining to the rights and best interests of the child.

4. METHODOLOGY

Narrative literature regarding the best interests of the child, with reference to Namibia, was reviewed in order to discuss and explore key concepts in relation to the standard for best interests of the child. According to Cronin, Ryan and Coughlan (2008:38), this type of review critiques and summarizes a body of literature, and draws conclusions about the topic in question. The body of literature is made up of the relevant studies and knowledge that address the subject area. Cronin, Ryan and Coughlan (2008:38), furthermore, elaborate by explaining that this type of review is useful in gathering a volume of literature in a specific subject area and summarizing and synthesizing it.

The author made use of articles from professional journals, textbooks and Acts from South Africa, Africa and mainly western countries to complete the review. Sources used were the internet and the library data bases of the library of the Potchefstroom Campus of the North-West University.

The following topics related to children's best interests were explored: the way different countries definite a child, the general nature of children's rights, the principle

of the best interest of the child, child participation, as well as legislation and documents pertaining to children's rights and the best interests of the child. The latter topic also includes various Namibian Acts pertaining to the general welfare of the child.

5. AN OVERVIEW OF CHILDREN'S RIGHTS

This section will cover various aspects of children's rights in pursuit of the first objective listed above. Different definitions of a child will be described, children's rights will be explored, different approaches to children's rights will be compared and the contents of children's rights will be analyzed.

5.1 Defining a child

The challenge of defining a child is encapsulated in the view of Boezaart (2009:4), namely that *"…a fundamental issue to be determined in dealing with any matter pertaining to children is who would be regarded as a child in the eyes of the law."* Schäfer (2011:14 - 15) draws the attention to the fact that some treaties on children do specify a fixed age at which the protection to children ceases but most treaties fail to define a 'child' which reflects a lack of consensus on the issue amongst the negotiating parties.

According to the Convention on the Rights of the Child (UNESCO, 1998), a child can be defined as any human being under the age of 18 unless the relevant national law recognizes an earlier age of majority. The maximum age for a child has been set, according to the Convention, as the basic minimum standard in defining a child. It does leave room for the setting of lower ages by member countries. Lloyd (2002:20) points out that defining age has many cultural implications and the definition of childhood is culture specific. This provides a unique perspective on the determination of the best interests of the child, because the cultural definitions of a child will have direct bearing on views regarding the child's best interests. For example, the different approaches to children in selected African countries are reflected in the

Table below. Some countries specify the maximum age of childhood as 18, others as 16, while others do not specify an age at all.

Table 1: Overarching definition of the child in Africa (African Child Policy Forum (ACPF, 2013))

COUNTRY	**OVERARCHING DEFINITION OF THE CHILD IN AFRICA**	
Country	**Act**	**Definition of a child**
Algeria	18 years 3rd and 4th periodic reports on the Convention on the Rights of the Child: Algeria, 2009	Algerian law conforms to the provisions of Article 1 of the Convention, where the child is generically defined as a "human being below the age of 18 years".
Angola	No definition Constitution, 2010 .	Article 24 of Constitution: The age of majority shall be 18. This by implication defines the upper limit of childhood.
Botswana	Children's Act, 2009 .	Article 2: "Child" means any person who is below the age of 18 years.
Kenya	18 years Constitution, 2010 The Children Act, 2001	Article 260 of Constitution: "Child" means an individual who has not attained the age of 18 years. Article 2 of Children's Act: "Child" means any human being under the age of eighteen years.
Malawi	16 years Constitution,1994 Child Care, Protection and Justice Act, 2010	Article 23(5) of Constitution: For purposes of this section, children shall be persons under sixteen years of age. Section 2 of Child Care and Protection Act: "Child" means a person below the age of sixteen years.
Namibia	18 years Initial state party report on the Convention on the Rights of the Child: Namibia, 1992	Children's Act 1961: A child is any person under the age of 18 years.
Somalia	Juvenile Justice Law, 2007	Article 1 of Juvenile Justice Law, 2007: In this act, unless the context indicates otherwise a child means any human being below the age of 15 years old.
South	Children's Act, 2005 .	Article 1 of Children's Act: "Child" means a person under

Africa		the age of 18 years. Constitution, 1997 Art 28(3) children: In this section "child" means a person under the age of 18 years.
Swaziland	- Child Care Service Order (1977) - Employment Act (1980) - Reformatories Act (1920) - The Adoption of Children Act (1952) - The Immigration Act (1982).	Child Care Service Order (1977) considers a child to be below 16. Employment Act (1980) states a child as a person below 15 years. Reformatories Act (1920) defines a juvenile adult as between 16 and 21 years (for purposes of detention). The Adoption of Children Act (1952) defines a child as being below 19 years. The Immigration Act (1982) considers a child to be below 18 years of age.
Zambia	Draft Constitution, 2012 .	Article 311 of Draft Constitution: “Child” means a person who is below the age of eighteen years, and “children” shall be construed accordingly.

The trend is that many countries define the upper limit of childhood as 18, which is a way of protecting persons under a specific age. However, there are exceptions where the upper limit of childhood is determined as below 18 by some countries. This implies that the person is no longer treated as a child even before he or she reaches the age of 18. Countries who signed the CRC must also abide by its definition of a child.

Children are seen as vulnerable members of society, and the law protects them not only from their own lack of judgment but also from neglect and abuse by adults. This, however, is not always the case in child custody and control disputes. Children’s voices are seldom heard or at times ignored, although it is claimed that decisions made are in the children’s best interests and that children have rights (Robinson, 2010:1). De Lange (2012:34) also states that there has been a shift in power where children are now seen as contributors and negotiators. The innocence and fragility of the child is, however, easily manipulated and mistreated if it is not nurtured and cultivated.

It is the experience of the researcher that there often arise conflicts between cultural beliefs and perceptions regarding a child in Namibia and the norms and standards used by professionals in child custody cases. This leaves the impression that professionals are struggling to align customs with legal definitions of children. This complicates decisions about children and their welfare and leaves room for further clarification and development.

The various legal definitions of children thus do not provide final solutions regarding the status of children in view of the cultural realities in Namibia; this situation is similar to that of some other countries. It, however, does appear that defining the concept, child, causes 'confusion' not only in the Namibian context, but also in other countries. In Namibia, different ages and situations related to childhood are specified by a series of Acts. This situation is reflected in the Table below.

Table 2: Different ages for different activities according to the relevant Acts in Namibia

Activity	Act	Minimum Age
Definition of a child	Constitution of Namibia (Art. 15)	16
Age for protection against economic exploitation and hazardous work		16
Age for children to be employed for work in factories and mines		14
Age for detainment of children		16
Age of sexual consent	Combating of Rape Act (8 of 2000)	14
	The Combating of Immoral Practices Act	16
	Common law	12
Age of criminal responsibility		7
Age of majority		21
Age of recruitment into the army		18
Age of marriage		15 years for girls and 18 years for boys

It is important to stress that, in Namibia, a child is seen by law as a person who has acquired certain rights, duties and capacities at birth. This is so, despite the child's legal capacity being limited during the initial stages of its life. This limitation has to do with the ability to perform certain acts within the content of the law. According to Dausab (2009:146), these include the ability to –

- have or possess legal rights and duties;
- perform juristic acts;
- incur civil or criminal responsibility for wrongdoing;
- be a party to litigation.

Documents and Acts providing for the protection of children in Namibia do exist or are in the process of being developed and improved; however, the challenge arises when stipulations and guideline are to be implemented. The implementation of such provisions should be given effect in decisions about children, especially in cases of divorce disputes. If children are taught that they have rights and a voice but somehow the means to implement it lacks, especially in child custody disputes, the purpose of the legislature to protect children, is defeated. A lack of training in hearing a child's voice sometimes causes more problems. If a child's voice is heard, and the message behind it understood, the challenge remains to act on it.

In working with children, social workers and other professionals will be compelled to take note of the stipulations of the various Acts as they relate to children in their everyday situations. It is to be understood that the variations in ages as stipulated in the different Acts are bound to cause confusion. A close look shows that in some cases the specified minimum age for a particular activity falls below the maximum of 16 when childhood ends according to the Namibian Constitution. The exceptions are the minimum age for recruitment for military service and the age of attainment of majority. The minimum age for involvement in activities specified in the various Acts does create some confusion. The issue is whether the minimum ages mentioned in the various Acts make the child vulnerable, depending on the situation. The authors are of the opinion that this is part of the confusion about when, and if, children can be taken seriously. Even during public debates, when formulating the new Child Care and Protection Act, this caused confusion, especially when questions needed

to be answered about when children required protection and when children needed to be given rights. Currently, with the Child Care and Protection Act (3 of 2015), questions are being asked regarding the age of majority. In Namibia this age is set at 21 (Age of Majority Act, 1972). According to the committee that monitors the Convention on the Rights of the Child, countries are encouraged to harmonize their definitions of a child and the age of majority. At present, various laws in Namibia already give 18-year-olds the right to drive, buy alcohol, gamble and vote.

5.2 Defining children's rights

Literature on children's rights states that there is no clear definition of the concept "Children's Rights" (Mailula, 2005; Ruck, Abromovitch and Keating, 1998). The concept of children's rights is also described as complex, due to the plurality of childhood and the many different cultural contexts in the lives of children.

The most authoritative document regarding children's rights is the UN Convention on the Rights of the Child (hereafter the CRC) which is a human rights treaty setting out the civil, political, economic, health, social and cultural rights of children. It has been signed by most member states of the United Nations, and all signatories to the treaty have the responsibility for its implementation. Evidence of the complexity of children's rights was the adoption of the African Charter on the Right and Welfare of the Child by the Organization for African Unity, the predecessor of the present African Unity in 1990. This document is very similar to the CRC, and is regarded as the only treaty, together with the CRC, that covers such a wide spectrum of children's rights. The significance of the Children's Charter lies in the fact that it originated because the member states of the AU believed that the CRC had missed important socio-cultural and economic realities particular to Africa. It emphasizes the need to include African cultural values and experiences when dealing with the rights of the child. It was thus an effort to provide for the uniqueness of the needs of the African child determined by African culture.

Martens (2008:10) sees childhood as a social construct that changes in space and time, while De Lange, (2012) and Mailula, (2005:16) state that this contributes to the

complexity of defining children's rights. McLaren (2005:119) defines a right as *"a legally guaranteed power to recognize an interest"*. Rights –

- usually encompass a correlative duty;
- are enforceable;
- are not absolute.

Their boundaries are set by the rights of others and the legitimate needs and interests of society (McLaren, 2005:119). De Lange (2012) agrees that having rights has moral implications. The author agrees. Children's rights are complex, especially in the diverse socio-cultural construct of Namibia. Different cultures in Namibia have their own perceptions and guidelines regarding children's place in society, the family, as well as gender-based beliefs. Although legislation provides for children's rights, theirs are often helpless voices in their own cultural context. Professionals also often do not understand or embrace the child's rights, due to the cultural context.

5.3 Approaches to children's rights

According to Mailula (2005:16) and Ruck *et al.* (1998:404), there are two approaches to the protection of the rights of children, namely the nurturance and the self-determination or autonomy approaches.

According to **the nurturance approach,** children should be provided with what is good for them. The Constitution of the Republic of South Africa (1996) recognizes that children are the bearers of rights by expressly and specifically entrenching children's rights (Mailula, 2005:16). This is the same in Namibia, according to Article 15(1) of the Constitution of Namibia (right to parental care, for example, if a parent is denied access it is disregard of children's rights, especially the right to parental care). Therefore, the child has the right to receive care and protection (Mailula, 2005:24).

Article 15(1) of the Constitution of Namibia states*: (1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interest of children, as far as possible the right to know and be*

cared for by their parents." However, effect should be given to these rights by implementing practical measures to protect them. In practice this is not always true with regards to a child's rights. One parent often makes the decisions on this matter. Often parents feel they have the right to decide and to know on behalf of the child what is in his or her best interest, frequently damaging ongoing relationships with a parent or the extended family. It is expected of the child to just accept whatever has been decided or implemented. The effect of culture regarding the rights of the child should be accepted as a given.

Martens (2008:10) defines the above-mentioned as child protectionist, where the differences between children and adults are highlighted. The emphasis is on children's "not yet citizens' status" as justification to control their lives. Martens believes children's rights are important, but the primary goal is to protect children. This affects the way in which child participation is viewed. With the belief that children should be protected from the problems of society, children's involvement and responsibility become limited in order to allow them a carefree childhood. Although this is a paternalistic approach to children, it is honestly believed by professionals and communities to be in the best interest of the child.

According to the **self-determination/autonomy approach,** children have the right to decide what is good for them. Martens (2008:10) describes this as a child liberationist approach. Here it is believed that children should have the same rights as adults, regardless of their age. Children are recognized as competent social actors. Children, therefore, have the freedom to participate as equals with adults and not only have their needs met. Children should, consequently, be able to participate in decisions about their future. This involvement also gives children the opportunity to practice and acquire skills in order to become responsible adults. Some people, however, may argue that children's right to decide what is good for them is limited by their abilities. Namibia, in certain areas, is working towards this approach by involving children in decision-making about, for example, environmental issues; however, their involvement is not necessarily accepted in issues concerning their emotional well-being.

According to the Human Rights Council (UNICEF, 2010), the right of children to civic participation in Namibia is widely respected. Most schools have Learners' Representative Associations that act as liaison between students and school administration. In 2007 the Namibian Parliament took the lead in establishing an annual Children's Parliament which brings children's issues to the attention of parliamentarians. The development of the new Child Care and Protection Bill is a good example of the involvement of children in political decision-making. A Children's Reference Group was an integral part of the public consultation process, ensuring that children's views were included.

Literature warns that children's rights must not be approached from the perspective of the parent, which is often the case (Robinson, 2010:31). Neither should children be seen as objects of their parents' rights, but should themselves be recognized as bearers of rights. Mailula (2005:27) cautions that, although it is generally accepted that children are bearers of rights, there are no clear methods of establishing what rights they may demand legally.

Robinson (2002:316) refers to Lord Fraser of Tullybelton who states that

> *"parental rights to control a child do not exist for the benefit of the parent, but for that of the child, and that such rights are justified only in so far as they enable the parent to perform his or her duties towards the child ... . Parental rights must yield to the child's right to make his or her own decisions when the child reached a sufficient understanding and intelligence to be capable of making up his or her own mind on the matter requiring decisions ... ."*
>
> *Unfortunately this is not true for a majority of cases in which children are involved.*

Until recently more focus was placed on nurturance rights. It is only now that there is a growing concern about children's rights to self-determination. This shift is mainly due to the focus on additional decision-making rights for children, especially with the UN Convention on the Right of the Child and the growing belief that children have the right to take an active part in decisions regarding their lives (Robinson, 2002:314).

According to the Human Rights Commission (2010), there is also a **Life-cycle approach** to children's rights, where children move from dependence to interdependence to independence. Each stage allows the child to exert greater power to act on his or her own behalf.

Ruck *et al*. (1998:405) refer to Melton and De Lange who state that children progress through three stages or levels of reasoning about rights:

- Egocentric orientation: Children perceive rights in terms of privileges that are bestowed on them or withdrawn from them on the whims of authority figures.
- Rights based on fairness: Children perceive rights as maintaining social order and obeying rules.
- Perceiving rights as abstract universal principles.

According to Ruck *et al*. (1998:404), a child's full range of rights is constrained by the child's various developmental needs. Consequently, the child needs a right to be cared for and nurtured; however, there needs to be a balance between nurturance and self-determination. Although there has been a shift in power to seeing children as contributors and negotiators, their innocence and fragility need to be protected for they can easily be manipulated and mistreated if not nurtured and cultivated (De Lange, 2012). Martens (2008:11) defines this view as a liberal, paternalist view. Children are seen as different from adults, but children are also seen as both vulnerable and competent. Children should, therefore, be assessed by adults on an individual basis. This view's main concerns are: Should children have the same rights as adults? Are they also capable of taking responsibility and dealing with the consequences of taking responsibilities as adults do? The answer could be that children should be allowed to execute their rights according to their stage of development.

Archard (2004:76) distinguishes between "liberationist" and "caretaker" rights. Liberationists emphasize that children's equality is the same as that of adults, and see children as having the same fundamental, human rights and freedom as adults. Caretaker rights place emphasis on children's vulnerability and incompetence. A

broad approach thus needs to be taken as far as children's rights are concerned, because their rights, to a large extent, derive from the community and the culture within which the child is reared and educated.

From the above it becomes clear that to deal with the rights of the child in practice is indeed a challenge. The author is of the opinion that it is difficult to understand the concept of children's rights for health professionals. They often talk about the concept, but in practice they have difficulty separating it from parents' rights, especially when they work with both the parents and children of a family. The author is, furthermore, of the opinion that these dual roles, as well as sub-conscious beliefs, of children's actual position mostly lead to parents' rights taking priority over those of children. This happens mainly because of the nurturance approach, especially when it comes to child custody disputes and decisions. The perception and understanding of professional practitioners dealing with children about the rights of the child are bound to have an important influence on their handling of situations where decisions about the rights of the child are to be considered.

5.4 The general nature of children's rights

According to Murphy (2005), Robinson (2002) and Robinson (2010), rights fall into three categories:

- Provision rights. These rights refer to an adequate standard of living, such as the right to free education, adequate health and the right to legal and social services.
- Protection rights. These rights include protection from abuse, neglect, bullying, discrimination, as well as the right to safety.
- Participation rights. These rights include the right to freedom of expression and the right to participate in public living.

According to Ambunda and Mugadza (2009:5), children's rights, with particular attention to the rights of special protection and care, also include their right to

- association with both biological parents;
- a human identity;
- having their basic needs for food, universal, state-paid education and health care met;

- criminal laws appropriate for their age and development.

Children's rights, therefore, cover four main aspects of a child's life (Robinson, 2010:30):

- The right to survive: the right to life and to have the most basic needs met.
- The right to develop: enabling children to reach their fullest potential.
- The right to be protected from harm: rights that are essential for safeguarding children and adolescents from all forms of abuse, neglect and exploitation.
- The right to participate: allowing children to play an active role in their communities.

Mailulua (2005:23) and Ruppel (2009:58) explain that children's rights should have the effect that allows the right to:

- **Equality** that belongs to every human being, irrespective of age, gender, birth or social origin. It ensures that everyone is equal before the law and has the right to equal protection by, and benefit from, the law. It prohibits any unfair discrimination based on birth or social origin (Mailula, 2005:27). The author is of the opinion that this is not true for children in Namibia. Due to their protection rights, provision rights and the nurturance approach towards children, especially in child custody disputes, as well as cultural beliefs and perceptions, children's rights are not viewed as equal to those of their parents, even though legislation makes provision for the paramountcy of the best interests of children.
- **Human dignity** which is an acknowledgement of the intrinsic worth of human beings. Children are, therefore, entitled to be treated as worthy of respect and concern.
- **Parental care** which shifts the emphasis from parent authority over the child to the child's right to be cared for by the parent. A child, therefore, has the right to adequate care by both parents. According to Kruger (Mailula, 2005:24), parental authority should be seen as a measure for the protection of the child. The concept of care indicates a shift of emphasis from the parent's authority/power over the child to the child's right to be cared for by the parent. The author is of the opinion that the focus in Namibia, when dealing with child custody disputes, is still on parental authority over the child, which is also deeply imbedded in

cultural beliefs although it clouds children's rights, which makes children's rights extremely complex.

- **Paramountcy** of the best interest of the child which acknowledges children's vulnerability and lack of judgment. It means that the child's best interest should be of paramount importance in any matter concerning the child (Mailula, 2005:26).

Children's rights must be implemented with regards to three key principles:

- Best interest of the child;
- Non-discrimination;
- Participation.

An important note to be added regarding the protection of the rights of the child is that the resources needed to implement such rights should be made available by national governments. Legislation in Namibia makes provision for the content of children's rights from a legal perspective; however, the author is of the opinion that adults place a greater emphasis on protection rights. During a divorce, parents' intention of protecting their children from conflict and disruption, among others, is well meant, but unfortunately their reasons are often clouded by their own pain, fear and emotions. Legal professionals, assisting a parent through a divorce, focus on protecting their client, although they cognitively know that children's best interests are paramount, and their intention might actually have been to protect the children. Lawyers, therefore, often proclaim that they are protecting children's rights, but the rights of the parent, as their client, are actually their primary concern. The rights of the child are thus seen through the eyes of the parent, often without them being aware of it. Mediation and the development of parenting plans by trained and experienced practitioners will greatly add to impartiality and objectivity in safeguarding the rights of the child and its best interests.

The author is thus of the opinion that if one looks at the content of children's rights, it is understood that children need to be protected and to participate, among others, but the confusion is about how this is approached in practice. Even for a mental health professional advocating for children's rights in divorce disputes, it is clear that the legal system does not always consider the paramountcy of children's rights and

best interests. The author is of the opinion that even the legal system often becomes entangled in adults' rights, leaving children behind and, thus, unprotected (the opposite of the intention to protect). Mental health professionals, involved in divorce cases, are also not always trained in understanding children's rights, hearing their voices and effectively presenting this in court.

In the above, the importance of children's' rights was stressed and their nature explored. It is once again clear that the topic of children's rights are being debated on a continuous basis and will still be done so in future, as reflected through the multiple perspective of various authors. To a large extent, every culture on earth will have its own way of describing a child and children's rights. The acceptance of the UN Convention on the Rights of the Child may be regarded as a major achievement, but the question remains whether it guarantees that all nations will implement it according to the spirit of the document. African countries have indeed developed their own document to provide for the needs of the African child in particular.

6 THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

The best interests of the child derive from Article 3 of the CRC which states that "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 consideration" (UNICEF, 1989). This Article of the CRC is one of the four pillars of the CRC and gives clear and comprehensive guidance on the areas where the best interests of the child are to be considered. It, however, does not provide guidance regarding what should be considered when assessing the best interests of the child. This leaves room for different assessments in different cultural environments.

According to Robinson (2002:315), the best interest of the child was traditionally a concept of welfarism, where it started as a principle of compassion. Currently the concept of the best interest of the child can be described as a golden thread which

runs throughout the whole fabric of our law relating to children (Heaton, 2009; Bekink & Bekink, 2004). Skelton (2009:486) sees it is a guiding principle in decisions to be made about children.

In Namibia this concept also forms part of the Constitution of Namibia (1990). Although the concept is widely used in Namibia, there is no clear definition of the meaning of the concept and often the best interest of the child is coloured by professionals and cultural perceptions, frequently resulting in decisions not in the best interest of the child. This is, however, not only true for Namibia, since the concept has been widely criticized for its vagueness and indeterminacy as a legal concept (Anderson & Spijker, 2002; Heaton, 2009; Semple, 2011; Zelechoski, Fuhrmann, Zibbell and Cavallero, 2012).

According to Bekink and Bekink (2004:22), this vagueness and indeterminacy as a legal concept relates to the subjective application of the standard and the difficulty in providing an objective assessment, given the rapidly changing social values, standards and customs of our times. As Currie and De Waal (Dausab, 2009:147) state, *"The concept of the best interest of the child is not without difficulty. It has become controversial because it has failed in the past to provide a reliable or determinate standard. In addition it creates the danger of social engineering through what the helping professional or social services consider to be in the best interest of the child".* Robinson (2010:1) also argues that there is a discrepancy between the state's attempts to facilitate (protect children) and what happens in practice. Namibia' legislation, however, does make provision for guidelines to be used when making decisions in the best interest of the child. The author is, however, of the opinion that mental health and legal professionals often struggle with the principle due to a variety of factors, such as cultural beliefs, biases towards children's views, a lack of training and not being sure what the best interest of the child means in practice. Another problem is the way in which criteria are to be prioritized in the unique situation of every individual child.

6.1 Defining the best interests of the child

Using the best interest of the child as standard in parenting disputes is a challenge due to the vagueness of the term as a legal concept (Anderson & Spijker, 2002; Bekink & Bekink, 2004; Heaton, 2009; Semple, 2011; Zelechoski *et al*., 2012). There seems to be little consensus regarding what constitutes the best interests of the child.

Ramolotja (1999:10) also states that what is in the best interest of a specific child cannot be determined with any degree of certainty. Worldwide, however, various constructs or principles have emerged as primary factors that courts can consider when making child custody decisions (Zelechoski *et al*., 2012:464). Many questions arise, however, about the best interest of the child principle, such as:

- Can the best interest of a child be determined as an absolute certainty?
- Can a child's view be taken into consideration by the court in determining the question of custody?

The author is of the opinion that although the best interest of the child is a guiding principle in decisions pertaining to children in divorce disputes and legislation providing guidelines, the principle of the best interest of the child is subjective. This is due to the fact that decisions are often clouded by professionals' own cultural beliefs and perceptions of what is in the best interest of a child, as well as a lack of knowledge regarding children.

According to the American Academy of Child & Adolescent Psychiatry (AACAP, 1997:58), the primary objective regarding the best interests of the child is to determine which arrangements will best fulfil the needs of a specific child. The benefit of this is that it places a "*judicial magnifying glass*" on children, making them the most important part of the process.

The best interests of the child, especially in divorce cases, can thus be interpreted in a variety of ways, ranging from financial suitability to psychological attachment. The best interests of each child should thus be considered in the context of the child. As

stated earlier, the criteria for assessment of the best interests of the child should be configured according to the needs of the particular child in a unique situation.

6.2 The best interest of the child as a principle

According to reviewed literature, the concepts of standard and principle are used interchangeably when referring to the best interests of the child. The best interest of the child operates as a principle and not a right (Dausab, 2009:147). A principle can be defined as –

- social goals which are legal tools to aid in the interpretation of rights;
- stated reasons which argue in a particular direction but do not necessitate a particular decision (McLaren, 2005:120).

The author agrees by acknowledging that the interest of a child is not an absolute. Namibia's legislation provides guidelines in order to aid legal and mental health professionals to argue in a particular direction. This, however, also makes it subjective due to each professional's views and the interpretation of the principle of a child's best interest by each individual.

Various authors (Dausab, 2009; Heaton, 2009; Martens, 2008) state that a truly principled, child–centered approach requires a close and individualized examination of the precise, real-life situation of the particular child. The author agrees that the 'best interest' principle, therefore, is not cast in stone. Due to the complexity of the best interests of the child, a case-by-case analysis should be used. Legislation has tried to provide a list of factors to be considered when deciding a matter affecting a child. This list is by no means exhaustive, but serves merely as a guiding framework and should be used in a flexible manner. It gives courts and professionals, working with child custody and control disputes, unlimited powers in establishing what is in the best interest of minor or dependent children. Courts also tend to rely on previous judgments, so that there is not always enough room for flexibility. It will require some judicial activism on the part of judges and judicial officers to ensure that each, unique case is attended to on its own merits.

6.3 Guidelines and processes in determining the best interest of the child

The process of deciding what is the best interest of the child is not an easy task (Anderson & Spijker, 2002; Dausab, 2009). Consequently, various lists of guidelines are available to assist health and legal professionals, as well as the courts, in determining the best interest of the child. It may be assumed that international lists/criteria will serve as guidelines, but each country, using the best interests of the child as a standard, will develop its own list of guidelines unique to the particular country.

6.3.1 Guidelines for determining the best interest of the child

A list of guidelines can be of great assistance to all bodies and persons who have to apply the best interest of the child to decisions regarding children. According to Heaton (2009:8), although such a list is undoubtedly of great assistance, no list of factors can ever remove the risk of the concept of the best interests of the child being manipulated to reflect the subjective views or values of the body or person who has to apply the concept. As said previously, a related difficulty is that historical, political, social, economic and other factors can be incorporated in the determination of the child's best interest. Strous (2007:224) also argues that such a list can merely serve as a guide.

Below is a summary of various authors' guidelines in determining the best interest of the child:

Table 3: A summary of various writers' guidelines in determining the best interest of the child

Fuhrman & Zibbell	Stahl	Bekink & Bekink	Dausab	Knoetze
According to Fuhrman & Zibbell in Zelechoski *et al*. (2012:464), the factors to be considered as guidelines can be grouped into four	According to Stahl (2011:33) the best interest of the child is defined around parameters such as nurturing, guidance, religious and economic issues,	Bekink and Bekink (2004:23) also state that the standard varies across jurisdictions, but typically includes factors such as – • the child's own	Dausab (2009:147) states that it is also about considering the child before a decision affecting him or her is	Knoetze (2002:355) states that the best interest of the child should include the child's background, which includes the need to maintain a connection with his

broad categories in order to address questions in general regarding physical custody, legal custody and access:	emotional attachment, stability and the maintenance of a healthy relationship with both parents.	wishes • his or her physical, emotional and educational needs • the desirability of present circumstances continuing • the child's age and gender • the capacity of the parent to provide for the child's educational, emotional, psychological and cultural development • the parents' ability to meet the basic physical needs of the child and the emotional bond that exist between the child and a particular parent.	made.	lifestyle, culture and tradition. It should also be recognized that a child's social and cultural development is an important factor which must be given proper consideration whenever any decisions are taken in respect of the child. Cultural values should be relevant in the form of the child's background and need to maintain connections with the extended family and the child's culture and tradition.
a) Parenting attributes. These include information about parents and their parenting, specifically the functional abilities or deficits of both parents, e.g. each parent's ability to– - create a positive relationship with the child - understand the child's needs as an individual, as well as in a develop-mental context - place the child's needs ahead of their own - demonstrate				

flexibility or adaptability in their responsive-ness to the child, and - communicate effectively with the child.				
b) Children's psychological needs and abilities. The focus here is on – - the child's nature and degree of attachment to each parent - the child's self-regulatory capacity - special needs - peer relationships - academic functioning, and - relationships with siblings, and preference for a particular outcome.				
c) The resulting fit between parent and child. The focus is on the congruence between the parents' functional capacities and the children's needs. This can include – - the degree to which parents understand and provide what their children need - the degree to which the children's needs are within the realm of what the parents are				

able to provide - the compatibility between parent and child tempera-ments, and - the level of agreement between parents' expectations and demands and the child's abilities.				
d) The co-parenting relationship. There is a strong correlation between a post-separation parenting relationship and the outcomes for children according to Amato & Booth in (Zelechoski *et al*. 2012:466). This includes – - the type of conflict - the level of conflict and how it is expressed - whether the conflict predated the separation - the degree to which the children are directly or indirectly involved, and - the co-parenting skills.				

Some of the selected authors' views reflected in the above columns are more detailed than others, making it difficult to compare. Although there is considerable agreement amongst the various criteria listed above, there are also difference. Not

all authors provide a detailed list of factors to be considered in determining the best interests of the child. There are, however, noticeable similarities. Important amongst these are the parenting abilities of the parents and consideration of the child's culture and background.

The criteria for assessing the best interests of the child as contained in the proposed Child Care and Protection Act (3 of 2015) and the Child Status Act (6 of 2006) of Namibia are contained in the Table below.

Table 4: A summary of guidelines in Namibia in determining the best interest of the child

Child Care and Protection Act (3 of 2015)	**Child Status Act (6 of 2006)**
"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 applied" (Draft Child Care and Protection Bill, 2009:12) According to the proposed Child Care and Protection Act the following list of factors should be considered in deciding what is in the best interest of the child: • The child's sex, age, background, maturity and level of development • The child's cultural, ethnic and religious identity • The impact of any disability or chronic illness • The nature of the child's relationship with the parents, siblings and other relatives, and with any other people who are significant in his life • The attitude and behavior of the parents or any other caregiver • The capacity of the caregiver to provide for the child's physical, emotional, intellectual, spiritual, developmental and educational needs • The importance of maintaining contact with family members – would a specific change make it easier or harder to maintain such contact? • The need to protect the child from harm • Any history of family violence against the child or any other family member • The need for a stable family	The concept of "the best interest of the child" is paramount and addressed by listing twelve factors in Art 3 (a – l) to be considered regarding custody, guardianship and access that must be taken into consideration whenever the best interest of the child must be determined. • The child's age, sex, background and any other personal characteristics • The child's physical, emotional and educational needs • The capability of each parent, and of any other relevant person, to meet the child's physical, emotional and educational needs • The fitness of all relevant persons to exercise the rights and responsibilities in question in the best interest of the child • The nature of the relationship of the child with each of his parents and other relevant persons • The degree of commitment and responsibility that the respective parents have shown towards the child, evidenced by such factors as financial support, maintaining or attempting to maintain contact with the child or being named as a parent on the child's birth certificate • Any harm which the child has suffered or is at risk of suffering, directly or indirectly from being subjected to abuse, ill-treatment, violence or other harmful behavior • In a case where the application has been brought before the children's court, the reasons for the application in question

environment (if possible).	• Any wishes expressed by the child or his or her representative, in the light of the child's maturity or level of understanding • The practical difficulty and expense of present and proposed arrangements • The possible effect of any change in the child's circumstances • Any other fact or circumstance that the court considers relevant.

When the contents of the two tables above are compared, they reflect a considerable similarity in some criteria to be used in assessing the best interests of the child. A criterion to be used to assess the best interests of the child that features prominently is the capacity of the parents or potential carer to meet the various needs of the child. Another important criterion from the lists in the tables are the importance of the cultural and ethnic background of the child. The lists of criteria in the two tables also reflect the different perspectives on assessing the best interests of the child. They highlight the complexity in operationalizing this standard. Differences between various lists of criteria are to be expected, because provision must be made for situations which are unique and thus differ from one another. However, the search for common ground between various proposed criteria should be noted.

The South African Children's' Act (38 of 2005) provides a fairly detailed list of factors to be considered in determining the best interests of the child. In a judgement by Judge King (1993) in the case of McCall vs McCall in the Cape Provincial Division of the Supreme Court of South Africa, he made a list of the following thirteen factors to be considered in determining the best interest of the child:

- The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child.
- The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires.
- The ability of the parent to communicate with the child and the parent's insight, understanding of and sensitivity to the child's feelings.
- The capacity and disposition of the parent to give the child the guidance he or she requires.
- The ability of the parent to provide for the basic, physical needs of the child.

- The ability of the parent to provide for the educational wellbeing and security of the child.
- The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development.
- The mental and physical health and moral fitness of the parent.
- The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo.
- The desirability or otherwise of keeping siblings together.
- The child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration.
- The desirability or otherwise of applying the doctrine of same sex matching.
- Any other factor which is relevant to the particular case with which the court is concerned.

Section 7 0f the South African Children's' Act (38 0f 2005) lists the following factors to be considered for the same purposes:

(a) The nature of the personal relationship between-
    (i) the child and the parents, or any specific parent;
    (ii) the child and any other care-giver or person relevant in those circumstances.

(b) The attitude of the parents, or any specific parents, towards-
    (i) the child;
    (ii) the exercise of parental responsibilities and rights in respect of the child.

(c) The capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs.

(d) The likely effect on the child of any change in the child's circumstances, including the likely effect on the child or any separation from -
    (i) both or either of the parents or
    (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living.

(e) The practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially

affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) The need of the child-

(i) to remain in the care of his or her parent, family and extended family;

(ii) to maintain a connection with his or her family, extended family, culture or tradition.

(g) The child's-

(i) age, maturity and stage of development;

(ii) gender;

(iii) background;

(iv) any other relevant characteristics of the child.

(h) The child's physical and emotional security and his or her intellectual, emotional, social and cultural development.

(i) Any disability that a child may have.

(j) Any chronic illness from which a child may suffer.

(k) The need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment.

(l) The need to protect the child from any physical or psychological harm that may be caused by-

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior;

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behavior towards another person.

(m) Any family violence involving the child or a family member of the child.

(n) Which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.

In a commentary by Bregman and Moodley (2015) the following differences between the factors listed in the McCall vs McCall judgement and those of the South African Children's' Act are noted:

- Section 7 has a wider application compared to the McCall list. Its application is not limited to parents but apply equally to a care-giver or any relevant person in the child's life.
- Section 7 does not include 'same sex matching'.
- Section 7 does not specify the ability to provide economic security but puts a strong emphasis on the emotional, intellectual and spiritual well-being and stability of the children.
- Section 7 does not include 'child preference'. Section 7(g) does include the child's maturity and developmental stage, which are often the criteria to consider when taking children's wishes into account; they are to be considered. However, it does not specifically mention the wishes of the child. They do point out, however, that Section 10 states that every child must be given the opportunity to participate in any proceedings regarding that child and that this is a separate, self-standing right accorded to every child and not merely a subsection of the best interest standard. There is thus an obligation to take Section 10 into consideration along with Section 7 in all proceedings concerning the child.

Finally, they point out that the McCall list was not exhaustive. It was not a closed list of factors and the court could consider any other factors it deemed relevant. Section 7, on the other hand, does not state that the court may consider any other factors, nor does it list the factors by starting with the word "including" which normally indicates that a list is not exhaustive.

The message flowing from the above is that there is no fixed list of factors to be considered in determining the best interests of the child because each list will reflect the value system of the context in which it is proposed. Each system will have its strengths and weaknesses but the search should be for the common ground between various systems. Although the determination of the best interests of the child is by no means an easy exercise, specification of factors to be considered makes it more organized and methodically processed, as well as promotes accountability, especially in courts.

Social theories and norms, culture and religion, values and rules should, therefore, not be disregarded when determining the best interest of the child. All of these and more could be relevant in terms of a contextualized approach to determine the best interest of the child. However, the focus of using such factors must be their relevance to, and impact on, the individual child. Each factor (interracial, sexual orientation, gender, religious conviction, cultural beliefs, and so forth) must be related to the specific child and his or her interest in the specific case (Heaton, 2009: 9). The key principles should thus be contextualization combined with individualization.

These lists or guidelines are, however, open for criticism. A major objection to the list is that it is closed; in other words, the listed factors are supposedly exhausted regarding what could be relevant in determining the best interests of the child. According to Gould and Martindale (2009:32) and Strous (2007:225), the best interest of the child standard has come under attack because it –

- is poorly defined. This statement is also supported by Strous (2007:225) who refers to various sources that state that the best interest of the child principle is vague, indeterminate and over-susceptible to biased interpretation;
- is ambiguous, leading to much judicial discretion;
- encourages more disputes and litigation because of its vagueness and ambiguity;
- offers no clear guidelines that can help in judicial decision-making;
- shows standards indeterminacy – what one evaluator may feel is in a child's best interest may not be what another evaluator determines to be in the child's best interest. It also seems as if there are skills deficits among evaluators and in the judicial system when it comes to assessing the best interests of the child. This often leads to experts reaching differing conclusions, due to biases or different weights being given to various aspects of a case, and is based on a normative pluralism (Gould & Martindale, 2009:33). No shared ideal dictates or defines proper work roles, proper family structures or proper family values. The challenge is to develop a legal standard that is sensitive to both the social values of culture and the needs of the legal system.

The author is, however, of the opinion that a list does provide a standardized guideline to work from. It can provide structure and uniformity as a tool in determining the best interests of the child as a baseline of factors to look at. Because these lists are not exhaustive, factors impacting each individual child can be added. The complexity or challenge may rather be in the process that each professional employs in determining the best interests of the child.

Information to determine the best interests of the child is normally gathered from clinical interviews with parents, children, teachers, therapists, observations and home visits, records reviewed, collateral interviews and psychological testing. The subjective views, values, historical factors, political factors, social factors and economic factors of professionals and courts are often incorporated in deciding the best interests of a child. Heaton (2009:5) stresses that the best interests of the child can only be properly addressed if the persons, who have to determine the child's best interests, approach the determination in a contextualized, individualized and child-centered manner, by –

- evaluating each individual case or situation in the light of the individual child's position and the effect that that child's circumstances have or will probably have on the child;
- not unquestioningly applying prevailing social, cultural or religious norms or social theories to what is best for children in general;
- not simply applying his or her personal views or those of society to one of the child's parents.

Different professional people will typically be involved in decisions about the best interests of the child. Examples of these may be health and legal professionals, psychologists and social workers, to name but a few. In many cases, depending on the situation, teachers may also become involved, over and above the child and the child's parents or caregivers. To make a trustworthy decision about such an important event as his or her best interests, the involvement of these professionals are to be recommended. Their involvement will make the result of the assessment process more reliable and the child's interests may be assessed from different

angles derived from the perspective of each involved professional or significant person.

The most important action to be taken, and which should form the basis of the decision about the best interests of the child, is an assessment of the child's needs by a well-qualified person. Such evaluation should not only focus on the individual child, but also on the environment in which the child lives. It will automatically be done with a view on the psycho-social functioning of the child.

6.3.2 The process of determining the best interest of the child

The sad fact is that the standard regarding what is in the best interest of the child has failed the child in some respects. If applied correctly, the principle does yield the required results in that the interest of the child is taken care of. However, according to Dausab (2009:148), '*the consistency in applying this principle correctly each time there is a matter that requires the determination of the best interest of the child may require some form of uniform guidelines from the courts, without imposing a standard that disregards the uniqueness and merits of each individual case*". Anderson and Spijker (2002:366) refer to Heaton, who states that "*what is in the best interest of a specific child is clearly a question of fact and will differ from case to case*". Bekink and Bekink (2004:23) also see it as factual, where the court has to determine every case individually.

The importance of achieving a situation, where the best interests of the child are secured, dictates that a systematic process of decision-making should be followed. This process, depending on the situation, may involve professionals like social workers, psychologists and legal experts. The parents and the child, as well as other people relevant to the process, will automatically be involved. Recommendations made and decisions taken with respect to the best interests of the child will be made an order of the court. All information needed to serve the best interest of the child must be collected from relevant sources.

Courts are careful to state a rule or practice that should be followed in all cases. It leaves room for treating each case on its own merit. Nonetheless, the paramountcy

of the best interest of the child is a constant. The best interest of the child, therefore, cannot be conveniently excluded on the basis of culture, historical context or any other matter that may seem to justify circumstances.

According to Dausab (2009:147), courts and professionals confronted with the question of the 'best interest of the child' often have to ask themselves the following questions:

- Which specific interest is at issue?
- What is the nature of such interest?
- Is the interest of a long-, medium- or short-term duration?
- Are the criteria for determining such an interest objective or are they based on the child's subjective wishes?

According to Ramolotja (1999:10), the following should be considered to determine what would be in the best interest of a child:

- All the options;
- All the possible outcomes of each option;
- The probabilities of each outcome occurring;
- The value attached to each outcome.

There are, however, also problems with the above requirements, especially if the best interest of the child is seen from the autonomy approach, where children can decide for themselves what is good for them. The following questions can then be asked in determining the best interests of the child:

- Which factors should be taken into account in determining the best interests of the child? Strous (2007:224) refers to Maya who states that each child's circumstances within each family unit vary across a wide spectrum of factors and, therefore, the best interest of the child standard is of "necessity an indeterminate and relative one". This again states the importance of looking at each case individually.
- Should the child's interests be sought primarily in his or her apparent happiness, moral and/or religious welfare, material welfare or stability and

security, or can his or her best interests be found only in a combination of all of the above and more?

- Should the child's interests be viewed from a short-term, medium-term or long-term perspective?
- Should the best interest be seen from a subjective or objective point of view?

The author is of the opinion that mental health professionals (social workers and psychologist) are often in the best position to answer these questions. This is especially so when they are working as a team where they combine each one's expertise while looking at the child's circumstances holistically. The question remains, however, what is the process and contribution of each professional in determining the best interest of the child?

Very few parents, but also professionals, understand that the aim of awarding custody is not to punish either of the parents, but merely to help them accept that they cannot have their children living with them (Romolotja, 1999:10). The best interests of the child can, therefore, often be in conflict with the interests or the rights of the parents. Courts now have unlimited discretion to decide on the best interests of the children, which makes their task even more difficult. Very often the court favors long-term rather than short-term or temporary interests, happiness and gratification.

Ford (2007) stresses the paramountcy of the best interest of the child. The High Court of Namibia assumes the protective role of upper guardian of all minor children. According to McLaren (2005:127), the best interest of the child as a standard or principle, therefore, creates an additional barrier to the violation of the right of the child. The principle ensures that the child's best interests are considered, but also adds greater weight to the interest of the child and counts in favor of the rights of the child where these rights are in conflict with other rights.

Strous (2007:226) summarizes the advantages of the best interest principle as follows:

- Often the major decision to be made is between the better of two options, or the less detrimental alternative available.
- It offers a framework for evaluation with systematic clinical observations and empirical research.
- It helps to protect vulnerable children where the disciplines of Law and Psychology intersect by trying to ensure that adults' rights are not elevated above children's rights.
- It facilitates the circumstances for a child to develop physically, intellectually, emotionally and spiritually.

Anderson and Spijker (2002:366) state that "*The child's preference is not always indicative of the 'best interest' but an informed nature and intelligent opinion carry substantial weight*." Simply put, the best interest of the child means considering the child before a decision affecting his or her life is made. It is an overarching, common law principle that has been utilized primarily to assist courts and other institutions in the decision-making process. It should be borne in mind that courts are the upper guardians of minor children and, if the need arises, they have the final say in determining the overall welfare of the child. Mental health professionals (psychologists and social workers) in conjunction with a child therapist, play an important role in assisting courts in voicing the child's needs, as well as determining the best interests of the child.

7. CHILD PARTICIPATION

Historically the courts respected the rights of parents to exercise discretion and control relating to the activities, welfare and destinies of their minor children. Children were deemed incompetent to make decisions as to what would be in their own best interest, due to their lack of intellectual and emotional maturity and experience, as well as diminished capacity to exercise free will. According to Freeman (Barratt, 2002:557), children are *"persons, not property; subjects, not objects of social concern or control; participants in social processes, not social problems".*

According to the UN Convention on the Rights of the Child, a child has the right to participate in matters affecting his or her destiny, thereby creating a balance between the child's self-assertive and protective rights. Child participation as conceptualized in the UNCRC is a procedural right through which children can act to protect and promote the realization of other rights. Article 12 states that "*states 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 him or her, such views being given due weight in accordance with his or her age and maturity"*.

According to Mahlobogwane (2010:234), it is important for children as individuals to be able to contribute to decisions about their future, which is a right-based principle. Barratt (2002:557) also states that in the past children were seen as passive beings, but are now looked at as social actors where their personhood, integrity and autonomy are recognized and respected. Weir (2011:789), however, warns that hearing a child's voice does not mean that a child should be burdened with undesirable choices, and advises that the weight given to the child's voice be influenced by the age and social maturity of the child. This is also because of the dangers when parents misuse the voice of the child, especially in high-conflict cases.

Here again mental health professionals (psychologists, social workers and child therapists) play an important role during divorce disputes in helping children voice and participate in decisions impacting their lives. Mental health professionals also play an important role in giving balance and value to a child's voice in a legal environment, but also serve as a protective stance between parent and child, legal professionals and child, as well as between parents' rights vs child's rights, without burdening children with decisions.

The author is of the opinion that professionals working with child custody disputes should, however, receive compulsory training in child development and understanding children, as well as working with them. Such training could help in overcoming the complexity of determining the best interests of the child. This may also help in determining a more unified process in involving children to voice their needs.

Research (Mahlobogwane, 2010:234; Taylor, Fritzgerald, Morag, Bajpai and Graham; 2012:646) supports the benefits of child participation. According to Taylor *et al*. (2012:246), no "best practice" or mechanisms, procedures and practices are in place for children to participate to the extent that Articles 12 and 13 of the UNCRC envisaged. According to them, the area of participation remains an under-researched area. The author agrees with this. Legislation in Namibia makes provision for child participation, but no guidelines exist on how children should participate in divorce disputes. Even if there is consensus on child participation, no guidelines exist on what the process will be like, for instance, who will see the child, how will the child be involved, what must be asked and how, among others. This often creates more confusion and stress for both children and parents, because questions are not age-appropriate, the child does not understand or the child was asked to choose, especially if the professional lacks skills or knowledge regarding working with children.

According to the United Nations Convention on the Rights of the Child (UNICEF, 1989) and the African Charter on the Rights and Welfare of the Child (OAU, 1990), child participation is a key principle in the rights of the child. Children with the necessary age, maturity and stage of development must be given a chance to express an opinion about decisions which affect them. Children's views should be given an appropriate degree of consideration, keeping in mind their age and maturity. Consequently, children should participate in decisions that affect them. Namibia has signed both of these agreements. Namibian laws must, therefore, make sure that children are able to participate in decisions that affect them.

Taylor *et al.* (2012:648) state that child participation is conceptualized in the Convention as a procedural right. According to the Convention on the Rights of the Child, the following Articles make provision for the child to participate:

Table 5: A summary of Articles according to the U N Convention on the Rights of the Child that make provision for child participation

ARTICLES	CHILD PARTICIPATION
Article 12	The right to express their views. This requires a climate in which the child will not only feel free but is also encouraged to express his or her views.

Article 13	The right to obtain and share information and freedom of expression. Practically it will involve answering the questions related to the needs of the child and sensitivity to his or her reactions.
Article 15	Freedom of association.
Article 17	The right to information.
Article 14	Freedom of thought, conscience and religion.
Article 4	Governments have a responsibility to take all available measures to ensure that children's rights are respected, protected and fulfilled. This will require a good child protection system.
Article 9	All interested parties shall have the opportunity to participate and be heard in legal proceedings.

The Namibian Child Care and Protection Act, Chapter 2 (Section 5) makes provision for child participation as follows:

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

The Act also makes provision for court proceedings according to Section 5, stating that children should be allowed to express their views and preferences. The author is, however, of the opinion that legislation is not the challenge, but rather how to implement this in practice. The child should thus be guided skillfully to participate in the process and the parents and any other caretaker of the child should be led to respect this.

According to Pickar and Kahn (2011:61), over 80% of child custody evaluators or mediators do not include children in the process. The majority of children, therefore, have visitation schedules, custody decisions or parenting plans imposed on them without their input. Consequently, it has been suggested by the above authors that children older than four years be engaged in individual/play sessions. Infants and preschoolers can be included via parent-child observations conducted either at the office or at home. A large majority of school-age children in separated and divorced families want their voices to be heard and their needs and opinions to be considered. According to Barratt (2002:558), the *"central issue is not whether the child's wishes*

will be decisive, but whether he or she will be treated with respect". Children need to be given an opportunity to express their views as part of their right to participate, and their views need to be given serious consideration. The author agrees, but is also of the opinion that only then will children's rights be implemented according to the three key principles, namely the best interest of the child, non-discrimination and participation (see 2.4).

Saposnek (Pickar & Kahn, 2011:61) outlines several arguments in favor of including children in the processes:

- Children frequently disclose their real feelings to the mediator/evaluator, whereas they only tell their parents what they believe their parents want to hear.
- Children feel that someone cares about their needs.
- By gaining first-hand knowledge of the children's needs, the evaluator/mediator can educate parents about their children's specific developmental needs based on direct knowledge of the child.

The author feels that this should be done by an experienced and professional trained in child development.

There is, however, a difference between child-inclusive processes and child-focused processes (in which the child is not directly involved). According to O'Kelly (2014), a child-inclusive process has the following advantages:

- It is a targeted intervention aimed at the factors that protect children's development from parental conflict.
- It can be used as part of the parents' dispute resolution process.
- Children are interviewed separately with the focus on their attachment relationships, their parents' separation and conflict, future plans and their thoughts and needs in light of these.
- It is in conjunction with Art. 12 of the UN Convention on the Rights of the Child.
- Consulting children has the potential to restore parent-child relationships.
- It help parents make more insightful choices.
- It aids the re-establishment of parental alliances.
- It has the potential to help children with their post-separation journeys.

Further research, according to McIntosh, Wells, Smyth & Long (Pickar & Kahn, 2011:61), also found that there were more positive outcomes when children were included in the dispute process. This also resulted in the improved emotional availability of parents to children.

According to Taylor *et al*. (2012:648), child participation *"does not afford children a right to decide, nor does it assume that the interest and views of children are the same. However, it does ensure that children, like adults are accepted as citizens and entitled to participate in social, cultural and political life."* Interestingly, O'Kelly (2014) also states that child-inclusive processes are not about aiding decision-making. These processes are designed to impact psychological adjustment and family re-organization following conflict, separation and/or divorce.

According to the Special Joint Committee on Child Custody and Access (Dueck, 2004:6), *"If children feel that important decisions about their future are made without consulting them or considering their wishes, the children will not easily accept the decisions made about them. This could have dire consequences for a child's ability to adapt to custodial arrangements, with long-term mental health or other negative implications for that child."*

7.1 Factors influencing child participation

According to Lloyd (2002:15), the African perception that children are the property of their parent, as well as the value of respecting parents and elders at all time, has an impact on children's consent and children voicing their needs. Very little appears to have been done under customary law when it comes to the recognition of the rights of the child. This is also true for Namibia, and the author is of the opinion that Namibia has made various efforts to make children more aware of their rights, especially the right to participate. What may be lacking is creating more awareness, especially cultural awareness, for adults as far as children are concerned. From a traditional point of view, children in rural areas do not belong only to the biological parent, but also to the community as a whole. This differs from South Africa where

the principle of serving the best interests of the child is paramount. When one considers the individualistic nature of human rights protection, it would seem that the right of an individual child supersedes that of the cultural or religious group. The same should be made to apply to the Namibian context (Ambunda & Mugadza, 2009:18).

According to Childwatch network's survey in 2009 (Taylor *et al.,* 2012:652), the following factors impact child participation:

- **Positive factors**
  - Legislation requiring child participation;
  - Pro-active judges who encourage and/or seek children's views;
  - UNCRC and other human rights conventions;
  - Supportive research;
  - Reviews and/or academic debate.

In Namibia there is sound international and national legislation that promotes and requires child participation. To just train legal professionals (judges, magistrates, and the like) in legislation, may not be enough if their own cultural beliefs and perceptions regarding children cloud their decisions or the way in which they view children. Currently in Namibia, research is also not focused on child participation in divorce disputes and the impact thereof on children's post-divorce adaption. Many professionals working with child divorce cases appear to be not conversant with new research regarding children. This can often be seen in the recommendations made to courts regarding access, contact and sleepovers, which are not always necessarily in the best interest of children and not in line with new research regarding attachment, age appropriate contact schedules and sleepovers. For example, they may still recommend alternative weekends without midweek visits or they may see the mother as the natural attachment figure.

- **Barriers**
  - Considerable variation between judges, courts, etc.;
  - Seeing child participation as discretionary, rather than as a right;
  - Resistance from judges, lawyers and families;
  - Limited acknowledgement of the UNCRC.

These factors could always be a barrier, but with more awareness and sensitivity they should become less of a barrier over time.

Weir (2011:788) cautions that children's unpredictability can also be a barrier. According to Weir, it is not possible to conclude that apparent maturity or intelligence is a guide to reliability. He warns that courts need to be cautious when evaluating children, because of parents who might misuse their child's right to a 'voice' in order to achieve their own goals. On the other hand, Taylor *et al*. (2012:652) warn that participation can place an undue burden of responsibility on children. Therefore, courts should make use of additional resources to achieve this. The author is of the opinion that trained professionals, especially in child development, children's needs and working with children, especially in hearing their voices, are invaluable to the legal system in helping legal professionals keeping children safe in a legal system that is mostly adult focused.

The factors influencing child participation should be known and recognized because children are part of a family system but also part of a policy and legislative environment. For this reason, the social worker or other professional person should take a systems view of the child's environment to identify the forces influencing the child's participation.

8. LEGISLATION AND DOCUMENTS PERTAINING TO CHILDREN'S RIGHTS AND THE BEST INTERESTS OF THE CHILD

Children's rights in Namibia are comprehensively protected by a wide-ranging set of international and national instruments. Children benefit from rights contained in general treaties, but also from a number of specialist instruments created to accord them extra protection, given their particular vulnerabilities.

Law, in general, appears to be neutral to children. It embraces predominantly the language and thought processes of adults. It highlights children's lack of power under the law, and contributes to their traditionally perceived vulnerability (Lloyd,

2002:15). This is also true for Namibia. Although the law and legal system promote the protection of children, often that same legal system leaves children in divorce disputes vulnerable and unprotected.

According to Monk (Taylor *et al*., 2012:649), *"law is not simply a set of rules but a shifting cultural and social text sustaining existing understandings, assumptions and practices concerning children and young people – with all its inherent inequalities and injustices".* Legislation and measurements that exist in Namibia lack effectiveness when it comes to the monitoring and implementation of children's rights. Existing legislation is either completely silent on providing specifically for the principle of the best interest of the child, or where this principle can be inferred, it is not adequate (Dausab, 2009:145). It can, however, be argued that the mechanisms for the protection of the best interests of the child do exist in Namibia, but their proper implementation by professionals is sometimes lacking.

8.1 International mechanisms

There are a number of legal instruments that specifically provide for children's rights and the best interest of the child as a legal norm. The best interest of the child principle is a well-established principle in the international and national normative framework. The principle is also entrenched and provided for in the United Nations human rights legal instruments, such as the UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), and national constitutions in their children's rights provisions make reference to it (Skelton, 2009: 483).

In Namibia, in terms of Article 144 of the Namibian Constitution, it states that "*Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.*" That means that once Namibia has ratified international instruments, they are applied to its legal system (Dausab, 2009:153). Following is a short description of the international legal instruments that underscore children's rights in Namibia, and which legal and mental

health professionals can utilize in advocating children's rights and the best interest of the child.

8.1.1 UN Convention on the Rights of the Child (CRC)

The overarching framework for children's rights is described in the 1989 UN Convention on the Rights of the Child (CRC). According to UNICEF, the Convention is the most universally accepted rights instrument in history. This was also the first treaty specifically concerned with the rights of children, and it marked an important shift in thinking towards a "rights-based approach" which holds governments legally accountable for failing to meet the needs of children (Lloyd, 2002:13). The CRC stipulates that children's rights are to be respected and protected without discrimination of any kind, irrespective of the child's, his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (Ambunda & Mugadza, 2009:7).

Signatories to the CRC have an obligation to undertake all appropriate legislative, administrative and other measures to implement the rights recognized under the CRC. The stated parties can enforce, or fail to enforce, the Articles of the CRC at various levels, namely in their constitutions, in enacted legislation, in policies, as well as through programs which affect children. On 30 September 1990, Namibia ratified the CRC. Namibia is now obliged to observe the provisions of the CRC. By ratifying and acceding to the CRC, Namibia shows its commitment towards the protection of children in accordance with the standards of international declarations and conventions.

The CRC contains 54 Articles, and is a comprehensive instrument that sets out those rights that define universal principles and norms for the status of children. The Convention created a new vision of children as bearers of rights and responsibilities appropriate to their age rather than viewing them as the property of their parents or the helpless recipients of charity.

Rights granted to children under the CRC must be implemented with regards to three key principles:

- The best interests of children shall be the primary consideration in all actions undertaken (Mahlobogwane, 2010:233). Article 3 of the Convention provides the following: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."*
- Non-discrimination.
- Participation – children who are capable (taking into consideration their age and maturity) of forming their own views have the right to express those views freely in all matters affecting them. Articles 9 and 10 focus on the right of the child to maintain family relations. Article 12 focuses on the right to express views on matters affecting them (Weir, 2011:789), while, according to Anderson and Spijker (2002:369), Article 12 does not only give the child the right to speak (to voice an opinion), but also the right to be heard (to have his opinion taken into consideration). According to them, speaking is equal to freedom. Speaking, however, on its own is not enough – one has to be listened to as well.

8.1.2 The African Charter on the Rights and Welfare of the Child (ACRWC)

Some child advocates in African countries state that the CRC did not adequately address certain issues that had specific relevance to Africa. The CRC was also often criticized for having a western bias. The ACRWC was consequently developed to provide a voice for the African child. (Lloyd, 2002:13; Skelton, 2009:483). Namibia ratified the ACRWC on 23 July 2004. The ACRWC is an important tool for advancing children's rights. While building on the same basic principles as the UN Convention on the Rights of the Child, the AU Children's Charter highlights issues of special importance in the African context.

According to Lloyd (2002:13), Africa took the lead in setting standards for children's rights in a regional context, due to Africa's own human rights situation while, at the same time, upholding cultures, traditions and histories unique to the region. This is

also important because of each region's unique human rights problems and priorities, such as protection of children against harmful, cultural practices, armed conflict and labor exploitation, among others. According to Lloyd (2002:14), the ACRWC, therefore, offers a higher level of protection than that offered by the CRC for the African child. The ACRWC, thus, puts children's rights legally and culturally in perspective.

In Article 2 (Lloyd, 2002:20), the African Charter offers wider protection for young people than the CRC by stating "*every human being below the age of 18*" will be seen as a child. There are no conditions such as the suspension of this right if a child participates in armed conflict. The ACRWC establishes in clear and unambiguous terms when a child is a child.

The 'best interest' norm, as provided for in Article 4(1) of the ACRWC, was solidified by making the 'best interest' consideration the ultimate consideration – as opposed to simply being one of many, as in the CRC (Dausab, 2009; Lloyd, 2002). Furthermore, the ACRWC slightly augmented the norm by the addition of Article 4(2). Article 4 provides opportunity for a child who is in the position to do so – i.e. who can communicate – to be heard, and that his or her views be taken into consideration "*by the relevant authority in accordance with the provisions of appropriate law*".

Criticism against the ACRWC, according to Lloyd (2002:16), is that children were not allowed to make their opinions clear and voice their needs in the drafting process. According to the author, children's rights in Namibia are protected by international instruments, as well as the best interest of the child and child participation, as promoted by Namibia. It, however, appears that, in child custody cases in Namibia, these rights, the best interest of the child principle and child participation are either:

- not understood by legal and mental health professionals working in the field of divorce,
- ignorant or unaware of such legislation,
- unaware of the importance of this for children or
- struggle to implement this in divorce dispute cases.

8.2 Namibian legislation

Since Independence in 1990, the government of Namibia has made various efforts to strengthen children's rights. One such effort was the establishment of a Ministry of Gender Equality and Child Welfare in 2000, with the objective of ensuring the empowerment of children and their full participation in political, legal, social, cultural and economic development (Ambunda & Mugadza, 2009:7). This Ministry, however, faces many challenges, such as a shortage of staff, a lack of resources, language difficulties between staff and community members and the need to cover long distances in rural areas with limited resources, among others.

Currently in Namibia, although everyone presumably 'acts' in the best interest of the child, current legislation does make provision for it. There, however, appears to be a diverse understanding among professionals, working in the field of child custody disputes, about what is the best interest of the child and how to determine it.

Since Independence in 1990, Namibia has functioned under the 1963 Children's Act, and has since struggled to replace this Act with the Child Care and Protection Act (3 of 2015), which is still being processed. Namibia, however, did make provision when trying to establish a child-centered approach in respect to the Criminal Procedures Act (child-friendly services, courts, vulnerable witness act, and so on). However, as far as divorce is concerned, there is still a long way to go regarding legislation, proceedings and state measures.

In the Child Care and Protection Act (3 of 2015) many of these challenges could be overcome by guidelines to guide proceedings, actions and decisions according to the best interest of the child principle. There are a number of statutes such as the Maintenance Act (9 of 2003), the Children's Status Act (6 of 2006) and the envisaged Child Care and Protection Act (3 of 2015), that either make specific reference to the principle of the best interest of the child, or such principle can be inferred from the provisions in the statutes in that the factors will lead to a determination of the best interests of the child. Following is a summary of some of the legislation that impacts children in child divorce cases in Namibia.

8.2.1 Namibian Constitution

The 1989 Constitution of the Republic of Namibia is the fundamental and supreme law of the country (Dausab, 2009:152). The preamble of the Constitution provides the following regarding children and their rights within the Namibian context: “whereas the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace...” (Article 15(1)). Consequently, the inherent dignity is not only applicable to adults, but also to children. Ambunda and Mugadza (2009:10), however, state that it appears as if only adults enjoy this protection, due to the following factors:

- Children do not know their rights.
- The protection system is not friendly to children.
- Society is quick to stigmatize any child who wants to ensure that his or her rights are recognized.
- Some cultural practices are hostile to children.
- There is a lack of information on the rights of children.
- The protection of children is applied selectively.
- Children still lag behind and appear to be treated like second-class citizens regardless of these constitutional provisions.

No explicit provision has been made by the Namibian Constitution, as in South Africa, for the best interest of the child as paramount in all matters concerning the child (Dausab, 2009:152). Instead, the Constitution, as the supreme law of Namibia, leaves this task to the legislator. This is problematic because, as the supreme law, the Constitution ought to be the guiding document. Legislators are supposed to seek guidance from the Constitution when drafting laws that will affect the rights of children. The Child Status Act, however, acknowledges the principle of the paramountcy of the best interests of the child, and lists aspects to be considered in determining the best interests of the child. Ambunda and Mugadza (2009:11) point out that, although the Namibian Constitution (1989) does not make the best interest of the child paramount in all matters concerning the child, Article 10 does recognise children’s rights in the form of the following principles:

- All persons are equal before the law.
- No person shall be discriminated against on the ground of sex, race, colour, ethnic origin, religion, creed or social or economic status.
- Children are the bearers of rights, by expressly and specifically entrenching children's rights.

Article 15 (1) also states that children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interest of children, as far as possible the right to know and be cared for by their parents.

The family, as the natural and fundamental group unit of society, is accorded special protection in Article 14 of the Constitution. This Article also states that men and women have equal rights as to marriage, as well as during and after the dissolution of the marriage. This statement has various implications for child custody disputes, where there is believed to be a winner and a loser. The new Child Care and Protection Act (3 of 2015) could solve these issues by suggesting mediation and parenting plans as part of the divorce process. Children may benefit more from shared parenting, and children and the non-custodian parent's relationship may have a better chance to be preserved than in the case of child custody and control disputes.

According to Ambunda and Mugadza (2009:16), the role of the High Court as the ultimate guardian of children must be emphasized in judicial decision-making. This passive stance by the High Court has so far not helped the plight of children in Namibia. The High Court, as the ultimate guardian of children, should play its part, not only by way of its judgements, but also by using its powers as far as its law-making authority function is concerned to ensure that it promotes laws that protect our most vulnerable resource, the children of Namibia (Ford, 2007).

Although it remains arguable and subject to many interpretations, Article 144 of the Namibian Constitution, provides for international law. It states that, unless an Act of Parliament provides otherwise, international agreements and the general rules of public international law and part of Namibian domestic law will be applicable. In other

words, once Namibia has ratified an international instrument, it is supposed to be directly applicable to its legal system. However, this is not entirely the position in practice, because reality dictates that, for a law to be enforced, it requires an enforcement mechanism. It is clear that even the Namibian courts have not taken this provision into account when interpreting constitutional matters. That the provision is binding is without question; but whether the citizenry can actually receive an effective remedy by employing international law as a basis is questionable, albeit not impossible. The author, however, believes that the Namibian Constitution does make provision for protection.

8.2.2 The Children's Act, No. 33 of 1960

The main piece of legislation regarding children is currently the Children's Act (33 of 1960). The Act is a South African law which came into effect in Namibia on 1 January 1977. This law was inherited by Namibia at Independence, and has served as the key piece of children's legislation in Namibia since then.

It is, however, outdated and out of keeping with the best interests of the child. The new Child Care and Protection Act (3 of 2015) is intended to replace the Children's Act (33 of 1960).

8.2.3 The Child Care and Protection Act (3 of 2015)

The new Child Care and Protection Act defines the rights and responsibilities of parents and of children (Mailula, 2005:22). The objectives of the proposed Child Care and Protection Act are to –

- uphold the children's rights in the Namibian Constitution;
- implement international agreements that are binding in Namibia;
- promote the protection of families;
- promote the best interests of children;
- strengthen and develop community structures which provide care and protection for children;
- protect children from discrimination, exploitation and other forms of harm;

- assist children in need of care and protection;
- generally promote the protection, development and welfare of children.

The new Child Care and Protection Act states that all decisions affecting children must:

- be consistent with the Namibian Constitution, the best interests of the child and the Child Care and Protection Act;
- respect the child's dignity;
- treat the child fairly;
- protect the child from unfair discrimination, including discrimination based on the health status or disability of the child or a family member of the child;
- recognize the child's need for development, play and recreation;
- respond to the child's special needs, if that child has a disability;
- Family participation: Decisions must be made only after the child's family has been given a chance to express their views (if this in the best interests of the child).
- Avoiding conflict: Matters concerning children should use negotiation to reach agreement and avoid conflict where possible.
- Avoiding delay: Move as quickly as possible on decisions involving children, because delays have more impact on developing children than on adults.
- Good communication: Children of sufficient age and maturity must be informed of all actions and decisions which could affect them. Parents also have a right to be informed.

Child participation is a key principle. Children of the necessary age, maturity and stage of development must be given a chance to express an opinion about decisions which affect them. Children's views should be given an appropriate degree of consideration, keeping in mind the child's age and maturity.

The Child Care and Protection Act quite comprehensively sets out the 'best interest' principle, as well as the factors to be considered when making a decision in the best interest of the child (Dausab, 2009:155). For example, the Act takes into account the nature of the relationship between the child and its parents and/or other caregivers,

their capacity, their attitude and the effect that a change in environment will have on the child. Compared to previous legislation dealing with children's issues, the envisaged Act will give adequate content to the principle of the best interest of the child.

8.2.4 Child Status Act (6 of 2006)

According to Dausab (2009), the objective of the Child Status Act is the promotion and protection of the best interest of the child. Article 3(1) states that *"When making any decision pertaining to custody, guardianship or access, the best interests of the child are, despite anything to the contrary contained in any law, the paramount consideration ..."*

The Act provides for children to be treated equally, regardless of whether they are born in or out of wedlock, and to provide for matters connected thereto. The Act shifts the emphasis onto the rights of the child in accordance with the Namibian Constitution and the UN Convention on the Rights of the Child.

The enactment of this Act is a result of the discriminatory practices imposed by common law and statutory law between children born in or out of wedlock in matters relating to custody, guardianship and inheritance (!Owoses-Goagoses, 2009:177). The objectives of the Child Status Act are to promote and protect the best interests of the child and to ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents. This Act must be interpreted in a manner consistent with these objectives.

The Children's Status Act also contains certain important definitions, which are as follows:

- "*Child*" means a person who is under the legal age of majority
- *"Marriage"* means a marriage in terms of any law of Namibia and includes a marriage recognized as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which marriage is recognized as a marriage by the laws of Namibia.

- "*Parent*" means a woman or a man in respect of whom parentage has been acknowledged or otherwise established.
- "*Sole custody*" means the exercise of the rights, duties and powers of custody by one person, to the exclusion of all other persons.
- *"Sole guardianship"* means the exercise of the rights, duties and powers of guardianship by one person, to the exclusion of all other persons.

This Act provides for matters relating to –

- proof of parentage;
- children born out of wedlock;
- custody and guardianship of children on the death of the custodian or guardian;
- children of void or voidable marriages;
- children born of assisted reproduction techniques;
- access;
- guardianship;
- inheritance in relation to children born out of wedlock.

The concept of the best interest of the child is paramount and addressed by listing twelve factors in Article 3 (a – l) to be considered regarding custody, guardianship and access and which must be taken into consideration whenever the best interest of the child must be determined:

- The child's age, sex, background and any other personal characteristics;
- The child's physical, emotional and educational needs;
- The capability of each parent, and of any other relevant person, to meet the child's physical, emotional and educational needs;
- The fitness of all relevant persons to exercise the rights and responsibilities in question in the best interest of the child;
- The nature of the relationship that the child has with each of his or her parents and with other relevant persons;
- The degree of commitment and responsibility which the respective parents have shown towards the child, as evidenced by such factors as financial support, maintaining or attempting to maintain contact with the child or being named as a parent on the child's birth certificate;

- Any harm which the child has suffered or is at risk of suffering, directly or indirectly, from being subjected to abuse, ill-treatment, violence or other harmful behavior;
- In a case where the application has been brought before the children's court, the reasons for the application in question;
- Any wishes expressed by the child or his or her representative, in light of the child's maturity or level of understanding;
- The practical difficulty and expense of present and proposed arrangements;
- The likely effect of any change in the child's circumstances;
- Any other fact or circumstance that the court considers relevant.

The list is quite comprehensive and also provides for the consideration of the child's relationships with significant others who are part of his or her situation or environment. It acknowledges the importance of the context of the child. It is not as focused on the protection of children as the Child Care and Protection Act (3 of 2015), in the sense that it does not provide protective mechanisms for children. It, however, provides very strongly for the entrenchment of the status of the child that should be understood in conjunction with the protection of children. Defining the status of the child in legislation forms the basis of the protection of children.

8.2.5 The Maintenance Act (9 of 2003)

The Maintenance Act provides for a tone that supports the best interest of the child. Previously, the issue of maintenance was a 'battle of the sexes'. The emphasis of the current legislation on maintenance is on the welfare of the child. It provides for the legal duty to maintain (Dausab, 2009:154).

The Maintenance Act is important, because the protection of children's rights is dependent on the duties and responsibilities of parents in relation to their children. This becomes an important aspect in dealing with maintenance in mediation processes and custody disputes. In Namibia it is mostly lawyers and the Maintenance Court that deal with maintenance issues during divorce cases. This Act provides for –

- the payment of maintenance;
- the holding of maintenance enquiries and the enforcement of maintenance orders;
- the repeal of the former Maintenance Act;
- dealing with incidental matters.

One of the key provisions is the parental duty to maintain children. Section 3 states that both parents of a child are liable to maintain the child if he or she is unable to support him- or herself (Ambunda & Mugadza, 2009:33). Parents of a child are, therefore, primarily and jointly responsible for maintaining their child. The availability of maintenance for a child provides a source for the material upkeep of the child and the meeting of his or her needs and, in that sense, promotes his or her protection.

8.2.6 Customary law and its implications for children

Most of Namibia's inhabitants still live according to customary law. It regulates marriage, divorce and inheritance, among others. Customary law can be defined as a body of norms, customs and beliefs that is relevant for most Namibians. Customary law was often ignored or marginalized under colonial rule with regards to decisions pertaining to child custody disputes (Ambunda & Mugadza, 2009:16).

According to Article 66 (1) of the Namibian Constitution: *"Both customary law and common law of Namibia in force on the day of independence shall remain valid to the extent to which such customary law does not conflict with this Constitution or any other statutory law."*

According to Article 19 of the Constitution on Cultural rights, *"Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest."* Both these Articles have implications for decisions related to child custody disputes, as well as the mediation process and parenting plans.

According to Ambunda and Mugadza (2009:19), African thinking on parental power tends to be conditioned by a belief that children are wayward and irresponsible. Western thinking emphasizes the vulnerability of children with a consequent need for protection and the child's right to self-determination. Common law interprets parental powers restrictively in favor of the child. It follows that a child's best interests should always be the overriding consideration, and a child who is old enough should be allowed to express a considered opinion to decide his or her own future. The question can be asked whether parental rights in Namibia are not considered more favorably than children's rights. When one takes customary law into consideration, it becomes evident that children in Namibia are still not given enough opportunities to have an input in their own future during child custody disputes, or even to have their voices taken seriously.

9 CONCLUSION

The aim of the article was to discuss and explore the various, important aspects of the best interests of the child with particular reference to Namibia. The bulk of this article focused on the best interests of the child in conjunction with the rights of the child, with the latter forming the basis, being closely related to the best interests of the child. This was done with reference to Namibia which was the topic of the research. An attempt was made to explore and explain the two complicated topics, namely the rights of the child and the best interests of the child, as well as problems with their implementation. The recurring theme in the article was the role of culture in the application of both the rights and best interests of the child, and their effect on the application of legal procedures in this regard.

The issue emerging in the article related to the problem of the status of children, as well as giving effect to the rights of the child in a practical way. This seems to be of particular interest in cases of divorce where the rights of the parents, instead of those of the children, become paramount. The same challenges seem to present in cases where the standard of the best interests of the child is applied. The complication in this regard is the use of the standard of best interests of the child by

the various professionals involved in custody disputes in the absence of a universally acceptable protocol. The principle of the best interests of the child is not interpreted in the same way by the different role players who have to decide what comprise the best interests of the child.

It emerged that the best interests of the child could be served best if the process was done according to stipulated criteria which assist in serving the best interests of the child. However, these criteria are not regarded as free from criticism because of the numerous factors impacting their application. It was further pointed out that professionals and court officers were not always properly equipped to deal with the best interests' standard. This also appears to be a challenge in Namibia. The experience of the author is that most professionals, working with child custody disputes, are largely ignorant of current research on child development and legislation pertaining to children; furthermore, there exists a lack of skills to determine the best interests of the child. The shortcoming in this regard could be the absence of a sound theoretical framework or basis. Children also find it difficult to express themselves freely, especially considering cultural perceptions regarding children. What appears to be paramount in debates about the best interests' standard is that it should be contextualized and individualized to do justice to each child.

Since Independence, Namibia has moved away from its reliance on certain South African Acts that it inherited from the era of the South African administration of the territory, and is in the process of reviewing Acts related to child protection. This provides the opportunity to make the relevant Acts Namibian-specific. Apart from the Namibian Constitution, other examples are the Children's Act of 1961 being replaced by the Child Care and Protection Act of 2015 and the Child Status Act of 2006.

The Namibian government did ratify and sign the Convention on the Rights of the Child, which means that they should abide by those definitions of a child. However, in Namibia the child is still regarded as a person under 16, and not 18 years of age. This implies that the child loses his or her protection as a child on reaching the age of 16. The country also ratified, and supports, the African Charter on the Rights and Welfare of the Child which also provides protection for the child and advances

children's rights. This can be regarded as an acknowledgement that Namibia is making an effort to provide protection to its children.

It also emerged from the article that culture played a significant role in utilizing and implementing Acts and guidelines for both the rights of the child and the best interests of the child.

The aim of this article has thus been accomplished because the rights of the child were defined and discussed, together with the standard of the best interest of the child. Attention has also been given to child participation and international and national legislation.

BIBLIOGRAPHY

AACAP (American Academy of Child and Adolescent Psychiatry). 1997. Practice Parameters for Child Custody Evaluation. http://www.jaacap.com/article/S0890-8567(09)62594-6/pdf Date of access: 10 March 2011.

ACPF (African Child Policy Forum). 2013. Harmonization of children's law in Namibia. http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/other-documents-harmonisation_1_en.pdf Date of access: 20 May 2014.

Acts **see** Namibia.

Acts **see** South Africa.

Age of Majority Act **see** Namibia.

Ambunda, L.N. & Mugadza, W.T. 2009. he protection of children's rights in Namibia: Law and policy. *In* Ruppel, O.C., (ed.). *Children's rights in Namibia*. Windhoek: Macmillan Education. p. 5-52. http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_a.pdf Date of access: 10 March 2011.

Anderson, A. & Spijker, A. 2002. Considering the view of the child when determining her best interest. *Obiter:* 365-372.

Archard, D. 2004. *Children's Rights and Childhood*. 2nd ed. NY: Routledge.

Barratt, A. 2002. The child's right to be heard in custody and access determinations. *Tydskrif vir Hedendaagse*. *Romeins-Hollandse Reg (THRHR),* 65: 556-573.

Bekink, B. & Bekink, M. 2004. Defining the standard of the best interests of the child: Modern South African perspectives. *De Jure*: 21-40.

Bernardini, S.C. & Jenkins, J.M. 2002. An overview of the risks and protectors for children of separation and divorce. http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2002_2/pdf/2002_2.pdf Date of access: 15 Sept. 2013.

Boezaart, T. 2009. (ed) Child law in South Africa. Claremont:Juta.

Bregman, R. & Moodley, S. 2015. The best interest of the child. http://www.bregmans.co.za/the-best-interest-of-the-child. Date of use. 3/9/16.

Child Care and Protection Act **see** Namibia.

Children's Act **see** Namibia.

Child Status Act **see** Namibia.

Constitution **see** Namibia

Constitution **see** South Africa

Cronin, P., Ryan, F. & Coughlan, M. 2008. Undertaking a literature review: A step-by-step approach. *British Journal of Nursing*. 17(91): 38 – 43.

Dausab, Y. 2009. The best interest of the child. *In* Ruppel, O.C., (ed.). *Children's rights in Namibia*. Windhoek: Macmillan Education. p. 145-158. http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_a.pdf Date of access: 10 March 2011.

De Lange, M. 2012. A philosophical foundation for approaches about the rights of children. http://magdachildstudies.blogspot.com/2012/03/philosophical-foundation-for-approaches.html Date of access: 15 Sept. 2013.

Dueck, A. 2004. Divorce and the best interests of the child. http://www.focusonthefamily.ca/tfn/family/PDF/Divorce_impact.pdf Date of access: 12 Dec. 2009.

Ford, J. 2007. The scope of divorce mediation: A question for Namibia. *Mediate.com.* Quarterly Newsletter. Sept. 2007. http://www.mediate.com/articles/ford14.cfm Date of access: 12 Dec. 2009.

Fung, D.S.S. & Yiming, C. 2008. *Primer of Child and Adolescent Psychiatry*. 1st ed. Singapore, World Scientific Publishing Company.

Gould, J.W. & Martindale, D.A. 2009. *The art and science of child custody evaluations*. (1st ed.). NY: Guilford Press.

Heaton, J. 2009. An individualized, contextualized and child-centered determination of the child's best interest, and the implications of such an approach in the South African context. *Journal of Juridical Science*: 34(2): 1-18.

Human Rights Commission. 2010. Human Rights in New Zeeland Today: Chapter 4: The rights of children and young people. http://www.hrc.co.nz/2004/09/01/first-report-on-state-of-human-rights/ Date of access: 16 January 2013.

Knoetze, E. 2002. The role of custom in the interpretation of the child's best interest principle. *Obiter*: 348-358.

LAC (Legal Assistance Centre). 2009. Draft Child Care and Protection Bill. http://www.lac.org.na/projects/grap/Pdf/ccpa-draft-full.pdf Date of access: 4 March 2010.

LAC (Legal Assistance Centre). 2009. Draft child care and protection act. - Issues for public debate: Booklet 1. http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsppr-insert1.pdf Date of access: 14 August 2011.

LAC (Legal Assistance Centre). 2009. Public participation in preparing a new child care and protection law: National consultation on the Child Care and Protection Bill. http://www.lac.org.na/projects/grap/Pdf/ccparevisionprocesssummary.pdf Date of access: 14 August 2011.

LAC (Legal Assistance Centre). 2010. Revision of Namibia's Draft Child Care and Protection Bill. Final Report 2010. http://www.unicef.org/namibia/CCPA_FINAL_DRAFT_COMPLETE_clean_copy__09june_2010__sent_9_July.pdf Date of access: 14 August 2011.

Lloyd, A. 2002. A theoretical analysis of the reality of children's rights in Africa: Charter on the rights and Welfare of the child. *African Human Rights Law Journal,* 2(1): 11-32.

Mahlobogwane, F.M. 2010. Determining the best interests of the child in custody battles: Should a child's voice be considered? *Obiter,* 31(2): 232-246.

Mailula, D. 2005. Taking children's rights seriously: Access to, and custody and guardianship of, a child born out of wedlock. *Codicillus*, 46(1): 15-29.

Maintenance Act **see** Namibia.

Martens, D. 2008. *Exploring children's rights in Custody and Access*. Canada, Windsor: University of Windsor.

McLaren, T. 2005. The best interest of the child: A right or a principle. *Responsa Merdiana.*

Mitcham-Smith, M. & Henry, W.J. 2007. High-conflict divorce solutions: Parenting coordination as an innovative co-parenting intervention. *The Family Journal*, 15(4): 368-373.

Murphy, M.J.K. 2005. Family courts: Serving the best interest of the child: An integrated model. Johannesburg: University of Johannesburg. (Dissertation – MA).

Namibia. 1960. The Children's Act 33 of 1960.

Namibia. 1972. Age of Majority Act 57 of 1972.

Namibia.1990. Constitution of the Republic of Namibia. 1990.

Namibia. 2003. Child Maintenance Act 9 of 2003.

Namibia. 2004. Criminal Procedure Act 25 of 2004.

Namibia. 2006. Children's Status Act 6 of 2006.

Namibia. 2015. Child Care and Protection Act 3 of 2015.

OAU (Organisation of African Unity). 1990. The African Charter on the Rights and Welfare of the Child. http://acerwc.org/?wpdmdl=8410 Date of access: 4 March 2010.

O'Kelly, A. 2014. Child Inclusive Practice (CIP) in counselling and family mediation. http://www.childandfamilyresearch.ie/sites/www.childandfamilyresearch.ie/files/ann_okelly-family_mediation_service.pdf

!Owoses-Goagoses, F. 2009. Custody and guardianship of children. In Ruppel, O.C., (ed.). *Children's Rights in Namibia.* Windhoek: Konrad Adenauer Foundation. p. 177-188. http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_a.pdf Date of access: 5 May 2011.

Pickar, D.B. & Kahn, J.J. 2011. Settlement-focused parenting plan consultations: An evaluative mediation alternative to child custody evaluations. *Family Court Review*. Vol 49 (1). January 2011. p. 59-71.

Ramolotja, M.A.1999. Determining the best interest of the child. *Codicillus*, XXXX (1): 10-14.

Rankin, P. 2001. Protecting the best interest of the child: Some Issues and Solutions. *IUC Journal of Social Work Theory and Practice*, 4.

http://www.bemidjistate.edu/academics/publications/social_work_journal/issue04/articles/rankin.html Date of access: March 2011.

Robinson, J.A. 2002. An introduction to the International Law on the rights of the child relating to the parent-child relationship. *Stellenbosch Law Review*, (2): 309-320.

Robinson, T. 2010. *Parenting plans: The development of substantive guidelines for professionals*. Potchefstroom: NWU. (Thesis - PhD).

Ruck, M.D., Abromovitch, R. & Keating, D. 1998. Children and Adolescents' understanding of Rights: Balancing nurturance and self-determination. *Child Development,* 64(2): 404-417.

Ruppel, O.C. 2009. The best interest of the child. In Ruppel, O.C., ed. *Children's rights in Namibia*. Windhoek: Macmillan Education. p. 145-158. http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_a.pdf Date of access: 10 March 2011.

Schafer, L. 2011. *Child law in South Africa: Domestic and international perspectives*. Durban: LexisNexis.

Semple, N. 2011. The "Eye of the beholder": Professional opinions about the best interest of a child. *Family Court Review*, 49(4): 760-775.

Skelton, A. 2009. The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments. *African Human Rights Law Journal*, 9(2): 482-500.

Stahl, P.M. 2011. *Conducting Child Custody Evaluations: From basic to complex issues*. Thousand Oaks: Sage Publications USA

South Africa. 2005. Children's Act 38 of 2005.

South Africa. 1996. Constitution of the Republic of South Africa 1996.

South Africa.1993. McCall vs McCall. 1994 (3) SA 201 (CPD).

Strous, M. 2007. Post-divorce relocation: In the best interests of the child? *South African Journal of Psychology,* 37(2): 223-244.

Taylor, N., Fritzgerald, R., Morag, T., Bajpai, A. & Graham, A. 2012. International models of child participation in family law proceedings following parental separation/divorce. *International Journal of Children Rights*, 20: 645-673.

Turkat, I.D. 2005. On the Limitations of Child-Custody Evaluations. *Court Review*, 42(2): 8 – 13. http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1034&context=ajacourtreview Date of access: 4 March 2010.

UNICEF. 1989. Convention on the Rights of the Child. (http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx)

UNESCO (United Nations Educational, Scientific and Cultural Organisation). 1989. United Nations Convention on the Rights of the Child. http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf Date access: 4 March 2010.

Weir, K. 2011. High-conflict contact disputes: Evidence of the extreme unreliability of some children's ascertainable wishes and feelings. *Family Court Review*, 49(4): 788-800.

World Health Organisation. 2013. Consolidated ARV guidelines. http://www.who.int/hiv/pub/guidelines/arv2013/intro/keyterms/en/ Date of access: 14 Aug 2014.

Zelechoski, A.D., Fuhrmann, G. S. W. Zibbell, R.A. & Cavallero, L. M. 2012. Case report – Evaluation for child custody: Using best practices in a worst case scenario. *Journal of Forensic Psychology Practice*, 12(5): 257-470.

ARTICLE 2: CHILD CUSTODY AND CONTROL INVESTIGATIONS IN NAMIBIA

A. Vorback

P. Rankin

ABSTRACT

In this article the focus is on defining child custody and control. The author will look at the purpose and components of child custody and control, and discuss the process of custody and control evaluations, especially in the Namibian context. Development and the importance of child custody and control in the Namibian context are also highlighted. This includes a discussion of the important concepts used in child custody and control.

Challenges, loopholes and criticism regarding child custody and control are discussed. The article focuses on the benefits of child custody evaluations. Focus is also placed on how the best interests of the child can be assessed, as well as on the need for a protocol or standard for child custody and control evaluations. Specific focus is placed on child custody and control evaluations in the Namibian context.

Keywords: *child custody and control, best interest of the child, protocol*

> *The area of child custody evaluations is potentially one of the most stressful and difficult ... because of high levels of emotionality and acrimony associated with the process and the participants ... It is speculated that child custody evaluations are among the most dangerous and risky endeavors ... owing to high levels of stress, threat of litigation, risk of board complaints and even the possibility of personal harm* (Kirkland & Kirkland, 2001:171).

1. INTRODUCTION

This article forms part of a research project on custody and control investigations in Namibia contrasted with mediation and parenting plans as alternative in an attempt to serve the best interests of the child. In this article custody and control investigations in Namibia are explored and described. The purposes of these investigations are to make an assessment of the arrangements regarding custody and control of minor children in cases of divorce. Although the intention of these investigations is to decide on the best interests of the child, it will be indicated in the article that custody and control investigations in reality only serve the interests of the parents. It is a complicated process which is adversarial in nature as the result of bitter fights between parents to protect their own rights.

As the basis of the article, important concepts related to custody and control will be conceptualized. Other key aspects to be discussed regarding custody and control evaluations are the purposes and components, the process, the development and importance, the challenges, loopholes and criticisms regarding the concept child, the content, the benefits and recommended protocols and standards for child custody and control evaluations. The assessment of the best interests of the child as an important aspect of custody and control evaluations will also be discussed.

2. PROBLEM FORMULATION

Certain agreements to take effect after a divorce must be finalized during the divorce. These agreements are given effect by an order of a high court. If children are involved, the court are assisted by relevant experts, like lawyers, psychologists and social workers, to make recommendations regarding the care of the children. This process involves deciding on who the primary carer should be and the access the other party will have to the child or children. It thus involves an evaluation of the needs of the child and the abilities of each parent to care for the child.

Child custody evaluations are stressful and complex, not only for the evaluator, but also for the families involved (Bekink & Bekink, 2004; Bernardini & Jenkins, 2002; Dueck, 2004; Herman, 1999; Preller, 2013). Various professionals may become involved in the process, which eventually will lead to a decision and order of the court regarding custody arrangements in contested divorce cases.

Studies show that over 40% of all children will be subject to their parents' divorce, and that one out of every two children born today will have divorced parents by the time he or she turns eighteen. Due to increased custody and control disputes, evaluators have to delve into the often complex history of families in order to make a determination regarding a child's best interests, all while balancing their own personal experiences, values and biases (Barth, 2011; Mitcham-Smith & Henry, 2007). In many cases, divorces are messy situations with parents accusing each other of various issues and children as the victims in this process.

Namibia's existing divorce law, which is currently being reviewed, is an outdated system inherited from South Africa at Independence. The current law is based on fault. This means that one spouse must prove that the other spouse did something wrong – usually some form of desertion or adultery. This approach does not fit well with reality, because the break-down of relationships is usually much too complicated to assign all the blame to one person (LAC. 2000). The bill currently proposed would change the fault-based system of divorce. The new basis for divorce would be that the marriage itself has broken down beyond repair. This is called "irretrievable breakdown". The court will also have new powers to make sure that the arrangements made for the children of the marriage will protect the best interests of the child.

In order to compare and contrast the current (old) system with the proposed (new) system, the system presently being phased out must be described and explored to contrast it with the proposed (new) system in order to achieve the goals of the research study.

This research was conducted in an effort to provide answers to the following research questions:

What is the nature of custody and control investigations in Namibia and what are the views and the experiences of the relevant professionals regarding this process?

The following research question guided the development of this article: What is the nature of custody and control investigations?

3. THE AIMS AND OBJECTIVES OF THE ARTICLE

3.1 Aim of the article

In order to compare parenting plans and child custody and control processes in serving the best interests of the child in Namibia, the aim of this article was to provide a description and exploration of child custody and control investigations, and to establish the views and the experiences of the relevant professionals involved in this process.

3.2 Objectives of the article

The following are the objectives of this article:

a) To discuss the nature of custody and control concepts and investigations.
b) To discuss child custody and control evaluations in Namibia.
c) To discuss assessing the best interest of the child.
d) To discuss the content of child custody evaluations.
e) To discuss the benefits of child custody evaluations.
f) To discuss the challenges, loopholes and criticism of child custody and control evaluations.
g) To look at a recommended protocol and standard for child custody evaluations.
h) To report on the views and experiences of the relevant professional involved in the custody and control processes in Namibia.

4 METHODOLOGY

The traditional narrative literature review was used to develop this article. According to Cronin, Ryan and Coughlan (2008:38), this type of review critiques and summarizes a body of literature and draws conclusions about the topic in question. The body of literature is made up of the relevant studies and knowledge that address the subject area. Cronin, Ryan and Coughlan (2008:38), furthermore, explain that this type of review is useful in gathering a volume of literature in a specific subject area and summarizing and synthesizing it.

The main sources consulted in the development of this article were the internet and the data bases of the Ferdinand Postma Library of the Potchefstroon Campus of the North-West University.

5 KEY CONCEPTUALIZATIONS

5.1 Universal conceptualizations

This section will explain the most important conceptualizations that are normally associated with custody and control and which also apply to the Namibian situation.

5.1.1 Parental responsibilities and rights

Parental responsibilities and rights (that include access, custody and guardianship) are defined as “the responsibility and right, in relation to a child, to care for the child, to have and maintain contact with the child and to act as the guardian of the child” (Mailula, 2005:22).

5.1.2 Guardianship

According to Bekker and Van Zyl (2002:128) and Mailula (2005:18), guardianship can be defined as the "*capacity to act on behalf of the child, to administer his or her estate and to supplement any deficiencies in his or her judicial capacities*". Froneman (1999:22) also states that it implies the administration of a child's estate on his or her behalf, and assists the child in juristic acts and in legal proceedings.

According to !Owoses-Goagoses (2009:179), guardianship is used in two senses. In its broad sense, guardianship is equated with parental authority and includes custody. It is seen as the lawful authority which one person has over the person and/or property of another who suffers incapacity to manage his or her own affairs and/or person, in the interest of the latter. In a narrower sense, guardianship refers, firstly, to the control and administration of the child's estate and, secondly, to the capacity to assist and represent the child in legal proceedings or in the performance of juristic acts.

In its narrowest sense guardianship is seen as relating exclusively to the guardianship of minors. In this context, the term "natural guardian" is used as a synonym for parental authority.

5.1.3 Custody

According to Bekker and Van Zyl (2002:128) and Mailula (2005:18), custody means "a person's capacity to have actual physical possession of a minor, and to live with the child, care for the child, and support the child in his or her daily life". Froneman (1999:23) and !Owoses-/Goagoses (2009:179), who refer to Van Heerden, state that custody is that portion of parental authority which pertains to the personal day-to-day life of the child. It is also seen as the control and supervision of the daily life and person of the child. The common law concept of custody includes the following:

- The duty to provide the child with accommodation, food, clothing and medical care.
- The duty to maintain and support the child.

- The duty to educate and train the child.
- The duty to care for the child's physical and emotional well-being.

5.2 Namibian conceptualizations

As this research focuses on the Namibian situation, the terminology normally used in the Namibian context will be described in this section.

5.2.1 Sole custody and sole guardianship

The Child's Status Act (6 of 2006) defines these terms as the exercising of the rights, duties and powers of custody or guardianship by one person to the exclusion of all other persons (!Owoses-Goagoses, 2009:179). Section 13(7) of the said Act provides as follows, however:
Unless the children's court orders otherwise, the written consent of both parents is required for –

(i) the adoption of the child, subject to the provisions for dispensing with any required consent, contained in the law on adoption or

(ii) the removal of a child from Namibia for a period longer than one year.

Froneman (1999:23) also states that although custody is awarded to one parent, the other parent does not lose his or her parental status.

5.2.2 Joint custody

According to Froneman (1999:24), certain criteria, such as no hostility, parents' need to co-parent and communicate, as well as that both parents must be fit as parents, should be met before joint custody can be allocated. Both parents must be perceived by the child as giving security and love. Namibian courts are currently not in favor of joint custody.

5.2.3 Care

Recently South African law replaced “custody” with “care”. Namibia still uses the concept of custody. There is uncertainty whether “custody” will be replaced with “care” in order to prevent confusion (LAC, 2009:2).

Care can be described as guiding the behavior of the child in a humane manner, maintaining a sound relationship with the child, guiding and directing the child’s education and upbringing, as well as guiding, advising and assisting the child in decisions to be taken by him or her. This boils down to the day-to-day care, support and guidance of the child by a custodian parent. According to Domingo (2011:2), care has a much wider domain than custody, “*it means not only providing for the child’s daily needs such as a safe home, food, education and love. It also includes promoting the well-being of the child, maintaining a sound relationship with the child and, of paramount importance, attending to the best interests of the child.”*
With regards to children born out of wedlock, the Namibian Child Status Act (6 of 2006) on custody and guardianship of such children, makes provision as follows: The Act provides that both parents have equal rights to become custodians of the child born out of wedlock. The person with custody of the child is also the guardian of the child, unless a court on application made to it directs otherwise. The mother of a child born out of wedlock no longer has the automatic custody and guardianship of the child. The Act now places both parents of the child born out of wedlock on equal footing in respect of custody and guardianship of their child. Another important aspect of the Child Status Act (6 of 2006) is the definition of marriage, which now includes a marriage recognized as such in terms of any tradition, custom or religion of Namibia.

According to the Namibian Child Care and Protection Bill (2009:2), care or custody in relation to the child includes –

- ***within available means, providing the child with*** –
  - a suitable place to live;
  - living conditions that are conducive to the child’s health, well-being and development;
  - the necessary financial support;

- safeguarding and promoting the well-being of the child;
- protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- respecting, protecting, promoting and securing the fulfilment of, and guarding against, any infringement of the child's rights set out in the Constitution and the principles set out in Chapter 2 of this Act;
- guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- guiding the behaviour of the child in a humane manner;
- maintaining a sound relationship with the child;
- accommodating any special needs that the child may have;
- generally, ensuring that the best interest of the child is the paramount concern in all matters affecting him or her.

Attention to the aspects listed in the list above, should go a long way in providing the child with comprehensive protection, if implemented. It includes most aspects which will serve the life needs of the child.

5.2.4 Access

According to Mailula (2005:18), access means regular visiting, as well as seeing, and spending time with, the child. Froneman (1999:25) defines access as *"the right of the child to see the parent with whom they are not living".* Recommendations often just state *"reasonable access", but with no clear detail on hours, days, weekends, etc.* Bekker and Van Zyl, (2002:129) are of the opinion that, with more detail, such recommendation will create more certainty for parties. Access to the non-custodial parent will give that parent the opportunity to bond with the child, and develop and maintain a parent-child relationship.

6 PURPOSE AND COMPONENTS OF CHILD CUSTODY AND CONTROL EVALUATIONS

Many families going through divorce cannot agree on decisions regarding their child's best interests and needs (Barth, 2011; Turkat, 2005). Often these families are characterized by high conflict. There are often allegations of family violence, mental health problems, concerns about the other parent's circumstances or habits, substance abuse or alienation of children (Stahl, 2011:5). Families then often turn to the court to assist in decisions regarding the best interests of the child/ren. Child custody evaluations are, therefore, ordered when parents cannot agree on a custodial arrangement. A third party from outside, which will presumably be objective, thus enters the process. The assumption will be that such a person will be suitably qualified to carry out the evaluation.

According to Zelechoski, Fuhrmann, Zibbell, and Cavallero (2012:457), custody and control evaluations are of the most criticized areas of forensic, mental health assessment due to the perceived lack of standardization in evaluation methods. Various authors (Froneman, 1999; Gould & Martindale, 2009; Ramolotja, 1999; Robinson, 2009) state that the field of child custody work is complex and filled with challenges and risks. Families are often seen in extremely stressful situations where they function at their worst rather than in their normal mode (Rohrbaugh, 2008:3). Parents try to present themselves in the best possible light or are often guarded. From this situation, an evaluator (social worker or psychologist) needs to gather information in order to make recommendations to the court regarding the best interests of a child. From the above it is clear that decisions regarding custody and control are indeed exceptionally challenging tasks. It should be added that training and the experience of social workers make them competent candidates to fulfill expectations. Social workers practice within the framework of a problem-solving process which includes most of the skills needed in the collection of data and assessment and evaluation.

6.1 Defining child custody and control

According to the Namibia Paralegal Association (2012:47), child custody is defined as "*the questions of whether a child will live with their mother or father and whether the other parent will have certain rights to visit the child. Custody also involves the rights of mother and father to make decisions about their children*."

Barth (2011:156) explains that the purpose of the child custody evaluation is to gather data and analyze the issues relevant to a custody dispute, culminating in a written report submitted to the court; thus, to provide relevant information regarding family functioning as it relates to the custody or parenting of the child in dispute.

A child custody evaluation can, therefore, be defined as a comprehensive assessment of the social, psychological, mental, physical and economic circumstances of a family as it relates to the issue of custody (Barth, 2011:157). According to the Association of Families and Conciliations Courts (AFCC, 2006:6), a child custody and control evaluation can be defined as a *"process that involves the compilation of information and the formulation of opinions pertaining to the custody or parenting of a child and the dissemination of that information and those opinions to the court".*

From the above it should be clear that, firstly, child custody is important in the life of the child and that, secondly, in the case of child custody disputes, it is of the utmost importance that the right decisions are taken. Furthermore, a custody evaluation should always serve the best interests of the child. Child custody and control evaluations should always be structured to focus on the best interests of the child and not on the reasons, conflict or unfinished business of the divorce. This can become a challenge to the evaluator, especially if there is no clear focus, purpose or structure when conducting the child custody evaluation. Here evaluators can easily become biased or lose track of the child's best interests vs those of the parent. The challenge faced by the professionals doing custody evaluations is to distinguish between the best interests of the child and those of the parent(s).

6.2 Purpose of child custody evaluations

In order to give direction to the child custody evaluation, its purpose should be clear to prevent it from becoming a misguided process. The primary purpose of a child custody evaluation is the conducting of a thorough, scientifically sound evaluation of the family. Such evaluation is to help the court by providing information to the court and the family about the best interests of the child, in order to determine what living arrangement and parenting plan would best meet the needs of the child/ren (Ackerman, 2006; Gould & Martindale, 2009; Rohrbaugh, 2008). According to Barth (2011), a custody and control evaluation can serve as a tool to aid in the determining of the child's best interests. Langelier (2009:3) argues that a child custody report can, therefore, be a valuable and reliable source of information to assist the court. Social workers, also in the Namibian context, are thus playing a vital role in assisting courts in making custody dispute decisions in the best interests of the child. In conjunction with other health professions, such as psychologists, child therapists, and the like, a vast source of information can be assessed in order to consider children's rights, their best interests and their participation when making child custody decisions.

Ackerman (2006), Rohrbaugh (2008) and Vertue (2011) regard the following as the purposes and core aspects of child custody evaluation:

- To assess the best psychological interest of the child, where the child's interest and well-being are paramount and
- To focus on parenting capacity, the psychological and developmental needs of the child, and the resulting fit.

In other words, should health professions work in a team as part of the assessment, each one can contribute on a structured and scientifically basis towards the best interests of children in custody disputes, keeping their, and not their parents', best interests paramount. It is not only a case of the best psychological interests of the child. Therefore, custody situations are often far too complex to look at psychological aspects only. The focus should rather be on the psycho-social, best interests of the child. The reason for this statement is that there will always be environmental

circumstances which have an influence on the child's life, and the child will react to these circumstances. An ecological approach should thus be used for full comprehension of the child's situation.

According to Froneman (1999:26), the purpose of custody evaluations is not to judge who will be the better parent, but to involve and work out with the parents the real needs of their children and the best way these needs could be met. Vertue (2011:336) also states that custody and control evaluations provide important information to the court in determining the needs of the children involved, as well as their parents' capacity to meet those needs. Child custody evaluations are instrumental in facilitating settlements where negotiations and mediation were unsuccessful. Child custody involves not only dealing with individual human behavior but also with the dynamics of complex social situations, as argued above. The importance of proper, competent custody considerations cannot be underestimated.

From the above it becomes clear that various conceptualizations of custody and control will be found. A distinction should, however, be made between the purposes of custody and control and the process and principles guiding the process. The ultimate goal should be to decide on a situation that will serve maximally the best interests of the child. The process entails the process of investigation and the principals will include those beliefs that will guide the process to its best conclusion.

6.3 The components of child custody evaluations

According to Bow and Quinnell (2004), Palen as cited by Gould and Martindale (2009), Rohrbaugh (2008) and Turkat (2005), the components of a child- focused evaluation should be to–

- identify and assess the psychological and developmental needs of the child;
- identify and assess the parenting capacities of parents by identifying the strengths and weaknesses of each parent as they affect his or her ability to parent;
- determine the best fit between the child's needs and the parenting capacities in order to serve the best psychological interest of the child;

- develop a parenting plan that maximizes the child's exposure to each parent's capabilities while protecting him or her as much as possible from their limitations;
- make specific recommendations that will facilitate the continued development of
  both children and parents;
- minimize parents' sense of shame and exposure and maximize their understanding of their child's needs.

The abovementioned can only be achieved by tapping into multiple sources of data, having the same evaluator talking with all family members and not going on a "pathology hunt". Ackerman (2006:2) states that all parties, with whom the child resides or who are responsible for the child's ongoing care, should be evaluated. Gould and Martindale (2009:14) refer to Greenberg and Shuman who focus on psychological fact finding, which refers to the need to focus attention on historical truth. This means that the focus must be on finding data that will help understand how people behave in the real world. Custody reports should, therefore, not be used as weapons in custody disputes to determine who has won and who has lost. They should be written in a manner that respects the family system and encourages a parenting plan that accentuates each parent's positive qualities. Although not always possible, it is advisable that inputs from various professionals become part of the process of deciding on child custody, especially in very complicated cases. Social workers play an essential role here, but cannot always be the sole role-players. Whatever the situation, the various insights should be integrated into a well-rounded report with acknowledgement of the contributors. The situation of professional imperialism should be avoided at all costs.

6.4 Clinical vs forensic evaluation

A clear distinction should be made between a clinical and a forensic evaluation, something which is echoed by Gould and Martindale (2009:17) when they stress that a forensic evaluation is not the same as a clinical evaluation. The methods and procedures, the position of the evaluator and the intended audience for the work

product are different. Ackerman (2006), O'Leary (2014), Munson (2011), Rohrbaugh (2008) and Stahl (2011) also see the difference between mental health roles as being therapeutic and forensic in nature.

The differences between forensic and therapeutic roles, according to Gould and Martindale (2009), Ackerman (2006), Munson (2011), Rohrbaugh (2008) and Stahl (2011) are listed in the Table below.

Table 6: Differences between therapeutic and forensic roles

DIFFERENCES	**THERAPEUTIC OR CLINICAL**	**FORENSIC**
Who is the client?	The focus is on the client as an individual, regardless of who hires the therapist and pays the bills. This can be an adult, a child or the family.	The court is the client even though the parents pay for the evaluation, if private or if the evaluator is appointed by a lawyer. As Gould (2006:18) states, the evaluator is "*ultimately answerable to the court*".
Dealing in confidentiality	Confidential relationships which are enforced by ethics. The client needs to give permission for information to be disclosed to a third party.	No confidentiality. The purpose is to collect and report information to the court.
Competency and skills required by the professional	Mental health professionals' clinical skills in working with children and families. Skills like listening and support are used together with the principles of acceptance and compassion.	Evaluations by mental health professionals trained in child custody. Ability to evaluate a situation and to predict possible outcomes. Rohrbaugh (2008:4) refers to Gould and Stahl who describe it as an *"art and science of child custody evaluations that blends the clinical and scientific models".*
Nature of hypotheses to be tested	Information is to understand the client's perceptions and not always the "truth". In other words, diagnostic criteria for the purpose of therapy.	To assess the individual and family factors that affect the best psychological interest of the child. In other words, psychological criteria for the purpose of legal decision.
Differences in the role or goal of the	To advocate for the mental health needs of the client.	To provide information to the court as an impartial evaluator who is

professional	To provide treatment to the client. The therapist is supportive, accepting and empathic. It is a helping relationship which is rarely adversarial.	neutral, objective and detached. Frequently adversarial.
Differences in the impact of the professional judgment and decision-making on the relationship	Conclusions, recommendations and decisions can be revised and updated. Even if the therapeutic process has been completed, clients can return for follow-up.	No revision. Conclusions and recommendations are more definite and have more far-reaching implications.
Use of tests	To assess an individual's cognitive and/or emotional functioning for the purpose of assisting in the development of appropriate interventions.	Tests should be seen as hypotheses which can be disconfirmed or further supported and understood in the context of information obtained by multiple sources.
Sources of information	Client or family. Accuracy is assumed, because there is no concerted effort to corroborate the information. The client's story is taken at face value.	Family and collaterals. Accuracy is checked, because information is often contested.
Activism	Intervention in the client's life in order to promote change.	No intervention. The purpose is to gather information and not to intervene.
Goal	To improve the client's mental health.	To provide accurate information and recommendations to the court on what is in the best interests of the child or children.
The amount of control and structure in each relationship	Client-structured.	Evaluator-structured and with more structure than in the case of therapy.

The differences between clinical and forensic evaluations are quite clear from the table above. The most noticeable difference is the fact that the individual is regarded as the client in clinical evaluations while the court is the client in forensic evaluations, as in the case of custody decisions. A further important distinction between the two "models" or approaches is that there is no intervention in the therapeutic sense in

forensic evaluations while the sole purpose is therapeutic intervention in the case of clinical evaluations.

It is quite possible that mental health professionals may confuse their roles when they are involved in both therapeutic interventions and forensic evaluations for a court of law. This could happen especially when the goals and purposes of forensic evaluations are not clarified properly. Divorces do not happen without emotions, and an evaluator, with a mental health background, may want to respond therapeutically to these emotions. If the tasks and responsibilities are not clear in the agreement between the evaluator and the divorcing parents before the evaluation starts, confusion may cloud the judgement of the evaluator. In Namibia agreements, where the terms are agreed on for the evaluation, are often non-existing. Issues like confidentiality, who is the client, who will be involved, what is the purpose of the evaluation, among others, are not clarified from the start. It is advisable that the therapist and the custody and control investigator should not be the same person. This could, perhaps, prevent role confusion and the custody and control process to be "contaminated" by therapeutic elements. It, however, does not mean that therapy has no place in the custody and control evaluation process. If parents feel overwhelmed by the process, they may develop a need for therapy and should subsequently be referred for therapy.

7 THE PROCESS IN CUSTODY AND CONTROL EVALUATIONS

Assessing a child's best interests requires a rational and objective evaluation process which, in turn, requires that the issues and criteria for assessment should be made explicit. Rohrbaugh (2008:29) states that this should be done in a thorough and impartial manner that would provide the court with sufficient information to make a decision in the best interests of the children involved. Although evaluation processes can vary in their complexity, guidelines should be the same for all custody and control evaluations. According to Ackerman (2006) and Bow (2006), these guidelines are not intended to be mandatory or exhaustive, but the goal is to promote proficiency in conducting child custody evaluation. Stahl (2011:79) also states that

ensuring that evaluators follow a similar process under most evaluation circumstances will ensure that custody and control evaluations are conducted more validly and consistently, which, in turn, will increase the scientific reliability of the process. This, however, does not mean that evaluations should follow a rigid pattern. It should allow for the unique circumstance of each case. It is important that certain issues be tackled in each evaluation.

In Namibia, each evaluator has his or her own framework for custody evaluation. The previous Ministry of Health did provide guidelines for custody evaluations, but they only served as a broad framework, and the less experienced social workers struggle to use them properly, mainly because it requires that they are being applied to a specific situation. Due to a lack of supervision and guidance, social work reports often fall short when it comes to the best interests of the child, due to a lack of planning or strategy on how to conduct such evaluations.

7.1 Different stages of the custody evaluation process

Any process which leads to a goal should be utilized in an orderly fashion which requires it to be dealt with in stages. This is in line with Barth (2011) and Herman (1999) who state that each custody evaluation should begin with a well-thought-out strategy in order to follow a procedure that makes sense to the family. This strategy is normally planned, based on who comprise the family, the number and ages of the children, who outside the family are also involved or had been involved, and whatever other collateral information may be needed.

According to Galatzer-Levy, Gould and Martindale cited in Galatzer-Levy, Kraus, and Galatzer-Levy (2009:1), an evaluation process often unfolds in a three-stage process when developing opinions in custody and control matters. These steps are often not carried out sequencely. Turkat (2005:9) describes a five-stage-model, namely interviewing key participants, administering psychological tests, conducting observations of the parents and children, conceptualizing the results of the former three stages and making recommendations to the court. Lewis (2009:3) gives the following schematic representation of the different stages:

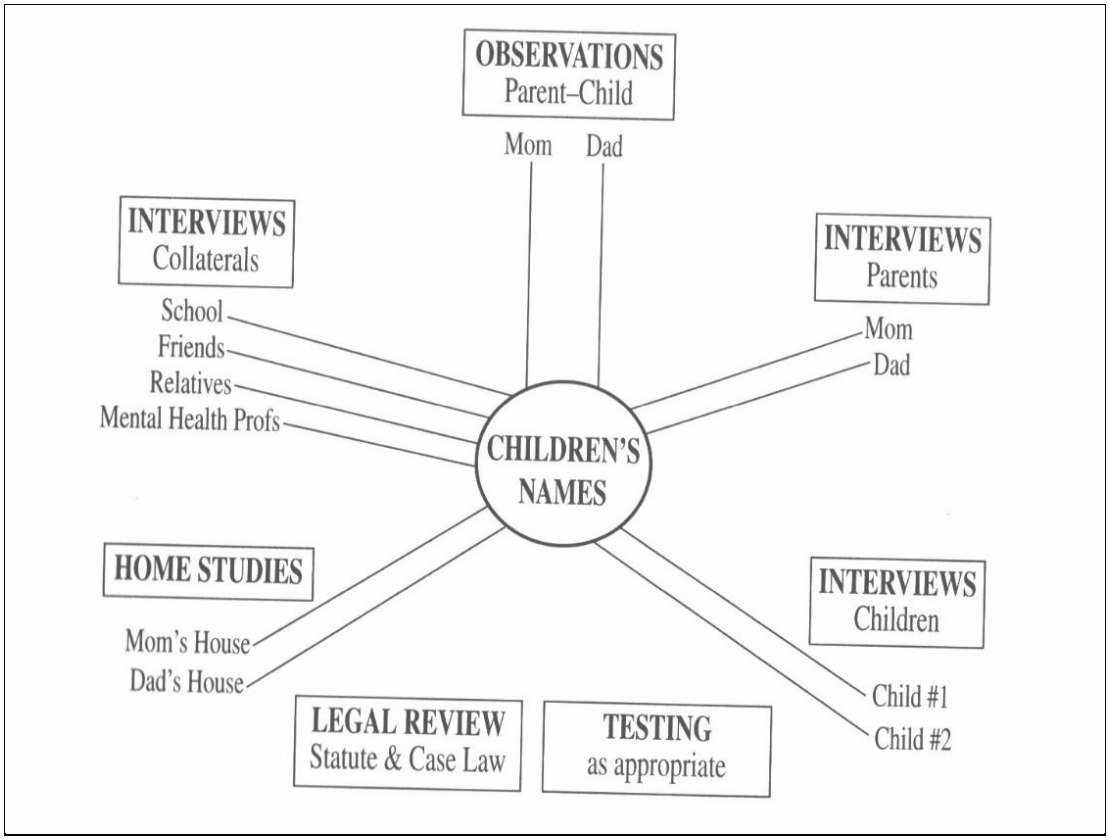

Figure 1: A schematic representation of different stages in custody and control matters (Lewis, 2009:3)

The diagram above depicts the various sources of information necessary for the custody evaluation, also making provision for reviewing and testing the results of the evaluation. In Namibia there is no standard procedure between evaluators regarding how information will be gathered from the various sources. Psychologists do not do home visits, and information is often based on psychological testing. Social workers have the mandate to do home visits and observe parents and children in their natural environment; they can also ask for psychological testing by psychologists about certain aspects regarding the parents, if needed, and can ask a child therapist to pay attention to a child's voice. Social workers, however, seem to struggle to present all this information in a report that is well structured and scientifically based on what is in the best interests of the child. They are often not able to follow the process due to time limits, a lack of resources, long distances that need to be traveled and a lack of

guidance and supervision in what information to use or what process to utilize in serving the best interests of the child.

The process of evaluation occurs in stages which are set out below.

7.1.1 Initial stage

According to Stahl (2011:79), this stage involves the following steps:
The initial appointment order either from the court or a lawyer. This appointment order from the court or letter from the lawyer should be reviewed. Ackerman (2006:92) also states that the scope of the evaluation is determined, based on the nature of the referral question. During this stage the following tasks may be attended to:

- Initial contact with each parent;
- Contracting and gaining informed consent;
- Finding out who is responsible for the payment of the fees;
- Explaining the procedures that will be followed.

It is important that social workers and psychologists spend enough time at the initial stage of the process in order to clarify any uncertainties related to the tasks above, and to explain what can be expected. In Namibia, government social workers have cases allocated to them through the High Court, and clients often do not have a choice when this happens. Government social workers are pressed for time and experience resource constraints. They seldom make use of a contract between them and the clients, maybe also because there are no fees involved. Often they have no choice whether to take a case or not, due to the fact that they are instructed by the High Court.

Psychologists and private social workers, doing child custody and control, enter into contracts via lawyers and clients. The author, however, often experiences that the referrals are not always clear. Should this not be clarified, it can lead to an unclear process or the evaluator can lose focus of what is in the best interests of the child. Often expectations are not met because the evaluator is unclear of the process.

Social workers, especially in private practice, somehow seem to be more sure of the process that they need to follow, and will make sure that contracts are completed and referrals are clear, before collecting data from the various resources. This may be due to the interest they have in projecting a positive image of their practice for professional and financial reasons.

7.1.2 Collecting data

The evaluator uses his or her knowledge regarding the kind of facts that might be relevant to the decision. Turkat (2005:10) warns about the power of evaluators in that they have tremendous discretion in determining what information *"to focus on or gloss over, assign weights of importance, or disregard completely"*. In the absence of scientific evidence, two evaluators viewing the same data of a family can vary in their interpretations, depending on their own views and biases. As pointed out earlier, data needed for custody evaluations are collected from various sources. Ackerman (2006), Herman (1999) and Stahl (2011) concur by explaining that evaluators are obliged to maintain multiple avenues of data gathering, which include:

- **Clinical interviews**: Turkat (2005:9) criticizes the fact that there is no scientifically accepted interview format for conducting custody evaluations. This is a serious indictment of the skills of professionals conducting custody evaluations. If this is in fact the case, it should come as no surprise that the format varies across evaluators, and that the questions asked will be the evaluator's choice. This lack of a format is perhaps one of the major shortcomings of this kind of evaluation and has implications for the reliability of the instrument used. The evaluator, however, should meet with each parent several times, interview each child separately and have at least one joint session where the child and each parent are observed together. Lewis (2009:3), however, warns that interviews should be limited to those factors that have relevance to the scope of the custody evaluation.
- **Collateral interviews**: This should include in-person interviews or telephonic interviews with childcare providers, other relatives, other therapists that are involved with the family, teachers and friends, among others. Evaluators need to

check the value of the person contacted. Will the person be helpful to the process or is the person interviewed part of the list of people for or against a parent? If this does not happen, the process could be jeopardized, to the child's detriment.

- **Home visits**: This is an addition to interviews held in the evaluator's office. According to Lewis (2009:4), home visits are often underrated and omitted. Home visits are helpful in observing the child and parent in their natural surroundings. They also provide information with regards to the appropriateness of the home for the child, as far as sleeping arrangements, safety and the like, are concerned. Social workers, in general, do home visits and see these as a valuable source of information. In Namibia, psychologists do not make use of home visits, but would rather ask a social worker to do this and provide feedback should there be questions regarding circumstances at home. The author is of the opinion that valuable information can be gathered, if the evaluator knows what to observe.
- **Observations**: This is the direct observation of the parent-child interactions. The author in her own practice finds it valuable to include parent-child observations in the form of a "fun" or "play" time, as well as a more "routine" event, such as dinner or homework time. This gives valuable information with regards to the structure, discipline, control, as well as interaction, between the parent and child.
- **Psychological testing**: Parents and children can be tested, especially if there are concerns regarding the emotional status of the child. There are, however, still controversies regarding the tests used, the ability of evaluators to interpret the tests and the context. Herman (1999:141) emphasizes that these tests should be used with caution due to the dangers of interpreting test data without understanding the context of the testing. Tests should not form the core of the evaluation, but rather serve to validate clinical hypotheses during the evaluation.

Tests should be seen as hypotheses which can be disconfirmed or further supported and understood in the context of information obtained by multiple sources. According to Stahl (2011:111), the use of psychological tests should rest solely with the evaluator, and should be based on the scope of the evaluation, the issues involved and other data available to the evaluator. Stahl (2011:111) also warns that caution should be maintained in interpreting and potentially over-interpreting test data, although some psychological tests and parenting interventories should form part of a

custody evaluation. Especially in high-conflict custody evaluations where the potential for distortion, deception and personal dysfunction are more likely, psychological tests can help the evaluator understand a parent's deception or distortion, or help identify parenting deficits and parents' relationship capacity and the potential for matching parents' abilities with the particular needs of a child (Stahl, 2011:121).

In Namibia evaluators make use of different tests. Social workers will often refer parents to clinical psychologists or psychiatrists for clinical testing if there are concerns regarding the mental health of the parent/s. Children would be referred to play-therapists for evaluation, where different projective tests would be used, depending on the therapist. This information will then be worked into a final report by the social worker. Psychologists, doing child custody evaluations, will do the testing and evaluation themselves.

The use of multiple sources of information provides a broader factual basis upon which such important decisions as custody of the child can be taken. However, the data should be evaluated and used with care.

It is both unlikely and insufficient to make use of only one source of information when doing custody evaluations. The situations in which both the parents of the child/ren and the child/ren themselves find themselves in are much too dynamic to rely on too few sources of information. To this can be added significant others, apart from the parents of the child, who are in a meaningful relationship with the child and who may be able to shed some light on what might be in the best interests of the child.

7.1.3 Integrating the resulting conclusions into an overall scientifically reliable recommendation

According to Herman (1999:144), the custody evaluation report is *"the culmination of the evaluation. It represents the sum and substance of everything the evaluator has done. It becomes a document frequently introduced at trial; it is a reflection of the quality of the work and, sometimes, it can even serve as the basis for a settlement. The report requires a great deal of thought, care and sensitivity on the part of the*

evaluator, for it is a permanent record and can have tremendous impact upon the case." In this sense, the final recommendations regarding custody arrangements are a reflection of the skills of the evaluator, whether it is a psychologist, social worker or both.

In Namibia this stage is one of the most criticized stages in the child custody and control process. Especially government social workers are criticized for their reports being biased, not properly done, recommendations not being in the best interests of the child, taking too long to complete, and so forth. This is often due to a lack of time, long distances that need to be travelled, not being able to obtain all the information, a lack of resources, the lack of supervision and guidance and a lack of training.

The author is also of the opinion that those reports are often not done in a sensitive manner; thus they can cause more harm to a family, as well as their support system, due to the manner in which information has been stated. In Namibia such a report becomes a public document, with the content available in newspapers, on the internet and other platforms. The author feels that these documents should also be protected due to their sensitive nature, which unfortunately is not the case and, therefore, not in the best interests of children for their post-divorce adaptation.

In general, the quality of reports submitted to a court of law is also an advertisement of the profession whose members have developed it. Courts should be able to rely on reports from professional people because these reports form part of the basis for the decisions by the court and, in custody cases, decisions regarding the best interests of the child.

8 DEVELOPMENT AND IMPORTANCE OF CHILD CUSTODY AND CONTROL EVALUATIONS

According to Barth (2011:157), the history and development of child custody is complex. The Dutch common law in which South Africa and Namibia have their roots, regarded fathers as being the determination of lineage, power and wealth

(Froneman, 1999; Robinson, 2002; Uugwanga, 2010). Consequently, in the 17th century custody and control disputes were determined by the father's right to his children. It was believed that fathers were financially in a better position to support their children, and children were also seen as property (Ackerman, 2006; Barth, 2011). Courts during that time had no interest in intervening in family matters, because family issues were dictated by religion rather than civil law.

In the late 17th century the state started to recognize their responsibility for child welfare. By the mid-18th century focus started to shift to maternal custody, supported by the tender-years doctrine (Barth, 2011:157). Mothers were automatically regarded more favorably in custody disputes, due to being seen as the better nurturer by virtue of their biological linkage to children (Froneman, 1999; Uugwanga, 2010). With the focus shifting to the inequity of custody decisions merely based on gender, the focus worldwide moved to a new standard of "the best interests of the child". This allows for the consideration of many factors, and thus provides for great judicial discretion. In other words, although the focus shifted over decades, the best interests of the child standard was based on societal beliefs of the court and community, which has changed to how the best interests of the child is currently determined (Froneman, 1999:12). According to Herman (1997:57), the evaluator needs to understand the historical basis of child custody disputes, because "*the examination and handling of the child custody dispute mirrors the social faces and morals of the time*" (Mason in Herman, 1997:58).

Judges and courts make rulings in custody and access disputes based on the needs of the children involved and their caregivers' capacity to meet those needs. A scientifically informed, child custody evaluation provides relevant and useful information to these judges and courts (Vertue, 2011:336).

According to Stahl (2011:27), it is the task of the evaluator to assess the entire family objectively, focusing on the dynamics of the family, the individual strengths and weaknesses of each parent and the functioning of the children, while making recommendations to the court regarding the best interests of the child. It is a unique role and must be kept separate from other roles. Ackerman (2006:2) also

emphasizes that all significant others (all parties with whom the child resides or who are responsible for his or her ongoing care) should be evaluated.

According to Gould and Martindale (2009) and Ackerman (2006), a shift has also been made from a clinically based model (emphasizing the clinical judgment of the evaluator) to a forensically based model (emphasizing the gathering of reliable data from independent sources and using reliable methods and procedures). According to them, a five-pronged methodology can be used. Such methodology includes semi-structured interview questionnaires, psychological tests, self-reporting measures, direct behavioral observations, extensive collateral record reviews and collateral interviews. Froneman (1999:27) warns, however, that a custody decision, even if carefully made, cannot guarantee the meeting of all the needs of a child.

The author is of the opinion that in Namibia child custody and control evaluations are still determined, to a large extent, by the "social faces and morals of the time". Cultural beliefs regarding what is in the best interests of a child and how children are viewed, among others, still play a huge role in the outcome of child custody disputes.

Should evaluators, especially social workers, have a uniformed training or protocol when doing child custody evaluations, a more forensically based model can be followed. Many of the challenges and loopholes experienced in child custody evaluations can thus be prevented or minimized.

9 CHALLENGES, LOOPHOLES AND CRITICISM OF CHILD CUSTODY AND CONTROL EVALUATIONS

Custody and control evaluation is a process designed by human beings and, as such, will have shortcomings. An important point of criticism is that it can contribute to the financial stress and emotional strain of a divorce (Gould & Martindale, 2009; Mitcham-Smith & Henry, 2007; Stahl, 2011; Vertue, 2011; Zelechoski, *et al*., 2012). It causes financial stress because of the costs when involving professionals and the

payment of maintenance. It causes emotional strain because of the experience of conflict and turmoil which characterizes divorce.

Child custody evaluations are also criticized because they are time-intensive (Bow & Quinnell, 2004; Preller, 2013). It is a lengthy and complex process, which typically can take three to four months to complete. In Namibia it can even take longer, due to limited resources, long distances that social workers need to travel to do evaluations, costs involved if private evaluators are used and the legal system. It can, therefore, be an expensive process, especially if private evaluators are involved. Litigation can also draw out the process because it has the character of “shuttle negotiations”.

A custody and control evaluation can add stress to an already stressful situation. According to De Jong (2010:2), parents are pitted against each other throughout the entire process, which leads to more bitterness and irreconcilability. This makes it more difficult to reach a satisfactory agreement. Parents worry about the impact of the evaluation on their children. They worry whether an evaluator will make recommendations that limit their custodial rights and interfere with their relationship with their children.

Child custody evaluations are potentially intrusive to the family. Such an evaluation and report exposes the family to significant airing of “dirty laundry” (Stahl, 2011:3). The author is also of the opinion that such an evaluation often yields a report that is both potentially insightful and damaging to the family. Often reports tear families’ support systems apart, due to collateral information used. Reports are lengthy, conclusions lack supporting data and objectivity; they also often lack proper recommendations for custody and visitations (Bow & Quinnell, 2004:125). Some of the problems thus emanate from the nature of the custody evaluation process and the impact it has on those concerned.

Psychologists, as evaluators, often lack the knowledge and experience of how to craft an evaluation so that the information gathered will meet the standards of admissibility required by the legal system (Bow & Quinnell, 2004:122). According to Ackerman (2006) and Rohrbaugh (2008), not all psychologists are qualified to perform child custody evaluations. Clinical skills in working with children and adults

do not automatically lead to the ability to evaluate custody and control disputes. Competence is, therefore, gained through education, training, supervised experience, consultation, study and professional experience. According to Bow (2006:27), child custody evaluators also, at times, have little or no training in child psychology, especially when evaluating children under twelve. Ackerman (2006:4) holds the view that child custody evaluators should have a doctorate in psychology, should have experience in performing custody evaluations and have knowledge of state law. Rohrbaugh (2008: 23), in addition, states that evaluators should have at least a minimum of a master's degree in a relevant mental health field, with competence in the psychological assessment of children, adults and families. Less experienced evaluators should have both course work and internship experience in forensic psychology. Barth (2011:158) also states that evaluators should have specialized knowledge and formal training in legal, societal, familial and cultural issues that arise in the context of child custody disputes. According to Rohrbaugh (2008:23), supervision is essential for the first two years, with ongoing peer supervision and consultation regarding topics outside their areas of expertise, even for experienced evaluators. Mental health professionals are mostly trained as helping professionals, which is not the same as entering the legal system in an adversarial process.

Lewis (2009:2) refers to the need for different health professionals, working with custody evaluations, to form a "*partnership of knowledgeable professionals*". In Namibia psychologists and social workers have different training backgrounds, but they can all learn from one another. The author is of the opinion that social workers can contribute to the field of child custody and control in the following ways, because of their training and background:

- Social workers, except for private social workers, are appointed by the state to do various forms of legal work and evaluations within the scope of their training.
- Social workers are familiar with the applicable legislation concerning families, as well as legal standards and procedures.
- Social workers can do family and child assessments on the basis of their training and experience.

- Social workers have, as part of their post-graduate training, already been exposed to court work, evaluations of families, home visits, doing observations and report writing as part of their practical work.
- Social workers are also trained in the concepts of supervision, peer consultations and reports that need to be assessed by supervisors.

As stated by Munson (2011:37), *"Forensic work of social work has been in existence since the beginning of the social work profession but has historically been a small segment of the profession."* This does not place social workers above criticism regarding child custody and control, but it does put them in a position to make a difference, especially in partnership with legal and other mental health professionals. In the words of Lewis (2009:1), *"Legal and mental health professionals working together in custody disputes have enormous potential to do good … and to work more effectively and humanely."*

According to Bow and Quinnell, (2004:122), child custody evaluators often lack objectivity. There can be confusion about who is the client. No matter who pays for the evaluation, in what context and for what reasons it was ordered or whether the end result is a settlement or a trial, the children in a divorce case become the primary focus of the evaluation and their needs must be served first (Stahl, 2011:7). According to Stahl (2011:55), custody evaluations are about the children and the needs of children. The task of the evaluator is to integrate the diverse data presented by the parents to formulate recommendations which best address the needs of the children and the ability of each parent to meet those needs. These needs will be influenced by developmental criteria, the temperament and emotional functioning of the child, the relationship that the child has with each parent, the degree in which the child is both directly and indirectly impacted by the parental conflict and the child's wishes.

Child custody evaluators are not always appointed by the court. If appointed by a court, it gives both parents the right to obtain second opinions if they disagree with the report or recommendations. This can, however, result in a battle of the experts (Ackerman, 2006:5). In Namibia most appointments are made via lawyers. Evaluator

roles are sometimes confusing. In Namibia, becoming a hired gun as a second-opinion expert, is one of the greatest dangers (Ackerman, 2006:6). Because each evaluator has his or her own procedure, the danger of being a hired gun is more common. Often different procedures are used because there is no general structure. Feedback is also not reported to all parties involved, but sometimes to the hired lawyer first. According to Ackerman (2006:6), second-opinion evaluations should be done when –

- incomplete evaluations have been done;
- complete evaluations have been performed incompetently;
- ethical standards have been violated;
- evaluations are based on opinions emerging from the administration of one test or a one-hour-long interview.

Practitioners, even private practitioners, should see themselves as an arm of the court, and not as independent practitioners. There is also the risk of putting children right in the middle of their parents' conflict.

Child custody evaluators often lack custody-relevant, psychological knowledge and knowledge of legal criteria (Vertue, 2011:336). Courts at times assume that an evaluator, by virtue of his or her professional degree, knows and understands how to undertake the task (Herman, 1999:140). There is often a lack of knowledge regarding child development. There are varying perceptions about when a child's preference should be considered or of what are the developmental needs of children. Evaluators may lack understanding of the emphasis on assessing and understanding the child within the context of the family. According to Rohrbaugh (2008:3), clinical skills in working with children and families do not automatically give a mental health professional the ability to evaluate a situation and predict possible outcomes. Rohrbaugh (2008:22) makes it clear that child custody evaluators should be knowledgeable in a wide variety of techniques and topics, both psychologically and legally. Clinical expertise is not enough, and a wide range of other skills are needed, such as –

- knowledge of relevant behavioral science research;
- forensic assessment techniques;

- legal standards and procedures;
- knowledge of special issues, such as abuse, relocation and child alienation.

There are currently no official requirements for evaluators in Namibia, such as what education, training or license requirements are needed. No best practice or standardization for the credibility and consistency of child custody evaluations exists among child custody evaluators. There is a lack of consensus among evaluators and evaluators and courts about what constitutes an ideal evaluation. Best practice standards can be defined as *"practice at its best, given the available theories, methods and procedures in the field"* (Zelechoski, *et al*., 2012:458).

Child custody evaluators require a substantial amount of specialized knowledge and training, particularly in the areas of clinical and forensic psychology (Zelechoski, *et al*., 2012:467). Evaluators also need knowledge of relevant psychological literature and literature on child development, child attachment and the impact of traumatic exposure on children of varying ages and developmental stages, as well as adult psychopathology and suicidal risk. These data need to be placed in context to relevant scientific and psychological knowledge.

Child custody evaluators also have limited knowledge of custody-relevant psychology (Vertue, 2011:336). Evaluations are not always based on sound behavioral science research (Rohrbaugh, 2008:4). Often a blend of clinical and scientific models is lacking. The lack of knowledge of current research findings could lead to assumptions and beliefs that are not scientifically based, but actually biased.

Evaluators can only inform the court about what is important for these children at this time (Zelechoski, *et al*., 2012:467) due to changes in circumstances in the parents' lives or as the children progress through developmental stages. Therefore, future evaluations may be necessary, especially in complex cases. This, however, is seldom recommended or, if recommended, seldom enforced. Child custody and control evaluators' practices often focus on adults rather than on the child (Vertue, 2011:336), which is perhaps an important obstacle in pursuit of the best interests of

the child. Parents need to realize that the purpose of the custody report is to determine the best interests of the child and that it is not about divorce issues.

According to Ackerman and Pritzl (2011:621), the use of testing in child custody evaluations, especially of children, has increased over the years. A much broader array of tests for evaluators is also now available than was a few years ago. Many tests, such as projective drawings, sentence completion, the Bricklin Perceptual Series and the Perception of Relationship Test (PORT), are mostly used in Namibia by evaluators, although there is concern in the literature about the validity of these tests, as well as increased criticism regarding the use and interpretation of tests. There is often an indiscriminate use of psychometric tests (Vertue, 2011:336).

No ethical guidelines exist among evaluators (Barth, 2011:155). Evaluators, especially private evaluators, are not always extensions of the court, but rather extensions of lawyers and clients. Evaluators often find themselves in dual roles (Vertue, 2011:336). Rohrbaugh (2008:10) states that evaluators can only serve in one role in any given child custody case.

From the above it becomes clear that the custody and control process is indeed challenging for a variety of reasons. It is, firstly, a costly process both financially and emotionally, as well as in terms of time, which to a large extent is related to the nature of the custody investigation and evaluation process. A second issue is the knowledge and skills of the professionals involved in this process; these do not always seem to meet the requirements for doing a proper custody and control evaluation, mainly as the result of the different perspectives from which they are approached. A problem in this regard is the lack of accreditation, including ethical rules, of people doing custody and control evaluations. Thirdly, a protocol for custody and control evaluations is needed. This will also be discussed in the next section.

10 CHILD CUSTODY AND CONTROL EVALUATION IN NAMIBIA

According to statistics from the Legal Assistance Centre (LAC, 2000:15), over the last ten years, an average of about 5 600 civil marriages were registered annually

nationwide. The average number of divorces (in respect of civil marriages) was about 400 each year over the period 1989-1999. These statistics indicate a divorce rate of about 1:15; in other words, about one of every fifteen marriages ends in divorce. Currently these statistics are outdated (LAC, 2000:15).

In the past, mothers were often favored in the allocation of custody of the children, especially in the case of young children. This is because of perceptions that mothers are in practice often more involved in the daily care of children. But the new law (Child Care and Protection Act (3 of 2015)) will not favor mothers over fathers, or fathers over mothers. It will look at the facts to see which parent is the primary caretaker. The primary caretaker will usually be favored over the other parent for custody, unless there are good reasons to decide otherwise. This will usually be the best way to provide continuity and security for the children, and can be considered as a very constructive development.

Namibia is still in a transformational process from being a protectorate of South Africa to becoming an independent country. This is reflected in many of its laws. A good example is its current divorce law which is an outdated system inherited from South Africa at Independence. Due to this, various problems, which have been observed by the author, still exist. Some of these are discussed below, with the basic problem being the adversarial nature of the way in which custody decisions are taken:

- The current law is based on fault. This means that one spouse must prove that the other spouse did something wrong – usually some form of desertion or adultery. This approach does not fit well with reality, because the break-down of relationships is usually much too complicated to put all the blame on one person.
- According to current law on divorce, it is almost impossible for couples to get divorced without the help of lawyers, even if they are both in agreement about how to divide the property and take care of the children. This makes divorces expensive.
- Divorce cases are heard only by the High Court in Windhoek. Even though divorce cases are almost always settled without a trial, it is still necessary for at least one of the spouses to appear in person in Windhoek. This can also add to

the expenses, especially for people who live outside Windhoek. Under the current law, one spouse must accuse the other spouse of some wrongdoing – such as having an affair, leaving the family home or making life so unbearable that it is no longer possible to live in the same house. Accusations like these can lead to increased conflict, which is not good for any children involved. Even if both spouses want the divorce, one of them will still have to go through the motions of accusing the other spouse of wrongdoing. So the court papers are often less than truly honest (LAC, 2005:20).

- In Namibia there is no standard practice where text describes areas to explore and methods to interview and observe parents and children, assess child development and parenting capacity, write the report and deal with cross-examination. No workshops are provided by professional organizations and academic institutes. There is a large amount of unwanted variability in the questions asked, methods pursued, the way information is processed and the kinds of conclusions reached. No consistent and appropriate framework that supports the best interests of the child is used. Currently the Ministry of Gender Equality and Child Welfare provides general guidelines for social workers in the government regarding report writing, as well as criteria for decision-making during custody and control evaluations. Emphasis is placed on the involvement of both parents in the emotional development needs of the child, and the assumption that the mother is the best care for the child is not any longer accepted unconditionally.
- It is the author's experience that there is no standard procedure regarding child custody evaluations in Namibia, especially not among private evaluators. The Ministry of Gender Equality and Child Welfare provides a framework for child custody evaluations but, in general, no standard exists for consistency among the different professions doing custody evaluations. Normally such an evaluation will include interviews (with parents, children and collaterals), observations, home visits and psychological testing.

According to the literature, child custody evaluations are conducted by a court-appointed professional or other representative of the court (Barth, 2011:157). In Namibia it is conducted by any social worker or psychologist, either appointed by the

court (mostly government) or requested by a lawyer for his or her client (mostly private).

According to literature (Barth, 2011:158), evaluations around the world should be performed by a professional with specialized knowledge and formal training in the legal, societal, familial and cultural issues that arise in the context of a child custody dispute. According to AACAP (1997:4) and the Association of Families and Conciliation Courts (AFCC, 2006:8), custody and control evaluation is seen as a specialized field, where evaluators need a background in forensic work; in other words, they should be trained in evaluation, diagnosis, treatment, interviewing skills, family and interpersonal dynamics, knowledge of child development and knowledge of law and legal processes. There is a large degree of variation on this issue, with traditional rules being applied with some flexibility and the wishes of the children sometimes being taken into account. However, cultural beliefs often cloud evaluators' perceptions of what is in the best interests of the child.

Due to the many challenges, child custody and control evaluators often step into the following pitfalls:

- The two-hats-syndrome: To act in both a therapeutic and forensic capacity. According to Herman (1999:144), the *"forensic and therapeutic roles serve very different purposes and are fundamentally incompatible".* AACAP (1997:4) also warns that the different roles of therapist and evaluator should be kept separate, because of complications that can occur. The two-hats-syndrome, according to them, is inappropriate and complicates therapy and the evaluation. The roles serve different interests and have different aims. In Namibia, due to a lack of resources and limited expertise, mental health professionals, especially psychologists and private social workers, often find themselves in dual roles. Without ethical guidelines or a standard for custody evaluation, supervision and experience mental health professionals will often be confronted with this issue, and in the end it may lead to bias or recommendations that are not in the best interests of the child.
- The hired-gun (one-sided) syndrome: In Namibia, parents living in different towns or parents not satisfied with a custody and control report often hire their own

mental health professional, who at times will base his or her report and recommendations on one-sided information.

- Misuse of data. Evaluators in Namibia often use data to support one parent or to disgrace another parent, without giving a clear and balanced view of a child's circumstances and how each fact serves or does not serve the best interests of the child. Often data, that were never checked, are used, leading to recommendations not in the best interests of the child involved.
- Misusing the literature. Often literature will be quoted in reports, but not in context, but rather to prove their own views.
- Biased evaluators. Herman (1999:145) emphasizes that bias and personal value, as well as moral judgments, have no place in forensic evaluations. However, especially when taking into consideration the different cultural values in Namibia, it is inevitable that mental health professionals would constantly fall into this trap, especially with issues such as homosexuality and fathers wanting custody of small children. A lack of knowledge of current research on these issues, as well as a misunderstanding of the best interest of the child principle, can lead to bias and recommendations that are even more harmful.
- The matter of privacy in child custody evaluations: At present, people are often very embarrassed by newspaper reports that give intimate details about their personal lives. New legislation is needed to protect families in this regard. Very few evaluators also warn or discuss possible newspaper publication of the divorce, as well as collaterals and confidentiality issues, as part of their agreement with parents.

If the court requests a report from a government-employed social worker, although prepared at state expense, it can entail delays of up to six to eight months. The cause for delays can be that the social workers must often travel long distances and may have trouble locating the relevant parties for interviews, particularly in rural areas or, in some cases, people may try to evade them. Another obstacle is the lack of resources, such as telephones and transport, in some regions. The depth of an individual report also varies with the experience and commitment of the social worker who prepares it.

If a social worker finds that a particular custody case is unusually complex, he or she may call in outside assistance, such as a child psychologist, if necessary. But this approach is complicated by the fact that the costs of such assistance must come from the budget of the Ministry of Health and Social Services. Some private practitioners will assist in these cases without charge.

Some practitioners say that many social workers' reports are of poor quality, while others say that they are usually helpful. Judges normally follow the recommendations made by social workers. Several practitioners have expressed concern that judges sometimes accept inadequate social worker reports uncritically.

The author is also of the opinion that Namibia has limited resources. In serving a population of approximately 1.5 million, distributed over a vast country, the few government employed social workers struggle to keep up with their workload and limited resources. Parents involved in custody disputes, desperate to conclude their divorce, often prefer private social workers. The number of private social workers in Namibia is limited, with approximately five known private social workers, who deal with child custody disputes. Due to the lack of private social workers, many parents turn to psychologists. This often leads to clinical-based evaluations, instead of working from a social science perspective, where the child is assessed according to scientific criteria and where expertise, reasoning in the best interests of the child, is provided to the court.

11 ASSESSING THE BEST INTERESTS OF THE CHILD

The best interest principle has become an indisputable legal imperative (Bekker & Van Zyl, 2002:117; Bekink & Bekink, 2004:21). This is reflected in the Constitution of South Africa (1996) and the South African Children's Act (38 of 2005) where the child's best interests are of paramount importance. In Namibia, with the Child Status Act (6 of 2006) and the new envisioned Child Care and Protection Act (3 of 2015), the child's best interests are also of paramount importance.

Many parents end up in a custody and control dispute when they disagree about the best interests of their child. As previously stated, the focus of a child custody and control evaluation is to assess the individual and family factors that affect the best psychological interests of the child. Froneman (1999:27) states that during child custody evaluation, children are the focus of the disputes but are also the ones that are the most damaged by it. There must, therefore, be a shift in attention away from adult grievances towards the needs of the child. A problem is that although parents can share a goal of "best interests of the child", the problem lies in agreeing what those interests are and how these could be met. This can include the assessment of the following (Froneman, 1999; Gould & Martindale, 2009; Zelechoski, *et al*. 2012 (who also include the co-parenting relationship)):

- Parenting fitness and capacities for parenting.
- Psychological and developmental needs of the child and wishes of the child where appropriate.
- Consideration of the resulting fit between each parent's parenting competencies and the needs of the child.

According to Gould and Martindale (2009:44), the best interests of the child can be achieved by focusing on the following:

- Children's needs, rather than parents' rights.
- Gender neutral standards.
- The needs of an individual child rather than the generally agreed-upon need of children as a group.

The author is of the opinion that, in order to achieve the above mentioned, there needs to be a clear purpose and structure to focus on the child and not on the reasons for the conflict in the divorce.

Ackerman (2006:1) agrees by focusing on the following factors to be considered in establishing the best interests of the child:

- The wishes of the parents regarding custody;
- The wishes of the child;

- The interaction and interrelationships of the child with the parents, siblings and anyone else who significantly affects the child's adjustment to home, school and community;
- The mental and physical health of the parties;
- Other factors that may be deemed relevant to each individual case.

According to Stahl (2011:7), *"… no matter who is paying for the evaluation, in what context and for what reasons it is ordered, or whether the end result is a settlement or a trial, the children of divorce become the primary focus of the evaluation and their needs must be served first"*. This is not true for Namibia, where parents' rights are often the main focus, and confusion exists between custody and control evaluators of who is the client or whether the person paying the fees becomes the client. Often evaluators become entangled in the conflict issues or try to proof who is right or who is the better parent, instead of focusing on what is in the best interests of the specific child and that child's needs. Structure and focus are then lost, often because evaluators do not know what to assess. According to Herman (1999:142), issues to be attended to are the following:

- Continuity and quality of attachments between parent and child;
- The child's parental preference;
- Special needs of a child and whether the parent is sensitive towards them;
- Educational planning;
- Relationships with siblings;
- Physical and mental health;
- Work and finances;
- Styles of parenting and discipline;
- Social support systems;
- Culture, ethnicity and religion;
- Issues that can complicate a case: psychiatric disorders, gender issues, relocation, allegations of sexual abuse, domestic violence, and the like.

The author is of the opinion that social workers are trained in child custody and control evaluations, as well as to work in a structured and focused manner, incorporating sources into a well-thought-through report, often making use of

psychologists' assessments, when needed, or to clarify certain mental health concerns which may affect a child. Social workers tend to network where expertise is needed, for example involving therapists; psychologists, on the other hand, especially in Namibia, seldom make use of other therapists as collateral. Working from a social science perspective, social workers can incorporate clinical assessments, but do not base their evaluations to determine the best interests of the child on that alone. Attention to the issues listed above will serve the purpose of providing structure to the custody and control investigations, as well as guarantee that the best interests of the child take precedence over all other concerns. In view of the possible involvement of more than one professional, including lawyers, it is important that issues to be attended to, are shared amongst them.

Froneman (1999:28) also proposes the following considerations regarding assessment aspects in determining the best interests of the child:

- Parents' rights and responsibilities must be balanced against the child's best interests;
- Children's needs will change with age;
- There is a question whether the best interests should be viewed from a long-term or a short-term perspective.

In Namibia the Child Status Act (6 of 2006) and the new Child Care and Protection Act (3 of 2015) provide the following factors for determining the best interests of the child:

Table 7: Factors for determining the best interests of the child

New Child Care and Protection Act (3 of 2015)	**Child Status Act (6 of 2006)**
"In all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance must be applied" (Draft Child Care and Protection Bill, 2009:12) According to the new Child Care and Protection Act (3 of 2015), the following list of factors should be considered in deciding what is in the best interests of the child.	The concept of "*the best interests of the child*" is paramount and addressed by listing twelve factors in Art 3 (a – l) to be considered regarding custody, guardianship and access that must be taken into consideration whenever the best interests of the child must be determined: • The child's age, sex, background and any other personal characteristics;

Here is a summary: • The child's sex, age, background, maturity and level of development; • The child's cultural, ethnic and religious identity; • The impact of any disability or chronic illness; • The nature of the child's relationship with the parents, siblings and other relatives, and with any other people who are significant in his or her life; • The attitude and behavior of the parents or other caregiver; • The capacity of the caregiver to provide for the child's physical, emotional, intellectual, spiritual, developmental and educational needs • The importance of maintaining contact with family members – Would a specific change make it easier or harder to maintain such contact? • The need to protect the child from harm; • Any history of family violence against the child or any other family member; • The need for a stable, family environment (if possible).	• The child's physical, emotional and educational needs; • The capability of each parent, and of any other relevant person, to meet the child's physical, emotional and educational needs; • The fitness of all relevant persons to exercise the rights and responsibilities in question in the best interests of the child; • The nature of the relationship of the child with each of the child's parents and with other relevant persons; • The degree of commitment and responsibility which the respective parents have shown towards the child, as evidenced by such factors as financial support, maintaining or attempting to maintain contact with the child or being named as a parent on the child's birth certificate; • Any harm which the child has suffered or is at risk of suffering, directly or indirectly, from being subjected to abuse, ill-treatment, violence or other harmful behavior; • In a case where the application has been brought before the children's court, the reasons for the application in question; • Any wishes expressed by the child or his or her representative, in light of the child's maturity or level of understanding; • The practical difficulty and expense of present and proposed arrangements; • The possible effect of any change in the child's circumstances; • Any other fact or circumstance that the court considers relevant.

There seems to be considerable overlap between the lists of factors to be taken into account in assessing the best interests of the child suggested in the Acts referred to above which serve as indication of the direction into which Namibian legislators want to move to promote the welfare of the Namibian child. Furthermore, when one considers the suggested aspects to be kept in mind when determining the best interests of the child, it becomes evident that the process of mediation and the development of parenting plans appear to be more effective instruments in deciding

the future of the child in the case of divorce. This, however, will be elaborated upon in the next section .

12 CONTENT OF CHILD CUSTODY EVALUATIONS

Guidelines are not mandatory or exhaustive, but they promote proficiency in using expertise in conducting child custody evaluations. According to Ackerman (2006:90), guidelines for custody and control can be divided into orienting, general and procedural guidelines.

Orienting guidelines: This refers to the purpose of a child custody evaluation and encompasses the primary purpose of the evaluation, namely to assess the best interests of the child:

- The child's interests and well-being are paramount.
- The focus of the evaluation is parenting capacity, the psychological and developmental needs of the child and the resulting fit.

This forms the focus of any child custody evaluation in order to determine the best interests of the child and not unresolved issues or issues of conflict between parents.

General guidelines: This encompasses preparing for a child custody evaluation and includes the following:

- The role of the evaluator as a professional expert, who strives to maintain an objective, impartial stance.
- Specialized competence in the area of performing custody evaluations.
- Being aware of personal and societal biases and engaging in non-discriminatory practices.

Evaluators, doing child custody and control, should have specialized training in child custody and control evaluation, with specialized knowledge of legislation, families and children. Social workers are trained and exposed to working with families and children, as well as writing reports and working with courts. Social workers, already as students, are bound by a code of ethics, with supervision as an integral part of

functioning. From a social science field, from the start the social work profession is an extension of the court to act in children's best interests.

Procedural guidelines: These guidelines relate to conducting a child custody evaluation with the following aspects to be observed:

- The scope of the evaluation is determined by the evaluator, based on the nature of the referral question.
- Obtain informed consent from all participants and, as appropriate informs child participants.
- Inform clients about the limits of confidentiality and the disclosure of information.
- Use multiple methods of data gathering.
- Neither over-interpret nor inappropriately interpret clinical or assessment data.
- Offer no opinion regarding the psychological functioning of any individual who has not been personally evaluated.
- Recommendations, if any, are based on what is in the best interests of the child.
- Clarify financial arrangements.
- Maintain written records.

As seen from the above, the evaluator is given a clear and purposeful structure regarding the process of an evaluation. There are certain steps that need to be in place for an evaluation to start. These are the structure and purpose regarding how information is gathered, as well as what information will be gathered and from whom. This information is clarified by multiple resources, always keeping the child's best interests as the focus.

According to (Stahl, 2011:33), the following are fundamental questions to be addressed in most custody and control evaluations:

- The best interests of the child.
- The bond between the child and his or her parents and siblings.
- Psychological dysfunction, the capacity to parent and the strengths and weaknesses associated with each parent's ability to parent, nurture and understand the children and their needs.

- The nature of the co-parental relationship.
- Recommendations for how the parents can share the time with their children (parenting plan).

To answer these questions, the evaluator should conduct multiple interviews, observations and do home visits. Valuable information is gathered from interviews with children and the parents, as well as from observations between parents and children in different settings. This information is again clarified and tested against information from collateral resources, such as teachers and therapists, among others. This can also assist with various factors to be assessed in child custody and control evaluations. Ackerman (2006:3) and Gould and Martindale (2009:145) suggest the following factors to be taken into consideration when considering child custody issues:

- Child-developmental factors – fit between parent and child (relational dimension of custodial assessment) which will determine whether the parents can provide for the needs of the child.
- The quality of the parent-child relationship and the parent's understanding, as well as the implementation of competent parenting skills.
- Factors associated with the child, the parent, the parent-child dyad, the parent-parent dyad and the sibling subsystem.
- Assessment of parent factors, such as the overall stability of the parent, which include emotional stability, job stability, stability of residence. A challenging aspect is defining parenting behavior, attitudes, beliefs and values that make up good enough parenting.
- Assessment of family factors which will make a difference in the best interests of the child.
- Assessing allegations regarding the best interests of the child.
- Questions to be addressed in general: physical custody, legal custody and visitation.

Child custody evaluations should thus be structured in such a way that the purposes of the evaluation can be achieved. If observed and followed, it will also lead to the standardization of the exercise to promote the best interests of the child. The

problem, as deduced from the literature, seems to be that there is no universal set of criteria and procedures to be followed in deciding what is in the best interests of the child.

The author is, however, of the opinion, that should a purposeful structure be followed, where specific criteria are universally employed by evaluators, each child's unique circumstances can be assessed in a structured way. This will lead to a more scientifically based evaluation and recommendations to guide courts in making more effective decisions in the best interests of each specific child.

13 BENEFITS OF CHILD CUSTODY EVALUATIONS

Child custody and control evaluations, therefore, have significant benefits if done appropriately (Stahl, 2011:4).

Child custody evaluations are significant in cases of allegations of drug and alcohol abuse, family violence, child abuse, significant mental health problems and questions regarding parental fitness (Stahl, 2011:4). Often parents will also use allegations to force a custody evaluation in their favor. It is the evaluator's task to determine whether allegations are true, part of a parental alienation syndrome or just to discredit the other parent. Social workers, as evaluators, coming from a social and family background, are in an expert position to assess these allegations, as well as what to look for and how to assess this, when a child's best interests are paramount.

Child custody and control evaluation is significant in high-conflict cases, where parents cannot agree on a parenting plan, do not know how to make decisions in the best interests of their child or are unable to focus on their child's needs because of their mutual differences. Social workers are trained to deal with conflict situations, and have the mandate to act in children's best interests as an extension of the legal system. Often child custody evaluations help to bring structure to high conflict, as well as re-focus conflict issues on the best interests of the child. It can also help to bring a stop to constant conflict as soon as there is structure and purpose.

Child custody and control evaluations provide an opportunity for parents to voice their concerns to an expert in child development and mental health so that they are truly heard by someone. It also provides an opportunity for children to participate in the child custody evaluation, where they can voice their concerns, share their wishes and explore their feelings. In such a case, the child evaluator can be the child's advocate in order for the court and the parents to meet the child's needs. It can also serve as a referral opportunity when children experience difficulties.

A neutrally appointed child custody evaluator listens to and observes all family members and relevant collateral witnesses, and considers everyone's input before reaching conclusions about the children's best interests. Fragmentation then can be prevented or limited.

Parents benefit from the evaluation report because it helps them to focus on the child rather than on their own conflicts. Parents can also learn from the report about their children's needs and how they can cooperate to meet these needs.

The evaluation report and recommendations can help to reduce conflict by explaining issues related to the best interests of the child. It helps to give structure in dealing with divorce related issues, as well as with children, often causing parents to regain focus of their children's issues and, with guidelines, help them to move forward during a confusing period. In cases of relocation, views can be shared about the adaptation abilities of children.

The evaluation assists and guides courts in making decisions regarding the best interests of children. Courts often look to the neutrally appointed child custody evaluator to assist in understanding the complexity of the family dynamics and the relevant psychological factors that can lead to the extermination of the child's best interests. The child custody and control evaluator can, therefore, serve as a quasi-consultant to the judge by providing crucial data about the family for a better understanding of the family dynamics and the needs of the children.

Child custody evaluations can also be partly instrumental in facilitating settlements where negotiations and mediation were unsuccessful (Vertue, 2011: 336). Child

custody evaluations will always have a place in dealing with divorce disputes and dealing with children's best interests. If done properly, child custody evaluations can be an invaluable tool for evaluators in assisting courts with making decisions regarding to each child's best interests.

14 RECOMMENDED PROTOCOL OR STANDARD

According to Bow (2006:24), in the mid-1990s various professional organizations developed child custody guidelines or parameters. These guidelines and parameters were developed to be inspirational rather than mandatory. According to Munson (2011:46), *"Guidelines are aspirational in intent. They are intended to facilitate the continued systematic development of the profession and to help facilitate a high level of practice … Guidelines are not intended to be mandatory or exhaustive and may not be applicable to every professional situation. They are not definitive and they are not intended to take precedence over the judgment of evaluators."* They outline important areas to consider in child custody practice and provide direction for child custody evaluators.

In Namibia the Ministry of Health and Social Services has guidelines for social workers on report writing in social work (MOHSS, 2003:55). The guidelines give an outline of what should be included in a custody report, the format and some criteria for decision-making during custody and control evaluations. Private social workers and psychologists in Namibia, doing custody evaluations, however, have no uniform format. Herman (1999:140) also states that a standard or guidelines can rectify the problem of varying levels of expertise, and can bring some order to the custody evaluation process. This should pertain to both court-appointed and private child custody evaluations. Rohrbaugh (2008:29) summarizes the importance of guidelines or protocols as follows: *"... to ensure that child custody evaluations are done in a thorough, impartial manner that provides the court with sufficient information to make a decision that is in the best interests of the children involved*".

Rohrbaugh (2008:29) states that guidelines should be the same for all child custody evaluations, although evaluations vary in their complexity and breadth, depending on

what information is needed. According to Stahl (2011:8) and Rohrbaugh (2008:20), a protocol or standard has the following benefits:

- It promotes good practice. Evaluators are becoming more and more concerned about the litigious and adversarial nature of child custody cases. The increased risks of lawsuits or malpractices are also a concern.
- It ensures the child's best interests above all else.
- It should be clear that the central responsibility is to assist the court.
- It helps evaluators to stay impartial.
- It avoids ex parte communications with lawyers.
- It provides information to those who utilize the services of custody evaluators.
- It increases public confidence in the work done by custody evaluators.
- It provides direction and guidance to evaluators in the courts of what to expect in the child custody evaluation process.
- It increases the likelihood of uniformity within the evaluation process.
- It addresses issues such as evaluators' qualifications, training and experience, proper procedures, ethical issues, bias, assessment techniques, confidentiality, recordkeeping, report writing, continuous education, and the like.
- It defines the scope of the evaluator's work.
- It prohibits issues of ex parte communication.
- It promotes accuracy, objectivity and fairness.
- It utilizes peer-reviewed published research.
- It uses multiple methods of data gathering and maintains relatively balanced procedures.
- It prevents conflict of interests.
- It can also prevent the following biases, according to Stahl (2011:13):
  - *Gender bias* – treating women and men differently in the system.
  - *Cultural bias* – the potential to make decisions based on aspects of the culture of both or one of the parties.
  - *Primacy* – to rely on the first pieces of information that an evaluator hears, or regency bias – relying on the last pieces of information that the evaluator hears.

- *Confirmatory bias* – the tendency for an evaluator to look for certain data or evidence that supports a particular position and then try to make all of the other data fit that position.
- *Bias from psychological test data* – psychologists who are prone to view cases in a certain way are at risk of interpreting psychological test data to support a particular position rather than using it to generate hypotheses.
- *Truth-lies-somewhere-in-the-middle bias* – the tendency to perceive that a couple engaged in conflict contributes equally to this conflict. It prevents evaluators to recognize the unique contributions of each parent to the conflict.

- It can prevent dual roles: According to Stahl (2011:28), an evaluator should never conduct a custody evaluation if he or she has had a prior relationship of any kind with any member of the family. Multiple roles are prevented when evaluators come into the process completely neutrally, without hidden bias and with no prior contact with any member of the family. Such an ethical position would preclude anyone who has been a therapist, mediator, consultant, expert witness, psychologist, evaluator, among others (Stahl, 2011:27).
- It can promote supervision and ongoing education. According to Bow and Quinnell (2004:124), ongoing consultation or supervision can reduce biases and pitfalls with which evaluators are challenged.

According to Herman (1999:140) and Munson (2011:54), standards should include the following guidelines:

- The scope of the child custody evaluation;
- The procedure upon initiating communication with a potential client and exploring possible areas for conflict of interest before accepting a case;
- Establishing letters of agreement, specifying what to expect, what services will be rendered as well as the financial agreement. A document of informed consent will include the following:
  - The services that will be provided;
  - Projected duration and costs of the services;
  - Statement of confidentiality and its limitations;

- Statement of payment agreement and what actions may be taken upon failure of agreement;
- Statement of record security and to whom a report will be made available;
- Consent for collecting data from other professionals for disclosure of information;
- Record keeping;
- What kinds of data are to be collected and in what manner;
- How a written presentation (report) is to be formulated;
- Ethical considerations for the evaluator;
- Fee arrangements;
- Provision for acceptance of, and response to, complaints about the evaluator's performance;
- Education and training of evaluators;
- Evaluation strategy, which should include collateral interviews, home visits, psychological testing and clinical interviews.

The literature on custody evaluations provides valuable guidelines to be used in custody evaluations and from these, if used eclectically, a proper workable protocol could be developed. There is no doubt that guidelines will add to custody evaluations of a good quality. A protocol for custody evaluations should be 'indigenized' for the particular country to reflect the socio-cultural nature and climate of the country, in this case Namibia. Quite interesting is the fact that, although in Namibia the Ministry of Health and Social Services has given a guideline for custody reports, private professionals do not have such guidelines. The existence of such a guideline should be seen as a valuable source to be used in developing a protocol. It does not have to be a closed protocol.

Barth (2011:156) cautions that custody evaluations are still a developing field. Cross-discipline dialogue must precede the development of best practices or standards. The author is also of the opinion that with so many overlapping fields of social work and psychology, health professionals can learn from each other and contribute to child custody evaluations. Working together towards a standard can benefit Namibia, and give a better service to courts to determine the best interests of the child in

custody disputes. This could also help to bring about a uniform process regarding how questions are asked, what methods are used, how information is processed and what kinds of conclusions are reached in order to develop a “best practice” for child custody evaluations in Namibia (Vertue, 2011:336). The author is of the opinion that such a methodological framework can assist in determining the best interests of the child. Namibia already has legal guidelines for establishing the best interests of the child. A guideline or standard of “how to” come to the best interests of the child by assessing the child’s developmental needs and the capacity of the caregiver to meet those needs can help to assist courts better.

The essence of protocol and standards for custody evaluations have been discussed above. The value of the use of tested protocols and standards cannot be underestimated. The use of these in practice will serve the purpose of refining and improving protocols and standards. Protocols and standards provide a scope for custody evaluations and ensures standard practices in custody evaluations, as well as promotes fairness and objectivity.

15 CONCLUSION

In this article an overview was given of custody and control as a method or procedure to decide on the custody and care of children after divorce. Various important dimensions of custody and control were explored in an effort to provide a broad-based view of efforts to act in the best interests of the child in cases of divorce. The complexity of the field of child custody work, as well as the problem of a lack of standardization in custody evaluations, was pointed out.

It has been stressed that the purpose of custody evaluations is to provide courts with reports regarding family functioning as it relates to the parenting of children in cases of divorce. The ultimate purpose is to serve the child’s best interests, which involves matching the needs of the child with the parenting capabilities of the parents.

The distinction between a therapeutic and forensic evaluation was pointed out and it was indicated that in cases of child custody the focus was on a forensic evaluation. It was suggested that a systematic process be followed in child custody investigations and such a process was described and explained. The important role of knowledge in this process and the importance of practitioners reviewing their knowledge in dealing with child custody cases were highlighted.

Frequent references to the Namibian situation indicated that there were challenges facing the system that will have to be tackled. Reservation was also expressed whether this system really served the best interests of the child in view of the focus on the interests of the parents. The adversarial nature of the procedure added to tension in the divorce process to the detriment of the child.

An overview was given of the qualities custody and control evaluations should have and the pitfalls of the process. The next article will be an exploration of mediation and parenting plans which differ considerably from the process described in this article.

Various role players involved in custody and control investigations and evaluations were involved in the research and different perspectives from the different professionals emerged from the data. It became clear that the present adversarial system of custody and control disputes presented unique challenges. There seemed to be a lack of clear standards for the conducting of custody and control investigations and evaluations. This was complicated by the lack of a proper protocol steering the process in the direction of its goal which should be the protection of the best interests of the child. It often happened that the interests of the parents involved in the divorce took precedence over those of the child. Professionals involved in custody and control investigations either did not have the experience or lacked proper training in this regard. Problems of hearing the child's voice directly were also reported, as well as that the voice of the child was often heard through that of the parents. This seemed to be complicated by a lack of trust in the voice of the child. It was also noted that magistrates (commissioners of child welfare) were often not child-friendly and, as a result, also did not hear the voice of the child. It was also

reported that within many of the cultural contexts in Namibia, the best interests of the child were not well understood because ‘children should be seen and not heard’.

Problems were also experienced with the child custody report because no guidelines existed in this regard, making it difficult to submit reports of a high quality. There were complaints that these reports were often inadequate and could not be used properly by the relevant courts.

Child custody evaluations are complex and emotionally taxing, but although there are challenges, child custody evaluations do have value and a place in Namibia. There is, however, a need for standardization in order to protect children’s rights and their best interests.

The objectives of the article were achieved in the sense that an overview, exploration and discussion were provided for the items listed in the objectives.

BIBLIOGRAPHY

AACAP (American Academy of Child and Adolescent Psychiatry). 1997. Practice Parameters for Child Custody Evaluation. http://www.jaacap.com/article/S0890-8567(09)62594-6/pdf Date of access: 10 March 2011.

Ackerman, M.J. 2006. Clinician's guide to child custody evaluations. New Jersey: John Wiley & Sons.

Ackerman, M.J. & Pritzl, T.B. 2011. Child Custody Evaluation Practices: A 20 year follow-up. *Family Court Review*, 49 (3): 618-628.

Acts **see** Namibia

AFCC (Association of Families and Conciliation Courts). 2006. Model standards of practice for child custody evaluation. http://www.afccnet.org/About/About-AFCC Date of access: 4 March 2010.

Barth, L. 2011. Consultant conduct in anticipation of a child custody evaluation: Ethical and social dilemmas and the need for neutral parent education. *Family Court Review*, 49(1): 155-169.

Baumeister, R.F. & Leary, M.R. 1997. Writing Narrative Literature Reviews. http://mrgibbs.com/tu/research/articles/literature_reviews_researched.pdf. Date of use; 8/11/16.

Bekink, B. & Bekink, M. 2004. Defining the standard of the best interests of the child: Modern South African perspectives. *De Jure*: 21-40.

Bekker, J.C. & Van Zyl, G.J. 2002. Custody of Black Children on Divorce. *Obiter*: 116-131.

Bernardini, S.C. & Jenkins, J.M. 2002. An overview of the risks and protectors for children of separation and divorce. http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2002_2/pdf/2002_2.pdf Date of access: 15 Sept. 2013.

Bow, J.N. 2006. Review of empirical research of child custody practice. *Journal of Child Custody,* 3(1): 23-50.

Bow, J.N. & Quinnell, F.A. 2004. Critique of child custody evaluations by the legal profession. *Family Court Review*, 42(1): 115-127.

Child Care and Protection Act **see** Namibia

Child Status Act **see** Namibia

Cronin, P., Ryan, F. & Coughlan, M. 2008. Undertaking a literature review: A step-by-step approach. *British Journal of Nursing*. 17(91): 38 – 43.

De Jong, M. 2010. A pragmatic look at mediation as an alternative to divorce litigation. *Tydskrif vir die Suid-Afrikaanse Reg:* 515 – 557.

Domingo, W. 2011. For the sake of the children: South African family relocation disputes. www.saflii.org/za/journals/PER/2011/14.html Date of access: 15 Sept. 2013.

Dueck, A. 2004. Divorce and the best interests of the child. http://www.focusonthefamily.ca/tfn/family/PDF/Divorce_impact.pdf Date of access: 12 Dec. 2009.

Froneman, A.P. 1999. Criteria social workers employ in making child custody recommendations. East London: Rhodes University. (Half-thesis – M).

Galatzer-Levy, R.M., Kraus, L. & Galatzer-Levy, J. 2009. The scientific basis of child custody decisions. 2nd ed. USA: John Wiley & Sons.

Gould, J.W. & Martindale, D.A. 2009. The art and science of child custody evaluations. 1st ed. New York: Guilford Press.

Herman, S.P. 1997. Practice parameters for child custody evaluations. *Journal American Academy of Child and Adolescent Psychiatry*, 36(10): 57-68.

Herman, S.P. 1999. Child custody evaluations and the need for standards of care and peer review. http://forensicpsychiatry.stanford.edu/Files/Child%20Custody%20Standards.pdf Date of access: 4 March 2010.

Kirkland, K. & Kirkland, K.L. 2001. Frequency of child custody evaluation complaints and related disciplinary action: A survey of the Association of State and Provincial Psychology Boards. *Professional Psychology*: *Research and Practice*, 32(2): 171-174.

(LAC) Legal Assistance Center. 2000. Summary of Proposals for divorce law reform in Namibia. http://www.lac.org.na/projects/grap/Pdf/divlawref.pdf Date of access: 4 March 2010.

LAC (Legal Assistance Centre). 2005. Divorce law reform: A summary of the law reform and development commission proposals. http://www.lac.org.na/projects/grap/Pdf/divlawref2.pdf Date of access: 4 March 2010.

LAC (Legal Assistance Centre). 2009. Draft Child Care and Protection Bill. http://www.lac.org.na/projects/grap/Pdf/ccpa-draft-full.pdf Date of access: 4 March 2010.

Langelier, P. 2009. *Rebuilding families: Blueprint for child custody team evaluations*. New York: iUniverce.

Lewis, K. 2009. Child custody Evaluations by Social Workers: Understanding the five stages of custody. 1st ed. USA: NASW Press.

Mailula, D. 2005. Taking children's rights seriously: Access to, and custody and guardianship of, a child born out of wedlock. *Codicillus*, 46(1): 15-29.

Ministry of Health and Social Services **see** Namibia. Ministry of Health and Social Services.

Mitcham-Smith, M. & Henry, W.J. 2007. High - conflict divorce solutions: Parenting coordination as an innovative co-parenting intervention. *The Family Journal*, 15(4): 368-373.

Munson, C. 2011. Forensic social work practice standards: Definition and specification. *Journal of Forensic Social Work*, 1(1): 37-60.

Namibia. Ministry of Health and Social Services: Directorate Developmental Social Welfare Services. 2003. Guideline on report writing in social work. Windhoek.

Namibia Paralegal Association. 2012. Access to justice: Paralegal manual Namibia. http://www.namibiaparalegals.org/assets/03527_New%20Perimeter_NPA_Legal_Manual_v13.pdf Date of access: 5 March 2015.

Namibia. 2006. Children's Status Act 6 of 2006.

Namibia. 2015. Child Care and Protection Act 3 of 2015.

O'Leary, J. 2014. Mediation in family and divorce disputes. 1st ed. Cape Town: SiberInk.

!Owoses-Goagoses, F. 2009. Custody and guardianship of children. In Ruppel, O.C., (ed.) *Children's rights in Namibia.* Windhoek: Macmillan Education. p. 177-188. http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_a.pdf Date of access: 10 March 2011.

Preller, B. 2013. Everyone's guide to divorce and separation. 1st ed. Cape Town: Zebra Press.

Ramolotja, M.A. 1999. Determining the best interest of the child. *Codicillus*, XXXX (1): 10-14.

Robinson, J.A. 2002. An introduction to the International Law on the rights of the child relating to the parent-child relationship. *Stellenbosch Law Review*, (2): 309-320.

Robinson, T. 2009. *Divorce: What about the children?* Cape Town: Struik.

Rohrbaugh, J. B. 2008. *A comprehensive guide to child custody evaluations: Mental health and legal perspective*. (2008 ed.). New York: Springer.

Stahl, P.M. 2011. *Conducting child custody evaluations: From basic to complex issues. (*1st ed.). Thousand Oaks: SAGE Publications.

Turkat, I.D. 2005. On the Limitations of Child-Custody Evaluations. *Court Review*, 42(2): 8–13.
http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1034&context=ajacourtreview
Date of access: 4 March 2010.

Uugwanga, C. 2010. The law on divorce and dissolution of marriages in Namibia: A reform analysis of the types of marriages found in Namibia and the divorce laws pertaining to such marriages. Windhoek: UNAM. (Dissertation – LLB).
http://wwwisis.unam.na/theses/uugwanga2010.pdf

Vertue, F. M. 2011. Applying case study methodology to child custody evaluations. *Family Court Review*, 49(2): 336-347.

Zelechoski, A.D., Fuhrmann, G. S. W. Zibbell, R.A. & Cavallero, L. M. 2012. Case report – Evaluation for child custody: Using best practices in a worst case scenario. *Journal of Forensic Psychology Practice*, 12(5): 257-470.

ARTICLE 3: THE CONTEXT OF THE PARENTING PLAN AND MEDIATION AS A FUTURE PROCESS IN NAMIBIA

A. Vorback

P. Rankin

ABSTRACT

In this article the focus is on divorce as a family problem and how it is currently dealt with in Namibia. The author then looks at mediation as an alternative to litigation, with special focus on the Namibian context. Definitions of mediation and parenting plans are discussed, and the components of mediation as an alternative process are explored. The differences between parenting plans and the litigation process are presented. Finally, the author looks at the advantages, as well as possible challenges, of the mediation process.

Keywords: *divorce, mediation, parenting plan*

> *In any caring society the importance of child welfare cannot be over-emphasized, because the future welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children need to be regarded as valuable national assets because the future well-being of the nation depends on how its children grow up and develop.*
>
> Kangandjela, L.N and Mapaure, C. (2009:121)

1. INTRODUCTION

The focus in this article will be on parenting plans and mediation as alternatives to litigation. Definitions of mediation and parenting plans will be discussed and the components of mediation as an alternative process will be explored. The differences

between parenting plans and the litigation process will also be presented. Finally, the writer will look at the advantages, as well as possible challenges, of the mediation process.

2. PROBLEM FORMULATION

Child custody and control processes in Namibia are stressful, lengthy and costly. The process often leaves children and parents more confused and helpless, and frequently increased conflict and deteriorating relationships are the result. The author is of the opinion that in the process of law reform and with the focus on eliminating discrimination and inequality, Namibia needs, and is ready for, an alternative process to litigation (Damaseb, 2013; LAC, 2005; Tjombe, 2013).

Namibians are more aware of their rights, and parents and children are not satisfied any longer with being told by third parties what is in their or their children's best interests. The media (radio and newspapers) have played a huge role in creating awareness of Namibians' rights, especially by involving the larger communities regarding law reform. People want more freedom and autonomy today. Parents have become increasingly dissatisfied with paternalistic decisions that are forced upon them by the courts. This has been especially true since legislation regarding fathers' rights and the status of illegitimate children in Namibia was changed (Child Status Act, 6 of 2006).

Both parents want to continue their involvement in their children's lives after divorce. According to Pickar and Kahn (2011:59), finding healthy and effective ways to assist families in custody and control disputes remains one of the great challenges. Parents in custody disputes can move from being the decision-makers in matters pertaining to their children to risking disempowerment that can occur if a third party decides their children's future.

In view of the above, mediation and parenting plans as a process alternative to litigation can be implemented. Many parents want what is best for their children. If

parents can be guided to look past conflict, they are mostly willing to try a more cooperative process.

The question to be addressed in this article is the nature of mediation and parenting plans as alternative and future process envisaged in Namibia.

3. AIMS AND OBJECTIVES OF THE ARTICLE

3.1 Aims of the article

The main aim of the research is to –
compare and contrast current child custody investigations and proposed parenting plans as mechanisms in serving the best interests of the child in Namibia,

3.2 Objectives of the article

The aim will be served by the following objectives:

- An exploration of mediation and parenting plans as envisaged in Namibia.
- A comparison between child custody and control investigations as well as reporting, and the development of parenting plans as mechanisms in serving the best interests of the child.
- The formulation of recommendations regarding the implementation of the proposed parenting plan in Namibia.

4. METHODOLOGY

A narrative literature review was done to write this article. Baumeister and Leary (1997) explain that narrative literature reviews form a vital part of most empirical articles, theses, and grant proposals, and of course many articles and book chapters are devoted specifically to reviewing the literature on a particular topic. In an *Authors' Guide to Writing Articles and Reviews*, (Anon, na) describes a narrative review as a review that summarizes different primary studies from which conclusions

may be drawn into a holistic interpretation; contributing would be the reviewers' own experience, existing theories and models.

The main sources consulted in the development of this article were the internet and the data bases of the Ferdinand Postma Library of the Potchefstroom Campus of the North-West University.

Various aspects of mediation and parenting plans were covered to make up the body of the article and to describe and discuss the nature of mediation and parenting plans. The most important of these were divorce as experienced in Namibia, the different aspects of mediation and parenting plans, the differences between parenting plans and the litigation process, as well as the challenges of the mediation process and parenting plans.

5. DIVORCE AS A FAMILY PROBLEM

Namibia's legal system is part of a patriarchal society. Constitutionally there is gender equality, and discrimination on the basis of sex is prohibited. However, existing laws, customs and practices in Namibia do not operate as such (Ford, 2007). Many restrictive and prescriptive guidelines regarding child custody and control decisions, as well as what is in the best interests of the child, are not based on child developmental research, and often reflect outdated views or are used inappropriately to defend a certain decision (Gould & Martindale, 2009; Lamb & Kelly, 2001).

A divorce process is often characterized by extreme emotional and physical distress for parents and children (Mienkowska-Norkiene, 2012:120). Much of this stress comes from the need to reorganize daily tasks and parental responsibilities, the loss of significant relationships and possessions, as well as the need to establish a new identity as an individual. Divorce or family breakdown is a multidimensional occurrence which requires psychological, no less than legal, intervention (De Jong, 2010; Froneman, 1999; Mitcham-Smith & Henry, 2007).

Lawyers often view divorce solely as a legal event. It is about tactics, representing only their client's best interest and subscribing to a winner-takes-all mentality. The court room is often used as a battleground (De Jong, 2010; Mitcham-Smith & Henry, 2007). Divorcing parties are pitted against each other throughout the process, as the focus is on past, negative behavior or on the parties and their opposing legal rights and obligations. Parents often use this process as a way to control, punish and publicly condemn their ex-spouses. The adversarial system has the potential to undermine communication and create hostility and rigid position-taking by parties. It escalates conflict, thereby causing parties to incur substantial costs regarding legal fees. It is too lengthy, too formal and too intricate. At a time when people are going through a very rough period in their lives, the legal system can actually contribute to making matters worse (Ottosen, 2006; Preller, 2013). Traditionally, it typically ends with bitterness, unresolved feelings and irreconcilability between divorcing parties, a situation which is particularly detrimental to any child involved.

Children often become the center of their parents' disputes over everything. The nature and intensity of these disputes can undermine parenting abilities heavily, and cause significant stress to children (De Jong, 2010; Robinson, 2010). This ongoing conflict places children at substantial emotional risks (Froneman, 1999; Mitcham-Smith & Henry, 2007). Research, therefore, has consistently shown that children who experience parental divorce are at an increased risk of a wide range of mental health problems, substance abuse use and social adjustment problems (Sigal, Sandler, Wolchik and Braver, 2011:120). It has also shown that, despite major disruptions caused by divorce, many children adjust well, while others develop serious and lasting problems. A factor that has a powerful impact on children from divorced families is, therefore, parenting by the mother and father following the divorce. This includes different aspects of parenting, the amount of time spent with the child, co-parenting between the mother and father and the quality of parenting by both the mother and the father.

6. THE CURRENT DIVORCE PROCESS IN NAMIBIA

Namibia's current divorce law is an outdated system inherited from South Africa at Independence. The current law is based on fault. This means that one spouse must prove that the other spouse had done something wrong – usually some form of desertion or adultery. In terms of the current law on divorce, it is almost impossible for couples to get divorced without the help of lawyers, even if they are both in agreement about how to divide the property and take care of the children. This makes a divorce expensive, and often a drawn-out process.

Divorce cases are heard only by the High Court in Windhoek. Even though divorce cases are almost always settled without a trial, it is still necessary for at least one of the spouses to appear in person in the high court in Windhoek. This can also add to the expenses, especially for people who live outside Windhoek.

Under the current law, one spouse must accuse the other of some wrongdoing – such as having an affair, leaving the family home or making life so unbearable that it is no longer possible to live in the same house. Accusations like these can lead to increased conflict, which is not good for any children involved. Even if both spouses want the divorce, one of them will still have to go through the motions of accusing the other of wrongdoing. Consequently, the court papers are often less than truly honest (LAC, 2005).

In Namibia there is no standard practice for mental health professionals (social workers and psychologists), where a text describes areas to explore and methods to interview and observe parents and children, assess child development and parenting capacity, write the report and deal with cross-examination.

No consistent and appropriate framework that supports the best interests of the child is used. Currently the Ministry of Gender Equality and Child Welfare (MGECW) provides general guidelines in report writing, as well as criteria for decision-making during custody and control evaluations, for social workers in the government. The Child Status Act (2006) and the new Child Care and Protection Act (2015), however,

do provide criteria for determining the best interests of the child, but procedures to get there, are lacking.

According to the literature, child custody evaluations are conducted by a court-appointed professional or other representative of the court (Barth, 2011:157). In Namibia it is conducted by any social worker or psychologist, either appointed by the court (mostly government social workers) or ordered by a lawyer for his/her client (mostly private social workers or psychologists).

There is no standard procedure regarding child custody evaluations in Namibia, especially not among private evaluators. The Ministry of Gender Equality and Child Welfare (MGECW) provides a framework for child custody evaluations but, in general, no standard exists for consistency in evaluations among the different professions doing custody evaluations. Normally such an evaluation will include the following:

- Interviews with parents, children and collaterals
- Observations
- Home visits (only done by social workers)
- Psychological testing (mostly done by psychologists)

According to international literature, evaluations should be performed by a professional with specialized knowledge and formal training in the legal, societal, familial and cultural issues that arise in the context of a child custody dispute (Barth, 2011:158). Social workers are mostly trained in child custody evaluations due to their scope of practice. Very few psychologists in Namibia have specialized training in child custody and control evaluations. This often causes confusion in courts and among parents, due to different perspectives in determining the best interests of the child. There is a large degree of variation in this issue, with traditional rules being applied with some flexibility and the wishes of the children sometimes being taken into account. However, cultural beliefs often cloud evaluators' perceptions of what is in the best interests of the child.

When the court requests a report from a government-employed social worker, although prepared at state expense, the process can entail delays as long as six to

eight months. The cause for those delays can be because the social workers must often travel long distances and may have trouble locating the relevant parties for interviews, particularly in rural areas or, in some cases, people may try to evade them. Another obstacle is the lack of resources, such as telephones and transport in some regions. The depth of an individual report also varies with the experience and commitment of the social worker who prepares it.

Psychologists often do not have the necessary training and would often base their reports on psychological testing. Both legal and health professionals (social workers and psychologists) in Namibia, dealing with child custody and control evaluations, are welcoming an alternative to child custody and control evaluations, especially because more divorce disputes can be resolved with mediation, instead of the litigation process.

7. MEDIATION AND PARENTING PLANS AS ALTERNATIVES TO THE CURRENT RESOLUTION PROCESS

Although mediation and parenting plans are dealt with separately in this chapter, it is for analytical purposes only. The two processes cannot be separated because both are part of an inter-related process. Where children are involved, parenting plans are the results of mediation. In the next section the latter will be discussed first.

7.1 Mediation

In this section the various aspects of mediation will be described and discussed.

7.1.1 Conceptualizing mediation

Family mediation is a process in which the mediator, an impartial third party who has no decision-making power, facilitates the negotiations between separating parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfactory settlement agreement that recognizes the needs and rights of all family members (De Jong, 2010:517). According to Rohrbaugh (2008:57),

mediation can be seen as a problem-solving approach where neutral professionals manage the negotiation process, but the parties are responsible for making the important decisions regarding their case. O'Leary (2014:3) refers to Haynes who defines mediation as "*the management of other people's negotiations …".*

According to the Legal Assistance Centre (LAC, 2000), divorce mediation in Namibia can be defined as "a *process whereby spouses who intend to divorce, or are in the process of divorcing, attempt to reach agreement on practical issues relating to the divorce, such as the division of property, custody and access to children and maintenance".*

Gauvreau (2012:4) defines mediation as a *"process where divorcing parents meet an impartial 3rd party who assists the divorcing parties to identify, discuss and resolve disputes resulting from the divorce".*

Uugwanga (2010:48) defines mediation as assisted negotiation between the two parties that are in the process of divorce. The result of mediation is also called a Memorandum of Agreement which includes all decisions made by the parents themselves (Uugwanga, 2010:48).

According to the author, the central theme running through these definitions is mediation as a process of negotiating between the parents, assisting them to arrive at a mutually acceptable agreement to the best interests of the child. As will be indicated later, this idea marks the important difference between mediation and litigation.

7.1.2 Different approaches to mediation

Gauvreau, (2012:17) and McIntosh, Wells, Smyth and Long (2008:105) refer to three variations of mediation:

Child-inclusive mediation*:* In child-inclusive mediation the child is directly consulted in the mediation process. The child is often seen by a child specialist in a brief, single assessment. This then leads to a meeting between the child specialist,

the parents and the mediator, where the child's developmental needs, adjustment and the implications thereof for the parenting plan are discussed. This inclusion has a more positive outcome for children and their adjustment in the post-divorce process because the child's voice can be heard directly and not via other people.

Child-focused mediation*:* Here the mediator is non-neutral with respect to advocating for the interests of the child involved. Interventions are educative and therapeutic, and target each parent indirectly. There is no direct involvement with the children. This is perhaps its weakest point because the child's views are in all likelihood interpreted by other people, in many cases either the parents or the professionals involved in the case.

In Namibia health professionals, dealing with child custody disputes, work mostly from a child-focused approach. Especially social workers, from their scope of practice and different roles as advocates and educators, have worked from this perspective, making recommendations in the child's best interests from what they know of the situation, the family dynamics, the child's needs and the parents' capabilities.

With the new Child Care and Protection Act (2015) which puts focus on child participation, mental health professionals are working towards child-inclusive mediation, but still have to overcome many challenges in dealing with hearing children's voices and acting on how it serves the best interests of the child in custody and control disputes.

Voluntary versus mandatory mediation*:* One of the most cherished values of mediation is the parties' right to self-determination. Rather than allowing a private or state-appointed third party to make a decision for the disputants, mediation offers the possibility of the parties to make their own decisions. Some definitions reflect this as the voluntary nature of the mediation process. However, another aspect of self-determination refers to the decision of whether or not to enter into, and participate in, mediation. Ottosen (2006:30) states that mediation becomes compulsory in resolving conflict as a means of disciplining parents to cooperate.

Disputants may decide to mediate for a number of reasons, including submission to social pressure. For example, a party may mediate to avoid the threat of litigation, because litigation is too expensive, or because a judge has inquired about the possibility of mediation. In some jurisdictions, laws or rules of court require that the parties mediate before proceeding to trial. What is apparent is that the voluntary entry and participation in mediation is a question of degree.

Where laws or court rules mandate mediation, effective limitations are placed on decisions about entry and participation. Mediation may be limited to certain issues, such as custody and visitation. Where mediation is mandated, the related issues of mediator reports, attorney involvement, responsibility for payment of a fee and mediator qualifications are normally regulated. Commonly referred to as mandatory mediation, it has its proponents and opponents.

The most controversial aspect of mandatory mediation is the requirement that the mediator reports to the trial judge where mediation does not produce a settlement. If the report takes the form of a recommendation, an adjudicatory function is performed without the procedural safeguards of a court of law.

Other criticisms of mandatory mediation focus on the erosion of choice with regards to the timing of the mediation, the fact that attorneys may be excluded from the process and the choice of mediator. (In mandatory mediation programs the mediator is often chosen for the parties.)

Proponents of mandatory mediation see it as a way of overcoming public resistance to an effective process. Not all proponents of mandatory mediation are in favor of making reports or recommendations. They argue that the parties are only mandated to enter into mediation, and that they are not obliged to make any decisions they do not want to (O'Leary, 2014:4). The parties should only be mandated to enter and not to participate. Savings in time and money and high satisfaction rates are considered as favorable in mandatory mediation.

In Namibia, according to the High Court rules (Ministry of Justice, 2014:6), divorce and disputes involving the custody of children, as well as the maintenance of

children and a spouse, are some of the case types designated for mandatory or compulsory mediation. The new Child Care and Protection Act (3 of 2015), however, rules that mediation for parenting plans “may” be referred for mediation. The author is of the opinion that by making mediation compulsory in divorce disputes, it does give all families the opportunity to negotiate agreements regarding parenting issues and what would be in the best interests of children through an alternative process. The author, however, agree that it may affect the voluntary component of mediation.

7.1.3 The process and components of mediation

Uugwanga (2010:48) refers to the process of mediation as an “instrument for the application of equity rather than the rule of law”. Mediation can, therefore, be seen as a process –

- in which divorcing spouses negotiate some or all of the terms of their settlement agreement with the aid of a neutral and trained third party;
- in which disputants attempt to reach a consensual settlement of issues in dispute with the assistance and facilitation of a neutral resource person or persons;
- through which a mediator (or a team of mediators) intervenes in a conflict with the aim of assisting the parties to the conflict to make their own decisions;
- that is informal;
- that allows for the consideration of the social and cultural contexts of the relationship, and for the emotional aspects of the situation;
- which usually involves a number of steps or stages. The structure of the process will depend on the mediation model which is adopted.

The emphasis tends to be on face-to-face sessions in which the parties deal with each other directly. The mediator’s overarching objective is the establishment and maintenance of a cooperative, problem-solving orientation between the spouses (as opposed to the competitive ‘I win, you lose’ orientation said to surround the adversary use of lawyers). The key factor is, therefore, the mediator’s neutrality and the parties’ autonomy in the process (O’Leary, 2014:4).

Within this broad objective the mediator's attention is directed to two principal areas: establishing a productive negotiating climate and addressing the substantive issues. Typically, lawyers are not directly involved in the negotiating sessions but serve the parties as consultants.

The mediator must be acceptable to the parties. Although mediators normally mediate on their own, co-mediation is common in divorce mediation. This allows for gender neutrality, and makes it possible to draw on the expertise of the mental health and legal professions simultaneously.

Mediation is most commonly understood as an intervention into a conflict. The aims include defining the scope of the issues, and settling or managing the conflict. Furthermore, mediation is fundamentally a process that allows the parties to make their own decisions (O'Leary, 2014:3). The mediator does not have decision-making authority and cannot impose or enforce a particular decision. It is indeed this aspect that distinguishes mediation from adjudication by a judge or arbitrator. Self-determination, which leaves the ultimate decision-making authority in the hands of the disputants, is seen as one of the main attractions of mediation. According to the author, it works in low-conflict families that are capable of taking part in rational and cooperative discussions. The key is the neutrality of the mediator and the parties' autonomy in the process.

Parenting plans are established through the mediation process that, according to De Jong (2010:518), Rohrbaugh (2008:58) and Uugwanga (2010:48), has the following features:

- The mediator must be neutral, unbiased and impartial. The mediator does not take sides or favor the position of one party over the other. The mediator must also ensure that one party is not disadvantaged by the other through intimidation or threats. Recommendations must be based on his or her professional opinion of what is in the best interests of the child. According to Rohrbaugh (2008:59), "impartial" can be defined as "freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual". This also implies that an evaluator must withdraw from a case where a conflict of interest exists, or where the

evaluator has information or personal relationships that would bias the process or outcome. The mediator may not allow prejudice or bias to influence the evaluation. Everyone needs to be treated fairly regardless of race, ethnicity, gender, religion, disability, age, socio-economic status, marital status or sexual orientation.

Rohrbaugh (2008:59) further states that mediators need to be sensitive to diversity. That means mediators need to be knowledgeable about family forms and other areas of diversity. Without understanding what customs are involved, one cannot understand what financial, social and emotional impact separation and divorce will have on parents and children.

Part of the process is also to restore any power imbalances between the parties. If this cannot be done, the process must be terminated. The mediator gives parties legal information as opposed to legal advice.

Mediation increases self-determination. This allows parties greater control over the consequences of their divorce – it is up to them to reach their own joint decisions. They formulate their own agreements and make an emotional investment in its success. Parties are more likely to support these agreements than they would be if the terms were negotiated by their legal representatives or ordered by the court.

- Mediation is a multi-disciplinary process, characterized by a cooperative relationship between law and psychology. Inherent in the process is a clear intention to synthesize behavioral sciences and law to improve the psychological functioning of separating couples in ways that promote their own, and their children's, best interests. Mediators are schooled in disciplines, such as the social and behavioral sciences. They also know what techniques and strategies to use in order to lessen conflict between parties and bridge communication gaps. The process, therefore, reduces emotional costs associated with divorce. Parties are also advised to seek independent information and advice from a variety of professionals during the process.

- Mediation is a private and informal process. Mediation is not bound by rules of procedure that dominate the adversarial system of litigation. It is a simple process that people can understand, and in which they can fully participate. With the assistance of a mediator, parties can consider a much broader range of information in determining a settlement outcome than with the information that is allowed to be introduced in court.

- The process can be adapted according to the context of the dispute and the needs of the parties concerned. During mediation it is possible to accommodate different cultural value systems and/or religious convictions. Specific customs, practices and perspectives can easily be built into the mediation process.

  With mediation one can achieve a desirable solution that is not within the range of a court order. Settlements can be reached in noticeably less time than through the traditional court process.

- Mediation is a flexible process. It can take place either early in the proceedings or just before the trial. It can occur over one day or over many weeks.

- Discussions in mediation are confidential to the extent permitted by the law. Parties can disclose any facts or information, even if it is of a highly personal nature, without being afraid that any statements or concessions made in the mediation process could later be used against them in the litigation that may follow an unsuccessful mediation attempt.

- Mediation is future-orientated. It establishes future behavior rather than trying to allocate blame or focus on past conduct. It aids disputing parties in resuming workable relationships with each other, and enhances the adjustment of their children. It helps to reach mutually satisfactory agreements, and provides them with a framework for resolving future disputes on their own. It cuts litigation and court costs for both the parties and the judicial system.

- Mediation operates in the shadow of the law (the role of lawyers differ in each mediation process).
    - The duty of a mediator is to give parties legal information.
    - The mediator should refer parties to lawyers for independent legal advice.
    - Negotiations take place against the background of this legal information.
    - The role of mediation lawyers is a less adversarial role.
    - Lawyers representing divorcing parties have to review any agreement reached in the mediation process.
    - Lawyers follow an interest-based, instead of a positional, approach during the mediation.

- Mediation promotes the best interests of children.
    - Mediation focuses on the best interests of the child (De Jong, 2010; Robinson, 2010). It should take into account the needs of children and reflect what children regard as important for their development and post-divorce functioning.
    - It enables those who know the children best, namely the parents, and not some third party or institution, to make decisions about their welfare.

- Mediation fits neatly into the legal process as a whole.
    - The objective of mediation is to keep parties and children out of court (De Jong, 2010:522).
    - It still acknowledges that the High Court is the upper guardian of all minor children (in Namibia the Children's Court), and that all decisions made in mediation have to be endorsed by an appropriate court.
    - But parties are given an opportunity to try to sort out and solve their own private and intimate problems before going to court.

According to Gauvreau (2012:5), mediation is a better alternative for the family than litigation. The main reason for this is that it is not adversarial in the sense that parents are jointly involved in the process with one person, the mediator, who facilitates and guides the process.

Mediation differs markedly from litigation in the sense that, at the mediation stage, there are no lawyers involved, making it non-adversarial and a more interactional process. It does not involve fault-finding and blaming. The purpose of protecting and promoting the best interests of the child is of paramount importance, and explicitly put to the parents. If the patents wander off this purpose in the process, the mediator is in a position to refocus the process.

Of the various approaches to mediation, the child-inclusive approach will grant the child a better say in decisions affecting him or her and should be propagated. This, however, will require some special skills from the mediator because, in order for this approach to be successful, the mediator should have the skills and attentiveness to not only hear the child, but to listen as well. In addition, the parents should also be assisted in hearing the voices of their child or children.

Mediation occurs in a process which makes it logical and orderly, which will increase the choices of a constructive outcome. In this sense, mediation can be regarded as a problem-solving process, something social workers are familiar with and which, at the same time, is one of the reasons why social workers are good candidates to do mediation. The parenting plan is a logical outcome and a product of mediation, as well as one of the most important tasks in mediation which parents should understand.

7.1.4 The value of mediation

Mediation, as an alternative process, is said to be a way of helping parties negotiate agreements and renegotiate relationships in a more adaptive way than in litigation procedures (O'Leary, 2014:3). The mediation process attempts to unite the parties in seeking solutions and in recognizing that the responsibility of caring for their children may require them to have ongoing contact for some years to come (De Jong, 2010:517). Gauvreau (2012:4) also stresses that mediation reduces conflict by improving communication and fostering co-parental cooperation. Rohrbaugh (2008:57) also states that the mediation process vs litigation helps parents reach resolutions for their issues more quickly and at a lower cost. They are more satisfied with the process and outcome, and have greater post-divorce communication. They

tend to have more frequent contact with their children and are more involved in parental decision-making. It also appears that the mediation process promotes better joint custody, and preserves parental civility and communication issues, which are often destroyed during the custody and control evaluation.

The author is of the opinion that with mediation and parenting plans as an alternative, more opportunity is given to increase the potential of parenting. Research shows:

- Families who are able to negotiate their own parenting plans are more likely to implement extended visitation patterns.
- Regarding the quantity of time that children spend with each parent following divorce, well-established, clear, visitation schedules are more likely to be followed if they are designed and implemented immediately following the divorce or separation, according to Kelly in Sigal, *et al*. (2011:121). This means that if the divorce is finalized and a parenting plan is in place, it already gives structure and consistency while parents and children adapt to the normal challenges of divorce.
- Both financial support and father involvement are required for children's optimal, educational attainment following parental divorce (Menning in Sigal, *et al*., 2011:122). This is already established in the parenting plan. Potential conflict regarding finances and parent involvement has already been clarified.
- More contact is related to a higher quality of parent-child relationship which, in turn, is related to better child adjustment. Positive outcomes regarding child adjustment are related to the nature of the relationship with the non-residential parent, as well as the nature of the relationship between the parents.
- Co-parenting or the degree to which the ex-spouses share the parenting role includes joint problem-solving and joint decision-making concerning the child's welfare, low levels of conflict around parenting issues or any relationship between parents regardless of the quality. Co-parenting refers primarily to the nature and quality of the ex-spouses' interpersonal relationship as they share parenting (Sigal, *et al*., 2011:120 - 122).

The author, however, agrees with Rohrbaugh (2008:58) who warns that the mediation process –

- does not consistently produce results superior to litigation;
- does not necessarily produce better post-divorce child adjustment than does litigation;
- may actually be harmful in high-conflict divorces because of the potential power imbalances.

The author is, however, of the opinion that when one takes into consideration that most divorce cases are not high conflict disputes, there is the potential to mediate rather than litigate, giving parents an alternative to negotiate their own co-parenting structure, instead of throwing them into a litigation process. Giving them an option for an alternative may serve the best interests of their children in a more positive way. However, in some high conflict cases, with definite power imbalances, custody and control evaluations may serve the best interests of the child more than the mediation process, due to factors that impact parents' ability, as well as limited understanding, of what are the best interests of their children.

7.1.5 Factors that could influence the mediation process

Cohen (2011:229) mentions various factors that could influence the prediction of the success of mediation:

- Participant characteristics: Favorable characteristics are higher economic status, fewer children, more secure attachment styles and parents' willingness to communicate and negotiate. Participants' perception also plays a role. The more positive the perception of the process by the participants, the bigger the mediation success.
- Relationship characteristics: This includes the spouses' level of anger, mutual consideration and concern about children and co-parenting abilities. The more hostile and intense the conflict, the less likely it is that mediation will succeed. Parents, who share similar views on child rearing and who have faith in each other's parenting, show a greater commitment towards the success of mediation.

- Mediators and mediation processes: These are skills, personal features and behaviors by which mediators intervene actively to encourage productive exchange while discouraging destructive conflict. This includes the ability to facilitate communication by raising relevant issues, promoting empathy and creating an atmosphere of trust, as well as suggesting alternative solutions, laying down rules of civil communication and helping parents focus on children rather on themselves.

Other factors that may influence the success of mediation, according to Cohen (2011:240), are:

- Disagreement about the divorce in itself can cause difficulties in resolving other issues.
- Age of participants: The younger they are, the more easily they agree. This is possibly due to fewer assets, less commitment to the spouse, fewer issues to dispute and less psychological baggage, and, therefore, more flexibility to reach agreements.
- Better financial status: Economic hardship increases conflict between spouses.
- Concern for the children's well-being.
- Co-parenting features.
- Training and ability of the mediator.

Mediation thus does not happen in a vacuum or in isolation. It is communication on a micro-level, influenced by forces on macro-level which the mediator should be aware of, and which the parents and children should be made aware of. Mediators should also be aware of the ways in which these factors affects the mediation sessions.

7.2 Parenting plans

This section will be used to provide an overview of the nature of parenting plans.

7.2.1 Conceptualizing parenting plans

The parenting plan, as a product of mediation, is a new concept, not only in South Africa, but also in Namibia. In terms of Section 119 of the new Child Care and Protection Act (3 of 2015) explicit provision is made for parenting plans.

Robinson (2010:24), however, warns that *"substantive guidelines that are comprehensive and clear on the basis structure and general content of these plans are needed for professionals, as the researcher is of the opinion that professionals are often not well grounded in the legal requirements of facilitating, formulating and adopting or implementing of a parenting plan. It can have devastating effects on the divorcing family and specifically on the child if the proposed parenting plan is not workable, realistic or adequate (in the sense that it lacks content and substance) for the family in question, and it may result in situations of dysfunction such as stress to the child."*

7.2.2 Purpose of parenting plans

The author agrees with Robinson (2010:25) who points out that the purpose of a parenting plan should be that of having the child's best interests at heart, and being child-centered and not parent-centered. According to her, it has frequently been found that in practice parenting plans are built around the wishes and needs of the parents and not those of the children. This is to be avoided if the pitfalls of the traditional custody evaluations are to be "dodged". The Child Care and Protection Act (3 of 2015), according to Section 119 (4), also clearly states that a parenting plan *"must be in the best interest of the child".* This clearly shows the intention of the legislator, and should be adhered to in practice.

According to the author, children's needs must form the core of a parenting plan, together with the best interest of the child standard, and mediators should respect this. Robinson (2010:95) also refers to Conell, Thayer and Zimmerman, who argue that many parents and their attorneys fight for plans that are representative of the parents' needs. Robinson (2010:94) stresses that *"it is imperative that a parenting plan is representative of the divorcing families' needs and that it can be used by the*

family post-divorce ... A parenting plan should be a document that can be applied successfully by the family, not a redundant document without any use."

Gould and Martindale (2009:167) suggest that, in developing a parenting plan, mediators should –

- examine the parenting history of the child;
- investigate the attachment history between the child and each parent;
- assess each parent's parenting strengths and weaknesses.

They conclude that *"just to draw up a standard parenting plan is not in the child's best interest, without having the parents involved or having investigated the above steps".* The option of having the child assessed if there is any doubt about the position of the child should always be left open, but it should not be a therapy session. According to the author, parenting plans should, therefore, be framed according to each child's individualized needs and best interests, and not according to a template of what should be in a child's best interests.

According to Robinson (2010:4), the aim of parenting plans, therefore, is to improve the quality of children's lives in divorce matters, reduce conflict between parents and clearly set out parents' responsibilities to prevent further disagreement. According to the author, a well-structured parenting plan can be valuable to parents as it can assist them by giving content to their respective post-divorce responsibilities, something that is the essence of the negotiation process.

According to Section 119 (6) of the Child Care and Protection Act (6 of 2015), a parenting plan within the Namibian Law "*may determine details relating to the exercise of parental responsibilities and rights, which include –*

- *where and with whom the child is to live;*
- *the maintenance of the child;*
- *contact with or access to the child by*
    - *any of the parties to the plan;*
    - *any other person.*

- *the responsibility for any costs associated with the contact contemplated in paragraph (c);*
- *the schooling and religious upbringing of the child;*
- *the responsibility for medical care, medical expenses and medical aid coverage".*

The purpose of parenting plans remains the best interests of the child which involves attention to all aspects determining the maintenance of the best interests of the child. This should also be reflected in the content and details of parenting plans. The latter is discussed in the next section.

7.2.3 Content of parenting plans

According to Robinson (2010:43), parenting plans should

- reflect the best interest of the child standard. They must determine any matter in connection with parental rights and responsibilities, including where and with whom the child is to live, the maintenance of the child, contact structure, schooling and religion.
- conform to certain formalities, such as that they must be in writing and signed by the parties to the agreement. They must be registered at court and made an order of the court.

The Child Care and Protection Act (3 of 2015), Section 119 (4) (c) and Section 96 (1) also states that

"A parenting plan must be in the best interest of the child".

The Act further states that a parenting plan must be

- *in the prescribed form;*
- *in writing, and signed by the parties to the plan in the presence of two witnesses, and must give due consideration to the views of the child in question.*

Section 119 (7) makes provision for the parenting plan to be registered with the clerk of the children's court who may lodge an application on the prescribed form for such plan to be made an order of the children's court –

> Section 120 of the Child Care and Protection Act (3 of 2015) also makes provision for the amendment or termination of parenting plans but it does not make provision for enforcement of parenting plans. If the plan has been made an order of the court and one of the parties has a complaint of non-compliance in this regard, the person should be free to go back to court.

According to the author, mediation, which should precede the parenting plan, should occur according to a mutually agreed-upon agenda to make sure that all matters concerning the divorce, are covered.

7.3 Parenting plans vs the litigation process

According to Lamb and Kelly (2001:366), Mienkowska-Norkiene (2012:121), Kitzmann, Parra and Jobe-Shield (2012:128) and Gauvreau (2012:4), the following differences exist between parenting plans and the litigation process:

Table 8: Differences between parenting plans and the litigation process

PARENTING PLANS	***LITIGATION PROCESS***
A less divisive and potentially more therapeutic process.	It is a more intrusive process that can be more stressful and often results in increased conflict and deteriorating relationships, due to fault-finding and a win-lose situation.
Reduce conflict and promote communication. Parents experience more fairness and satisfaction, and are, therefore, more likely to comply and cooperate.	Can increase conflict, which has a negative impact on children by discouraging parental communication, cooperation and mature thinking about children's needs.
Can reduce the negative effects of divorce	Can increase the negative effects of divorce due to increased conflict.
Can shift parents from a "bad" divorce to	It puts parents against each other by

a “good” divorce, by drawing attention to the specific needs of the children. The best interests of children play a greater role.	encouraging polarized and positional thinking about each deficiency of the other parent.
Better family relationships and better post-divorce psychological adjustment for families and children. According to Gauvreau (2012:11), this is because *“the boundaries of post-divorce family relationships – specific rules and contingencies – are explicitly defined in detail”.* Therefore, a clear and specific parenting plan creates consistency for children.	Does not always ensure satisfaction but, at least, enables avoiding dissatisfaction.
Less intrusive	Based on an adversarial principle. Based on proving fault.
More efficient and cheaper, because it needs less time to reach an agreement.	Can be lengthy and costly.
More compliance promotes more contact between children and the non-custodian parent.	Increased conflict and hostility amongst parents can lead to deterioration not only of parent-child relationships, but also between children and their extended families, which should be part of their support system and could lead to more losses.

According to the author, it is important to state that both parenting plans and the litigation process have a valuable place in divorce disputes. The author is, however, of the opinion that parenting plans do offer an alternative process for co-parenting in divorce disputes that are less divisive, especially in disputes where conflict is not high.

According to the author, parents and children should have the right to a less intrusive process where they can participate actively in major decisions that affect their lives, instead of having no choice and being submitted to an intrusive process that might lead to more conflict and deterioration of relationships; thus, not serving the best interests of the children involved. It is, however, important to state that one process is not above the other, but that both processes do have a valuable place in divorce

disputes depending on the level of conflict, the concerns raised by the parents concerning the well-being and safety of children, as well as parents' ability to co-parent and understand the best interests of their children. Mediation in itself, according to the author, can also not be in the best interests of children, if mediators are not skilled and lack knowledge, when there are power-imbalances or parents' needs are the focus instead of what is in the best interests of the children.

The author is, however, of the opinion that the mediation process and the development of a parenting plan may have a healing effect on the parties involved, which may counter the pain of the divorce. The author has found the following differences between parenting plans and litigation in her experience.

Table 9: Differences between parenting plans and the litigation process as found by the author

PARENTING PLANS	***LITIGATION PROCESS***
All parties (parents and children) are involved. It is a more co-operative; these are inclusive processes where parties (parents and children) experience that they can contribute to, and participate in, decisions concerning their lives.	All parties (parents and children) are involved. It is, however, a less co-operative process with a third party (mostly a social worker) making the decisions of what will be in the best interests of the children. It often leads to feelings of loss and hostility.
The family determines the process and content of the parenting plan. The fears and needs of each individual can be addressed, which also makes it culturally more appropriate.	The parents' concerns and accusations often determine the process, as well as the evaluator's process in dealing with child custody and control evaluations. It often leads to increased conflict, which has a negative impact on children by discouraging parental communication, cooperation and mature thinking about children's needs. In the end it is a winner-loser situation of 'washing dirty laundry', fault-finding and blaming. Parents, and often collaterals, work towards proving who is the better parent. This causes more damage to post-divorce relationships. It is not a constructive process.
There is not necessarily less conflict, but	Although the focus is also on the best

the process is more constructive towards the future. Both parents feel they are involved and can contribute, as well as address fears or concerns, with the main and mutual focus being the best interests of the children.	interests of the child, this process often leads to more conflict due to 'fault finding', 'dirty laundry', blaming and parents trying to prove who is the better parent. This often leads to more relationship damage. Often extended relationships, which are part of children's support systems, are also harmed, because of collaterals that are used. The custody and control report becomes a permanent record of who said what, which causes permanent damage to relationships.
The process is less intrusive. The focus is on the best interests of the children and factors that concern the children, often giving parents a mutual focus.	Due to the evaluation process the focus is often on determining who is the better parent, and parents seldom experience that it is about the best interests of the children involved. The custody and control report becomes a record of parents' history and bad behavior, often being misused by many parents and extended family members to get back to one another.
In Namibia the process is not necessarily cheaper. This will be a concern in the future, namely whether it will be financially possible for everyone to afford the process. Each family also determines its own process, which can sometimes be lengthy if parents struggle to reach agreements on certain issues.	Children are often in the middle, and are exposed to prolonged conflict and power struggles between parents and extended family members. Due to the increased levels of conflict, the process is often drawn out, even though an evaluation has been conducted, causing more lawyers' costs, often depleting parents (and children's) resources.
It gives parents and children more perceived control over the divorce process and the impact it has on their future.	Parents and children experience less perceived control and are often in the hands of the evaluator, who has to determine what is in the best interests of the children. This often leads to feelings of dissatisfaction, losing, unfairness and increased and prolonged conflict and hostility. This also may have more losses involved, such as broken relationships, broken contact and loss of finances and support systems, not only for children but mostly for children, which does not serve

	their best interest.
The enforcement of parenting plans is still unsure, because of the lack of guidelines in this regard.	The enforcement of child custody recommendations are also unsure. Issues like maintenance can be enforced via the maintenance court, but a parent's contact or consistency is seldom enforced.

Parents are free to decide on mediation and parenting plans or litigation; none of the options may be enforced upon them. It is, however, in their own interest that they be placed in a position to make an informed decision.

7.4 The advantages and possible pitfalls of the mediation process

In this section the advantages and pitfalls in the mediation process will be discussed to provide an overview of this aspect of mediation in an effort to give a balanced view of this dimension of the process.

7.4.1 Advantages of mediation

Mediation, as an alternative process to litigation, has various advantages (Cohen, 2011; Gauvreau, 2012; Kitzmann, *et al*., 2012; Mienkowska-Norkiene, 2012; Uugwanga, 2010). According to the American Academy of Child and Adolescent Psychiatry (AACAP), families are served better by mediation than by litigation, and mediation could help to protect the best interests of children. Mediation can act in children's best interests in the following ways:

- It is an alternative to non-adversarial means of arriving at a divorce settlement.
- It is a means of effecting social change.
- It promotes a good spirit between parties. It encourages finding common ground for an agreement.
- It promotes equality, and is a source of empowerment by strengthening communities and making them less reliant on state agencies.

- It helps to maintain relationships, not only between parents, but also between parents and children, as well as between the extended support system
- It compensates for the lesser access to justice enjoyed by disadvantaged groups (Cohen, 2011:229). The author, however, is of the opinion that, especially in Namibia, one needs to be careful that it is accessible, due to available skilled mediators and distances. Should mediators only be available in central Namibia, rural areas may not be able to have access to a mediation process.
- It results in satisfaction, in the sense that a good mediation process creates a good chance that the parties involved will reach a settlement in their dispute, and will feel that their needs and interests have been satisfied, as well as that the resulting agreement is an acceptable one.
- It improves relationships between parents; therefore, it creates better cooperation.
- It creates transformation, which focuses on the impact of mediation on the players rather than on the outcome of the disagreement at hand. According to Cohen (2011:228), it can alter patterns of interaction between hurt and angry parents, and can inhibit the escalation of conflict by protecting parents from the potentially harmful effects of litigation.
- It is a source of moral growth for the participants, and can give them a sense of their own value and power, as well as the capacity to make decisions about life. It also provides educational aspects.
- It reduces spousal hostility and tension. It can improve parental communication and cooperation.
- It is a process which allows people to acknowledge, and empathize with, the situations and problems of others. It, therefore, provides parents with an opportunity to resolve past and present conflicts.
- It results in savings on both the legal and emotional costs of a protracted, adversarial proceeding.
- It allows the parties to avoid the risks and uncertainties of litigation. The speed and efficiency of the mediation process already reduce conflict. Parents can reach resolutions more quickly than in litigation, and it takes less time. According to the author, the fact that parents can start to make real decisions,

instead of experiencing the uncertainty of waiting for a social worker or psychologist's report already reduces stress.

- Children can benefit if a mediation process minimizes bitterness between the parents. With the reduction in duration and intensity of conflict, children's exposure to, and involvement in, inter-parental conflict are reduced. According to Gauvreau (2012:15), research shows that cooperative parenting is associated positively with the quality of the relationship of the non-custodian parent and the child, regular contact, as well as contact with the extended family. A strong support network, as well as a positive environment for the child, is thus provided during a major life transition. According to Cohen (2011:228), it fosters more child-focused communication, especially between parents.
- A resolution of issues which is arrived at by the parties themselves is more likely to be satisfactory, and thus more likely to be adhered to over time. In such a setting, the parties are likely to feel a greater sense of ownership of the outcome, and to feel empowered, rather than weakened, by the process.
- Mediation can encourage an open and full sharing of relevant information in a way that is not dictated by the requirements of the legal process. It, therefore, provides a framework for resolving future conflicts, which again promotes co-parental communication.
- Mediation has been said to encourage more flexible and creative agreements, which also result in agreements that are better for the family unit as a whole.
- Because the mediation process allows for the venting of emotions, it can remove obstacles to effective problem-solving. Gauvreau (2012:13) stresses that this leads to a reduction in the duration and intensity of the conflict and also results in greater financial resources available to children.
- It is easier through a mediation process than in a court setting for parties to consider property division, custody and maintenance as interlinked issues and to make appropriate trade-offs.
- Through the inclusion of children in the process, children feel heard, their needs are voiced and parents have more information on what their children's needs are. Children, who are part of the process, accept the arrangements more easily. According to Gauvreau (2012:16), children who are excluded from the

mediation process present with feelings of exclusion, isolation, loneliness, anger and frustration.

- There is an element of control over the process by the parties themselves, because they control the pace of the process, and make the decisions themselves. According to Uugwanga (2010:50), the process is emotionally more manageable; therefore, less stress is experienced. It, however, still keeps open the option of going to court. There is nothing to lose, but potentially everything to gain.
- According to Mienkowska-Norkiene (2012:121), mediation eliminates conflict arising in families by improving communication between family members. It, therefore, reduces the negative consequences of breaking family ties.
- It requires less time to reach an agreement.

7.4.2 Pitfalls of mediation

According to Cohen (2011:228), research studies show inconsistencies in findings. Mediation, especially court mediation, is short and instrumental in focus. According to the author, there is often little capacity to modify conflicting relations or to promote cooperation. Cohen (2011:239) and Uugwanga, (2010:53) list the following disadvantages:

- Mediation may not necessarily bring changes in actual co-parenting behavior. It does not always result in more consideration and communication or more involvement, especially regarding court mediation.
- It may fail to provide the procedural safeguards of the legal system which can ensure that the parties' constitutional rights are respected. Traditional cultures, which value harmony, and women, who may place a higher value on the resolution or avoidance of conflict than men, are particularly vulnerable.
- An unsuccessful attempt at mediation can add substantial costs and delays to the divorce process. It will often then revert back to litigation with all its disadvantages listed in the previous article.
- Ethical problems may arise when one legal practitioner advises both parties, or 'translates' the mediated agreement into 'legal language'. This is why it is

advisable for the mediator to have a good relationship with the legal representatives of the parties concerned.

- Some people may find a face-to-face confrontation with their spouse more stressful and traumatic than it would be to let a court decide the outstanding issues.
- Because marriages are such complex relationships, even the most experienced mediator may be unable to identify subtle forms of pressure and coercion between the parties.
- People (particularly women) who are not experienced in expressing their needs and desires may not be able to articulate their points of view effectively in a mediation process.
- The checks and balances of the legal system are important safeguards for the parties to disputes, and it may be dangerous to shift decision-making to a mediation process which lacks this protection.
- It is necessary to guard against an unrealistic fairy-tale view of mediation as being the humane and caring answer to all the problems surrounding divorce negotiations. There will seldom be 'happy endings' in divorce cases, no matter what process has been implemented.
- Lawyers still need to be involved, which may increase the cost of mediation.
- Parties may also be so emotionally charged that cooperation is hampered, and can, therefore, stand in the way of an agreement.
- The success of mediation is too dependent on the ability of parties to reach consensus. Because the decision of the mediator is not binding, parties must be committed to reaching an agreement. If the parties are not ready to agree, the process can become frustrating and a waste of time.
- It should be accepted that divorce is a complex process that requires insight from the person in charge to oversee the process. Much depends on the skill of the mediator. An unskilled or poorly trained mediator can do more damage than good.

Burman and Rudolph (1990) point out some specific problems of mediation in the South African context, which are equally applicable to Namibia:

- Mediation schemes operate within a paradigm based on the presumption that the parties are equal, that people operate reasonably and that all parties using the system have equal access to the court, property, housing and child-care facilities, and are equally informed of their rights. This does not accord with the facts. Uugwanga (2010:53) also stresses that openness and easiness are not always possible. Women are often not experienced in expressing their needs, due to cultural factors. Elements of legal protection mechanisms may be lacking in this regard.

- Mediation schemes usually fail to provide adequately for the fact that a certain level of negotiation takes place outside the mediation conference when the parties still have contact with each other. This is a possibility in both South Africa and Namibia where economic constraints mean that some divorcing couples continue to share the same home while the divorce proceeds.

- The prevalence of domestic violence against women means that women may be unable to negotiate with their husbands as equals, without fear.

- Mandatory mediation: One of the most cherished values of mediation is the parties' right to self-determination. Rather than allowing a private or state-appointed, third party to make a decision for the disputants, mediation offers the possibility for the parties to make their own decisions. Ottosen (2006:30) also states that mediation becomes compulsory in resolving conflict more as a means of disciplining parents to co-operate.

  Where laws or court rules mandate mediation, effective limitations are placed on decisions about entry and participation. Mediation may be limited to certain issues, such as custody and visitation. Where mediation is mandated, the related issues of mediator reports, attorney involvement, responsibility for payment of a fee and mediator qualifications are normally regulated. Commonly referred to as mandatory mediation, it has its proponents and opponents.

The most controversial aspect of mandatory mediation is a requirement that the mediator reports to the trial judge where mediation does not produce a settlement. When the report takes the form of a recommendation, an adjudicatory function is performed without the procedural safeguards of a court of law. In mandatory mediation programs the mediator is often chosen for the parties.

- Power imbalances: The question of power and power imbalances in mediation is difficult. Power or influence is necessary for the negotiation process to be effective. Where there is a parity of power, there is a greater likelihood of an equitable outcome. Some argue that the mediator should not intervene to influence power dynamics. However, it appears that the mediator must manage the power relationship between the parties in some way.

  When mediation takes place, the question is whether power imbalances can be dealt with and, if so, how (O'Leary, 2014:8). A number of feminists have argued that, as long as society is patriarchal, mediation will be used as a tool for men to oppress women. While it is true that extreme power imbalances may be a reason not to mediate, the mediation process can also offer a number of unique features that allow the power relationship between the parties to be assessed and addressed.

  It has been asserted that power relations can be assessed through the mediation process, the role of the mediator and the role of the divorce crisis. Firstly, the process is a short-term one which usually encourages collaborative or problem-solving approaches rather than competitive ones. This requires the active participation of the parties as equals, at least for the duration of the mediation sessions. Secondly, a good mediator will have the skills to identify power imbalances and to address them. The mediator normally has more power than either of the parties, and can exert influence over the dynamics between the parties in a number of ways, from the modification of the physical setting (seating arrangements, separate meeting areas, and so forth) to the management of communication behavior (ground rules about who speaks, when and for how long) and the negotiation process, (collaborative

negotiations, issue framing, interest exploration, option generation and proposal presentation). Thirdly, divorce mediation takes place during a crisis which centers on a change in the relationship between the parties. This may change their expectations and assumptions, and make them more open to interventions by the mediator.

An awareness of power is essential to the mediation process. In divorce mediation the challenge is to assess and address any power imbalances based on gender, stereotyping, unequal access to resources and other factors that raise concerns about a woman's ability to negotiate from a position of inequality. The goal is to create a relatively level playing field for the duration of the mediation.

- Confidentiality: Mediation is not necessarily a private process. However, confidentiality, as well as the protection of communications associated with mediation, is viewed as an integral and crucial component of the mediation process. Confidentiality is achieved either by agreement or through the operation of the law. Where agreement is relied upon, its efficacy rests on the value that the court places on promoting settlement negotiations rather than having access to the relevant evidence to decide a contested matter.

  Effective mediation is premised on open and frank communication between the disputants. However, the mediator has no authority to compel the provision of information. Any information furnished is done so because the parties believe in the process and trust the mediator. If the parties thought the mediator could testify or talk to others about what is said or revealed in the mediation, then there would be no motivation to be candid about the situation at hand. A similar reluctance would exist if the parties do not trust one another not to be called to testify about what they have revealed in a mediation session. In divorce mediation, the private nature of the proceeding is a further reason why all communications should be confidential.

  The issue of confidentiality may also arise within the mediation process if separate meetings or caucuses are held. Whether or not the mediator will

reveal information disclosed in caucus to the other party is a matter to be agreed upon by the parties and the mediator. Furthermore, where the mediator needs to communicate with other professionals, such as attorneys and mental health therapists, it is important that specific permission is obtained from the parties prior to making the communication.

Where the confidentiality of communications is protected, there may be limitations. For example, a duty to report child abuse may necessitate the mediator to reveal information obtained in a mediation session. Rules of evidence that protect settlement discussions are one example of how the law operates to protect the confidentiality of communications made in mediation.

From the above discussion it is clear that mediation and parenting plans may, for reasons given, be fair alternatives to the traditional custody ‘wrestling’ between the parents. It eliminates some of the disadvantages of the litigation process associated with custody and control. Although it promises to be less threatening and more beneficial for the children involved, it has its own disadvantages and challenges to be dealt with. If guided correctly by a trained mediator, it does involve both the father and the mother in a search for a mutual satisfactory arrangement. The role of legal representatives is different in the mediation process, but they are not excluded. To succeed, mediation should be accepted by both the parents and the legal fraternity.

It will be unrealistic to regard mediation as the perfect process to resolve all disputes regarding divorce. Note should be taken of the powers influencing this process. It does have advantages but it also does have pitfalls. The latter could be prevented through training.

Mediation, in general, creates a better atmosphere for the resolution of conflicts and disputes because it is a co-operative process involving parents and, preferably, children as well. A result of this process can be improved relationships, not only between parents, but also with their children and among the broader family system.

There is no guarantee, however, that mediation will bring changes in parenting behavior. If mediation does not succeed, the alternative is litigation which will

increase costs, as well as all other disadvantages associated with it. Not everybody will be articulate enough to benefit by mediation. Not all spouses will necessarily be able to reach consensus, which will defeat the aims of mediation.

8. AN ALTERNATIVE PROCESS FOR NAMIBIA

According to Uugwanga (2010:47), mediation in the Namibian context is already employed in customary divorce cases where extended families of both spouses help in attempting to resolve marital disputes. This is an encouraging development, considering the requirements of the UN Convention on the Rights of the Child. It is culture-based, and works for the community with traditional values supporting and prescribing it. The author is, however, of the opinion that the best interests of the child are often overlooked, while focusing, instead, on the parents and their needs.

Stahl (2011:46) emphasizes that it is critical for child custody evaluators to understand the law. Namibian law currently makes provision for child custody disputes to comply with current legislation. With the new Child Care and Protection Act (3 of 2015), more options and methods of protection are built in for child custody disputes. Legislation in Namibia currently covers various aspects of children's rights and the best interest of the child standard, such as

- **Children's rights**

Regarding children's rights, it is stipulated by the Child Care and Protection Bill (LAC, 2009:10) that all proceedings, actions or decisions in matters concerning a child must follow the following six basic principles:

> *Respect, protect, promote and fulfil the children's fundamental rights and freedoms as set out in the Namibian Constitution, the best interest of the child and the rights and principles set out in this Act.*
>
> *Respect the child's inherent dignity.*
>
> *Treat the child fairly and equitably.*

Protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of a family member of the child.
Recognize the child's need for development, and engage in play and other recreational activities appropriate to the child's age.

Recognize the child's disability, and create an enabling environment to respond to any special needs that the child may have.

This is also entrenched in the Namibian Constitution, as well as in an international instrument, like the CRC.

- **The best interest of the child**

The Child Care and Protection Act (3 of 2015) (3) (1) and the Child Status Act (6 of 2006) (3) (1) state that the best interest of the child is the paramount consideration.

Both the Child Care and Protection Act (3 of 2015) (3) (1) (a – q) and the Child Status Act (6 of 2006) (3) (1) (a-l) provide an extensive list of factors in determining the best interests of the child.

The objectives and interpretation of the Child Status Act (6 of 2006) as stated in Article 2 (1)

The objectives of the Act are to promote and protect the best interest of the child and to ensure that no child suffers any discrimination or disadvantages because of the marital status of his or her parents …

The Child Status Act (Art. 3) (1) states the following:

When making any decision pertaining to custody, guardianship or access, the best interests of the child are, despite anything to the contrary contained in any law, the paramount consideration and the children's court or any other competent court …

The Child Care and Protection Act (3 of 2015) has laid the foundation for a new perspective on the rights of the child, but these principles must be made practice

when the Act becomes law and the regulations are written. However, nothing prevents mediation to take place and the agreement between the parents to be made an order of the court with the assistance of legal representatives. Resistance from lawyers will in, all probability, be quite a normal response, in view of mediation; furthermore, parenting plans will be a less expensive alternative than litigation.

The UN Convention on the Rights of the Child (CRC) provides further justification for mediation by stating that the best interests of the child must be a primary consideration in all matters concerning children. Mediation, to a certain extent, forces parents and professionals in custody disputes to keep children, their needs and their wishes as the focus of the decisions.

- **Child participation**

The Child Care and Protection Bill (Art. 5) supports child participation by stipulating that every child "…*that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration".*

Art. 4(6) states *that "… the children's court may afford a child who will be affected by any decision made in terms of this Act an opportunity to express his or her views or preferences if the children's court considers that the child is able to understand and participate in the proceedings having regard to the child's age and maturity."*

According to The Child Care and Protection Bill Section 50 (1), more explicit reference is made where the commissioner, preceding in a matter before a children's court, must *"… allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses so*".

This is also in line with the UN Convention on the Rights of the Child (CRC), Article 12, which states that a child must be heard. It is, furthermore, in line with Article 4(1)

of the African Charter on the Rights and Welfare of Children (ACRWR), where the "*best interests of the child shall be the primary consideration*". Article 4(2) further provides for a child to be heard.

The question, however, is how many professionals do keep up with new legislation, or how many professionals know how the relevant legislation is applied to the custody situation. In order to assess public attitudes about the introduction of family law mediation in Namibia, the Legal Assistance Centre (2000:157) conducted interviews in June and July 1999 with 35 individuals who were identified as interested parties or key informants in the Windhoek area. In general, the response to the idea of divorce mediation was overwhelmingly positive.

Interviewees felt that family disputes are not currently dealt with in a satisfactory manner. Extended family members play an important role in dealing with family disputes, but negotiations in this context can become adversarial and accusatory. There is always the danger that family members will side with their own children, regardless of the merits of the dispute. Concerns about trust and confidentiality have also been raised.

Further input regarding the idea of family mediation was gathered at a workshop held in Windhoek in July 1999 (LAC, 2000:160) and attended by 21 persons. Mediation had already been used in customary divorce cases where the extended families of both spouses helped in attempting to resolve marital disputes; hence, the relevance of mediation to divorce had already been tested, at least in the customary sphere of our law.

From the preceding discussions, a legitimate question arises as to whether divorce litigation as it is, is still relevant in today's society and how divorce as a process can be made less cumbersome. Is there any legal mechanism that can be employed to help make the divorce process less confrontational? How can moving towards a peaceful settlement help maintain the relationships of the parties involved, for the sake of the children, if any? In the context of divorce, mediation could be defined as an assisted negotiation between the two parties who are in the process of divorce. The mediator is impartial, and helps to ensure that both participants come to a fair

agreement, which means the mediator cannot give advice to either party, and also cannot act as a lawyer for one of the parties either. With the new focus on the child by new legislative developments, this should provide valuable input into the use of mediation and the acceptance of parenting plans.

9 CHALLENGES OF THE MEDIATION PROCESS AND PARENTING PLANS

Although mediation and parenting plans are portrayed as a solution to the challenges associated with the process of litigation and the system of custody and control, a balanced view would require a critical look at the challenges of mediation and the development of parenting plans. Several authors have highlighted issues in this regard (Gauvreau, 2012; Pickard & Kahn, 2011; Robinson, 2010).

Robinson (2010:94) finds that parenting plans are not always representative of divorcing families' needs. Often parents and children do not convey their needs to the mediator due to –

- the state of turmoil, which may make it difficult for them to communicate their needs effectively;
- intense conflict that can prevent members of the family to be honest about their needs;
- family members' inability to communicate or express their needs;
- ineffective interviews by mediators, because of a lack of skills, training or experience.

Thayer and Zimmerman (Robinson, 2010:97) and Pickard and Kahn, (2011:61) also stress that children are often excluded from the process of developing parenting plans and, therefore, are not given the opportunity to express their views. The right of the child to participate is thus not observed.

Gauvreau (2012:19) refers to various authors who state that the advantages of mediation may have been overstated in previous research, because –

- the benefits may be in limited areas of the children's lives;

- the benefits may be short-lived;
- methodological issues in research to date have under-represented or excluded uncontested cases, or cases with a history of violence and high conflict, from the sample groups.

Although research evidence should be taken into account in mediation and parenting plans, the latter is a new venture in Namibia. This is the main reason for the present research, and the results should give valuable answers to be considered, especially in view of new legislation in the country.

Should the Namibian Child Care and Protection Act be implemented, parenting plans will be obligatory. The author is, however, of the opinion that it will still be a long road, due to the above-mentioned challenges, as well as to –

- a lack of clear guidelines for conducting mediation sessions, as well as the structuring of parenting plans;
- no specifications for a parenting plan;
- no ethical standards professionals should adhere to;
- no uniform procedures or compulsory registration of mediators;
- the problem of the dual roles of the lawyer, due to limited resources and mental health professionals.

According to Gould and Stahl (Gould & Martindale (2009:167), the primary focus of evaluators is to understand child development research and how to apply it to each case.

Mediation and the development of parenting plans should thus be undertaken with the full knowledge that there will be challenges that will have to be dealt with. The challenges associated with mediation and parenting plans justify the training of mediators. No professional training guarantees the acquisition of skills in this regard. The researcher wants to elaborate that practitioners must believe in mediation and parenting plans as possible solutions to some of the problems and conflict that follow in the wake of a contemplated divorce.

10 CONCLUSION

This article discussed parenting mediation and parenting plans as planned processes in Namibia, according to new legislation regarding the protection of children and safeguarding the best interests of children. It covered the most important aspects of the topic. It discussed key concepts of mediation and parenting plans including the relevant legal aspects that apply to mediation and parenting plans. The article distinguished between the various approaches to mediation and also pointed out that there are voluntary and mandatory mediation. Voluntary mediation grants parents greater freedom than mandatory mediation where limits are placed on freedom. It was also stressed that in child-inclusive mediation, the child's voice is heard directly, which is not the case in child-focused mediation. Although mediators in Namibia presently work according to child-focused mediation, new legislation puts more emphasis on child participation.

It was pointed out that mediation does not necessarily produce better results than litigation in all cases, and that it should not be assumed that it produces better post-divorce results than litigation. From the above fact, it may be deduced that a selection between mediation and litigation processes needs to be made at some point in the process for an appropriate referral to be done. It seems likely that mediation will be more challenging, if not impossible, in high-conflict divorce cases.

Parenting plans were presented in the article as the result of mediation. The parenting plan is still a new concept in Namibia which will require the training of potential and practicing mediators. It has been stressed that the purpose of parenting plans should be a guarantee that the best interests of the child are protected. It also implies that the capacities of each parent to care for a child should be considered carefully, and that it should bring clarity about parental roles after divorce. It, however, does not imply that litigation should not be considered as an option.

Mediation in Namibia will be more in line with current national and international legislation regarding the rights of children, as well as the 'best interest' standard. With the new Child Care and Protection Act, mediation will offer a more 'child-

inclusive' process in divorce disputes. With mediation and parenting plans, parents will be more involved in a co-parenting process, where children's needs, developmental stages and voices can be heard and taken into consideration in order to make decisions in the child's best interests.

Mediation does not replace the litigation process, but offers parents and children an alternative that is less damaging and has a better outcome on post-divorce relationships and adaption. Parents and children in the divorce process have more control over decisions, which leads to better cooperation. Namibia still has a long way to go, but the timing is right, considering the current and future legislation that is more focused on children's rights and their best interests.

The objectives of the article were realized. Apart from an exploration and discussion of mediation and parenting plans, attention was also paid to divorce as a family problem and the current divorce process in Namibia as background to the rest of the article. Recommendations regarding the implementation of the proposed parenting plans were also discussed.

BIBLIOGRAPHY

AACAP (American Academy of Child and Adolescent Psychiatry). 1997. Practice Parameters for Child Custody Evaluation. http://www.jaacap.com/article/S0890-8567(09)62594-6/pdf Date of access: 10 March 2011.

Acts **see** Namibia

Anon, na. *Authors' Guide to Writing Articles and Reviews*. https://www.elsevier.com/__data/promis_misc/edurevReviewPaperWriting.pdf Date of use:6/11/16

Barth, L. 2011. Consultant conduct in anticipation of a child custody evaluation: Ethical and social dilemmas and the need for neutral parent education. *Family Court Review*, 49(1):155-169.

Burman, *S. &* Rudolph, D. 1990. Repression by mediation*:* Mediation and divorce in South Africa. *South African Law Journal*, 107(2): 251-278.

Child Care and Protection Act **see** Namibia.

Child Status Act **see** Namibia.

Cohen, O. 2011. Agreement reached through court mediation conducted by social workers: Impact on the co-parenting relationships. *British Journal of social work*, 42: 227-244.

Damaseb, P. (2013, June 28). Nam divorce law 'outdated'. *The Namibian Sun.* Retrieved from http://www.namibiansun.com/justice/nam-divorce-law-outdated.54466

De Jong, M. 2010. A pragmatic look at mediation as an alternative to divorce litigation. *Tydskrif vir die Suid-Afrikaanse Reg:* 515 – 557.

Ford, J. 2007. The scope of divorce mediation: A question for Namibia. *Mediate.com.* Quarterly Newsletter. Sept. 2007. http://www.mediate.com/articles/ford14.cfm Date of access: 12 Dec. 2009.

Froneman, A.P. 1999. Criteria social workers employ in making child custody recommendations. East London: Rhodes University. (Half-thesis – M).

Gauvreau, D. 2012. Mediation versus litigation: Examining differenced in outcomes amongst the children of divorce. http://www.riverdalemediation.com/wp-content/uploads/2009/07/Gauvreau-Mediation-vs-litigation.pdf Date accessed: 5 June 2014.

Gould, J.W. & Martindale, D.A. 2009. *The art and science of child custody evaluations*. 1st ed. NY, Guilford Press.

Kangandjela, L.N. & Mapaure, C. 2009. Work in progress: The Child Care and Protection Act in Namibia. (In Ruppel, O.C., *ed.* Children's rights in Namibia. Windhoek: Macmillan Education. p. 121-144). http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_a.pdf Date of access: 10 March 2011.

Kitzmann, K.M., Parra, G.R. & Jobe-Shield, L. 2012. A review of programs designed to prepare parents for custody and visitation mediation. *Family Court Review*, 50(1): 128-136.

Lamb, M.E. & Kelly, J.B. 2000. Using empirical literature to guide the development of parenting plans for young children: A rejoinder to Solomon and Biringen. *Family Court Review*, 39(4): 365-371.

(LAC) Legal Assistance Centre. 2000. Summary of Proposals for divorce law reform in Namibia. http://www.lac.org.na/projects/grap/Pdf/divlawref.pdf Date of access: 4 March 2010.

LAC (Legal Assistance Centre). 2005. Divorce law reform: A summary of the law reform and development commission proposals. http://www.lac.org.na/projects/grap/Pdf/divlawref2.pdf Date of access: 4 March 2010.

LAC (Legal Assistance Centre). 2009. Draft Child Care and Protection Bill. Windhoek: Ministry of Gender Equality and Child Welfare (MGECW).

LAC (Legal Assistance Centre). 2010. Public participation in Law Reform: Revision of Namibia's Draft Child Care and Protection Bill: Final Report. Windhoek: Solitaire Press.

McIntosh, J.E., Wells, Y.D., Smyth, B.M. & Long, C.M. 2008. Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post-separation adjustment. *Family Court Review, 46(1)*, 105-124.

Mienkowska-Norkiene, R. 2012. Inequality in divorce mediation – reasons, manifestations and ways to avoid it. Lessons for Lithuania. *Socialinis Darbas*, 11(1): 119-130.

Mitcham-Smith, M. & Henry, W.J. 2007. High-conflict divorce solutions: Parenting coordination as an innovative co-parenting intervention. *The Family Journal*, 15(4): 368-373.

Namibia. 2006. Child Status Act 6 of 2006.

Namibia. 2015. Child Care and Protection Act 3 of 2015.

OAU (Organization of African Unity). 1990. The African Charter on the Rights and Welfare of the Child. http://acerwc.org/?wpdmdl=8410 Date of access: 4 March 2010.

O'Leary, J. 2014. Mediation in family and divorce disputes. 1st ed. Cape Town: SiberInk.

Ottosen, M.H. 2006. In the Name of the father, the child and the holy genes: Constructions of “the child’s best interest in legal disputes. *Acta Socialogica*, 49(1): 29-46.

Pickar, D.B. & Kahn, J.J. 2011. Settlement-focused parenting plan consultations: An evaluative mediation alternative to child custody evaluations. *Family Court Review,* 49(1): 59-71.

Preller, B. 2013. Everyone’s guide to divorce and separation. 1st ed. Cape Town: Zebra Press.

Robinson, T. 2010. Parenting plans: The development of substantive guidelines for professionals. Potchefstroom: NWU. (Thesis – PhD). http://dspace.nwu.ac.za/bitstream/handle/10394/4700/Robinson_TM.pdf?sequence=2 Date of access: 16 Jan. 2013.

Rohrbaugh, J.B. 2008. A comprehensive guide to Child Custody Evaluations: Mental Health and legal perspective. 2008 *ed*. NY, Springer.

Sigal, A., Sandler, I., Wolchik, S. & Braver S. 2011. Do parent education programs promote healthy post-divorce parenting? Critical distinctions and a review of the evidence. *Family Court Review*, 49(1): 120-139.

Stahl, P.M. 2011. Conducting child custody evaluations: from basic to complex issues. 1st *ed*. CA, SAGE Publications.

Tjombe, N. (2013, July 1). Reform of divorce law in Namibia. *The Namibian Sun.* Retrieved from http://www.namibiansun.com/opinion/reform-divorce-law-in-namibia.54501

UNESCO (United Nations Educational, Scientific and Cultural Organisation). 1989. United Nations Convention on the Rights of the Child. http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf Date access: 4 March 2010.

Uugwanga, C. 2010. The law on divorce and dissolution of marriages in Namibia: A reform analysis of the types of marriages found in Namibia and the divorce laws pertaining to such marriages. Windhoek: UNAM. (Dissertation – LLB). http://wwwisis.unam.na/theses/uugwanga2010.pdf

Vertue, F.M. 2011. Applying case study methodology to child custody evaluations. *Family Court Review*, 49(2): 336-347.

Weir, K. 2011. High-conflict contact disputes: evidence of the extreme unreliability of some children's ascertainable wishes and feelings. *Family Court Review*, 49(4): 788-800.

ARTICLE 4: A NAMIBIAN PERSPECTIVE ON MEDIATION AND PARENTING PLANS

A. Vorback

P. Rankin

ABSTRACT

Namibia is currently moving through a transitional stage regarding child protection legislation from a phase where practices and legislation in this regard were ‘inherited’ from South Africa. This article is a report on research done on the conventional custody and control investigations with their classic adversarial character which, at present, is still a mechanism in child custody decisions in cases of divorce. These investigations are contrasted with a new emphasis on mediation and parenting plans envisaged in new legislation. The new Child Care and Protection Act (3 of 2015), in which room is made for mediation and parenting plans, has, however, not yet been implemented.

The research focuses on the views of relevant role players in the field of child protection with regards to how they envisage mediation and parenting plans as an alternative to child custody and control evaluations, within the Namibian context.

The research purpose was a combination of description and exploration, because both systems of current child custody and control investigations and proposed parenting plans pertaining to the best interests of the child, were explored.

Semi-structured interviews were conducted with at least one person from each of the following groups during individual interviews: staff from the Legal Assistance Centre, psychologists, lawyers and court-appointed mediators, social workers, magistrates and advocates.

Divergent views on mediation and parenting plans were found amongst the participants in the research which forms the basis of the conclusions and

recommendations made in the report. It became clear that shortcomings in the various methods used to safeguard the best interests of the child existed and that important changes were bound to be implemented once the new Child Care and Protection Act (3 of 2015) took form.

Keywords: *qualitative, children's rights, best interest of the child, child custody and control, mediation, parenting plan*

1 INTRODUCTION

This article reports on research done with respect to the views and understanding of key professional practitioners in Namibia on Namibian legislation pertaining to the best interests and the protection of the Namibian child. It, furthermore, reports on the views of the same group of practitioners regarding mediation and parenting plans.

Professional practitioners consulted were psychologists, lawyers, social workers, advocates, Legal Assistance Centre staff and magistrates, because of their roles in cases of child custody and decisions on the best interests of the child.

That Namibia is currently moving through a transitional stage regarding child protection legislation and practices, as reflected in the views of the professional practitioners consulted. The researcher came across a wide variety of perspectives regarding the methods used to protect the best interests of the child, as well as certain areas of uncertainty about the best practices concerning the best interests of the child. The conclusion the researcher has reached is that it is of paramount importance that practices and methods concerning the best interests of the child be standardized, and that quality control and insurance in child custody cases receive urgent attention.

2 ORIENTATION AND STATEMENT OF THE PROBLEM

Currently the mechanism used to assist the courts in Namibia to come to decisions regarding the custody of children in cases of divorce, is the child custody and control report, submitted by either a social worker or a psychologist to the Supreme Court. A child custody and control evaluation can be described as “a thorough, scientifically sound evaluation of a family in order to help the court determine what living arrangements and parenting plan would best meet the needs of the children” (Rohrbaugh, 2008:3). Although child custody and control reports are important in providing information to the court and the family about the best psychological interests of the children, they have the potential to be emotionally damaging to a family. Child custody and control reports are invaluable to the court and families in determining what is in the best interests of the children involved; however, many families feel that the evaluation process is intrusive and exposes the family’s “dirty laundry” (Buchanan in Ackerman, 2006; Stahl, 2011). This again has an emotional and painful impact on the family, as well as the family and the family’s support system (which is often used for collateral information).

Currently in Namibia, where there are no guidelines or protocols for child custody evaluations, families are passed from one evaluator to the next by lawyers, especially if the original custody and control report is rejected by one of the parties involved. This, according to Stahl (2011:3) and Turkat (2005:8), leads to prolonged custody battles and huge expenses, with the children left in the middle of the process without their interests being considered. Courts and lawyers accept that social workers and psychologists are capable of conducting investigations and making recommendations on the mere basis of their qualifications. Diffusion of roles and the lack of a framework, in which each can function, create confusion. Couples who can afford it, mostly go through lawyers, where they either decide preliminarily who will have child custody and control, or, after months of fighting, allocate any professional available to do a custody and control evaluation. Here very basic recommendations are made without any guidelines of how to deal with issues regarding the children concerned. When a court date has finally been set (this can be after two years of constant conflict), various professionals are already involved, which leads to even

more complications. The children, their rights and what is in their best interests are influenced by each professional's perception of the case, as well as the view of the parent. The child custody and control investigation becomes a battleground, with the focus on the past, negative behaviour of the parties and their opposing legal rights and obligations (De Jong, 2010:123). This process, at times, undermines communication, creates further hostility and puts children in the centre of their parents' disputes. According to De Jong (2010:123), the nature and intensity of these disputes can undermine parenting abilities seriously, and cause significant stress to children.

According to Stahl (2011:5), perhaps only 20% of custody and control cases occur in high-conflict families. These families are unable to agree on a parenting plan, and cannot make decisions or focus on the needs of their children, due to their own mutual differences and pain.

In current Namibia each child custody dispute is done according to the individual professional's own criteria in determining the outcome of an investigation, as well as criteria for the best interests of the children involved. This makes it difficult to –

- compare investigations with regards to second opinions or re-evaluations as part of the recommendations by a court, especially if different professionals are involved;
- apply uniformity and consistency in terms of what should be taken into consideration during such a dispute;
- determine each professional's viewpoint as "in the child's best interests". Although the Child Status Act (6 of 2006), Art. 3 (1) and (2) defines "the best interests" of the child - many professionals are unaware of this legislation.
- provide the best possible service to families in the long term;
- provide families with an alternative process in the form of the parenting plan, especially where there is low to medium conflict.

According to De Jong (2010:124), the time has come for a new or alternative approach to the resolution of divorce and other family disputes. Parenting plans, as well as the mediation process, are currently new concepts in Namibia and will form

part of the New Child Care and Protection Act (3 of 2015). According to the Draft Child Care and Protection Act, a parenting plan is an agreement that can cover any aspect of parental authority. It is intended to –

- help prevent disputes;
- make decisions before problems occur;
- reduce the potential for conflict;
- protect the best interests of the child.

Although the 'new' Child Care and Protection Act (within the Namibian context) provides limited guidelines for parenting plans, no provision is made with regards to a structure or the content of this process. In Namibia, lawyers, social workers and psychologists are not trained in mediation, and few are aware of parenting plans as an option.

Namibia is currently moving through a transitional process regarding its child care legislation. The time has thus come for inputs into these processes. Western countries, including South Africa as Namibia's neighbour, have gone through these processes, and serve as valuable sources of experience in this regard.

Although no definition of parenting plans is suggested, Part 3 of the South African Children's Act (38 of 2005) describes in detail the processes and procedures to be followed in the development of a parenting plan. It also suggests what should be considered regarding the welfare of the child in completing the parenting plan.

In view of the tentative nature of suggestions regarding parenting plans proposed in the new Child Care and Protection Act (3 Of 2015) of Namibia, and the problems experienced with the present child custody procedures, it is deemed necessary to explore the nature of parenting plans and compare them with the present child custody investigation procedures. This comparison can help to develop guidelines and an alternative process in order to overcome the current challenges in child custody and control investigations. This proposed parenting plan process may be more helpful in attempting to unite parties in seeking solutions and recognizing that the responsibility of caring for their children is an ongoing process, with the best interests of the children as paramount consideration.

Research question: What are the differences between the current child custody investigations and the proposed parenting plans in Namibia and the possible advantages of the latter in relation to the best interest of the child principle?

It will be in the interest of the Namibian child to compare child custody and control investigations with parenting plans as mechanisms to serve the best interests of the child, because –

- Child custody and control investigations tend to look into the past, have negative, emotional effects on the family and children, and do not necessarily serve the best interests of the child.
- Parenting plans are more future-orientated and can build and strengthen families by taking the best interests of the child into consideration.
- Parenting plans currently form part of the South African legal system, and Namibia can draw on literature and experiences from South Africa with regards to the implementation of parenting plans.
- With the new Child Care and Protection Act (3 of 2015), parenting plans will form part of Namibian legislation.

It is also important to note that, with regards to this research, information could be drawn from respondents' experience with the current system and child custody and control process. Limited experience, however, existed regarding the new Child Care and Protection Act (3 of 2015), as well as of the envisioned parenting plan process in Namibia.

3 PURPOSE OF THE ARTICLE

The article has the purposes to:

establish the views of key professionals in the child protection field in Namibia on legislation pertaining to the best interests of the child;

ascertain and discuss the views of key professionals in the child protection field in Namibia on mediation;

ascertain and discuss the views of key professionals in the child protection field in Namibia on parenting plans;

establish a factual basis for recommendations regarding investigations and decisions concerning the best interests of the child in Namibia.

4 RESEARCH METHODOLOGY

This section is used to provide a description of the research methodology used in the research.

4.1 Research purpose

The research purpose was a combination of description and exploration (Rubin & Babbie, 2001:134 -135), because both the systems of current child custody investigations, as well as the proposed methods of protecting the best interests of the child, were explored.

4.2 Research approach

The dominant research approach was qualitative because the phenomenon of child custody investigations and parenting plans had to be described and explored in depth (Rubin & Babbie, 2001: 34). Due to the fact that Namibia is currently moving through a transitional stage regarding the best interests of the child, the researcher was compelled to use a two-pronged approach which made the research challenging and complicated. On the one hand, the researcher had to focus on the experiences and views of relevant practitioners about the current systems and practices while, at the same time, ascertain the views of the same practitioners on the emerging systems regarding decisions concerning the child. Due to the Child Care and

Protection Act that still had to be implemented, parenting plans and new measures to protect the child would only become a legal option in Namibia at a later stage.

4.3 Research design

A phenomenological research design was utilized. Creswell (2007:115) and Babbie (1998:281) regard a phenomenological study as describing the meaning of experiences regarding a phenomenon, topic or concept for various individuals. This was regarded as suitable, considering the purposes of the research because the views of several professional practitioners on safeguarding the best interests of the child had to be established.

4.4 Participants

Non-probability, purposive sampling (Strydom & Delport, 2011:392) was used, with at least one member from each of the following groups that deal with custody and control investigations within the geographical area of the research:

- Legal Assistance Centre (LAC)
- Lawyers and court-appointed mediators
- Social workers in private practice
- Social workers from the Ministry of Gender Equality and Child Welfare (MGECW)
- Psychologists
- Social workers from the Church Board of Benevolence
- Advocates
- Commissioners of Child Welfare

It was the assumption that the abovementioned research participants would be able to provide the information required for the purposes of the research. A wide variety of professionals were chosen because quite a wide array of professionals were, at the time of the study, involved in the child protection field in Namibia. For practical and economic reasons, respondents residing in Windhoek, Namibia, were chosen.

Namibia is a country known for the long distances between towns, and it would have been impossible for the researcher to travel widely to conduct personal interviews with respondents. It would have made the research unaffordable and, in view of its explorative nature, personal interviews with respondents were regarded as essential.

4.5 Data collection instrument

An interview guide (Neuman, 2003:279) for semi-structured interviews was developed from preliminary discussions with one member from each of the following groups: social workers in private practice, social workers from Ministry of Gender Equality and Child Welfare (MGECW), psychologists, lawyers and commissioners of child welfare. Semi-structured interviews were then conducted with individual members of the same groups. Data gathered from the preliminary discussions were used as guidelines for the individual interviews. Seventeen respondents responded to e-mail, sms and telephone requests for interviews. It was desirable to conduct interviews with each of these respondents until data saturation was achieved. This, however, was impossible, partly because of the fluid situation in Namibia, and partly because of the divergent views expressed by the respondents. Geographical limitations also made this both impossible and impractical. Regardless of these challenges, a factual basis for further research has been laid.

4.6 Data analysis

According to Babbie (1998:387), qualitative data analysis is the "… non-numerical examination and interpretation of observations, for the purposes of discovering underlying meanings and patterns of relationships". The data were analyzed by making use of the process suggested by Marshall and Rossman (Poggenpoel, 1998:342) which, in essence, is a thematic analysis based on a data reduction process.

5 PROFILE OF PARTICIPANTS AND THEMES IDENTIFIED

5.1. Profile of participants

Table 8 contains information of the research participants concerning their professions, as well as their involvement in child custody and control evaluations and parenting plans.

Table 10: Profile of the participants

Respondents	Unit	Court-appointed mediator	Formal training in child custody and control or mediation	Currently doing Custody and Control	Currently doing Mediation	Currently doing Parenting plans	Took note of new legislation	Skills in working with children
Legal Assistance Centre								
Respondent 1	1	0	0	0	0	0	1	0
Lawyers and court-appointed mediators								
Respondent 2	1	1	1	1	1	1	1	0
Respondent 3	1	1	1	1	1	1	1	0
Respondent 4	1	0	0	0	0	0	1	0
Respondent 5	1	1	1	1	1	1	1	0
Private social workers								
Respondent 6	1	0	0	0	0	0	0	1
Respondent 7	1	0	1	1	1	1	1	0
Respondent 8	1	0	1	1	1	1	0	1
Government social workers								
Respondent 9	1	0	0	1	1	1	0	0
Respondent 10	1	0	0	1	1	1	0	0
Respondent 11	1	0	0	0	0	1	1	1
Psychologists								

Respondent 12	1	0	0	1	1	1	0	0
Respondent 13	1	0	0	0	0	0	1	0
Respondent 14	1	0	0	0	0	0	0	0
Church Board of Benevolence								
Respondent 15	1	0	0	0	0	0	1	0
Advocate								
Respondent 16	1		0	1	1	0	1	0
Commissioners of Child Welfare								
Respondent 17	1	1	0	1	1	0	1	0
TOTAL	**17**							

Three of the four lawyers contacted dealt with family law issues, such as child custody and control, mediation and parenting plans. They received additional training in divorce mediation and parenting plans. All four lawyers were aware of the new Child Care and Protection Act, but were still unsure of the content and what it fully entailed.

Two of the three social workers in private practice were involved with child custody and control, mediation and parenting plans. They were also aware of the Child Care and Protection Act, but also not fully familiar with the content and how it would impact their work.

Of the three psychologists contacted, none had formal training in child custody and control, mediation or parenting plans. Only one was aware of the Child Care and Protection Act but had no knowledge of the content. Only one psychologist did child custody and control, mediation and parenting plans.

The advocate dealt with child custody and control and parenting plans, and was also aware of the new Child Care and Protection Act (3 of 2015). The social worker from the Church Board of Benevolence was solely involved with child custody cases, mediation and parenting plans, although she had had no formal training in this

regard. She was, however, aware and knowledgeable of the content of the Child Care and Protection Act (3 of 2015).

The child commissioner dealt with child custody and control cases on a daily basis, and although she was involved with mediation, she did not do parenting plans. She was aware of the Act but not of its content.

The three government social workers all did child custody and control, mediation and parenting plans, although they had not received any specialized training in this regard. Two of the three social workers also were not aware of the content of the Child Care and Protection Act (3 of 2015).

Of all the respondents who were contacted, only two lawyers and the commissioner of child welfare were court-appointed mediators. Of all the respondents only two had had special training in working with children.

5.2. Themes identified

From the interviews with the respondents by means of the interview guideline, the following themes were identified (Table 2):

Table 11: Themes identified

THEMES	SUBTHEMES
PERCEPTIONS OF CHILDREN'S RIGHTS, BEST INTEREST OF THE CHILD AND CHILD PARTICIPATION IN NAMIBIA	• Perceptions of a child in Namibia, children's rights and the best interests of the child
	• Child participation
LEGISLATION	• The 'new' Child Care and Protection Act
	• Challenges of the 'new' Child Care and Protection Act

CHILD CUSTODY AND CONTROL REPORT	
PARENTING PLANS AND MEDIATION	• New process
	• The importance and place of parenting plans in Namibia
THE IMPACT OF CULTURE ON PARENTING PLANS	
ROLES OF PROFESSIONALS INVOLVED WITH PARENTING PLANS	• Role of lawyers, court-appointed mediators and other legal professionals
	• Role of mental health professionals (social workers and psychologists)
CHALLENGES	• Lack of standards, guidelines and procedures
	• Lack of knowledge and training
	• Lack of experience, exposure and supervision
	• Practical challenges in the implementation of parenting plans
RECOMMENDATIONS	

These themes and the respondents' views are discussed below in more detail.

6 DISCUSSION OF PARTICIPANTS' PERCEPTIONS REGARDING THEMES IDENTIFIED

6.1 Perceptions of children's rights, best interests of the child and child participation in Namibia

6.1.1 Subtheme 1: Children's rights and best interests of the child in Namibia

Below is a summary of the respondents' views regarding children's rights and the best interests of the child in Namibia:

Respondent 1 (Legal Assistance Centre): Professionals lack the experience and training to hear the child's voice. According to the Legal Assistance Centre, they are still working on how the child's voice in Namibia can be heard. Currently, in the draft regulations of the Child Care and Protection Act, it is a "section on a form that needs to be ticked". Lawyers and magistrates oversee that children's rights and the best interests of the child are met. According to researcher, this again was in contrast with most respondents' experience of lawyers and magistrates as being not child-friendly.

Although no provision was made for a child advocate in the new Child Care and Protection Act, a child's ombudsman, who would be the observer of children's rights in Namibia, was appointed. Although this person would be more involved in global issues regarding the child, she would become a powerful force regarding the rights and best interests of the child. Her role, however, still had to be defined. Below are some of the verbatim quotes of the respondent:

> *Still working on how the child's voice will be heard. Currently it is a section on a form that needs to be ticked.*

> *The concern is that professionals currently do not have experience or training in hearing the child's voice.*

The researcher is of the opinion that, although legislation in Namibia makes provision for children's rights and the best interests of the child, the resources for implementing these were still lacking.

Respondents 2 to 5 (Lawyers and court-appointed mediators): Respondents expressed their concerns that within the divorce process, especially when finances were involved, the best interests of the child seldom played a role. Although the Child Status Act and the New Child Care and Protection Act did give guidelines for determining the best interests of the child, the best interests of the child were seldom paramount. One respondent felt that the best interests of the child were plain, logic experience. Another felt that if you worked with the child's best interests, it was important to manage the parties' emotions, and that this often came with experience.

It was, however, a difficult process, and especially young social workers struggled with it.

In general respondents felt that children were not heard. Lawyers and parents often decided what was in the best interests of the children without consulting the child or checking with a child expert. Below are some of the verbatim quotes of the respondents:

Best interest of the child is plain logic or experience.

Children are not heard.

Lawyers and parents often decide what is in the best interest of the children without consulting the child or checking with a child expert.

The researcher of the opinion that, due to cultural beliefs and professionals' own views regarding the best interests of the child, there was no conformity regarding the best interests of the child and how children should be regarded as bearers of rights. It looked as if legislation that should form guiding principles was not always used.

Respondents 6 to 8 (Private social workers): According to the respondents interviewed, in many cultures in Namibia the best interests of the child were not embraced or understood. Especially in rural and traditional areas it was still believed that children should be seen and not heard. Many professionals came with their own cultural beliefs regarding the best interests of the child or how children were viewed. Children's best interests were, therefore, not paramount, although one respondent mentioned that she could not do a parenting plan without seeing the child. Below are some of the verbatim quotes of the respondents:

In many cultures in Namibia best interests of the child are not embraced or understood.

Many professionals come with their own cultural beliefs regarding the best interest of the child or how children are viewed.

Children, especially in rural and traditional areas, are still only seen and not heard.

Children's best interests are not paramount.

The researcher is of the opinion that most professionals did see the importance of children's rights and the best interests of the child as paramount. In practice it, however, appeared as if these aspects were seldom respected or honored. Children in rural areas, especially, seemed to be overlooked in this regard. It also appeared that respondents saw parenting plans as a tool to overcome the exclusion of children, their needs and their best interests. This again would depend on the professionals' cultural beliefs around children, time, knowledge and skills regarding working with and understanding children.

Respondents 9 to 11 (Government social workers): These respondents, in general, felt that the best interests of the child were not honored and used. This was often due to a lack of guidelines or outdated guidelines, a lack of training or training not relevant to the needs of the social workers or relevant to new legislation.

The experience of government, social workers was that the best interests of the child were often dependent on the magistrate's knowledge and skills regarding children. Magistrates' own cultural beliefs also impacted how children were viewed, and this was what would be perceived as in the best interests of the child. Lawyers and magistrates, in general, were not experienced as being child-friendly. Social workers were, therefore, often frustrated because children's best interests were not paramount. They were then forced to skip the legal process in order to act in the best interests of the child. Below are some of the verbatim quotes of the respondents:

Kinders moet steeds aan die agterste speen drink.

The best interest of the child principle are not really used.

It is not what is in the best interest of the child, but who has the best lawyer.

The researcher is of the opinion that, due to a lack of training and sensitivity around the needs of children as vulnerable members of the community, children often became lost in the system among the various professionals who were dependent on one another to act in the best interests of the children. This appeared to lead to frustration and feelings of hopelessness, especially among government social workers.

Respondents 12 to 14 (Psychologists): One respondent stated during her interview that, although we said that we acted in the child's best interests, we sub-consciously felt more obligated to the parents, because they paid the accounts, and the child was underage. The voice of the parent, therefore, subconsciously came out more strongly, because, although children had a voice, professionals often doubted that they knew what was best for them. Somehow the child's voice was not trusted enough. Respondents also expressed many uncertainties, such as: How do we prepare our parents for parenting plans and what is in the best interests of the child? How do we hear the voice of the child? How do we determine children's best interests? Below are some of the verbatim quotes of the respondents:

Although we say we act in the child's best interest we subconsciously feel more obligated to the parents, because they pay the accounts and the child is underage.

The voice of the parent unconsciously comes out strongly, because although children have a voice, do they know what is best for them?

Somehow we as professionals do not trust the child's voice enough.

From the responses of the respondents, the researcher is of the opinion that it is widely believed that children are to be seen and not heard. As a result, their views and interests often do not matter, even though Namibia has legislation on international and national level that protects children's rights. This means that

professionals dealing with children will have to be more sensitive to the voice of the child. Children are seen as voiceless members of society who, at times, are the innocent victims of divorce. Beliefs and views around children in Namibia are, therefore, not in line with legislation. Children's rights are, therefore, still approached from the perspective of the parents.

Respondent 15 (Church Board of Benevolence): The respondent's general view was that the child's best interests or what was important for a child was seldom considered. The lack of independent, qualified professionals working with children was a problem and, very often, if one did find a trained professional, parents could not afford the service. The respondent, however, expressed the importance of seeing children during divorce disputes in order to hear their voices.

Nooit is daar na die kind se belang gekyk nie.

The researcher is of the opinion that more trained, but affordable, professionals are needed to assist with the best interests of the child, and to hear children's wishes and needs in processes concerning them.

Respondent 16 (Advocate): The respondent was of the opinion that there were enough resources and legislation to give guidelines on what was in the best interests of the child, especially McCall v McCall 1994 (3) SA 201 (C), which stated factors that had an impact on the best interests of the child. Professionals working with child custody cases, however, should always use what was in the best interests of the child as the final test. The fact that professionals made use of outdated concepts regarding the best interests of the child, and that there was no provision in the Namibian legislation for a family advocate hampered children's rights and the best interests of the child. Below are some of the verbatim quotes of the respondent:

The final test for child cases is what is in the best interest of the child.

Many concepts regarding the best interest of the child is "out dated".

Gebrek aan 'n gesinsadvokaat.

The researcher is of the opinion that there are enough resources and guidelines to help professionals determine the best interests of the child; however, the lack of conformity and standards in 'how' to determine the best interests of the child hampers this. It also looks as if professional are not cognizant of new research or legislation, especially in their own fields. That often has the result that children's rights and their best interests are ignored because of the professionals' own ignorance or lack of knowledge.

Respondent 17 (Child commissioner): Although provision had been made in the law, even in the old Children's Act, the experience was that magistrates, in general, did not hear the child's voice. This was often due to a lack of training.

Many magistrates are not trained.

The researcher is of the opinion that the way in which children are seen and regarded in Namibia determines their role and position in society, as well as what will be seen as being in their best interests, how seriously their voices will be heard and to what extent they will be allowed to participate in decisions affecting their lives. It appears, that although Namibia makes provision to protect children through legislation, cultural views, the lack of training and understanding of children jeopardize children's value as members of society.

As stated in the literature, in many ways and settings, children are still seen as objects of their parents' rights, and, therefore, not as bearers of rights (Anderson & Spijker, 2002; Lloyd, 2002; Mailula, 2005).

Outcomes in cases concerning children often depend on the magistrate's knowledge and skills, as well as his or her own cultural beliefs, regarding children. In general, the experience of respondents was that it was not what was in the best interests of the child but who had the best lawyer. Lawyers and magistrates were generally experienced as not being child-friendly, child-focused or child-inclusive.

The experience and exposure of professionals working in the field of children's rights and best interests are important. Many skills in working with the child's best interests, such as managing the parties' emotions or understanding what would be in a child's best interests, often come with experience. It is, however, a difficult process and guidelines and support for professionals are lacking. No consistent and appropriate theoretical framework, that supports the best interests of the child is, therefore, used.

Magistrates' own perceptions, cultural views and lack of training in child development often influence their decisions of what is in the best interests of the child. Court-appointed mediators often have no family law background or knowledge regarding child development and children's needs. The result is that children are ignored or are not respected as bearers of rights.

As stated by Stahl (2011:7) *"… no matter who is paying for the evaluation, in what context and for what reasons it is ordered, or whether the end result is a settlement or a trial, the children of divorce become the primary focus of the evaluation and their needs must be served first"*. This is not true for Namibia, where parents' rights are often the main focus. There is confusion between custody and control evaluators, the mediators doing parenting plans and about who the client is; often the person paying the fees is regarded as being the client. Children's rights and their best interests disappear in this. There is thus a lack of clear criteria about who the client is, under what conditions and for what purpose.

6.1.2 Subtheme 2: Child participation

Below is a summary of the respondents' views regarding child participation in Namibia:

Respondent 1 (Legal Assistance Centre): Concerns were expressed that professionals working with children did not have adequate experience or training to hear the child's voice. Currently lawyers and magistrates oversaw children's rights to be heard. This often did not happen, due to a lack of training and understanding of children in general. Below are some of the verbatim quotes of the respondent:

Still working on how the child's voice will be heard. Currently it is a section on a form that needs to be ticked.

The researcher is also of the opinion that professionals, not only in the legal field but also in the mental health profession, do not always have adequate experience or training to hear the child's voice. Professionals who have the training or expertise are often not accessible or affordable by the larger population of children in Namibia. Professionals' own perceptions of children, and what they need, have an impact on children's participation. Sometimes children may be allowed to participate, but it does not guarantee that their views, needs and wishes will be taken seriously.

Respondents 2 to 5 (Lawyers and court-appointed mediators): During interviews respondents in general felt that children in Namibia were not heard. Lawyers and parents often decided what was in the best interests of the children without consulting them. Below are some of the verbatim quotes of the respondents:

Children are not heard.

Lawyers and parents often decide what is in the best interest of the children without consulting the child or checking with a child expert.

Respondents 6 to 8 (Private social workers): According to the respondents, in many cultures children in Namibia, especially in rural and traditional areas, should still only be seen and not heard. Many professionals came with their own cultural beliefs *regarding* how children were to be seen. Below are some of the verbatim quotes of the respondents:

Many professionals come with their own cultural beliefs regarding the best interest of the child or how children are to be viewed.

Children especially in rural and traditional areas are still only seen and not heard.

The researcher is of the opinion that cultural beliefs around children impact their participation and the extent to which their opinions are honored.

Respondents 9 to 11 (Government social workers): During interviews respondents in general felt that magistrates' and professionals' own cultural beliefs impacted how children were viewed and what would be perceived as being in the best interests of the child. Lawyers and magistrates, in general, were not experienced as being child-friendly. Children were generally viewed as being neglected when it came to their participation. Below are some of the verbatim quotes of the respondents:

Kinders moet steeds aan die agterste speen drink.

Professionals' and especially magistrates' cultural beliefs play a huge role.

The researcher is of the opinion that there is a huge need for sensitizing of legal and health professionals about their own cultural beliefs, and how these impact their perceptions in dealing with children. Consistent training and opportunities to learn from the different professions would be to all children's advantage.

Respondents 12 to 14 (Psychologists): During interviews respondents, in general, felt that children's views were seldom considered during decisions that impacted their lives. One respondent felt that the voice of the parent subconsciously came out more strongly. She felt that, although children had a voice, the belief was that they did not know what was best for them. Somehow professionals did not trust the child's voice enough. They also expressed uncertainty about how a child's voice should be heard. Below are some of the verbatim quotes of the respondents:

The voice of the parent unconsciously comes out more strongly, because although children have a voice, do they know what is best for them?

Somehow we as professionals do not trust the child's voice enough.

Respondent 15 (Church Board of Benevolence): During the interview the respondent expressed concern that children's voices were often not considered or not taken seriously enough. Below are some of the verbatim quotes of the respondent:

Wat ek wel doen is ek sien die kinders alleen en dan praat ons bietjie oor skool, die huis, wat maak jy as jy vir Pappa gaan kuier en sulke goed, maar ek probeer om glad nie te vra waar hy wil bly nie. Ek neem dan daardie inligting as die stem van die kind.

Respondent 16 (Advocate): The lack of a family advocate who could see to the children's best interests, and oversee that the child's voice was respected and taken into consideration could be a challenge for Namibia and should be considered. Below are some of the verbatim quotes of the respondent:

Gebrek aan 'n gesinsadvokaat is a leemte.

Respondent 17 (Child commissioner): Although provision was made in the law, (even in the old Children's Act), magistrates did not hear the child's voice. This was often due to a lack of training. According to the new Child Care and Protection Act (Art. 4), children should participate, and every child had a right to choose. The law, therefore, made provision for principles to be followed with regards to child participation.

From the responses of the respondents the researcher is of the opinion it is widely believed that children are to be seen and not heard. As a result, their views and interests often do not matter, even though Namibia has legislation on international and national level that protects children's rights. Children are seen as voiceless members of society who are at times the innocent victims of divorce. Beliefs and views around children in Namibia are, therefore, not in line with legislation. Children's rights are obviously still approached from the perspective of the parents.

The researcher's perception of child participation is that, although children are more often heard, their voices in connection with decisions impacting their lives are not taken seriously; that is if they are heard, or not heard at all. The culture of parents' rights is still the major factor and Namibia, to a large extent, still makes use of the nurturance approach where adults decide what is in the best interests of a child. The

child's voice is often lost. Glasser (*in* Anderson & Spijker, 2002:365) describes these children as "*voiceless members of society who are at times the innocent victims of divorce*". This stresses the importance of understanding the meaning of child participation and the weight of the child's opinion.

6.2 Legislation in Namibia

6.2.1 Subtheme 1: New Child Care and Protection Act

Below is a summary of the participants' responses regarding the new Child Care and Protection Act:

Respondent 1 (Legal Assistance Centre): Although the Child Care and Protection Act had been passed, regulations still needed to be compiled before the Act could be implemented. Currently the Ministry of Gender Equality and Child Welfare (MGECW), with various other stakeholders was still working on the regulations.

The Act dealt with a vast area of issues. In order to deal with everything and all the envisioned details, the regulations would have to be amended regularly. First, minimum standards would be implemented. Currently every standard started fairly broadly with details increasing as the various aspects of the Act would be implemented. Political issues could also determine what would have priority.

The respondent also expressed the importance of creating awareness through constant guidelines and circulars for professionals and, especially, magistrates. Training would, therefore, be needed, but could only start when the regulations had been published. Ministries would have to source money for training, which again would have huge implications for their available resources. Currently everyone was still figuring out who would do what. Various problems with the implementation were also foreseen. Below are some of the verbatim quotes of the respondent:

Roles still need to be defined.

Ministries will have to source money for training. This will have massive implications for the resources of the ministries.

The researcher is of the opinion that the new Child Care and Protection Act is still new, unknown to many professionals and comes with huge challenges with regards to the implementation process. It appears that one of the largest challenges will be the allocation of resources for training, staff and negotiating responsibilities among stakeholders.

Respondents 2 to 5 (Lawyers and court-appointed mediators): During interviews respondents stated that in Namibia, lawyers worked strictly according to the common law. This had the implication that divorce disputes were still settled according to the guilt principle. This had a huge impact on families and child custody and control disputes.

According to the participants, Namibia had sound legislation where children were concerned. There were, however, gaps in the implementation of this legislation. Many participants were also not yet familiar with the content of the new Child Care and Protection Act. Below are some of the verbatim quotes of the respondents:

Sound legislation concerning children.

Gaps in the implementation.

Respondents 6 to 8 (Private social workers): During interviews respondents expressed their uncertainty regarding the content of the new Child Care and Protection Act, as well as how it would be implemented. There was also uncertainty regarding their own roles.

Respondents 9 to 11 (Government social workers): Respondents expressed their uncertainty regarding the new Child Care and Protection Act and how it would be implemented. They were also of the opinion that, although Namibia had sound legislation pertaining to children, the implementation of this legislation was often a problem. One respondent stated that the new Child Care and Protection Act was so

vast and covered so many facets that it could lead to some of the aspects being neglected if someone did not specifically focus on them. Below are some of the verbatim quotes of the respondents:

Sound legislative framework.

Gaps are in the implementation and how it will be implemented.

The Act has so many facets, if the social worker does not focus on them specifically, they can be neglected.

Respondents 12 to 14 (Psychologists): Most respondents stated that the Child Care and Protection Act was unknown to them. Only one respondent was aware of the new legislation, but was unsure about its content or its impact on professionals and children. A need was expressed for more collaboration between professionals, but also between Ministries and private professionals in order to remain up to date with national issues. Below are some of the verbatim quotes of the respondents:

Private practitioners lose touch with legislation or national issues.

Not sure what is the content and how it will impact on children and psychologists.

More collaboration between professionals is needed.

Respondent 15 (Church Board of Benevolence): The respondent felt that legislation in Namibia was not always clear regarding aspects concerning children, for example the age of a child to participate in making decisions regarding where he or she wanted to live or when his or her voice should be heard. Below are some of the verbatim quotes of the respondent:

'n Probleem in Namibië is dat ons wette rondom kinders nie altyd so duidelik is nie, bv. op watter ouderdom kan 'n kind self besluit waar hy wil bly of wanneer as ons na 'n kind se stem luister, word dit in ag geneem? As ons volgens die kind se

ontwikkeling en volwassenheid oordeel, hoe definieer ons dit, want my definisie van 'n kind se volwassenheid en joune mag dalk heeltemal verskil.

Respondent 16 (Advocate): The respondent felt that Namibia had sound legislation regarding children, but that there were gaps and challenges in the implementation. Below are some of the verbatim quotes of the respondent:

Sound legislation exists

Gaps are in the implementation.

Respondent 17 (Child commissioner): The respondent saw various problems and concerns regarding the implementation of the Child Care and Protection Act. Although the content of the Act was new, it was complex. There were still many questions and uncertainties regarding how and by whom it would be implemented. The respondent felt that social workers in the current legislative framework were already a frustration due to services, such as reconstruction services and foster care that were not rendered. They struggled to maintain the old system. The concern would, therefore, be: If they already struggled in the past, would they have the capacity and expertise to deal with the new legislation? Currently it could take up to a year for the court to obtain a report from a social worker.

The fact that the Status Act was incorporated in the Child Care and Protection Act, made the Act even more complex. The general feeling was that the Child Care and Protection Act was cumbersome and could have worked more easily. There appeared to be a problem with the understanding of the terms, and the lack of provision of a family advocate was seen as a further drawback. Below are some of the verbatim quotes of the respondent:

New act is complex.

Still a lot of questions and uncertainties regarding the new legislation, e.g. who is going to implement the act.

The new act makes provision for enormous responsibilities.

Stahl (2011:46) emphasizes that it is important for child custody evaluators to understand the law. According to Gould and Stahl (Gould & Martindale (2009:167), the primary focus of evaluators is also to understand child development research, and how to apply it to each case. This is also true for professionals in Namibia. The researcher is of the opinion that although the Child Care and Protection Act is new, many respondents are unfamiliar with its content and implications. This creates many uncertainties not only for legal professionals, but also for health care professionals. Various obstacles and challenges still have to be overcome before the Act can be implemented. This will still take some time and it will take even more time to smooth out challenges in practice. The researcher is of the opinion that Namibia has sound legislation pertaining to the protection of children. It would be interesting to see the effect of the new Act on children's status and their best interests in Namibia in a few years' time.

The researcher is of the opinion that although children in Namibia are protected by a wide range of international and national instruments, respondents' knowledge in general, regarding existing legislation is limited, except maybe for social workers and lawyers. Many of the other professionals, for example psychologists, are not always aware of legislation and how it impacts their roles, as well as the children they work with. Respondents, especially in the legal field, however, agree that Namibia has "*excellent and sound legislation*" regarding children, but the "*implementation*" due to various reasons, is a huge challenge. To this could be added the importance of an understanding of the child within his or her particular developmental context.

The Child Care and Protection Act, in general, is new and to, a large extent, viewed with uncertainty and lack of knowledge by the respondents contacted. Many respondents were not aware of the existence of such an Act. Others knew about it, but were not yet familiar with the content or knew how it would be implemented or affect their work. Many respondents were also unaware of the processes currently

in progress to make the Child Care and Protection Act more user-friendly and understandable, not only for professionals but also for communities.

According to legal respondents, Namibian lawyers worked strictly according to the common law. This means Namibia still works according to the "principle of guilt". This may have implications for, and effects on, how child custody and control cases are to be dealt with. This may have a major impact on children of divorce, due to the fault-finding principle, which increases conflict between parents and, consequently, impact children's emotional well-being.

The researcher is also of the opinion that in many cases decisions not in the best interests of children are made, because professionals, dealing with these cases, are not aware of the relevant legislation. This is especially true for private practitioners in the health professional field. Terms are also often used without a full understanding of their definitions or implications.

The researcher is of the opinion that Namibia has sound legislation regarding children and their protection. The problem, however, lies with the implementation of such legislation, and with the professionals who work with the Act. Tremendous challenges in the implementation still have to be dealt with; these had been challenges even before the new Act was passed. Some challenges are a lack of resources and manpower, as well as the distribution of responsibilities and roles among government officials and professionals.

The political climate and political issues will also determine what has priority. Currently in Namibia, the political focus is on the Hague Convention and on violence against women and children. With the increased level of violent acts against women and children in Namibia, Namibia's outgoing President in 2014 called for a national crisis convention regarding the epidemic of violence, and declared it a priority to deal with the issue.

The Legal Assistance Centre stressed the importance of creating awareness, not only for professionals working with the Act, but also for community members.

Hopefully by giving training and distributing constant guidelines and circulars to professionals and magistrates, awareness can be increased.

As many respondents stated, the need for networking among professionals to share information, as well as to be involved in especially national issues that concern their work, is huge. The government, especially the Ministry of Women, Child and Gender Equality and the Ministry of Justice, could play an important role to involve more private professionals, instead of just focusing on staff members. Various respondents expressed that they experienced a lack of training opportunities in national issues and were mostly excluded from such training. Government social workers, however, expressed the same need for training, as they felt that the current training they received was often not in line with the new tendencies or relevant issues in their field of work.

6.2.2 Subtheme 2: Challenges of the new Child Care and Protection Act

Below is a summary of the respondents' responses regarding the challenges of the new Child Care and Protection Act:

Respondent 1 (Legal Assistance Centre): Although the Child Care and Protection Act had been passed, regulations still needed to be compiled before the Act could be implemented. The Act, however, dealt with a vast area of issues. Political issues and the political climate would also determine what would have priority in Namibia.

The respondent also expressed the need for awareness and training. Training, however, could only start when the regulations had been published. Ministries also needed to source money for training, which again would have huge implications for their available resources. Various problems with the implementation of the Act were foreseen. Below are some of the verbatim quotes of the respondent:

Roles still need to be defined.

Ministries also have to source money for training. This will have massive implications for the resources of the ministries.

Currently everyone is still figuring out who will do what

Respondents 2 to 5 (Lawyers and court-appointed mediators): According to the respondents, there were gaps in the implementation of legislation in Namibia. Many participants were also not yet familiar with the content of the new Child Care and Protection Act. Below are some of the verbatim quotes of the respondents:

Unfamiliar with the content

Gaps in the implementation

Respondents 6 to 8 (Private social workers): During interviews respondents expressed their uncertainty regarding the content of the new Child Care and Protection Act, as well as how it would be implemented. There was also uncertainty regarding their own roles.

Respondents 9 to 11 (Government social workers): Respondents expressed their uncertainty regarding the new Child Care and Protection Act and how it would be implemented. They were also of the opinion that, although Namibia had sound legislation pertaining to children, the implementation of this legislation often created a problem. One respondent stated that the New Child Care and Protection Act was so vast and covered so many facets that it could lead to some of the aspects being neglected if someone did not specifically focus on it. Below are some of the verbatim quotes of the respondents:

Gaps are in the implementation and how it will be implemented

The Act has so many facets, if a person does not specifically focus on it, it can be neglected.

Respondents 12 to 14 (Psychologists): Most respondents stated that the Child Care and Protection Act was unknown to them. Only one respondent was unsure about its content or impact on professionals and children. A need was expressed for more collaboration between professionals, but also between Ministries and private professionals in order to stay up to date with national issues. Below are some of the verbatim quotes of the respondents:

Private practitioners lose touch with legislation or national issues.

Not sure what is the content and how it will impact on children and psychologists.

More collaboration between professionals is needed.

Respondent 15 (Church Board of Benevolence): The respondent felt that legislation in Namibia was not always clear, regarding aspects concerning children, for instance the age of a child to participate in making decisions regarding where he or she wanted to live or when his or her voice should be heard. Below are some of the verbatim quotes of the respondent:

'n Probleem in Namibië is dat ons wette rondom kinders nie altyd so duidelik is nie, bv op watter ouderdom kan 'n kind self besluit waar hy wil bly of wanneer as ons na 'n kind se stem luister word dit in ag geneem? As ons volgens die kind se ontwikkeling en maturity oordeel, hoe definieer ons dit, want my definisie van 'n kind se maturity en joune mag dalk heeltemal verskil.

Respondent 16 (Advocate): The respondent felt that Namibia had sound legislation regarding children, but that there were gaps and challenges in its implementation. Below are some of the verbatim quotes of the respondent:

Sound legislation.

Gaps are in the implementation.

Respondent 17 (Child commissioner): The respondent saw various problems and concerns regarding the implementation of the Child Care and Protection Act. Although the content of the Act was new, it was complex. There were still many questions and uncertainties regarding how and by whom it would be implemented. The respondent felt that social workers in the current legislative framework were already a frustration, due to services that were not rendered. They struggled to maintain the old system. The concern would, therefore, be: If they already struggled, would they have the capacity and expertise to deal with the new legislation?

The general feeling was that the Child Care and Protection Act was cumbersome and could have worked more easily. There appeared to be a problem with the understanding of the terms; the lack of provision of a family advocate was seen as a further drawback. Below are some of the verbatim quotes of the respondent:

New act complex.

There are still many questions and uncertainties regarding the new legislation, e.g. who is going to implement the act.

The new act makes provision for enormous responsibilities.

Judging from the responses of the respondents, the following are regarded as challenges:

- The vastness of the Act - everyone is still figuring out who will do what.
- Many respondents see a problem with its implementation.
- Minimum standards and regulations are still in progress.
- Roles of the different professionals still need to be defined.
- Ministries also have to source money for training. This will have massive implications for the resources of the Ministries.
- Political needs and current issues will also determine what will have priority.
- A process is needed to create awareness by compiling constant guidelines and circulars for professionals and magistrates.

- Training is needed, but can only start once the regulations have been published.
- Respondents still have many questions and uncertainties regarding the new legislation. Many are unsure how the Act will impact them and their work.
- From the legal side, there is the question of which role players are going to implement the Act. The new Act makes provision for enormous responsibilities. Social workers in the current legislation are a frustration, because they cannot deal with current demands of social work practice. With the new Act, the role and tasks of social workers are going to put a heavier burden on them in an already overburdened system. The expectation is that the new legislation will improve the system.
- Legal professionals are of the opinion that professionals struggled to maintain the old system. A new system could complicate progress even more.
- The Ministry of Women, Child and Gender Equality currently lacks the capacity and the expertise to deal with issues in the new legislation. It takes up to a year for the court to obtain a custody and control report from a social worker.
- There are concerns regarding the implementation of the new Act. Parents do not comply with court orders. An example is where parents just ignore the orders given in the maintenance court.
- The Act is cumbersome. It could have worked more easily. The Child Status Act that is also incorporated in the new Act makes it even more complicated. The Status Act on its own was already a problem.
- There are problems with the understanding of terms.
- No provision for a family advocate has been made in the new Act.
- According to respondents, problems are seen mostly with the implementation of the Act. Due to its newness and complexity, everyone still needs to become acquainted with it. There are many questions and uncertainties regarding the new legislation:
    - Who is going to implement it?
    - The Act makes provision for enormous responsibilities for both legal the legal and welfare system.
    - What will be the responsibilities of the different role-players?

6.3 Child custody and control report

Below is a summary of the respondents' responses regarding the child custody and control report:

Respondent 1 (Legal Assistance Centre): The respondent was not involved in custody and control reports, but in legislation in general in Namibia. Therefore, no response could be given regarding child custody and control reports.

Respondents 2 to 5 (Lawyers and court-appointed mediators): Respondents were of the opinion that the fact that lawyers in Namibia worked strictly according to the common law and guilt principle had an impact on the child custody report process. It had a huge impact on families and children in custody and control disputes, due to the fault-finding principle. Below are some of the verbatim quotes of the respondents:

Custody and control in essence is to get back at each other. All these actions have an effect on the children.

Children get traumatized.

Respondents 6 to 8 (Private social workers): During interviews all respondents reported that they experienced child custody and control as stressful, not only for parents and children, but also for them as professionals. The process was seen as conflict-ridden and damaging on various levels for families involved. Below are some of the verbatim quotes of the respondents:

'n Morsige stryd.

Conflict is more.

Sleg om vuil wasgoed te was terwyl die einddoel eintlik is om te bepaal waarheen die kinders moet gaan. Vuil wasgoed doen soveel skade.

Met toesig en beheer ondersoeke is die rimpeleffek baie groot. Het agterna met verwonde mense te doen.

Respondents were also of the opinion that the child custody report was not done properly. No standards or guidelines existed. Many professionals, who had very little experience or knowledge, were involved in the child custody process. New social workers struggled because they did not receive the proper exposure and supervision. Many professionals still focused on outdated approaches with reference to children's needs and age. This led to improper recommendations, for example a 2-year-old child who had to rotate weekly between the parents. Everything currently was about joint custody, and the child was lost in the process. It was more about parents' needs, or rather about the two parents and their two lawyers. The outcome depended on who the lawyer was and how much knowledge he or she had regarding family law and children. This again stressed the importance to focus on the best interests of the child and not on those of the parents. Below are some of the verbatim quotes of the respondents:

It is often not about the child but rather about the parent. The child's interest does not feature.

One respondent pointed out that each child should be seen as unique and, therefore, each child custody and control report should be written according to the child's specific needs and best interests. There should thus be clarity on the purpose of the report.

Respondents 9 to 11 (Government social workers): The respondents were of the opinion that there was no holistic approach within custody and control. No thorough processes were followed when doing child custody and control reports. Often only one party was assessed, and recommendations were then made on incomplete evaluations. Evaluations were not done thoroughly and were superficial. Criticism of social work, custody and control reports was not only received from legal professionals, but also in the social work profession. Social workers seemed to

struggle with custody reports and were, therefore, seen as biased, which could be improved if a clear scientific basis supported their work.

The impact of magistrates, who were not child-friendly, who lacked training regarding what was in the best interests of the child and who did not support or value social workers' recommendations, were also experienced as having an influence on the child custody report. Below are some of the verbatim quotes of the respondents:

No support from magistrates.

Magistrates change High Court orders according to the Child Status Act, without considering social workers' reports. Not all magistrates have the necessary knowledge.

There are problems with magistrates who are not trained or who do not understand the law when it comes to children.

Respondents 12 to 14 (Psychologists): Respondents interviewed had no formal training in custody and control reports. Many did not want to be involved in this field due to the trauma and high stress levels that accompanied these child custody and control reports. One respondent, however, did conduct child custody and control reports without training, or without structured guidelines to safeguard herself. Below are some of the verbatim quotes of the respondents:

Ek doen toesig en beheer ondersoeke op my manier.

No guidelines. I do as I think best.

It is not only clients who are traumatized through the child custody and control process, but also the professional who is involved.

Respondent 15 (Church Board of Benevolence): The respondent had no formal post-graduate training in child custody and control, but had, through peer consultation and own research, formulated her own structure. Below are some of the verbatim quotes of the respondent:

I have my own structure to do custody and control.

Respondent 16 (Advocate): The respondent stressed the importance of the context of information that was utilized in child custody and control reports. This was often lacking in reports. Courts were dependent on experts who could stand independently and unbiased regarding who paid her fees, who appointed her, and so forth. Health professionals should, therefore, be led by good judgement and what was in the best interests of the child. Child custody and control reports often failed due to a lack of the mentioned points. Below are some of the verbatim quotes of the respondent:

Professionals need to be led by good judgement in what is in the best interest of the child.

Information used in child custody and control reports should be given in context.

Courts are dependent on experts.

Respondent 17 (Child commissioner): During the interview, the respondent expressed her frustration, especially with social workers, when it came to the child custody and control report. There was a general feeling that the Ministry of Gender Equality and Child Welfare (MGECW) lacked the capacity and expertise to deal with child custody issues. This caused delays in reports that could take up to a year to get from a social workers. There were not enough social workers to do the work and there was a problem with social workers who lacked competence and did not understand the terms used in either child custody and control or legislation. Below are some of the verbatim quotes of the respondent:

Social workers in the current legislation are a frustration, because they do not do their work.

The Ministry of Gender Equality and Child Welfare *currently lacks the capacity and the expertise to deal with issues.*

The researcher is of the same opinion as stated by respondents during interviews, that child custody and control reports are in general viewed as stressful and complex and filled with challenges and risks. Especially mental health professionals felt 'traumatized', not only due to the stress of conducting a child custody evaluation, but also due to the conflict involved and the role lawyers played in the process. The possibility of going to court to testify or to be cross-examined, as well as being responsible for making decisions in the best interests of the children involved while balancing parents' rights, led to enormous stress. More than one respondent explained why they did not want to be involved in child custody evaluations:

I feel traumatized.

It is too stressful.

It is often not about the child but rather about the parent. The child's interest does not feature.

The researcher also experienced child custody and control processes as complex and conflict-ridden. Especially in Namibia, where the country is small and has a small population, stress and conflict can continue for months, even years, after the child custody evaluation has been completed, with antagonism towards the evaluator. The main reason for this is that people have easy access to the professional person who has done the evaluation. Parents seldom see recommendations in the light of their children's best interests, but rather as a win-lose situation. Often the battle does not stop, but multiple evaluations are done and various professionals are involved. In the end it is a battle not only between the parents but also among professionals, with the children as the losing party. This is

in line with literature where child custody evaluations are described as stressful and complex, not only for the evaluator, but also for the families involved (Bekink & Bekink, 2004; Bernadini & Jenkins, 2002; Dueck, 2004; Herman, 1999).

According to Zelechoski, Fuhrmann, Zibbell, and Cavallero (2012:457), custody and control evaluations are of the most criticized areas of forensic, mental health assessment due to the perceived lack of standardization in evaluation methods. Various sources (Froneman, 1999; Gould & Martindale, 2009; Ramolotja, 2000; Robinson, 2009) state that the field of child custody work is complex and filled with challenges and risks. In Namibia this is also true. Due to the lack of an association or regulating body to regulate standards of practice, very few resources are available to health and legal professionals working in the field of child custody.

Criticism is mostly aimed at the quality of work done by social workers. Legal and private professionals are of the opinion that evaluations and reports are not properly done. Especially new social workers in the field struggle if they do not have the proper exposure, supervision, guidelines and support.

Respondents felt that no holistic approach regarding children was followed. Very often only one party was assessed, and recommendations were then made on incomplete evaluations. Social workers' reports were biased. Respondents were also of the opinion that many health professionals did not have the background theory to deal with cases in a holistic approach. The general view was that there was a lack of standardization and thoroughness. Turkat (2005:9) states that there is no scientifically accepted interview format for conducting custody evaluations. The format, therefore, will vary across evaluators and so it is up to the evaluator to choose what questions will be asked. This is perhaps one of the major shortcomings of this kind of evaluation and has implications for the reliability of the instrument used.

Due to the fact that there is no standard procedure regarding child custody evaluations in Namibia, especially not among private evaluators, there are uncertainties, confusion and a lack of uniformity. The Ministry of Gender Equality

and Child Welfare (MGECW) provides a framework for child custody evaluations but, in general, there is no standard for consistency, which may be improved by a good theoretical background, among the different professions doing custody evaluations. Normally, such an evaluation will include interviews (with parents, children, and collaterals), observations, home visits and psychological testing. This is, however, not true for health professionals in Namibia.

Respondents, especially private social workers, felt that the focus and recommendations were often outdated and not in line with new research and global changes in the field of custody and control. This was especially true when it came to recommendations regarding children's best interests, especially with reference to children's needs and developmental age.

Social worker respondents in the field acknowledged this, but struggled with their own challenges, such as:

- No standardization or guidelines for custody reports. Guidelines that are currently used are outdated and not relevant to current needs. This is, however, not true for social workers only; many health professionals who were contacted did not have specialized training or guidelines for doing child custody and control reports.
- Not adequate support from magistrates. There are different understandings among different magistrates when it comes to children's best interests, for instance where magistrates change High Court orders according to the Child Status Act, without considering social workers' reports. There are misunderstandings about the powers of the High Court and lower courts. Not all magistrates have the necessary knowledge. There are problems with magistrates who are not trained or who do not understand the law when it comes to children. Magistrates are often seen as not child-friendly.
- Requests from the High Court for custody and control reports are increasing, especially the change of custody and control cases. Clients do not have the knowledge or financial resources to apply to the High Court. Due to this, many private arrangements take place without the High Court's interference.

- In custody and control disputes, it is about the two parents and their two lawyers. The outcome depends on "*who your lawyer is and how much knowledge he has on family law and regarding children*". It is often not about the child but more about the parent. The child's interests do not feature.

Legal respondents, however, highlighted the role of health professionals in giving the context of information to the courts as important. Courts are dependent on experts who can stand independently and not be influenced by who pays his or her fees, or who has appointed him or her, among others. Health professionals need to be led by good judgement regarding what is in the best interests of the child. This can only be done if understanding, description, prediction, interpretation, evaluation and recommendation were based on theory.

Respondents are of the opinion that every child should be seen as unique. If this is not done, it can lead to improper recommendations, for example for a 2-year-old child to rotate between the parents on a weekly basis. Understanding the impact of terms, such as joint custody, and its impact, on the child is important. Most children are lost in the process, and the focus is more on the parents' needs and rights. As explained by a lawyer, when dealing with family law, "*It is not about the parents' rights to their child, but their child's rights to his parents".*

The researcher is also of the opinion that professionals dealing with child custody, as well as parenting plans, often lack knowledge and experience in how to craft an evaluation so that the information gathered will meet the standards of admissibility required by the legal system (Bow & Quinnell, 2004:122). According to Ackerman (2006:3) and Rohrbaugh (2008:3), not all psychologists are qualified to perform child custody evaluations. Clinical skills in working with children and adults do not automatically lead to the ability to evaluate custody and control disputes. Competence is, therefore, gained through education, training, supervised experience, consultation, study and professional experience. Shock was expressed by respondents at how many psychologists, with very little experience and knowledge, were involved in custody and control evaluations. Respondents, in general, were of the opinion that child custody and control evaluations were not done properly.

Bow (2006:27) also states that sometimes child custody evaluators also have little or no training in child psychology, especially when evaluating children under twelve. The same happens in mediation. Many professionals in the field of child custody and control are still focused on outdated approaches with reference to children's needs and age. Their knowledge of custody and control processes and current research, as well as of children and what are in their best interests, is outdated and not in line with new research.

6.4 Parenting plans and mediation

6.4.1 Subtheme 1: New process

Below is a summary of the respondents' reactions regarding parenting plans and mediation as a new process in Namibia.

Respondent 1 (Legal Assistance Centre): The current format of the envisioned parenting plan would be very simple, more like the previous recommendations as done in custody and control. Much work still needed to be done before parenting plans could be implemented; this included creating awareness, training, drawing up regulations, and so forth. Below are some of the verbatim quotes of the respondent:

> *The current format will be very simple; more like the previous recommendation as done in custody and control.*

> *LAC is currently working on a comic format to give parents on a simplified way to understand parenting plans.*

> *It is more to set boundaries and is therefore flexible. The question is whether one should make it formal or not. Currently parenting plans do not need to be registered at court.*

Respondents 2 to 5 (Lawyers and court-appointed mediators): During interviews respondents were of the opinion that the envisioned parenting plan was still in its infancy. Structures in following a parenting plan would be essential in order to provide guidelines for all involved. Parenting plans should focus on practical arrangements that would help parents to keep within boundaries but, at the same time, also create security and routine for the children involved. A parenting plan provided a wide scope to strengthen parent-child relationships in a divorce situation. Below are some of the verbatim quotes of the respondents:

Ouerskapplanne en mediasie is in sy kinderskoene.

The scope is wide enough to work in all possible solutions to strengthen the bond and contact between parent and child.

Parenting plans also help to steer parents in a specific direction quickly.

Clients are skeptical of the mediation process. They feel they just want to get the divorce behind them, and see mediation as a waste of time.

It is still an uncertain process.

Respondents 6 to 8 (Private social workers): During interviews respondents were of the opinion that the envisioned parenting plans might be a softer, more constructive approach through mediation. They also felt that parenting plans had a higher possibility of including the best interests of the child. There was also more potential to inform and guide parents on the dimensions of the child's needs. There was, however, still uncertainty and a lack of knowledge regarding parenting plans and how they would work, as well as how they would impact the roles and responsibilities of professionals. Below are some of the verbatim quotes of the respondents:

I am not sure how mediation and parenting plans work.

Parenting plans should be a flexible process that can be adapted according to each family's unique needs.

It will only be an elite group of parents that will make use of parenting plans.

The process is often hastened to put a parenting plan on the table with the aim to change it later. Why? Why don't you follow a proper process in the child's interest?

Respondents 9 to 11 (Government social workers): During interviews the respondents expressed various concerns and uncertainties regarding the envisioned parenting plans. They were concerned about the feasibility of the parenting plans in the Namibian context, due to the ongoing impact of culture and cultural beliefs in Namibia, especially regarding women's and children's positions. There were further concerns that, with social workers' current workload and the lack of resources, the envisioned parenting plans could become an additional burden on an already exhausted capacity. Parenting plans were expected to be time-consuming and a long process, and with a lack of manpower in many regions, they might not be possible. Many concerns were also expressed with regards to the roles and responsibilities of professionals involved with divorce and parenting plans. A general lack of understanding and cooperation was experienced from lawyers and magistrates when dealing with children's best interests. Below are some of the verbatim quotes of the respondents:

Time-consuming and a long process.

Not enough manpower to carry out parenting plans in all the regions.

If custody and control gets to High Court cases parents are seldom at a point to discuss issues regarding their children. Not without their lawyers. How will parenting plans then work?

Problems with lawyers. They do not necessarily recommend parenting plans as an option.

The process would be difficult if you do not have social workers specifically allocated to do parenting plans or whose job it is to focus on it.

It would be difficult due to the workload of social workers.

The clients that government social workers work with.

Training around the new act and the envisioned parenting plans is still lacking and might help if it could be given.

Social workers do draw up good parenting plans, but they are not implemented.

Social workers make recommendations, but magistrates will follow their own ideas.

The feeling is that the client with the best lawyer wins and what the child needs is not the biggest priority.

Parents do not stick to the parenting plan. After three months there are comebacks.

Social workers do not always have the time or the know-how to follow up to see if it works.

It is not easy to draw up a parenting plan due to conflict between parents. Interviews are used to keep parents apart rather than being constructive.

If parents are angry with each other, they do not understand the child's best interest.

Use own discretion for the format of the parenting plan. Sometimes it is verbal, sometimes in writing so that both parents have to sign. It is mostly about the parents' rights or an opportunity to assist clients with the distribution of their estate.

There is a need for a type of assessment to determine each family's unique needs as well as those of the child at the beginning of parenting plans.

Respondents 12 to 14 (Psychologists): During interviews only one respondent admitted to doing parenting plans. However, no formal training or structure was in place. The other respondents were aware of parenting plans, but not sure how they would work in the future. Below are some of the verbatim quotes of the respondents:

Doen dit op my manier.

I have no guidelines. I do as I think best.

Respondent 15 (Church Board of Benevolence): The respondent felt that parenting plans were still a new concept and this created various uncertainties around the process and what was expected. She was, however, excited about the possibility of having an alternative to child custody reports. Training, however, was seen as essential before one could start with parenting plans.

Respondent 16 (Advocate): The respondent felt that the envisioned parenting plans could have value in the Namibian context. Professionals involved, however, would have to be led by good judgement and by what was in the best interests of the child. Concerns were expressed about the implementation of these plans. Below are some of the verbatim quotes of the respondent:

Sound legislation.

Gaps in the implementation.

Respondent 17 (Child commissioner): The respondent expressed concerns regarding the implementation of the envisioned parenting plans, especially due to the Ministry of Gender Equality and Child Welfare's lack of capacity and expertise. The concern was also expressed that there had been various problems with the implementation and management of the old system of child custody and control.

Parenting plans would just add to an already challenged field. Social workers in the current legislation were a frustration, because they did not do their work. With parenting plans this frustration might increase, which in the end could have an impact on children and their best interests. Below are some of the verbatim quotes of the respondent:

Problems with the understanding of terms.

Problems with implementation.

Too few social workers.

It is envisaged that the new process will provide an opportunity to deal with these challenges in a constructive, planned fashion.

6.4.2 Subtheme 2: The importance and place for parenting plans in Namibia

Below is a summary of the respondents' responses regarding the importance and place of parenting plans and mediation in Namibia.

Respondent 1 (Legal Assistance Centre): The respondent felt that the importance of parenting plans lay in the fact that it helped to set boundaries and was, therefore, a flexible document that could be adapted to each child's needs. Below are some of the verbatim quotes of the respondent:

It is rather to set boundaries and is therefore flexible.

Respondent 2 to 5 (Lawyers and court-appointed mediators): Respondents were of the opinion that the importance of parenting plans lay in their practicality and the structure they could provide for parents and children in a life-changing and traumatic event in their lives. It was believed that the envisioned parenting plan could focus more specifically on what was in the best interests of children involved in divorce

disputes, and could give direction to parents and children in a very uncertain period of their lives. Below are some of the verbatim quotes of the respondent:

It provides structure and practical arrangements.

Parenting plans do not only help parents to keep within boundaries, but it also creates security and routine for children.

The scope is wide enough to work in all possible solutions to strengthen the bond and contact between parent and child.

Parenting plans also help to get parents heading in a certain direction quickly.

Respondents 6 to 8 (Private social workers): Respondents during the interviews were of the opinion that parenting plans were a more constructive approach through mediation than litigation. They were also of the opinion that the child's best interests were more paramount in parenting plans. Parenting plans were seen by one respondent as a flexible process, where each family's needs could be incorporated. Some respondents were, however, of the opinion that cultural influences, with regards to how children were viewed, might impact how parenting plans would be received by various communities. For parenting plans to be of value, respondents expressed the need that they should become a court order. Below are some of the verbatim quotes of the respondents:

Softer, more constructive approach through mediation.

It includes the best interests of the child.

More potential to inform and guide parents on what the child's needs are.

Parenting plans not applicable in certain cultures, especially in the North and among the more traditional people. It is more of a Westernized

approach. Culture dictates where children and estate should go, even if there is a legal decision.

Parenting plans should be a flexible process that can be adapted according to each family's unique needs.

Respondents 9 to 11 (Government social workers): The respondents who were interviewed expressed feelings of being overwhelmed by their current workload, as well as experiencing frustrations due to a lack of support. Parenting plans were, therefore, viewed as more work and frustration. Respondents, however, acknowledged the fact that parenting plans could be a more holistic approach towards handling all aspects of divorce. Below are some of the verbatim quotes of the respondents:

Time-consuming and a long process.

Not enough manpower to do it in all regions.

Due to the time it takes, by the time the social worker has to draw up a custody report for the High Court it often means that parents are already in the process where they cannot come to an agreement.

It would be difficult due to the workload of social workers.

An opportunity to assist clients with distribution of estate distribution.

More holistic. Handling of all aspects of divorce.

Respondents 12 to 14 (Psychologists): Respondents expressed the value of parenting plans, especially as being a more constructive process than child custody and control. Due to uncertainties pertaining to implementation and how parenting plans would work, as well as a lack of knowledge, the introduction of parenting plans could not be discussed in more detail. Below are some of the verbatim quotes of the respondents:

No guidelines. I do what I think is best.

Private practitioners lose touch with legislation or national issues.

Respondent 15 (Church Board of Benevolence): The respondent felt that the concept of parenting plans was still new, and this created various uncertainties around the process and what was expected. She was, however, excited about the possibility of having an alternative to child custody reports. Training, however, was seen as essential before one could start with parenting plans. Below are some of the verbatim quotes of the respondent:

Ek is nogal opgewonde daaroor.

Baie sake wat vir custody kom voel ek is geld mors en kan met mediasie hanteer word.

Ek het nog nie baie blootstellling aan die mediasie proses nie, maar wil graag deel word van die groep.

Ek voel daar is definitief 'n plek daarvoor.

Respondent 16 (Advocate): The respondent felt that the envisioned parenting plans had value in the Namibian context. Professionals involved, however, would have to be led by good judgement and in what was in the best interests of the child. Concerns were expressed about the implementation of parenting plans. The respondent viewed parenting plans as a flexible document that could grow with families and children's needs. Below are some of the verbatim quotes of the respondent:

Settlement, but not cast in stone.

Vloeiende dokument.

Respondent 17 (Child commissioner): The respondent acknowledged that there were still too many uncertainties around the workability of parenting plans in the Namibian context. Below are some of the verbatim quotes of the respondent:

Unsure of the workability of parenting plans.

Parents seldom get over their issues and if they do new ones are created.

The researcher agrees that the concept of parenting plans is new in Namibia. This creates various uncertainties and doubts regarding the workability of parenting plans within the Namibian context. Many challenges still have to be overcome before the new Child Care and Protection Act is implemented, and the workability of parenting plans can be evaluated and adjusted according to the Namibian context. The pitfalls and problems of the old system must serve as a basis for the development of the new system. New legislation open new possibilities.

Mediation as an alternative process to litigation has various advantages (Cohen, 2011; Gauvreau, 2012; Kitzmann, Parra and Jobe-Shield, 2012; Mienkowska-Norkiene, 2012; Uugwanga, 2010). Families are also better served by mediation than by litigation, and it may help to protect the best interests of children. It can help parents going through a divorce to set boundaries and is, therefore, flexible. Parenting plans also help to move parents in a certain direction quickly.

Parenting plans can help parents with practical arrangements regarding children's issues. This is not only to keep parents within boundaries, but it also creates security and routine for children. It is important when drawing up parenting plans, to look at the practical implications. Practical implications can be considered. Parenting plans give a wide enough scope to work on all possible solutions to strengthen the bond and contact between parent and child. They bring functionality to a disorganized family system.

Children can, therefore, benefit if a mediation process minimizes bitterness between the parents. With the shorter duration and less intensity of conflict, children's

exposure to, and involvement in, inter-parental conflict are reduced. According to Gauvreau (2012:15), research shows that cooperative parenting is positively associated with the quality of the relationship of the non-custodian parent and the child, regular contact, as well as contact with the extended family. A strong support network during a major life transition, as well as a positive environment for the child, is consequently provided. According to Cohen (2011:228), it fosters more child-focused communication.

Parenting plans can, therefore, be viewed as a softer, more constructive approach through mediation. They also include the best interests of the child, and there is more potential to inform and guide parents on the child's needs. Parenting plans are thus viewed as an excellent tool to incorporate children's rights and their best interests due to the uniqueness of each family's own needs. Parenting plans are also seen as flexible, and they can grow with children's needs.

The researcher is of the opinion that the formality of a parenting plan gives parents more legal enforceability. If parenting plans are not made formal, the possibility of their not being carried out and that the conflict, therefore, will be continuing, is high.

6.5 The impact of culture

Below is a summary of the respondents' responses regarding the impact of culture on the implementation of parenting plans:

Respondent 1 (Legal Assistance Centre): The respondent was of the opinion that culture did not need to be a challenge, because each family's culture could be incorporated in parenting plans.

Respondents 2 to 5 (Lawyers and court-appointed mediators): Respondents were of the opinion that professionals working with mediation and parenting plans needed to make an effort to understand culture in order for them to deal appropriately with it when necessary.

Respondents 6 to 8 (Private social workers): Respondents were of the opinion that culture would have an impact on parenting plans. One respondent felt that culture should always be taken into consideration. Doubt was, however, expressed whether parenting plans would be effective, especially in rural areas. Below are some of the verbatim quotes of the respondents:

Parenting plans might not be applicable in certain cultures, especially the North of Namibia and among the more traditional people.

It is a more Westernized approach.

Culture dictates where children and the estate should go, even if there is a legal decision.

In many cultures in Namibia best interests of the child are not embraced nor understood.

Many professionals come with their own cultural beliefs regarding the best interest of the child or how children are viewed.

Children, especially in rural and traditional areas, are still only seen and not heard.

Children's best interest is not paramount.

Respondents 9 to 11 (Government social workers): The respondents expressed various concerns and uncertainties regarding the role that culture could play in the envisioned parenting plans.

The respondents were of the opinion that culture was an integral part of their clients' system, which already had its own determination of aspects about children and custody. They were concerned about the feasibility of parenting plans in the Namibian context, especially due to the impact of culture and cultural beliefs in Namibia, specifically regarding women and children's position in certain cultures. Below are some of the verbatim quotes of the respondents:

Culture should definitely play a role in parenting plans.

It is already visible with specific clients where you do not necessarily work out a parenting plan, but work out specific guidelines to handle a conflict situation.

Although you give different options, clients will fall back into their culture.

Clients' level of understanding might also play a role. The more educated clients are, the more open they will be for guidance, family therapy, etc.

It might work for private social workers' clients, but not necessarily for our type of clients.

Respondents 12 to 14 (Psychologists): During interviews one respondent explained the impact of culture as follows:

According to culture (Oshivambo culture) the extended family is involved. No one worries about what will happen to a child. Normally grandparents take over. Each child has lots of "moms" and "dads".

There were also concerns about how certain definitions within a culture, for instance of what elements did a family consist, would be put into the Act. The respondent explained:

Some cultures have definitions that are not part of the Western world

Respondent 15 (Church Board of Benevolence): The respondent felt that parenting plans could be a solution to deal with clients' various cultural beliefs and perceptions regarding children.

Respondent 16 (Advocate): The respondent felt professionals' own cultural beliefs had a larger impact than those of clients on how parenting plans would be dealt with.

Respondents 17 (Child commissioner): The respondent acknowledged the role of culture and its impact, not only with regards to the culture of the parents, but also that of professionals, especially magistrates. Parents often did not understand orders from courts, especially if these were not in line with their culture.

Different and opposing views were expressed regarding the role of culture in the development and use of parenting plans. It was evident, however, that most respondents were positive about the role of culture, stating that it should be considered in parenting plans. It should be accepted as something that would have an impact on parenting plans. There were, however, some respondents who believed that the best interests of the child were not embraced or understood in many cultures, with the implication that this would make parenting plans unworkable. A view to be considered that was expressed was that, specifically amongst Oshivambo speakers, culture determined what happened to a child; the assumption was thus that parenting plans were not necessary.

It is indeed true that if parenting plans are regarded as foreign and in conflict with some cultural beliefs, they cannot be imposed on parents. To develop parenting plans within the more traditional, cultural frameworks will indeed be a challenge, but more research needs to be done on the topic of culture. The truth is that culture needs to be understood, if it is to be used as a strength in parenting plans.

6.6 Roles of mediators involved with parenting plans

6.6.1 Subtheme 1: Role of lawyers, court-appointed mediators and other legal professionals

Below is a summary of the respondents' responses regarding the role of lawyers, court-appointed mediators and other legal professionals.

Respondent 1 (Legal Assistance Centre): The respondent stressed that Namibia was in a new process with the New Child Care and Protection Act. Roles and responsibilities still needed to be sorted out and defined. Below are some of the verbatim quotes of the respondent:

Roles and responsibilities still need to be sorted out and defined.

Respondents 2 to 5 (Lawyers and court-appointed mediators): Respondents were of the opinion that lawyers did, at times, act in the parents' best interest and not in that of the children. Lawyers also did not always make use of health professionals to guide them in the best interests of the child. Mostly children were left behind in the process and the focus was more on parents' needs and rights.

During interviews these respondents stressed the fact that, as court-appointed mediators, they had received formal training. One respondent, however, stressed the concern that there was no examination or following up on skills. Many of the court-appointed mediators had no background in family law, and, therefore, had no knowledge or experience to determine whether decisions were practical or in the best interests of the child. Few considered alternative options regarding the best interests of the child, due to a lack of knowledge regarding age-appropriate options for the concerned child. Below are some of the verbatim quotes of the respondents:

No criteria or requirements on who can be a mediator.

No requirements to mediate divorce cases, e.g. legal or mental health background.

Will get mediators with no experience or knowledge on divorce matters or family law.

If mediators may not mediate it is not based on competence but rather on not turning up for mediation. Therefore limited mediators.

Regters vra geen vrae nie.

There is no more background for a judge to make a decision or to find out what the concern was. It appears that if a mediator comes back to court with a successful mediation, it is just accepted, no matter what the content.

Courts are full. Aim is to get cases faster through the process.

A mediator with no experience. The lawyer then has to take over the process over. This defeats the whole purpose.

Difference between private mediation and court-appointed mediation. Work with different type of client.

Unsure who will be responsible for what. Unsure who will be allowed to do mediation and who will be allowed to do parenting plans.

Many lawyers do not have knowledge regarding children's developmental stages and what would be in their best interests.

Many court-appointed mediators do not realize the implications of just getting to an agreement that needs to be enforced. Many do not realize the practical implications of the how and when.

If a lawyer does not ask for a health professional's input it will not be used.

Children's court is very frustrating and takes long.

Best interest of the child is plain logic or experience.

Children are not heard.

Lawyers and parents often decide what is in the best interest of the children without consulting the child or checking with a child expert.

Respondents 6 to 8 (Private social workers): Respondents were of the opinion that very few lawyers and court-appointed mediators were child-focused. Below are some of the verbatim quotes of the respondents:

Court-appointed mediators do not have experience or knowledge regarding family law and child development. They should have a background of family law.

The need for a family advocate to do case management and planning and oversee children's best interest with regard to child custody cases as well as parenting plans.

Respondents 9 to 11 (Government social workers): Respondent felt that lawyers had a huge impact on dealing with divorce cases and what options and guidance clients were given regarding the process of divorce. Lawyers often contributed to the conflict between parents, and the child was left in the middle. Lawyers were seen as the direct link between clients and the court. Respondents felt that it was the responsibility of the lawyers to children to request reports or parenting plans from health professionals.

Respondents were also of the opinion that they did not receive support from magistrates. They stated that their experience was that there were different perceptions of different magistrates when it came to children's best interests. Magistrates did not always consider social workers' reports. There also appeared to be misunderstandings regarding the power of the High court and lower courts.

Respondents stated that not all magistrates had knowledge regarding children's best interests. There was also a problem with magistrates who were not trained or who did not understand the law when it came to children.

The respondents were of the opinion that magistrates were not always child-friendly, and they received no support from them. Requests from the High Court for custody and control reports were increasing, especially a change of custody and control cases. Below are some of the verbatim quotes of the respondent:

Cases often depend on lawyers' openness to act in the child's best interest.

Lawyers need to be more child-focused.

The client with the best lawyer wins and not what the child needs.

Lawyers are not always child-friendly.

The outcome depends on "who your lawyer is and how much knowledge he has on family law and regarding children". Often it is not about the child but mostly about the parent. The child's interest does not feature.

Respondents 12 to 14 (Psychologists): Respondents were of the opinion that clients wanted their lawyers to be present in mediations. This complicated the mediation process and increased the conflict and tension. Lawyers' pressure often caused health professionals to disregard children's best interests in favour of those of the parents in order to get out of a conflict-ridden situation. The need for more cooperation between professionals was expressed. Below are some of the verbatim quotes of the respondents:

More collaboration between professionals is needed.

Court-appointed mediators are negatively experienced. A feeling that the mediator does not know what to do.

Respondent 15 (Church Board of Benevolence): The respondent expressed the need for a family advocate.

Respondents 16 (Advocate): The respondent was of the opinion that the need in Namibia was for a family advocate who could oversee child cases.

Respondent 17 (Child commissioner): The respondent experienced lawyers as a problem in mediation. She felt that lawyers did not advise or guide their clients in the children's best interests. Magistrates were also seen as lacking in training. Below are some of the verbatim quotes of the respondent:

No provision for a family advocate.

Lawyers are experienced as a problem in mediation.

Lawyers do not advise or guide their clients in children's best interest.

Several significant themes emerged from the respondents' views regarding the role of mediators involved in parenting plans. Firstly, the need for a family advocate, who could co-ordinate cases where children were involved, was expressed. Secondly, there seemed to be reservations about court-appointed mediators. Skepticism about their knowledge and backgrounds were expressed. It also appeared as if poorer clients were served by court-appointed mediators. The third theme emerging from the responses was that lawyers seemed to work only in the interests of the parents and not in the interests of the child. This can be explained by the perspective and scope of practice of lawyers. It must be accepted that they will work from their own logic and experience.

In conjunction with this were the responses that magistrates (Commissioners of Child Welfare) did not always give their support, and lacked understanding of the reports of social workers. In this regard, like in the case of lawyers, the perspectives and roles of magistrates should be understood. They are legal and not health professionals. It is also important that reports from social workers presented in children's and other courts meet certain the requirements to achieve the purposes they were written for.

It also appeared that legal professionals were frustrated with various professionals in the legal field. The current court-appointed mediators were experienced as a frustration, due to their lack of knowledge and exposure. According to lawyers and health professionals, court-appointed mediators did not always have the knowledge and skills to mediate in all aspects of the divorce process. Currently court-appointed mediators were chosen from a list. Many had no family law background, and came from different professions, such as architects, quantity surveyors, and the like. They did not have the necessary knowledge and skills to deal with families and children either. Many did not understand children's needs and what was in the best interests of children. The Children's Court was very frustrating and worked slowly.

6.6.2 Subtheme 2: Role of health professionals

Respondent 1 (Legal Assistance Centre): The respondent stressed that Namibia was in a new process with the New Child Care and Protection Act. Roles and responsibilities still needed to be sorted out and defined. Below are some of the verbatim quotes of the respondent:

Roles and responsibilities still need to be sorted out and defined.

Respondents 2 to 5 (Lawyers and court-appointed mediators): Legal respondents, however, highlighted health professionals' role in giving the context of information to the courts as important. Courts were dependent on experts who could stand independently and not be influenced by who paid his or her fees, or who appointed him or her, and so forth. Health professionals had to be led by good judgement in what was in the best interests of the child, and not, as stated by a respondent, with "*no guidelines but do as I think is best"* or according to *"op my manier".* Below are some of the verbatim quotes of the respondent:

Social workers and psychologists play an important role in this process and can be used constructively.

In the past lawyers were careful to allow parents to make decisions regarding the children on their own. They rather referred the clients to a health professional to make the decision or to assist the lawyers in making decisions.

Not all lawyers are child focused or will use health professionals to assist in cases where children are involved.

Cases where parents reside in different towns are challenging, because lawyers cannot check each parent's circumstances and need a mental health professional to do so.

Respondents 6 to 8 (Private social workers): The new Child Care and Protection Act talked about designated social workers. There was still uncertainty about how this would be defined and how it would impact private social workers' roles and responsibilities. Respondents also expressed their concern regarding conflict that was experienced between private social workers, and also among different professions.

Respondents felt that the focus and recommendations were often outdated and not in line with new research and global changes in the field of custody and control. This was especially true when it came to recommendations regarding children's best interests, specifically with reference to children's needs and developmental age. Below are some of the verbatim quotes of the respondent:

Conflict between the different professions.

Uncertainty of professional roles and boundaries, especially between different professions.

A general feeling that some professionals work in fields where they should not or do not have necessary the expertise.

A need for peer group consultation

A need for an association for mediation and custody and control

Respondents 9 to 11 (Government social workers): Respondents expressed their uncertainty regarding their roles and responsibility as stated in the new Child Care and Protection Act. A lack of knowledge and training also created uncertainty, especially with issues such as parenting plans and mediation.

Respondents in the field also acknowledged their own struggles and challenges, such as a lack of standardization or guidelines for custody reports and parenting plans. Guidelines that were currently used were outdated and not relevant to current needs.

Respondents 12 to 14 (Psychologists): Respondents expressed uncertainty regarding the new Child Care and Protection Act and how it would impact their roles. The need for more collaboration between different professions, and also between private practitioners and government, was also expressed, in order to keep abreast of legislation and national issues. Below are some of the verbatim quotes of the respondents:

More collaboration between professionals

See own role as that of a peace keeper

Often involved in dual roles.

Respondent 15 (Church Board of Benevolence): The respondent expressed her own uncertainty regarding her role within the new Child Care and Protection Act. The lack of cooperation among professionals, especially health professionals, often left professionals isolated and without peer support. Below are some of the verbatim quotes of the respondent:

Die kliënte wat ek kry is obvious kliënte wat betaal. Ek dink van die staat se maatskaplike werkers sien baie keer kliënte wat nie kan bekostig om privaat ouens aan te stel nie en hulle kan ook nie bekostig om terug te gaan na 'n prokureur toe nie. So baie goed word net vining afgehandel om geld te spaar en dan kan estate verdeling en maintenance die kliënt help. Dis egter ook goed waaraan ek nie wil vat nie. Daar is baie wette betrokke en goed wat ek nie aldag verstaan nie.

En dan is die gevaar dat ek dink hierdie goed,'n mens so kan opneem dat jy baie vining kan vergeet van die kind. So ek dink dit is 'n opsie op sy eie.

Ek voel dat daar eerder 'n verdeling moet wees. Laat die maatskaplike werker fokus op die kind en die prokureur, wat in elk geval met estate verdelings en maintenance werk, daaraan aandag gee.

Die probleem vir my onder veral die maatskaplike werkers is dat ons prioriteite vanuit ons werkslading verskil. Ek soek 'n parenting plan van die maatskaplike werker waar die stem van die kind moet gehoor word, maar haar prioriteit is nou 'n kinderhofsaak waarvoor sy in die hof moet verskyn. Sy het nie tyd om die kind te sien nie.

Ek dink tydsbestuur kan soms challenging raak met 'n lack of resources en dan kom ons nie uit by wat belangrik is nie.

Ons verstaan ook nie altyd mekaar se velde en die uitdagings wat elkeen in die veld beleef nie.

Respondent 16 (Advocate): According to the respondent, the court was dependent on mental health experts to make decisions in the best interests of the child because the final test for child cases was what was in the best interests of the child.

Respondent 17 (Child Commissioner): There were still many questions and uncertainties regarding the new legislation, like who was going to implement the Act. The new Act made provision for enormous responsibilities, while everyone still struggled to maintain the old system. Social workers in the current legislation were experienced as a frustration, because they did not do their work in terms of reconstruction services, foster care, and the like. The experience was that the Ministry of Gender Equality and Child Welfare lacked the capacity and the expertise to deal with issues, such as parenting plans, in the new legislation. Below are some of the verbatim quotes of the respondent:

Struggled to maintain the old system

The Ministry of Gender Equality and Child *Welfare currently lacks the capacity and the expertise to deal with issues in the new legislation.*

Too few social workers to deal with the demands of what is needed.

It takes up to a year for the court to get a custody and control report from a social worker.

Work not properly done.

No proper exposure.

Processes and recommendation are outdated and improper

The lack of conformity and standards, however, in “how” to determine the best interests of the child, to draw up parenting plans, amongst others, hampered this. Professionals also did not seem to remain updated on new research or legislation, especially across professional fields. This often led to children’s rights and their best interests being ignored due to professionals’ own ignorance or lack of knowledge.

The researcher is also of the opinion that mental health professionals do play an important role and could be used constructively in the process of mediation and assisting the court with parenting plans. But there were still many uncertainties regarding mental health professionals’ roles and responsibilities regarding who would be allowed to do mediation and who would be allowed to do parenting plans.

Mental health professionals, however, should work more closely together, instead of against each other. With the limited number of mental health professionals available to cover the whole of Namibia, professional support and guidance are essential. The lack of these often leads to isolation and services not in the best interests of children.

The overlapping of boundaries with professionals currently involved with child custody and control, parenting plans and mediation often leads to misunderstandings and conflict. The uncertainty regarding boundaries, guidelines, structure and roles among different professions complicates networking even more. There was a general feeling among the respondents that some professionals were working in fields where they should not, or where they did not have the necessary skills, knowledge, training, experience or expertise. This especially refers to children and their best interests.

One respondent states: "*Die probleem vir my onder veral die maatskaplike werkers is dat ons prioriteite vanuit ons werkslading verskil. Ek soek 'n parenting plan van die maatskaplike werker waar die voice van die kind gehoor moet word, maar haar prioriteit is nou 'n kinderhofsaak waarvoor sy in die hof moet verskyn. Of sy het nie tyd om die kind te sien nie."*

Time management and a lack of resources will also be a challenge. Conflict between health professionals, especially government social workers and the legal system, often arises from a lack of resources and time management. What may be of importance for one professional, like removing a child to safety vs having a parenting plan ready, often differs from what another finds important.

Due to high workloads, many government social workers do not meet the demands of courts, reports, parenting plans and what is expected of them. One respondent stated: "*Ons verstaan ook nie altyd mekaar se velde en die uitdagings wat elkeen in die veld beleef nie*."

According to government respondents, the problem lay with the management in the various Ministries involved. Many felt that there was no progress or no forward movement. Management was not always in touch with what was happening in the field.

The system was experienced as a frustration, because of incompetence, persons operating in the system without the necessary training or who did not act in the child's best interests. A respondent said that "*We have all these laws, but no one is trained*." Due to the fact that no ethical guidelines existed among evaluators and mediators (Barth, 2011:155), especially private ones, these health professionals were not always extensions of the court, but rather extensions of lawyers and clients. Health professionals often found themselves in dual roles (Vertue, 2011:336). Rohrbaugh (2008:10) states that evaluators can only serve in one role in any given child custody case.

6.7 Challenges

Below is an indication of the respondents' responses regarding challenges in dealing with child custody and control processes, as well as the envisioned parenting plans, in Namibia.

6.7.1 Subtheme 1: New process

The envisioned Child Care and Protection Act has not yet been implemented in Namibia. Below are respondents' responses regarding their envisioned challenges with regards to its implementation, while awaiting the completion of the regulations.

Respondent 1 (Legal Assistance Centre): The respondent stressed the fact that the new Child Care and Protection Act was vast. Regulations were currently in progress, but needed to be completed before training or awareness could start. Many aspects would first be dealt with in a broad way and then refined over time. Roles and responsibilities also needed to be sorted out and defined.

According to the respondent, the current format of the envisioned parenting plan would be very simple, more like the previous recommendation as done in custody and control. Much work, such as creating awareness, training, drawing up regulations, and so forth, still needed to be done before parenting plans could be implemented. Below are some of the verbatim quotes of the respondent:

The current format will be very simple, more like the previous recommendation as done in custody and control.

LAC is currently working on a comic format to inform parents in a simplified way how to understand parenting plans.

Roles and responsibilities still need to be sorted out and defined.

The Child Care and Protection Act needs to be implemented.

A need for training.

Regulations are still in process and need to be completed before training or awareness can start.

Respondents 2 to 5 (Lawyers and court-appointed mediators): Respondents acknowledged that the current processes regarding mediation and parenting plans were new. Most of the respondents were aware of the new Child Care and Protection Act but most were unsure of what the impact of the new Act would be and how it would be implemented. Below are some of the verbatim quotes of the respondent:

Still an uncertain process.

Unsure who will be responsible for what.

Unsure who will be allowed to do mediation and who will be allowed to do parenting plans.

Parenting plans and mediation is "in sy kinderskoene".

Respondents 6 to 8 (Private social workers): The newness of the current process of mediation and parenting plans was highlighted. The fact that this would lead to many uncertainties and challenges was acknowledged. Below are some of the verbatim quotes of the respondents:

Process still new.

Lots of uncertainties.

Respondents 9 to 11 (Government social workers): Respondents stressed their frustration about systems that did not work, for example overloading, the lack of

resources, among others. They acknowledged that it was a new process, but they were still unsure of the content of the Child Care and Protection Act, as well as of how it would be implemented and affect their work and roles. Below is one of the verbatim quotes of the respondents:

Unsure of content.

Respondents 12 to 14 (Psychologists): Most of the respondents were unsure of the content of the Child Care and Protection Act, as well as of how it would impact their roles and responsibilities. They also, to an extent, felt excluded from new developments in Namibia. A need was expressed for more collaboration, especially between private practitioners and government. Below are some of the verbatim quotes of the respondents:

Uncertainties regarding new legislation.

A need for more collaboration.

Private professionals need to make more effort to stay up to date. Often just lose touch.

Feel excluded from global issues.

Need more cooperation between government and private health professionals.

Private practitioners are often unaware of new legislation or national issues. They are not always in touch and need to make extra efforts to remain up to date.

Respondent 15 (Church Board of Benevolence): The respondent was aware of the Child and Protection Act and its content. She was, however, still unsure of how it would be implemented and impact her role and responsibilities. Her only concern was:

Ek het ook nog net die wet in sy draft vorm gesien. Ek is net bekommerd dat weens onkunde custody en control gaan verval omdat ouens net mediation wil doen of dit werk of nie. Of hul opgelei is of nie. Dit is amper soos 'n nuwe buzz woord. Dit kan dalk meer skade doen veral as ons na die kind se belang kyk.

Respondent 16 (Advocate): The respondent acknowledged that, with the implementation of the new Child Care and Protection Act, mediation and parenting plans were still in their infancy, and many challenges still needed to be overcome, before everyone would be comfortable and would know how the process would work.

Respondent 17 (Child commissioner): The respondent expressed her doubts regarding the new legislation, especially around who would implement the Act and the lack of capacity from the Ministry of Gender Equality and Child Welfare (MGECW). Below are some of the verbatim quotes of the respondent:

Uncertainties regarding the new legislation, e.g. who is going to implement the act?

The Ministry of Gender Equality and Child Welfare currently lacks the capacity and the expertise to deal with issues in the new legislation.

6.7.2 Subtheme 2: Lack of standards, guidelines and procedures

Respondent 1 (Legal Assistance Centre): The respondent stressed the fact that the new Child Care and Protection Act was vast. Regulations were currently in progress, but needed to be completed before training or awareness could start.

Much work, such as creating awareness, training, drawing up regulations and the like, still needed to be done, before parenting plans could be implemented. Below are some of the verbatim quotes of the respondent:

LAC is currently working on a comic format to inform parents in a simplified way how to understand parenting plans.

Roles and responsibilities still need to be sorted out and defined.

The Child Care and Protection Act needs to be implemented.

A need for training.

Regulations are still in progress and need to be completed before training or awareness can start.

Respondents 2 to 5 (Lawyers and court-appointed mediators): Respondents expressed various challenges regarding the lack of standards, guidelines and procedures for parenting plans.

A lack of criteria for mediators was stated. Currently there were no requirements and any person could become a mediator. This concern was expressed, especially with regards to court-appointed mediators who had to mediate family law cases without any training or background in family law or mental health. Below are some of the verbatim quotes of the respondents:

Lack of criteria on who can be a mediator.

No requirements to mediate divorce cases, e.g. legal or mental health background.

There is no background for a judge to make a decision or to find out what the concerns were.

Still an uncertain process.

Unsure who will be responsible for what.

Unsure who will be allowed to do mediation and who will be allowed to do parenting plans.

A need for case planning and case management.

Professionals with no background working with families in parenting plans.

No structure or guidelines on how to do mediation and parenting plans.

Respondents 6 to 8 (Private social workers): Respondents expressed their concern about the lack of guidelines and structure, not only with the new envisioned parenting plans, but also with child custody and control cases. Below are some of the verbatim quotes of the respondents:

Process still new.

Lots of uncertainties.

Professionals that will do mediation are not trained.

Professionals doing mediation or custody and control without knowledge or training.

A need for an association to regulate standards and guidelines.

Respondents 9 to 11 (Government social workers): The respondents were of the opinion that guidelines and structure were lacking. Where there were guidelines, they were often outdated. Below are some of the verbatim quotes of the respondents:

A need for a forum or association to discuss challenges.
A platform where social workers and psychologist can work together and work on solutions for the challenges.

No framework for training.

No uniformity.

No standards for social workers. If there are, they are outdated and not relevant any longer.

Respondents 12 to 14 (Psychologists): The respondents were of the opinion that guidelines, procedures and structure were lacking. If there were guidelines, nobody was aware of them. Below are some of the verbatim quotes of the respondents:

Lack of standards and procedures.

Private professionals need to make more effort to stay up to date. They often just lose touch.

Feel excluded from global issues.

A need for more cooperation between government and private health professionals

Putting oneself in difficult situations, not following proper processes.

Respondent 15 (Church Board of Benevolence): The respondent expressed the need for guidelines, procedures and structure to guide and create uniformity among professionals in doing child custody and control and parenting plans. Below are some of the verbatim quotes of the respondent:

Ons verstaan ook nie altyd mekaar se velde en die uitdagings wat elkeen in die veld beleef nie. Dit word verder bemoeilik deur 'n gebrek aan riglyne.

Respondent 16 (Advocate): The respondent acknowledged the need for guidelines, procedures and structure to guide and create uniformity among professionals in doing child custody and control and parenting plans. The need for training was highlighted.

Respondent 17 (Child commissioner): According to the respondent, there was a general need for standards, guidelines and procedures, not only for parenting plans, but also for child custody and control evaluations. Currently health professionals all had their own methods and processes and most did what they thought should happen. Again, many functioned in the field of child custody and control and parenting plans without any formal training. This led, specifically psychologists, to putting themselves in difficult situations.

Criticism against health professionals from especially the legal professionals and courts was that no standard or proper processes were in place or followed. There were no official requirements for evaluators or mediators in Namibia, such as education, training or license requirements. No best practice or standardization for the credibility and consistency of child custody evaluations and parenting plans existed. There was also a lack of consensus among professionals about what constituted an ideal evaluation or parenting plan. Best practice standards could, therefore, be defined as *"practice at its best, given the available theories, methods and procedures in the field"* (Zelechoski, *et al*., 2012:458).

The researcher is also of the opinion that a more uniform structure and guidelines will ensure a more reliable and trustworthy process in conducting child custody and control, but also in assisting with parenting plans. This will help with conformity and a more consistent way of looking at the best interests of the child. This may also lead to more networking and collaboration among professionals. Stahl (2011:79) also states that making sure that evaluators follow a similar process under most evaluation circumstances will ensure that custody and control evaluations are conducted more validly and consistently which, in turn, will increase the scientific reliability of the process.

Due to the lack of structure and uniformity in the process of child custody evaluations, many health professionals, especially psychologists, do not do home visits or are of the opinion that they may not. This leads to incomplete information available to make decisions. Decisions are then based on clinical tests that can be manipulated by the clients. Many health professionals are also not open to guidance. Private social workers and psychologists in Namibia, doing custody evaluations,

however, have no uniform format. Herman (1999:140) also states that a standard or guidelines can correct the problem of varying levels of expertise, and can bring some order to the custody evaluation, as well as to the parenting plan, process. Rohrbaugh (2008:29) summarizes the importance of guidelines or protocols as follows: *"... to ensure that child custody evaluations are done in a thorough, impartial manner that provides the court with sufficient information to make a decision that is in the best interests of the children involved*".

6.7.3 Subtheme 3: Lack of knowledge and training

Respondent 1 (Legal Assistance Centre): The respondent stressed the fact that the new Child Care and Protection Act was vast. Regulations were currently in progress, but needed to be completed before training or awareness could start.

Much work, such as creating awareness, training, and drawing up regulations, among others, still needed to be done before parenting plans could be implemented. Below are some of the verbatim quotes of the respondent:

LAC is currently working on a comic format to inform parents in a simplified way how to understand parenting plans.

Roles and responsibilities still need to be sorted out and defined.

The Child Care and Protection Act needs to be implemented.

A need for training.

Regulations are still in progress and need to be completed before training or awareness can start.

Respondent 2 to 5 (Lawyers and court-appointed mediators): The respondents stressed the lack of knowledge and the need for training, especially for court-appointed mediators. The need for specialized training, especially with regards to

children, was highlighted. A need was also expressed to coordinate training so that all professionals involved could benefit and not be excluded. Below are some of the verbatim quotes of the respondents:

Do not inform each other of trainings.

Many lawyers do not have knowledge regarding children's developmental stages and what would be in their best interests.

Professionals with no background working with families in parenting plans.

Respondents 6 to 8 (Private social workers): The respondents expressed their concerns with regards to professionals working in the field of child custody and parenting plans without proper training or knowledge. A need for specialized training in working with children was highlighted. Below are some of the verbatim quotes of the respondents:

The danger of seeing one's profession as an automatic expertise for mediation and parenting plans. It has its own expertise and specialty field.

A need for training.

A need for specialty training in working with children.

A need to involve all partners in training.

Knowledge and skills to mediate in all aspects of the divorce process.

Respondents 9 to 11 (Government social workers): The respondents were of the opinion that there was a general lack of knowledge and training, not only among social workers, but also among magistrates and lawyers. Different magistrates had different perceptions when it came to children's best interests. Not all magistrates had the necessary knowledge. The problem lay with magistrates who were not trained or who did not understand the law when it came to children. This often led to magistrates being experienced as not being child-friendly.

Clients also did not always have the necessary knowledge about options or procedures. Outcomes often depended on "*who your lawyer is and how much knowledge he has on family law and regarding children*". Often it was not about the child but about the parent. The child's interests did not feature. Below are some of the verbatim quotes of the respondents:

Specialty field and training to hear the child's voice. Specialty fields are a minimum.

Lack of training in the new Act, parenting plans, custody and control and guidelines.

No framework for training.

A lack of training. It is as if no one realises that social work as a profession is changing. The client system is changing. Head office somehow does not stay in touch and cater for these changes. Social workers have to figure things out by themselves.

In the end the social workers' incompetence or lack of training has an impact on the children. It is the children who suffer.

Magistrates are not trained to focus on children and to understand and act in children's best interest.

The problem may be at UNAM. There is a feeling that training is not as it should be. Young social workers from the university also do not get the support or supervision or they are not open to receive guidance.

Due to a lack of training and exposure, many mistakes are being made because of ignorance.

Social work students lack the training as well as exposure to custody and control and parenting plans. There is a general feeling that the university should look critically at their curriculum and adapt it according to new trends, relevance and changes. It should start at the university. Currently the university offers a very

“lomp” module on mediation. They mostly use part-time lecturers and information is often retrieved from the internet.

The problem lies with the management of Ministry of Gender Equality and Child Welfare*. No forward movement. Not in touch with what is happening in the field. The system is a frustration. We have this laws, but no one is trained.*

Magistrates do not always know what they are doing. Many magistrates do not see children's issues as priority.

Respondents 12 to 14 (Psychologists): The respondents expressed a need for knowledge and training. The feeling was that many psychologists put themselves in difficult situations regarding custody and control and parenting plans due to a lack of training and knowledge. Below are some of the verbatim quotes of the respondents:

Private professionals need to make more effort to stay up to date. They often just lose touch.

No formal training in custody and control or parenting plans. This leads to feelings of helplessness, decisions that are not in the best interest of the child.

Private practitioners are often unaware of new legislation or national issues.

Putting themselves in difficult situations, because they do not following proper processes.

Respondent 15 (Church Board of Benevolence): The respondent expressed a need for guidance, specifically for new professionals. She was also of the opinion that misconceptions and misunderstandings regarding each field and challenges caused many conflict situations amongst professionals. Training might overcome this. Below are some of the verbatim quotes of the respondent:

Ons verstaan ook nie altyd mekaar se velde en die uitdagings wat elkeen in die veld beleef nie.

Ek dink dit kan ook veral vir nuwe of professionele persone met min blootstelling ondersteuning en leiding gee. Ek dink baie kritiek gaan grootliks oor onkunde of die gebrek aan supervisie of leiding.

Ek is net bekommerd dat weens onkunde custody en control gaan verval omdat ouens net mediation wil doen of dit werk of nie. Of hulle opgelei is of nie.

Respondent 16 (Advocate): The respondent highlighted the need for training for all professionals working in the field of child custody and parenting plans. According to the respondent, the danger of "fashionable thinking" without proper knowledge and training within the area often led to recommendations not in the best interests of the child. Below are some of the verbatim quotes of the respondents:

Magistrates often lack training.

Probleem met regters en magistrate se eie kulturele beliefs en gebrek aan opleiding.

Respondent 17 (Child commissioner): A need for training for social workers and magistrates was expressed, not only in mediation and parenting plans, but also with regards to Namibian legislation.

The researcher is of the opinion that training is crucial for professionals working in the field of mediation, child custody and, especially, with family law. The need for training refers to the following:

- **Working with children**. Specialty training and skills are needed for social workers, psychologists, lawyers and, especially magistrates, to understand children and their developmental needs, but also to help children to voice their needs and wishes. This will counteract misunderstandings regarding children's

position in Namibia, as well as misconceptions regarding children's best interests.

- **Networking** is needed among the different professions with regards to training, especially between government and the private sector. The private sector is often not involved in, or aware of, training on a national level that impacts their work.
- **Training in Namibian legislation**, especially of the new Child Care and Protection Act. Professionals need to understand how legislation impacts their roles and responsibilities.
- **Training in report writing** especially for social workers and psychologists.
- **Training of cross-professional fields**, such as health professionals, who need more intensive training in legislation, and legal professionals, specifically court-mediators, who need more training in understanding children.

The researcher is also of the opinion that a lack of knowledge and training leads to misunderstandings and misinterpretations of legal terms, especially among health professionals in Namibia, specifically with concepts like joint custody, attachment, parenting plans and mediation. Health professionals use these terms and become involved in these areas, but do not have formal training or a sound knowledge and understanding of the terms or field. This leads to the unnecessary exposure of health professionals to difficult situations and ethical issues.

Government social worker respondents also experienced that their training was not up to standard. Social workers felt they were not prepared for courts, or did not received training or education for what was expected of them, especially in dealing with courts and lawyers.

The researcher agrees with respondents who felt that private practitioners were often unaware of new legislation or national issues. They were not always in touch, and needed to make extra efforts to keep up to date. The lack of appropriate and relevant training for the current needs in Namibia, was a huge issue.

Respondents were also of the opinion that training programs at the University of Namibia (UNAM) might be a problem. They felt that the training was not as it should be and that institutions were sending young professionals, who were not equipped and ready for the demands of their profession, into the field. Young professionals, straight from university, also did not receive support or supervision. This led to feelings of helplessness, burnout and, finally, decisions that were not in the best interests of the child.

Due to the lack of structure and uniformity in the process of child custody evaluations, many health professionals, especially psychologists, did not do home visits or were of the opinion that they should not. This led to incomplete information available to make decisions. Decisions were then based on clinical tests that could be manipulated by the clients. Many health professionals were also not open to guidance.

It is assessment of the training needs of each field. The importance of team work cannot be underestimated. As far as the safeguarding of children is concerned, there will be areas of training that will be common to all professional fields. There should be some mutual understanding amongst the various professionals.important that training should be unique to each professional field because of the special training needs of each field. Training must therefore be based on an

6.7.4 Subtheme 4: Lack of experience, exposure, networking and supervision

Respondent 1 (Legal Assistance Centre): The respondent did not comment on this subtheme.

Respondents 2 to 5 (Lawyers and court-appointed mediators): The respondents expressed concerns specifically regarding the new court-appointed mediators who currently had little or no experience or exposure regarding aspects of family law. Supervision and guidance were also not concepts that fitted naturally within the legal profession. Networking between professionals might help to

encourage information- and experience-sharing. Case planning and management might also be useful. Below are some of the verbatim quotes of the respondents:

Mediator with no experience. The lawyer then needs to take the process over. This defeats the whole purpose.

A need for case planning and case management.

Professionals with no background working with families in parenting plans.

Respondents 6 to 8 (Private social workers): The respondents expressed a lack of opportunities regarding supervision and peer consultation in order to assist them in dealing with child custody and parenting plan cases. The need for new professionals in these fields to work under the guidance of more experienced professionals was also expressed. Case planning and case management might also be useful. Dealing with ethics, regarding parenting plans and child custody in these forums, might also assist professionals in order for them to safeguard themselves. Below are some of the verbatim quotes of the respondents:

The danger of seeing one's profession as an automatic expertise for mediation and parenting plans. It has its own expertise and specialty field.

Ethics.

A need for peer consultation.

Respondents 9 to 11 (Government social workers): The respondents experienced a huge lack of supervision and support, especially from head office. They felt overworked and under pressure due to time limits and a lack of resources. This led to feelings of burnout and isolation.

Many respondents felt that they lacked experience and exposure to child custody and control, as well as to parenting, plans. Especially social workers new to the field might have the knowledge but they had no exposure or experience in this field. The

University of Namibia sent students to overworked social workers who assigned them to intakes in order to deal with their own workload; they, thus did not create opportunities for students to gain experience and exposure in these fields. The social workers in control often lacked the knowledge and experience to assist these new social workers with guidance and proper supervision.

Respondents expressed the need for supervision and support, especially from head office. They experienced supervision from head office as limited or non-existing. Some social workers, especially in some rural areas, had not had supervision in two years. Supervision largely depended on the supervisor. Social work in itself was experienced as stressful and, as one respondent stated, *"if you do not get support or do not know how or try and get problems, you become demotivated*". Below are some of the verbatim quotes of the respondents:

Social workers are over-worked.

Pressure on social workers.

A need for a forum or association to discuss challenges.

A platform where social workers and psychologists can work together and work on solutions for the challenges.

Young social workers from university also do not get the support or supervision.

Due to a lack of training and exposure, many mistakes are being made because of ignorance.

Lack of supervision and support. Supervision from head office is limited or non-existing. Some social workers have not had supervision in two years. It depends on the supervisor.

Social workers try what they think is best or is in the best interest of the child. Then they are reported to the council. No support. Social workers feel scared and uncertain to act in the best interest of the child, out of fear for getting reported.

Respondents 12 to 14 (Psychologists): The respondents expressed the need for more collaboration between professionals in order to provide a platform for support and guidance. Many felt isolated and had lost touch with relevant issues due to a lack of cooperation, especially among health professionals. Below are some of the verbatim quotes of the respondents:

More collaboration between professionals is needed.

They feel excluded from global issues.

The need for more cooperation between government and private health professionals.

Respondent 15 (Church Board of Benevolence): The respondent was of the opinion that there was a general lack of supervision, peer consultation and a platform where guidance was received. Many professionals worked in isolation. Below are some of the verbatim quotes of the respondent:

Ek dink dit kan ook veral vir nuwe of professionele persone met min blootstelling ondersteuning en leiding gee. Ek dink baie kritiek gaan grootliks oor onkunde of die gebrek aan supervisie of leiding.

Respondent 16 (Advocate): The respondent expressed the need for professionals to learn from one another. Below are some of the verbatim quotes of the respondents:

Experts need to guide the court and judges. Judges are not always all wise, due to the human factor.

Respondent 17 (Child commissioner): The respondent was of the opinion that social workers, in general, did not have the capacity, experience and expertise to deal with their workload.

The researcher is of the opinion that the health profession, in general, lacks support and peer consultation regarding child custody and control, mediation and parenting plans. Many felt isolated or did not have the confidence to consult with colleagues about their own uncertainties and lack of experience out of fear to not “look good” as a professional. This lack of supervision and guidance led to many mistakes and exposure being reported to the Health Council.

The researcher also agrees with respondents that the University of Namibia should look critically at their curriculum, and adapt it according to new trends and changes, especially for social workers. Specialty fields that are offered at the university are not relevant to the Namibian context. The lack of training and exposure of health professionals should, therefore, initially be addressed at the university.

The researcher is also of the opinion that in the interviews, all the respondents were willing to share their experiences, resources and skills, not only among health professionals, but also among different fields of professions. Somehow this wealth of resources is not used and explored.

6.7.5 Subtheme 5: Practical challenges in the implementation of parenting plans

Respondent 1 (Legal Assistance Centre): The respondent expressed the challenge of completing the regulations for the new Child Care and Protection Act in order for it to be implemented. Training could only start then. This, however, had huge implications for role players to locate resources that were needed for the implementation.

Respondents 2 to 5 (Lawyers and court-appointed mediators): The respondents identified a few challenges, namely getting all the role players trained;

establishing criteria for mediators and, especially, court-appointed mediators; structure and guidelines with regards to mediation and parenting plans. A need to identify roles and requirements to fulfil those roles was also mentioned. Case planning and case management, maybe through the appointment of a family advocate, could solve many of the challenges. Frustration with the time-consuming process at the children's court was also a challenge. Health professionals, magistrates and court-appointed mediators lacked common sense, experience and knowledge when making recommendations. Children were mostly lost in the process, and their best interests were not of paramount consideration. Below are some of the verbatim quotes of the respondents:

A need for case planning and case management.

Professionals with no background working with families in parenting plans.

No structure or guidelines on how to do mediation and parenting plans.

Respondents 6 to 8 (Private social workers): The respondents were of the opinion that their biggest challenge was the professionals, without knowledge, experience or training, who were involved in child custody and control and parenting plans. Guidelines, structure and procedures needed to be put in place. An association or forum should be established in order to deal with the ethics of parenting plans, but also to monitor and set standards for child custody and control and parenting plans. The lack of cooperation among professionals was another challenge. One respondent stated that

If all professions work together, Namibia will have the capacity. In Namibia we have more psychologists who are spread across Namibia.

The danger of seeing one's profession as an automatic expertise for mediation and parenting plans. It has its own expertise and specialty field.

Costs involved and whether everyone will be able to afford it.

Respondents 9 to 11 (Government social workers): The respondents expressed practical challenges, such as being overworked, not having the resources and support needed, struggling to cope with the demands of being a social worker in Namibia and aspects like time and distances that they had to overcome. Below are some of the verbatim quotes of the respondents:

Costs of parenting plans and whether it will be accessible for all Namibians.

The time parenting plans will take to complete.

The impact of culture on the understanding and enforceability of parenting plans.
Social workers are overworked.

Respondents 12 to 14 (Psychologists): The respondents' main challenges were dealing with lawyers and cooperation among professionals. One respondent also stated that

This leads to feelings of helplessness and decisions made not in the best interest of the child. May not do home visits, which leads to incomplete information available to make decisions. Decisions are then based on clinical tests that can be manipulated by the clients.

Respondent 15 (Church Board of Benevolence): The lack of resources was highlighted as a challenge. This might impact the affordability of, and access to, parenting plans.

Respondent 16 (Advocate): The respondent was of the opinion that professionals often used fashionable terms without understanding their implications. The impact of culture and the lack of training and understanding of, specifically magistrates, were further challenges. The respondent stated that

Namibia did not make provision for a family advocate as was done in South Africa.

Respondent 17 (Child commissioner): The respondent's biggest practical challenge was the implementation of the Child Care and Protection Act, due to the vastness of the Act, as well as the limited capacity of Ministry of Gender Equality and Child Welfare (MGECW).

The researcher is of the opinion that Namibia is on the brink of a new era with regards to legislation and new fields to be explored. The whole process of parenting plans and mediation is new, and forms a small part of the larger context of aspects that need to be dealt with in the new Child Care and Protection Act. Many challenges that have been identified, as well as challenges that may not have been anticipated, will need to be addressed and dealt with accordingly. Namibia is in the process and cannot turn back. Many uncertainties with regards to defining roles, responsibilities, guidelines and processes exist. These all need to be clarified and addressed in training opportunities, which have their own challenges, such as securing funds for training, making sure that all regions and different Ministries involved receive training, as well as creating awareness amongst professionals and the public.

Challenges, especially for government social workers, arising from a lack of manpower, distances and limited resources, such as offices, transport, telephones, and the like, need to be addressed. The lack of training, guidance and supervision for health professionals, but also for legal professionals, especially magistrates, is another challenge.

Costs involved with regards to training also play a role. If role players (Ministries) have not budgeted for training for 2016; thus, training will not be possible before funds are available. Costs involved in making parenting plans accessible to communities, as well as creating awareness and the education of professionals and community members, also prove to be a challenge. Many respondents were concerned whether everyone would be able to afford it.

Parenting plans, if done properly, may take time. Social workers in the field are overworked and under pressure. The Child Care and Protection Act can increase their workload and responsibilities or take it to more quality work and different approaches to being more effective.

Frustrations in dealing with cultural issues and their impact on children, as well as decisions made in the best interests of children, appear to be yet another challenge. Yet parenting plans could offer more effective ways of dealing with the benefits that culture is offering. The lack of specialty fields, for example working with children, needs to be addressed, and opportunities for training need to be created.

Changing from a child-focused perception to a child-inclusive process will take time. Role players have to be trained and made aware of, as well as guided to overcome, cultural beliefs in this regard. Mental health professionals need to be identified and collaborated into the process of implementing the Child Care and Protection Act to serve as mentors, trainers and experts in guiding the courts and various role players.

Professionals need to network to support one another and to create a pool of expertise and resources available to role players to promote the best interests of children in Namibia. Professionals should respect each field of expertise, but also need to understand boundaries. This will create the need for an association or forum to form a platform where guidelines, standards and structure can be provided for professionals from which to work. This will assist with the upholding of standards and uniformity, but also support professionals in the field of custody and control and parenting plans. Ethics, professional behavior and conduct can be addressed to protect professionals, but also the public and children, from actions and decisions not in their best interests.

The Ministry of Gender Equality and Child Welfare (MGECW), as well as the Ministry of Justice, needs to look at the capacity and well-being of social workers in the field. Resources have to be mobilized in order for parenting plans and mediation to be accessible to all parts of Namibia. If this is not done, parenting plans will only be available to an elite group of parents who can afford the process.

6.8 Recommendations from respondents

With the new Child Care and Protection Act that still needs to be implemented, various uncertainties and envisioned challenges were identified during interviews with the respondents. The Table below gives a summary of recommendations made by respondents with regards to the implementation and challenges that the new Child Care and Protection Act holds, especially when dealing with parenting plans as an alternative option within the Namibian context.

Table 12: Recommendations made by respondents

Respondents	Responses
Legal assistance centre **Respondent 1**	• To complete the regulations of the new Child Care and Protection Act in order to start with intensive training for professionals and communities. • To assist with roles and responsibilities of professionals according to the Child Care and Protection Act.
Lawyers and court appointed mediators **Respondent 2 to 5**	• To create a process where there is a combination of an evaluation system for background information and to understand the concerns, as well as a starting point to mediate from, and, with that in mind, create a parenting plan according to the children's best interests. • To provide in the need for practical guidelines and expertise that can guide the best interests of the child. • To provide for flexibility in parenting plans in order to adapt to the changing needs of parents and children. • To educate parents in what is in the best interests of the child (e.g. not alternative December holidays but rather split holidays). It is not about parents but about children. • To provide guidelines and regulations with regards to mediation and parenting plans. • To create a compulsory questionnaire for parents to complete regarding their finances before they come for mediation. • To provide for involving experts to assist with certain aspects, e.g. estate division, finances, children during the mediation process. • To explore the possibility of co-mediations. This provides a better pool of expertise to parents and children. • To provide guidelines for current court-appointed mediators. Due to court-appointed mediators also being a new process respondents have recommended that: - Court-appointed mediators with family law background should deal with family issues. - Court-appointed mediators should receive more training in family and child issues.

Respondents	Responses
	- Easy checklists be provided that can assist court-appointed mediators in order to help them through the mediation process when dealing with parenting plans and children.
Private social workers **Respondent 6 to 8**	• To create accredited training for doing custody and control, mediation and parenting plans. • To provide guidelines and criteria for professionals working in the field of child custody, mediation and parenting plans. Only accredited professionals will be able to work in these fields. Minimum requirements need to be established for professionals working in this field, e.g. accredited training, minimum years of experience and ongoing professional development. Professionals do harm if they do not have the necessary knowledge, training, skills and experience. • To provide compulsory training not only in mental health but also in legislation for all professionals working in the field. This will lead to a better understanding and holistic dealing with cases. • To have a platform where all mediations should be registered in order to do case management. Feedback can be given on the progress of the case, as well as proof that mediation was tried. • To provide guidelines and protocols to guide professionals. One needs to give feedback on the progress and case management needs to be done. There needs to be proof that mediation was tried. • To make mediation and parenting plans compulsory. • To provide a platform for peer group consultation and supervision. • To establish and an association for custody and control and parenting plans to regulate standards and uniformity.
Government social workers **Respondent 9 to 11**	• To establish an association or platform to regulate standards of practice in mediation, parenting plans and child custody. • To create a platform or networking among professionals. • To train volunteers or community members to assist with parenting plans. • To provide supervision and support for social workers in the field. • To provide training that is relevant to current legislation and global tendencies in the field of social work. • To provide training for magistrates to be more child-focused. • To provide cultural awareness training in order to create sensitivity and awareness regarding the impact of cultural beliefs on children's best interests.

Respondents	Responses
	• To provide training for all role players in dealing with and understanding children and what is in their best interests.
Psychologists **Respondents 12 to 14**	• To establish formats and standardized processes in mediation and parenting plans. • To let parents deal with financial issues first, before they come for mediation regarding children's issues. This is especially due to conflict surrounding finances, which could lead to not focusing on the children. • Structure and training in dealing with high conflict situations, power imbalances during mediation and lawyers. • Training in child custody, mediation and parenting plans.
Church board of benevolence **Respondent 15**	• To provide training for health professionals in terms of parenting plans and mediation. • To establish an association for professionals working in the field of mediation, child custody and parenting plans in order to regulate standards and professionalism. • To standardize and provide guidelines for child custody and control, mediation and parenting plans. • To establish guidelines and protocols for uniformity in child custody and parenting plans. • To provide for a child advocate to serve as the voice of the child. • To establish guidelines and structure for child participation. • To provide specialized training in working with children and to hear the child's voice.
Advocate **Respondent 16**	• To provide for a family advocate with his own team of social workers to manage children's best interests in child custody cases and parenting plans. • To change divorce legislation in Namibia in order to take away the guilt concept in divorce. This will have a more positive impact on the outcome of children's best interests.
Commissioner of Child Welfare **Respondent 17**	• To provide training for magistrates, court-appointed mediators, social workers and lawyers dealing with child custody.

7 CONCLUSION

All the purposes of the article have been reached. The views of professionals in the child protection field in Namibia regarding legislation pertaining to the best interests of the child and mediation have been established and discussed. The views of key

professionals in the child protection field in Namibia regarding parenting plans have been ascertained and discussed. A factual basis for recommendations regarding investigations and decisions concerning the best interests of the child in Namibia has been established.

Regarding child protection and the best interests of the child, Namibia is moving through a transitional stage, away from its dependence on South Africa after years of being a protectorate of South Africa. The findings in this research should be viewed within this context. Respondents were asked about their views in particular on mediation and parenting plans. Views expressed will be useful as the new dispensation is being rolled out, and can be used to prepare role players for change, as well as dealing with resistance to change.

A concern expressed by respondents is that problems to hear the voice of the child exist. Professionals are not trained to perceive the child's voice. This is regarded as an obstacle in protecting the best interests of the child. It happens that parents decide what is in the best interests of the child. A further problem is that in some cultures the best interests of the child are not understood. The culture of the professional also clouds hearing the child clearly. This also impacts the real participation of the child

Not all professionals are familiar with the new Child Care and Protection Act, and training will have to be designed for its proper implementation. Greater clarity on the roles of the relevant role players in the Act will have to be provided. The regulations of the Act are still outstanding. Uncertainty is, however, a normal reaction to such an important Act. There also seems to be a need for better co-operation between private practitioners and state departments regarding national issues.

Child custody investigations are experienced as stressful, with no proper guidelines to conduct them and to write the reports. Young social workers seem to struggle. This seems to lead to custody reports that are lacking in quality.

Mixed views were found about parenting plans. There were reservations, as well as positive expectations. Reservations were related to possible additional workloads

and the effect of culture, while others felt that parenting plans would be a good alternative to the current custody and control system.

Reservations were expressed about the role of mediators involved in parenting plans. Lawyers seem to focus on the rights of the parents and not on those of the child, while magistrates are not always child-friendly, and the experience and knowledge of court-appointed mediators are in doubt. A plea for more collaboration among the different professions, private practitioners and government was also recorded.

The biggest challenge foreseen by respondents flows from uncertainties about the new Child Care and Protection Act and the envisaged mediation and parenting plans, as well as the perceived lack of capacity from the Minster of Gender Equality and Child Welfare to deal with the demands that will flow from the implementation of the Child Care and Protection Act. There are also no requirements regarding who qualifies for the role of mediator.

There are, in conclusion, several challenges that will have to be dealt with over the course of the implementation of the new child protection system in Namibia, with the new Child Care and Protection Act as the new piece of legislation to give form to the reformed child protection system.

BIBLIOGRAPHY

Ackerman, M.J. 2006. *Clinician's guide to child custody evaluations*. New Jersey: John Wiley & Sons.

Acts **see** Namibia.

Acts **see** South Africa.

Anderson, A. & Spijker, A. 2002. Considering the view of the child when determining her best interest. *Obiter:* 365-372.

Babbie, E. 1998. *The practice of social research*. (8th ed.). Belmont, Calif: Wadsworth.

Barth, L. 2011. Consultant conduct in anticipation of a child custody evaluation: Ethical and social dilemmas and the need for neutral parent education. *Family Court Review*, 49(1): 155-169.

Bekink, B. & Bekink, M. 2004. Defining the standard of the best interests of the child: Modern South African perspectives. *De Jure*: 21-40.

Bernardini, S.C. & Jenkins, J.M. 2002. An overview of the risks and protectors for children of separation and divorce. http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2002_2/pdf/2002_2.pdf Date of access: 15 Sept. 2013.

Bow, J.N. 2006. Review of empirical research of child custody practice. *Journal of Child Custody,* 3(1): 23-50.

Bow, J.N. & Quinnell, F.A. 2004. Critique of child custody evaluations by the legal profession. *Family Court Review*, 42(1): 115-127.

Child Care and Protection Act **see** Namibia.

Children's Act **see** South Africa

Child Status Act **see** Namibia.

Cohen, O. 2011. Agreement reached through court mediation conducted by social workers: Impact on the co-parenting relationships. *British Journal of social work*, 42: 227-244.

Creswell, J.W. 2007. Qualitative inquiry and research design: Choosing among five approaches. (2nd ed.). Thousand Oaks, CA: Sage Publications.

De Jong, M. 2010. A pragmatic look at mediation as an alternative to divorce litigation. *Tydskrif vir die Suid-Afrikaanse Reg:* 515 – 557.

Dueck, A. 2004. Divorce and the best interests of the child. http://www.focusonthefamily.ca/tfn/family/PDF/Divorce_impact.pdf Date of access: 12 Dec. 2009.

Froneman, A.P. 1999. Criteria social workers employ in making child custody recommendations. East London: Rhodes University. (Half-thesis – M).

Gauvreau, D. 2012. Mediation versus Litigation: Examining Differenced in Outcomes amongst the Children of Divorce. http://www.riverdalemediation.com/wp-content/uploads/2009/07/Gauvreau-Mediation-vs-litigation.pdf Date access: 5 June 2014.

Gould, J.W. & Martindale, D.A. 2009. *The art and science of child custody evaluations*. 1st ed. New York: Guilford Press.

Herman, S.P. 1999. Child custody evaluations and the need for standards of care and peer review. http://forensicpsychiatry.stanford.edu/Files/Child%20Custody%20Standards.pdf Date access: 4 March 2010.

Kitzmann, K.M., Parra, G.R. & Jobe-Shield, L. 2012. A review of programs designed to prepare parents for custody and visitation mediation. *Family Court Review*, 50(1): 128-136.

Mailula, D. 2005. Taking children's rights seriously: Access to, and custody and guardianship of, a child born out of wedlock. *Codicillus*, 46(1): 15-29.

Mienkowska-Norkiene, R. 2012. Inequality in divorce mediation – reasons, manifestations and ways to avoid it. Lessons for Lithuania. *Socialinis Darbas*, 11(1): 119-130.

Namibia. 2015. The Child Care and Protection Act 3 of 2015.

Namibia. 2006. Child's Status Act 6 of 2006.

Neuman, W.L. 2003. *Social research methods: Qualitative and quantitative approaches.* (5th ed.). Boston, Mass: Allen & Bacon.

Poggenpoel, M. 1998. Data analysis in qualitative research. (In De Vos, A.S., Strydom, H., Fouche, C.B., Poggenpoel, M., Schurink, E. & Schurink, W. eds. *Research at grass roots. A primer for the caring professions*. Pretoria: Van Schaik.

Ramolotja, M.A. 1999. Determining the best interest of the child. *Codicillus*, XXXX (1): 10-14.

Robinson, T. 2009. *Divorce: What about the children*? Cape Town: Struik.

Rohrbaugh, J.B. 2008. *A comprehensive guide to child custody evaluations: Mental health and legal perspective*. New York: Springer.

Rubin, A. & Babbie, E. 2010. *Research methods in social work*. 4th ed. Belmont, CA: Wadsworth.

Stahl, P.M. 2011. *Conducting child custody evaluations: From basic to complex issues*. 1st *ed*. California: SAGE Publications.

South Africa. 2005. Children's Act 33 of 2005.

Turkat, I.D. 2005. On the Limitations of Child-Custody Evaluations. *Court Review*, 42(2): 8–13. http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1034&context=ajacourtreview Date of access: 4 March 2010.

Uugwanga, C. 2010. The law on divorce and dissolution of marriages in Namibia: A reform analysis of the types of marriages found in Namibia and the divorce laws pertaining to such marriages. Windhoek: UNAM. (Dissertation – LLB). http://wwwisis.unam.na/theses/uugwanga2010.pdf

Vertue, F. M. 2011. Applying case study methodology to child custody evaluations. *Family Court Review*, 49(2): 336-347.

Zelechoski, A.D., Fuhrmann, G. S. W. Zibbell, R.A. & Cavallero, L. M. 2012. Case Report – Evaluation for Child Custody: Using Best Practices in a Worst Case Scenario. *Journal of Forensic Psychology Practice*, 12: 257-470.

SECTION D

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS AND RECOMMENDATIONS

1. CONCLUSIONS

Namibia is currently in a transition period with the new Child Care and Protection Act (3 of 2015) that will be implemented in the near future, as soon as the regulations are completed and approved. Training that may fill the current gap in ignorance and the lacking knowledge of professionals regarding legislation can then start. The Act is, however, vast and complex. It may take time to implement all aspects of the Act and to get the relevant training done.

1.1 The best interests of the child: Children's rights and legislation

In divorce disputes there are still various challenges that need to be overcome to make children's best interests paramount or to act according to the Namibian Constitution and the various international and national legislations regarding children, present in Namibia.

The author is of the opinion that Namibia does try to make provision for children's rights and best interests by also accepting international legislation. Proof of this can be seen in the legislation in place, as well as in the provisions of the new Child Care and Protection Act.

The Child Care and Protection Act is still new, unknown to many professionals and comes with huge challenges with regards to the implementation process. It appears that one of the largest challenges will be the allocation of resources for training staff and negotiating responsibilities among stakeholders.

Legislation regarding divorce and the guilt concept in divorce also needs to change in order to take away the impact this has on the outcome on children's best interests. This will represent an important paradigm shift.

From this study it, however, seems that services in the field of child custody and family laws are still fragmented and mainly focused on parents' rights. Services are presumably child-focused, but rarely child-inclusive. Children's voice are seldom heard and, if heard, seldom considered.

According to respondents and as seen in literature, a lack of training, and knowledge in the field of children, legislation, as well as cultural beliefs and perceptions regarding children, play a huge role in how children are being dealt with in Namibia. In divorce disputes, with child custody and control and parenting plans, the child is often lost in the process.

1.2 Custody and control report

In this study, child custody and control reports are in general viewed as stressful and complex and filled with challenges and risks. Especially mental health professionals felt "traumatized" not only due to the stress of conducting a child custody evaluation, but also due to the conflict involved and the role that lawyers play in the process. The possibility of going to court to testify or to be cross-examined, as well as being responsible for making decisions in the best interests of the children involved while balancing parents' rights, leads to enormous stress. This is in line with literature where child custody evaluations are described as stressful and complex, not only for the evaluator, but also for the families involved (Bekink & Bekink, 2004; Bernadini & Jenkins, 2002; Dauck, 2004; Herman, 1999).

In this study, criticism was mostly aimed at the quality of work done by social workers during child custody and control evaluations. Social workers' reports seemed to be biased. Legal and private professionals were of the opinion that evaluations and reports were not properly done. This was often due to a lack of proper exposure, supervision, guidelines and support. The general view was that there was a lack of standardization and thoroughness. According to Zelechoski,

Fuhrmann, Zibbell, and Cavallero (2012:457), custody and control evaluations are of the most criticized areas, due to the perceived lack of standardization in evaluation methods. Due to the lack of an association or regulating body to regulate standards of practice, very few resources are available for health and legal professionals working in the field of child custody.

With no standard procedure, especially among private evaluators, regarding child custody evaluations in Namibia, there are uncertainties, confusion and a lack of uniformity. According to this study, the focus and recommendations in custody reports are often outdated and not in line with new research and global changes in the field of custody and control. This is especially true when it comes to recommendations regarding children's best interests, specifically with reference to children's needs and developmental age. There is thus a lack of scientific work based on theory, which should form the basis of guidelines to describe, understand, interpret, evaluate and predict in cases affecting the best interests of children.

1.3 Mediation and parenting plans

The concept of parenting plans is new in Namibia. This creates various uncertainties and doubts regarding the workability of parenting plans within the Namibian context. Many challenges still have to be overcome before the new Child Care and Protection Act is implemented and the workability of parenting plans can be evaluated and adjusted according to the Namibian context.

In this study parenting plans are viewed as a softer, more constructive approach through mediation. It also includes the best interests of the child, and there is more potential to inform and guide parents on what the child's needs are. Parenting plans are, however, viewed as an excellent tool to incorporate children's rights and their best interests, due to the uniqueness of each family's own needs. Parenting plans are also seen as flexible, and they can grow with children's needs. As far as parenting plans are concerned, many challenges still need to be addressed before they can be implemented:

- In the implementation of the new Child Care and Protection Act, possible role confusion will have to be resolved.
- Roles still need to be defined.
- Training is needed, but can only start once the regulations on the Child Care and Protection Act have been published.
- There is a need for a family advocate to manage children's best interests and to provide a platform for case management of child custody and parenting plans.
- Provision protocols and standards for doing mediation and parenting plans are needed.

With the new Child Care and Protection Act (3 of 2015), the envisioned implementation of mediation and parenting plans may assist in contextualizing and individualizing the best interests of each individual child. Mediation in Namibia will be more in line with current national and international legislation regarding the rights of children, as well as the "best interest" standard. With the new Child Care and Protection Act mediation will offer a more 'child-inclusive' process in divorce disputes. Parents will also be more involved in a co-parenting process, where children's needs, developmental stages and voices can be heard and taken into consideration in order to make decisions in their best interests.

Mediation, however, will not replace the litigation process, but offers parents and children an alternative that is less damaging and has a better outcome on post-divorce relationships and adaption. Parents and children in the divorce process have more control over decisions, which leads to better cooperation. Namibia still has a long way to go, but the timing is right, considering current and future legislation that is more focused on children's rights and their best interests.

Parenting plans should be the outcome of effective mediation, with a circular interdependence between the two. It must be accepted that not all cases are suitable for mediation and that careful assessments should be made in all cases. Professionals doing mediation should be suitably qualified and preferably registered. This will protect the child.

1.4 Knowledge, training, support and networking

In this study it shows that there is a general lack of knowledge among professionals working with child custody and parenting plans. Many professionals do not have sufficient training in child custody evaluations, report writing, mediation, parenting plans, working with and understanding children and their needs, as well as training in legislation pertaining children. Few professionals keep up to date with new research and developments in the field of child custody and control and parenting plans.

This lack of knowledge and training impacts the best interests of children, and children are often not heard or recognized as having rights. In divorce disputes they become, as Glasser (in Anderson & Spijker, 2002:365) states, "*voiceless members of society who are at times the innocent victims of divorce*".

Professionals, dealing with custody and control as well as parenting plans, often feel isolated and lack the confidence to consult with peers when dealing with difficult cases. Supervision and networking seldom happen. A lack of standards, protocols and guidelines complicate uniformity further, and leads to uncertainties, inadequate reports and parenting plans, as well as recommendations that are not in children's best interests.

Child custody evaluations are stressful and complex, not only for the families involved, but also for the evaluator. This can clearly be seen by the views professionals expressed during interviews. This is further impacted by various factors in Namibia, for instance no clear guidelines, the role of lawyers in the process, a lack of knowledge and experience and professionals being biased and influenced by their own beliefs around how children are viewed and what is in the best interests of children.

It emerged that the interests of children could be served best if it was done according to stipulated criteria which assisted in serving the best interests of the child. However, these criteria were not regarded as free from criticism because of the numerous factors impacting their application. It was further pointed out that professionals and court officers were not always properly equipped to deal with the best interest standard in Namibia. Most professionals working with child custody

disputes were largely ignorant of current research on child development and current legislation pertaining to children, and they lacked the skills to determine the best interests of the child.

Children also find it difficult to express themselves freely, especially considering cultural perceptions regarding them. With a relative unaccommodating justice system with bias and cultural views of children and parenting, children's rights are often ignored in Namibia. What appears to be paramount in debates about the best interests is that this standard should be contextualized and individualized to do justice to each child.

As seen during interviews with professionals, Namibia, however, still has to overcome various challenges in order to be more child focused, and to serve the best interests of the child as paramount to decisions pertaining children in divorce disputes.

2. RECOMMENDATIONS

With regards to child custody and control reports and the envisioned parenting plans within the Namibian context, the researcher recommends the following:

2.1 Legislation

- Intensive training should be provided as soon as the regulations with regards to the new Child Care and Protection Act are completed.
- Training spread out across the year in collaboration with professional associations (Law Society, Association for Psychologists, Association for Social Workers, Legal Assistance Centre) and Ministries (such as the Ministry of Justice and the Ministry of Equality and Child Welfare) should be made available to all professionals. This training should not just be on the new Child and Protection Act but on all legislation pertaining to children.

- There should be a lobby for change in divorce legislation, in order to take away the guilt concept in divorce. This will have a more positive impact on the outcome of children's best interests.
- There must be a paradigm shift from a problem-focused approach to a solution-focused approach.

2.2 Children's rights, the best interests of the child and child participation

- Training opportunities for health professionals and legal professionals, especially designed to understand and assess children in order to hear their voices, should be initiated.
- Opportunities for professionals in specialized fields, such as play therapy to assist in guiding courts and professionals involved regarding children's best interests, should be created.
- A position for a family advocate who can monitor children's rights and their best interests, especially with regards to custody and control and parenting plans, should be established.
- Practical guidelines to assess the best interests of the child, especially for court-appointed mediators, should be developed.
- Pre-divorce programmes for parents to educate and guide them regarding their options with regards to processes available, as well as what is in the best interests of their children and how to deal with challenges during the divorce process, should be developed.

2.3 Custody and control report

- Standardized training for doing custody and control, especially with regards to the process and how to establish the best interests of the child, as well as writing reports, should be made available.
- A protocol with regards to the child custody and control process and the elements that need to be covered during such a process should be developed.

- Training on assessment of children should be provided to relevant role players.
- Opportunities for training in new developments, global tendencies and relevant research with regards to child custody and control and what is in children's best interests should be made available.
- Minimum requirements, such as accredited training, minimum years of experience and ongoing professional development, need to be established for professionals working in this field.

2.4 Mediation and parenting plans

- Formats and standardized processes in mediation and parenting plans must be made available.
- Discussions about boundaries and responsibilities with regards to different professionals doing mediations should be initiated.
- Accreditation standards for professionals working in the field of child protection, and especially regarding divorce and custody, should be set up.
- Training in mediation and parenting plans needs to be provided.
- The involvement of experts to assist during the mediation process with certain aspects, such as estate division, finances and children, need to be provided.
- The possibility for co-mediations as a process for Namibia needs to be explored. This will provide a better pool of expertise to parents and children.
- Guidelines for current court-appointed mediators need to be made available by
  - providing training in family and child issues. Court-appointed mediators with family law background should deal with family issues;
  - providing easy checklists that could assist them through the mediation process when dealing with parenting plans and children's best interests;
- establishing an association for professionals working in the field of mediation, child custody and parenting plans in order to regulate standards and professionalism;
- providing for a child advocate to serve as the voice of the child;
- establishing guidelines and structure for child participation;

- providing specialized training in working with children and to hear the child's voice;
- training volunteers or community members to assist with parenting plans.

2.5 Improving knowledge and training

- To provide standardized training for all professionals in terms of understanding children, child custody and control, parenting plans and mediation.
- To provide training with regards to cultural beliefs and how these can impact objectivity or recommendations not in the child's best interests.
- To provide training with regards to relevant legislation, especially legislation pertaining to children.
- To continue professional development training to keep professionals up to date with new developments in the field of child custody, mediation and parenting plans.
- To provide training in dealing with high-conflict situations, power imbalances and impasse situations during mediation.
- Training to understand and deal with cross-professional fields, by understanding and clarifying the different roles, boundaries and challenges that each experiences when dealing with child custody or parenting plans.

2.6 Supervision, support and networking

- To establish an association or platform for professionals working in the field of child custody and parenting plans in order to –
  - regulate standards of practice in mediation, parenting plans and child custody;
  - create a platform for networking among professionals;
  - provide supervision and support for professionals in the field, but also to guide new professionals in the field who lack exposure or experience;
  - keep members informed of new developments with regards to custody and control, parenting plans, mediation and children's rights and best interests;

- provide criteria for professionals working in the field of child custody and control and parenting plans with regards to training, minimum standards of education and expertise, as well as compulsory, ongoing, professional development;
- provide guidelines and standardization to protect the public from unprofessional and unethical behaviour or action;
- establish child custody and control evaluators, as well as mediators, as a profession in Namibia.

SECTION E

CONSOLIDATED BIBLIOGRAPHY

CONSOLIDATED REFERENCE LIST

AACAP (American Academy of Child and Adolescent Psychiatry). 1997. Practice Parameters for Child Custody Evaluation. http://www.jaacap.com/article/S0890-8567(09)62594-6/pdf Date of access: 10 March 2011.

Ackerman, M.J. 2006. Clinician's guide to child custody evaluations. New Jersey: John Wiley & Sons.

Ackerman, M.J. & Pritzl, T.B. 2011. Child Custody Evaluation Practices: A 20 year follow-up. *Family Court Review*, 49 (3): 618-628.

ACPF (African Child Policy Forum). 2013. Harmonization of children's law in Namibia. http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/other-documents-harmonisation_1_en.pdf Date of access: 20 May 2014.

Acts **see** Namibia

Acts **see** South Africa

AFCC (Association of Families and Conciliation Courts). 2006. Model Standards of Practice for Child Custody Evaluation. http://www.afccnet.org/About/About-AFCC Date of access: 4 March 2010.

African Child Policy Forum. 2013. Harmonization of children's law in Namibia http://www.africanchildforum.org**A**

Age of Majority Act **see** Namibia

Ambunda, L.N. & Mugadza, W.T. 2009. The protection of children's rights in Namibia: Law and policy. In Ruppel, O.C. *Children's Rights in Namibia.* http://www.unam.na/faculties/law/documents/ChildrensRightsBook.pdf

American Academy of Child and Adolescent Psychiatry (AACAP). 1997. Ovwe Contact. Acta Socialogca. 49 (29)

Anderson, A. & Spijker, A. 2002. Considering the view of the child when determining her best interest. *Obiter:* 365-372.

Anon, na. *Authors' Guide to Writing Articles and Reviews*. https://www.elsevier.com/__data/promis_misc/edurevReviewPaperWriting.pdf Date of use:6/11/16

Archard, D. 2004. *Children's Rights and Childhood*. Psychology Press.

Austin, W.G., Kirkpatrick, H.D. & Flens, J.R. 2011. The emerging forensic role for work product review and case analysis in child access and parenting plan disputes. *Family Court Review*, 49(4): 737-749.

Barratt, A. 2002. The child's right to be heard in custody and access determinations. THRHR (556-573)

Barth, L. 2011. Consultant conduct in anticipation of a child custody evaluation: Ethical and social dilemmas and the need for neutral parent education. *Family Court Review*, 49(1):155-169.

Bekink, B. & Bekink, M. 2004. Defining the standard of the best interests of the child: Modern South African perspectives. *De Jure*: 21-40.

Bekker, J.C. & Van Zyl, G.J. 2002. Custody of Black Children on Divorce. *Obiter*: 116-131.

Bernardini, S.C. & Jenkins, J.M. 2002. An overview of the risks and protectors for children of separation and divorce. http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2002_2/pdf/2002_2.pdf Date of access: 15 Sept. 2013.

Boezaart, T. 2009. (ed) Child law in South Africa. Claremont:Juta.

Bow, J.N. 2006. Review of empirical research of child custody practice. *Journal of Child Custody,* 3(1): 23-50.

Bow, J.N. & Quinnell, F.A. 2004. Critique of child custody evaluations by the legal profession. *Family Court Review*, 42(1): 115-127.

Burman S & Rudolph D. 1990. Repression by mediation: Mediation and divorce in South Africa. *South African Law Journal*, 107(2): 251-278.

Chambliss, D.F. & Schutt, R.K. 2010. *Making sense of the social world: Methods of investigation.* 4th ed. Thousand Oaks, CA: Pine Forge Press.

Child Care and Protection Act **see** Namibia

Children's Act **see** Namibia

Children's Act **see** South Africa

Children's Status Act **see** Namibia.

Cohen, O. 2011. Agreement reached through court mediation conducted by social workers: Impact on the co-parenting relationships. *British Journal of social work*, 42: 227-244.

Constitution **see** Namibia

Constitution **see** South Africa

Creswell, J.W. 2007. *Qualitative inquiry and research design: Choosing among five approaches*. 2nd ed. Thousand Oaks, CA: Sage Publications.

Damaseb, P. (2013, June 28). Nam divorce law 'outdated'. *The Namibian Sun.* Retrieved from http://www.namibiansun.com/justice/nam-divorce-law-outdated.54466

Dausab, Y. 2009. The best interest of the child. In Ruppel, O.C. (Ed). *Children's rights in Namibia.* http://www.unam.na/faculties/law/documents/ChildrensRightsBook.pdf

De Jong M. 2005. An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation. http://vanaswegeninc.co.za/wp-content/uploads/2014/12/Prof-de-Jongh-Article.pdf Date of access: 12 Dec. 2009.

De Jong, M. 2010. A pragmatic look at mediation as an alternative to divorce litigation. *Tydskrif vir die Suid-Afrikaanse Reg:* 515-557.

De Lange, M. 2012. A philosophical foundation for approaches about the rights of children. http://magdachildstudies.blogspot.com/2012/03/philosophical-foundation-for-approaches.html Interdisciplinary Child Studies, Linkoping, University Sweden

Domingo, W. 2011. For the sake of the children: South African family relocation disputes. www.saflii.org/za/journals/PER/2011/14.html Date of access: 15 Sept. 2013.

Dueck, A. 2004. Divorce and the best interests of the child. http://www.focusonthefamily.ca/tfn/family/PDF/Divorce_impact.pdf Date of access: 12 Dec. 2009.

Duke, M. L. In P. Rankin, 2001/2 Protecting the best interest of the child: Some Issues and Solutions. *IUC Journal of Social Work*. Issue 4.

Ford, J. 2007. The scope of divorce mediation: A question for Namibia. *Mediate.com.* Quarterly Newsletter. Sept. 2007. http://www.mediate.com/articles/ford14.cfm Date of access: 12 Dec. 2009.

Fouché, C.B. & Schurink, W. 2011. Qualitative research design. In De Vos, A.S., Strydom, H., Fouche, C.B. & Delport, C.S.L. (Eds.). *Research at grass roots: For the social sciences and human service professions*. 4th ed. Pretoria: Van Schaik. p. 307–328).

Froneman, A.P. 1999. Criteria social workers employ in making child custody recommendations. East London: Rhodes University. (Half-thesis – M).

Fung, D.S.S. & Yiming, C. 2008. *Primer of Child and Adolescent Psychiatry*. 1st ed. Singapore: World Scientific Publishing Company.

Galatzer-Levy, R.M., Kraus, L. & Galatzer-Levy, J. 2009. *The scientific basis of child custody decisions.* 2nd ed. USA: John Wiley & Sons.

Gauvreau, D. 2012. Mediation versus Litigation: Examining Differenced in Outcomes amongst the Children of Divorce. http://www.riverdalemediation.com/wp-content/uploads/2009/07/Gauvreau-Mediation-vs-litigation.pdf Date access: 5 June 2014.

Gould, J.W. & Martindale, D.A. 2009. *The art and science of child custody evaluations*. 1st ed. New York: Guilford Press.

Goonesekere, S. A. Rights-based approach to realizing gender equality. www.un.org/womenwatch/daw/news/rights.htm Date of access: 4 March 2010.

Heaton, J. 2009. An individualized, contextualized and child-centered determination of the child's best interest, and the implications of such an approach in the South African context. *Journal of Juridical Science*: 34(2): 1-18.

Herman, S.P. 1997. Practice parameters for child custody evaluations. *Journal American Academy of Child and Adolescent Psychiatry*, 36(10):57-68.

Herman, S.P. 1999. Child custody evaluations and the need for standards of care and peer review. http://forensicpsychiatry.stanford.edu/Files/Child%20Custody%20Standards.pdf Date of access: 4 March 2010.

Human Rights Commission. 2010. Human Rights in New Zeeland Today: Chapter 4: The rights of children and young people. http://www.hrc.co.nz/2004/09/01/first-report-on-state-of-human-rights/ Date of access: 16 January 2013.

Human Rights Education Association (HREA). http://www.hrea.org/index.php?base_id=81 Date of access: 16 January 2013.

Kangandjela, L.N. & Mapaure, C. 2009. Work in progress: The Child Care and Protection Act in Namibia. http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_g.pdf Date of access: 16 January 2013.

Kelly, J.B. & Lamb, M.E. 2000. Using child development research to make appropriate custody and access decisions for young children. *Family and Conciliation Courts review*, 38(3): 297-311.

Kirkland, K. & Kirkland, K.L. 2001. Frequency of child custody evaluation complaints and related disciplinary action: A survey of the Association of State and Provincial Psychology Boards. *Professional Psychology*: *Research and Practice*, 32(2): 171-174.

Kitzmann, K.M., Parra, G.R. & Jobe-Shield, L. 2012. A review of Programs designed to prepare parents for custody and visitation mediation. *Family Court Review*, 50(1): 128-136.

Kline Pruett, M. 2011. Parenting Plans following Separation/Divorce: Developmental Considerations. http://www.childencyclopedia.com/Pages/PDF/KlinePruettANGxp1.pdf

Date access: 6 June 2013.

Knoetze, E. 2002. The role of custom in the interpretation of the child's best interest principle. *Obiter.*

LAC (Legal Assistance Center). 2000. Summary of Proposals for divorce law reform in Namibia. http://www.lac.org.na/projects/grap/Pdf/divlawref.pdf Date of access: 4 March 2010.

LAC (Legal Assistance Centre). 2005. Divorce law reform: A summary of the law reform and development commission proposals. http://www.lac.org.na/projects/grap/Pdf/divlawref2.pdf Date of access: 4 March 2010.

LAC (Legal Assistance Centre). 2009. Draft Child Care and Protection Bill. Windhoek: Ministry of Gender Equality and Child Welfare (MGECW).

LAC (Legal Assistance Centre). 2009. Draft Child Care and Protection Bill. http://www.lac.org.na/projects/grap/Pdf/ccpa-draft-full.pdf Date of access: 4 March 2010.

LAC (Legal Assistance Centre). 2009. Draft child care and protection act. - Issues for public debate: Booklet 1. http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsppr-insert1.pdf Date of access: 14 August 2011.

LAC (Legal Assistance Centre). 2009. Public participation in preparing a new child care and protection law: National consultation on the Child Care and Protection Bill. http://www.lac.org.na/projects/grap/Pdf/ccparevisionprocesssummary.pdf Date of access: 14 August 2011.

LAC (Legal Assistance Centre). 2010. Revision of Namibia's Draft Child Care and Protection Bill. Final Report 2010. http://www.unicef.org/namibia/CCPA_FINAL_DRAFT_COMPLETE_clean_copy__09june_2010__sent_9_July.pdf Date of access: 14 August 2011.

LAC (Legal Assistance Centre). 2010. *Public participation in Law Reform: Revision of Namibia's Draft Child Care and Protection Bill: Final Report*. Windhoek: Solitaire Press.

Lamb, M.E. & Kelly, J.B. 2001. Using empirical literature to guide the development of parenting plans for young children: A rejoinder to Solomon and Biringen. *Family Court Review*, 39(4): 365-371.

Langelier, P. 2009. Rebuilding Families: Blueprint for child custody team evaluations. New York: iUniverce.

Lewis, K. 2009. Child custody Evaluations by Social Workers: Understanding the five stages of custody. 1st ed. USA: NASW Press.

Lincoln, Y.S. & Guba, E.G. 1985. *Naturalistic Inquiry*. 1st ed. USA: Sage Publications.

Lloyd, A. 2002. A theoretical analysis of the reality of children's rights in Africa: Charter on the rights and Welfare of the child. *African Human Rights Law Journal,* 2(1): 11-32.

Mahlobogwane, F.M. 2010. Determining the best interests of the child in custody battles: Should a child's voice be considered? *Obiter,* 31(2): 232-246.

Mailula, D. 2005. Taking children's rights seriously: Access to, and custody and guardianship of, a child born out of wedlock. *Codicillus*, 46(1): 15-29.

Maintenance Act **see** Namibia.

Martens, D. 2008. Exploring children's rights in Custody and Access. University of Windsor, Canada.

McIntosh, J.E., Wells, Y.D., Smyth, B.M. & Long, C.M. 2008. Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post-separation adjustment. *Family Court Review, 46(1)*: 105-124.

McLaren, T. 2005. The best interest of the child: A right or a principle*. Responsa Merdiana.*

Mienkowska-Norkiene, R. 2012. Inequality in divorce mediation – reasons, manifestations and ways to avoid it. Lessons for Lithuania. *Socialinis Darbas*, 11(1): 119-130.

Ministry of Gender Equality and Child Welfare (MGECW), facilitated by the Legal Assistance Centre and supported by UNICEF. Fact Sheet. Draft child care and protection act. - Issues for public debate: Objectives and guiding principles of the child care and protection act.

Ministry of Gender Equality and Child Welfare (MGECW), Legal Assistance Centre and UNICEF. Public Participation in Law Reform - Revision of Namibia's Draft Child Care and Protection Bill. Final Report 2010. Published by Ministry of Gender Equality and Child Welfare (MGECW), Legal Assistance Centre and UNICEF

Ministry of Health and Social Services **see** Namibia. Ministry of Health and Social Services.

Mitcham-Smith, M. & Henry, W.J. 2007. High-conflict divorce solutions: Parenting coordination as an innovative co-parenting intervention. *The Family Journal*, 15(4): 368-373.

Munson, C. 2011. Forensic social work practice standards: Definition and specification. *Journal of Forensic Social Work*, 1(1): 37-60.

Murphy, M.J.K. 2005. Family courts: Serving the best interest of the child: An integrated model. Thesis. University of Johannesburg.

Namibia.1960. The Children's Act 33 of 1960.

Namibia. 1972. Age of Majority Act 57 of 1972.

Namibia. 1990. Constitution of the Republic of Namibia. 1990.

Namibia. 2003. Child Maintenance Act 9 of 2003.

Namibia. 2004. Criminal Procedure Act 25 of 2004.

Namibia. 2006. Child Status Act 6 of 2006.

Namibia. 2015. Child Care and Protection Act 3 of 2015.

Namibia. 2003. Ministry of Health and Social Services: Directorate Developmental Social Welfare Services. Guideline on report writing in social work. 2003. Windhoek.

Namibia. Ministry of Gender Equality and Child Welfare (MGECW). 2009. Draft Child Care and Protection Bill. 2010. Windhoek.

Namibia Paralegal Association. 2012. Access to justice: Paralegal Manual Namibia. http://www.namibiaparalegals.org/assets/03527_New%20Perimeter_NPA_Legal_Manual_v13.pdf Date of access: 5 March 2015.

Neuman, W.L. 2003. *Social research methods: Qualitative and quantitative approaches.* (5th ed.). Boston, Mass: Allen & Bacon.

OAU (Organisation of African Unity). 1990. The African Charter on the Rights and Welfare of the Child. http://acerwc.org/?wpdmdl=8410 Date of access: 4 March 2010.

O'Kelly, A. 2014. Child Inclusive Practice (CIP) in Counselling & Family Mediation. Family Mediation Services. [PowerPoint slides]. Retrieved from http://www.childandfamilyresearch.ie/sites/www.childandfamilyresearch.ie/files/ann_okelly-family_mediation_service.pdf

O'Kelly. A. 2014. The Voice of the Child in Family Disputes. [PowerPoint slides]. Retrieved from http://www.legalaidboard.ie/lab/publishing.nsf/650f3eec0dfb990fca25692100069854/ab5ada4d704d403180257bcd00458f51/$FILE/A.%20O'Kelly.pdf

O'Leary, J. 2014. Mediation in family & divorce disputes. 1st ed. Cape Town: SiberInk.

Ottosen, M.H. 2006. In the Name of the father, the child and the holy genes: Constructions of "the child's best interest in legal disputes. *Acta Socialogica*, 49(1): 29-46.

!Owoses-Goagoses, F. 2009. Custody and guardianship of children. In Ruppel, O.C., *(ed.). Children's Rights in Namibia*. Windhoek: Konrad Adenauer Foundation. p. 177-188). http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_a.pdf Date of access: 5 May 2011.

Pickar, D. B. & Kahn, J.J. 2011. Settlement-focused parenting plan consultations: An evaluative mediation alternative to child custody evaluations. *Family Court Review,* 49(1): 59-71.

Poggenpoel, M. 1998. Data analysis in qualitative research. (In De Vos, A.S., Strydom, H., Fouche, C.B., Poggenpoel, M., Schurink, E. & Schurink, W. eds. *Research at grass roots. A primer for the caring professions*. Pretoria: Van Schaik.

Preller, B. 2013. Everyone's guide to divorce and separation. 1st ed. Cape Town: Zebra Press.

Ramolotja, M.A. 1999. Determining the best interest of the child. *Codicillus*, XXXX (1): 10-14.

Rankin, P. 2001. Protecting the best interest of the child: Some Issues and Solutions. *IUC Journal of Social Work Theory and Practice*, 4. http://www.bemidjistate.edu/academics/publications/social_work_journal/issue04/articles/rankin.html Date of access: March 2011.

Robinson, J.A. 2002. An introduction to the International Law on the rights of the child relating to the parent-child relationship. *Stellenbosch Law Review*. (2): 309-320.

Robinson, T. 2009. *Divorce: What about the children*? Cape Town: Struik.

Robinson, T. 2010. *Parenting plans: The development of substantive guidelines for professionals*. (Doctoral thesis). Retrieved from http://dspace.nwu.ac.za/bitstream/handle/10394/4700/Robinson_TM.pdf?sequence=2

Rohrbaugh, J.B. 2008. *A comprehensive guide to child custody evaluations: Mental Health and Legal Perspectives*. New York: Springer.

Rubin, A. & Babbie, E. 2001. *Research methods in social work*. (4th ed.). Belmont, CA: Wadsworth.

Ruck, M.D., Abromovitch, R. and Keating, D. 1998. Children and Adolescents' understanding of Rights: Balancing nurturance and self-determination. *Child Development,* 64(2): 404-417.

Ruppel, O.C. 2009. Protection of children's rights under international law from a Namibian perspective. In Ruppel, O.C. (Ed) *Children's rights in Namibia*. http://www.unam.na/faculties/law/documents/ChildrensRightsBook.pdf

Semple, N. 2011. The "Eye of the beholder": Professional opinions about the best interest of a child. *Family Court Review*, 49(4): 760-775.

Sigal, A., Sandler, I., Wolchik, S. & Braver S. 2011. Do parent education programs promote healthy post-divorce parenting? Critical distinctions and a review of the evidence. *Family Court Review*, 49(1): 120-139.

Skelton, A. 2009. The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments. *African Human Rights Law Journal*: 482-500.

Sloth-Nielsen, J. 2002. Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child. *The International Journal of Children's Rights*, 10: 137-156.

South Africa. 2005. Children's Act 38 of 2005.

South Africa. 1996. Constitution of the Republic of South Africa 1996.

Stahl, P.M. 2011. Conducting Child Custody Evaluations: From basic to complex issues. 1st ed. Thousand Oaks: SAGE Publications.

Strous, M. 2007. Post-divorce relocation: In the best interests of the child? *South African Journal of Psychology,* 37(2): 223-244.

Taylor, N., Fritzgerald, R., Morag, T., Bajpai, A. & Graham, A. 2012. International models of child participation in family law proceedings following parental separation/divorce. *International Journal of Children Rights*, 20: 645-673.

Thomas, N. 2011. Children's Rights: Policy into practice. Centre for children and young people. Southern Cross University.

Tjombe, N. (2013, July 1). Reform of divorce law in Namibia. *The Namibian Sun.* Retrieved from http://www.namibiansun.com/opinion/reform-divorce-law-in-namibia.54501

Turkat, I.D. 2005. On the limitations of child-custody evaluations. Court Review, 42(2): 8 -13 http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1034&context=ajacourtreview Date of access: 4 March 2010.

UNESCO (United Nations Educational, Scientific and Cultural Organisation). 1989. United Nations Convention on the Rights of the Child. http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf Date access: 4 March 2010.

Uugwanga, C. 2010. The law on divorce and dissolution of marriages in Namibia: A reform analysis of the types of marriages found in Namibia and the divorce laws pertaining to such marriages. Windhoek: UNAM. (Dissertation – LLB). http://wwwisis.unam.na/theses/uugwanga2010.pdf

Vertue, F. M. 2011. Applying case study methodology to child custody evaluations. *Family Court Review*, 49(2): 336-347.

Weir, K. 2011. High-conflict contact disputes: evidence of the extreme unrealibility of some children's ascertainable wishes and feelings. *Family Court Review*, 49(4): 788-800.

WHO (World Health Organisation). 2013. Consolidated ARV guidelines. *http://www.who.int/hiv/pub/guidelines/arv2013/intro/keyterms/en/* Date of access: 14 Aug 2014

Zelechoski, A.D., Fuhrmann, G. S. W. Zibbell, R.A. & Cavallero, L. M. 2012. Case Report-Evaluation for Child Custody: Using Best Practices in a Worst Case Scenario. *Journal of Forensic Psychology Practice*, 12: 257-470.

SECTION F: ANNEXURES

ANNEXURE 1

SEMI-STRUCTURED INTERVIEW SCHEDULE

1. What is your experience and views regarding the current child custody and control process?
2. How does the current child custody and control process impacts the best interest of the child in the Namibian context?
3. What is the process you would follow when doing child custody and control evaluations?
4. What would you consider as challenges in the current child custody and control process?
5. Are you aware of the new Child Care and Protection Act?
6. If yes, what is your views regarding the envisioned parenting plans as stated in the new Act and how will it serves the best interest of the child.
7. What would you see as challenges in the implementation of parenting plans within the Namibian context?
8. What would you recommend in order to serve the best interest of the child in a better way when doing child custody and control and parenting plans in the Namibian context?