

**FAMILY COURTS: SERVING THE BEST INTEREST OF THE CHILD:  
AN INTEGRATED MODEL**

by

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It is a gross injustice that the future care of the child from divorced parents should depend on the economic status of the parents. This is insulting towards the constitutional rights of equal access to the law. The Department of Justice is concerned with the transformation of the Justice System to become a fast, efficient and a cost-effective service that reflects the basic constitutional ideals. The creation of a Family Court in South Africa is such an initiative. By using developmental research, the best interest of the child in relation to his developmental needs and rights are explored. The application of these principles is investigated within a psycho-legal context.



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## **CHAPTER 1: INTRODUCTION**

### **1.1 Scope of paper**

The point of reference for all child custody and access within the legal system relies on the principle of the best interest of the child. It has become a vexed concept because it is hard to define and to measure. The concept is intertwined within the social and political thinking of the day. The concept of Family Courts in South Africa with regard to the proposed pilot project will be examined in which the best interest of the child principle is adhered to and is served. Various Family Courts will be examined and commented on.



The best interest principle from the viewpoint of the child, parent and the Court is examined from a developmental perspective. This allows the parents and the court to be more aware of child developmental needs and child psychopathology. A delicate balance between the needs of the child, parent and the court should be maintained to ensure the reduction of continual litigation, involvement of the court in the private lives of families and the continual changes in the needs of the child.

## 1.2 Definitions of divorce

A definition of divorce will depend on the role of the individual within the divorce process. According to the law the dissolution of marriage and grounds of divorce is defined in the Divorce Act 70 of 1979 Section 3(a)(b), Section 4 (1)(2)(3)(4), Section 5.

A divorce action means "an action by which a degree of divorce or other relief in connection therewith is applied for, and includes –

- (a) an application *pendente lite* for an interdict or for the interim custody of, or access to a minor child of the marriage concerned or for the payment of maintenance; or
  - (b) an application for the contributions towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or application;
- (2) For the purposes of this act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of Court, as the case may be.

**3. Dissolution of marriage and grounds of divorce** – A marriage may be dissolved by a Court by a degree of divorce and the only grounds on which such a degree may be granted are –

- (a) the irretrievable breakdown of the marriage as contemplated in section 4;
- (b) the mental illness or the continuous unconsciousness as contemplated in section 5 of a party to the marriage.

In section 6 of the Divorce Act provisions are made in safeguarding of interests of dependent and minor children. Section 6(1) states that a degree of divorce shall not be granted until the court –

- (a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactorily or are the best that can be effected in the circumstances; and

- (b) if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (a) or (2) (a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section for (1).
- (2) For the purposes of sub-section (1) the court may cause any investigation which it may deem necessary to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.

Divorce definitions according to a psychological perspective are abound. Divorce may be defined as a process in which one's clear identity may be formed through a life transition, by the emotional, physical and psychological separation from a spouse, whilst still maintaining the parental role and fulfilling the legal and moral requirements towards the offspring, to ensure that their rights and best interests are safeguarded.

### **1.3 Divorce rate in South Africa**

According to the South African Statistical Centre (1996) a total of 32 775 divorces were reported. The crude divorce rate for the Republic of South Africa was 81 per 100 000 of the population. A total of 41 971 minor children were involved in divorces registered.

During the divorce process it is essential to focus on the planning of the continual care of the children and the continuity of the child's relationship with both parents as well as the establishment of a realignment of the relationship of the parents with each other. This is essential to ensure that the best interests of the child are protected during and after the divorce process.

### **1.4 Best interest of the child principle**

The best interest of the child principle means different things to the parents, children, and law and to other role players in the divorce process. The best interest relationship is examined from the viewpoint of the child, parent and the Courts. Dowdall (1999) summarised the best interest of the child principle under the following headings:

**A. Criteria concerning the capacities of the respective parents to provide for the**

**material and economic needs of the child, and, where applicable, for the safety of the child.**

1. The capacities of the parents to provide for the basic physical needs of the child, such as adequate housing, food, clothing, medical care and other material or special needs.
2. Precedence should be given in any situation where the safety of the child is threatened, to arrangements, which will best safeguard the child's safety.

**B. Criteria concerning the bonds of affection and relationships between the respective parents and the child.**

1. The love, affection and the emotional bonds which exist between parent and child.
2. The child's preference, to the extent the Court deems the child to be of sufficient age or maturity to express preference.
3. Parenting skills and commitment based on the extent and range of past and present involvement in care taking and the capacity to provide emotional support and understanding and give appropriate guidance.

**C. Criteria concerning the capacity of the parent to sustain a stable and satisfactory social, cultural, environmental and educational context for the child, and their likelihood for doing so.**

1. The stability (or otherwise) of the child's existing social environment, and the desirability (or otherwise) of maintaining the status quo.
2. The child's adjustment, functioning and social and academic performance in the school context and the desirability or otherwise of sustaining this setting.
3. An assessment of parental support or alternative caretakers in each home, such as babysitters, crèches, relatives or stepparents.

**D. Criteria concerning the personal characteristics of the different parents, insofar as these directly bear on their fitness as custodial parents.**

1. The physical health and mental health of the parties, insofar as deficits may impact on the development and well being of the child.
2. The parents as functioning adults, including their emotional state, maturity, stability and any antisocial tendencies, insofar as these may impact on the well-being of the child.
3. The moral fitness of the parents, insofar as these may impact on the development or well being of the child.
4. The parents' motivation for custody and evaluation of their practical justifications.
5. The parents' own interpersonal relationships, and attitudes and behaviour towards the other parent, relatives and potential spouses on both sides.
6. The likelihood of the parent fostering visitation to the other parent, and sustaining a respectful attitude  
Before the children towards the other parent.

## 1.5 Forensic psychology

Forensic psychology 'is the application of psychological theories, methods and findings to the administration of justice' (Losel, 1992, p.7). The concern with forensic psychology is not only how to optimise the legal procedures but how to develop a good understanding of the law. A large proportion of studies in forensic psychology deals with decision-making and sentencing processes, the judgement situation, characteristics of the Judge and behaviour in the legal process (Sykes & Brent, 1983). Most research studies have been situated in the area of criminal law. However, with the increase in the participation of psychologists in the law, there has been a marked increase in other areas of the law such as, tort law, reparations and the best interest of the child in family law (Losel, 1992).

## 1.6 Psychology in relation to the Law Science

Even if the different cultures and traditions are discarded there are many areas of tension when law and psychology meet:

- Legal versus psychological terminology.  
This makes the reports between the two difficult to understand. The terms that are used, often when everyone knows the meaning, makes it hard to translate into a standardised form that may be used in varyingly different situations. Therefore the constructs that are used may have no correspondence in psychological theories or may be unfamiliar to the legal sciences (Zaal, 1991, Wexler & Schopp, 1991; Swenson, 1993).
- Empirical versus normative approach.  
Psychology looks at specific goal categories that are as empirically accessible as possible whereas the law has a normative approach that may not correspond to individual development (Hammond, McClelland & Mumpower, 1980).
- Pluralism and the uniformity in law.  
In law there is the avoidance of inequality through the judgements of courts, within psychology there is a multiple of theories and perspectives as a matter of course. This may result in the perception that in psychology there often appears to have contradictions (Lloyd-Bostock, 1981). The certainties of the law versus the probabilistic psychological findings. Legal scientists should be made aware of the flexibility of human behaviour and

the probabilistic hypothesis in psychological cause a great deal of uncertainty in certifying a sentence or order (Lloyd-Bostock, 1981). The mental health professionals usually focus on the external determinates of behaviour as the basis for predictions and a cause of causality. Most theories and systems in psychology are deterministic, where harmful behaviour as caused by independent variables; normally 'guilt' is not attributed because the psychologists feel that there is no scientific way in doing so (Horowitz & Willing, 1984).

- New research findings in psychology versus the long established rules of the law. Time delays are often found in the law when implementing new scientific findings. This may often lead to impatience amongst the psychologists (Lipsey, 1992).

- Empirical experimentation versus the fixed jurisdiction.

Many psychological models are flexible in their applications concerning for example, access, and custody arrangements, because of the fixed nature of jurisdiction (for example reaction to child abuse), field experiments can not be experimentation and observation and consider this to be a better guide to reality or the truth than the opinion of important person or tradition (Thilbault & Walker, 1975; Skafte, 1985; Stahl, 1994). The psychologists pay more attention to the methodological procedures than to the elegance of expression. For the legal professional the scientifically gathered data must compete equally with philosophical ideas (Swenson, 1993).

There is increase sensitivity to these differences. There is a growing understanding for the possibilities and potential for the other side. It is however important for psychologists to retain a relative autonomy but not be merely a tool or scientific aid as defined by the lawyers since this will result that psychologists become less visible and articulate (Lloyd-Bostock, 1981).

To better understand the position of the parties involved in serving the best interest of the child, the legal structure and the processes in which the child finds himself is examined.

## 1.7 Goals and aims of this study

The aim of this study is to do a literature analysis of both developmental psychology and family law in order to ascertain to what extent psychology can lay a foundation for recommendations in terms of custody decisions by the courts. In order to do this, the developmental theories of

Piaget and Erikson will be examined, as well as other psychological theories that may inform the legal process.



## CHAPTER 2: THE ROLE PLAYERS

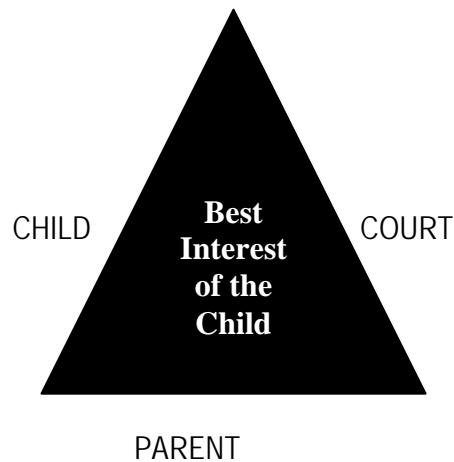
### 2.1 Introduction

In assessments of custody, the “best interest of the child” principle must be adhered to strictly. Although this principle sounds relatively simple, the professional who does the assessment is always faced with a dilemma as to what this principle really implies. One approach would be to consider what developmental tasks are for children of a particular age. This not only provides guidelines as to how the child will experience the divorce, but also what the ideal situation would be to ensure optimal development.

Development takes place when the individual and the environment act upon one another. Development is the result of encounters between the individual and the physical, social, emotional and cultural contexts (Garbarino & Stott, 1990). Mack, 1983 as cited in Garbino and Stott, 1990, p.20, suggests that self-esteem is an important task in childhood since this allows the child to reflect on his thoughts and feelings. Garbarino & Stott, 1990 suggest that individuals with a high self-esteem more often feel happy which manifest in feeling confident, a sense of worthiness and acceptance. Those who with a lowered self-esteem are more likely to feel more pain, doubt and sadness. Therefore feeling more confident results in the competence in school and work. Acceptance derives from approval by others and the capacity to form intimate relationships. Therefore when a child needs to cope with problems, frustrations and challenging situations, he needs to draw on his feels of competency, acceptance and internal resources to meet these stressful challenges. The child needs to look at his cognitive capacities, motor capacities, affect, complex capacities and self-esteem. A child with a positive self-esteem is less vulnerable to stress. These capacities will depend on the developmental stage of the child and will influence the coping strategies the child has as source of information. The coping strategies that the child has at his disposal will influence the defence mechanism that he can make use of when dealing with very stressful situations. Defence mechanism that are maladaptive will interfere with effective coping. An understanding of the cognitive, language and psychosocial development of the child can be useful to the parent in understanding the child' behaviour and prevent the child's involvement in the blaming or control battles. An understanding of the child's developmental needs will prevent the breaking down of the child's self defences that may interfere with the child's ability to cope (Garbarino & Stott, 1990).

There exists a relationship between the child, the parent and the court, bound together by a golden thread called ' in the best interest'.

Figure 2.1: Diagrammatic representation of the role-players protecting the best interest of the child



For the child “in his best interest” is served during the divorce process and will eventually ensure that he is able to become an optimally functioning parent to his children. For the parent “in the best interest” serves as a means of “winning” the divorce battle. For the Judge “in the best interest” opens the way to endless applications and justifications. It is important to understand the characteristics and factors of the relationship existing between the parent, court and child. In understanding what contributes to the best interest of the child as held in the South African Courts, one must understand that as a child develops so to do his needs. To be able to understand what contributes to the needs of the child one should understand how a child develops. By understanding what contributes to normal development, one is then able to recognise the deficiencies and act upon them. In recognising these deficiencies, the best interests of the child are better able to be served. This principle is noted in article 3.1 of the UN Committee (hereafter known as the Convention) on the rights of the Child (1989):

*“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 of primary consideration.”*

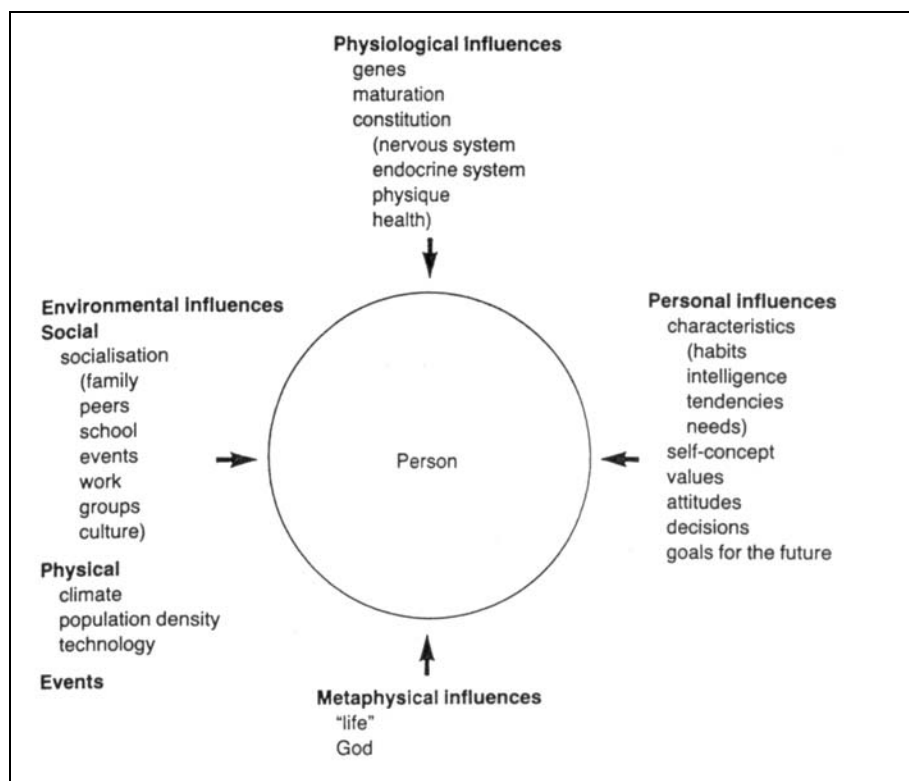
The key element of this principle is that each child will have its own, unique, needs therefore the “best interest” of one child, will differ from the “best interest” of another child. It would therefore be important to keep the developmental stages of the child in mind when considering the best interest. When looking at childhood development, one also needs to consider the history of developmental psychology.

The 1920s were noted for an increased interest in the somatic development of the child. This led to pressure on ‘deviant’ groups (the mentally handicapped, children of divorced parents, and the deaf, the



blind and delinquents). This resulted in research from child guidance clinics, the psychoanalytic school (Sigmund Freud) and behaviourists (Watson and Jean Piaget). Books published in the 1930s focused on the value of childhood and its consequences on adult personality. Herbert (1991) cites several theorists who have highlighted the need to study the importance of the family and social environmental factors to better understand child psychopathology together with principles from developmental psychology. At present the approach focuses on the developmental-interactional approach, that is the continuous interplay between child development and environmental change. Piaget's, Selman's and Kohlberg's theories are consistent with this development.

Figure 2.2 - How development is influenced by a variety of factors (Louw, 1996, p.17).



There are many factors that influence a child's development. Knowledge of determinates of development should always be taken into account when considering the effects of divorce on children (Herbert, 1991). There is a delicate balance between the state of the child's physical and psychological achievements. Divorce changes the environmental structure so that the family becomes an open-ended family system.

Divorce produces new roles for the parent in the upbringing of their children. The divorce produces the psychological meaning of divorce to the children and the promotion of intrapsychic development of the

child, to ensure moral stability, reality testing, control over impulses, affect regulation and the ability to disengage in a process towards individualisation (Pfeffer, 1981).

In understanding the interplay between development, environment and psychopathology in divorce, key concepts should be highlighted:

- The process of emotional adaptation following the end of the divorce (Cludlow & Vincent, 1987).
- The relation between affect and cognition before and after the marriage.
- The developmental transitions between stages of thought and behaviour.

This approach may serve as a basis towards the understanding and interpretation of the child's behaviour and so enable practitioners and parents to design routines and interventions that will best serve the interest of the child. It is also useful to understand the developmental process with reference to the characteristics and skills that an individual should develop in order to function in society. This may then serve as a basis from which society's expectations can be measured at any particular stage. These expectations have been called developmental tasks by Erikson (1963, in Louw, 1996, p. 58). In the family, and the extended family, the various members fulfil different roles, linked together by the invisible thread of loyalty. Thus what one member does may have a profound impact on another's life (Boszormenyi-Nagy & Spark, 1973, in Kaslow & Schwartz, 1987, p. 7).

Kaslow and Schwartz (1987) suggest that the effects of divorce have implications for developmental tasks, namely an impact on:

- Identification
- The achievement of intimacy.

Rice and Rice (1986, in Kaslow & Schwartz, 1987, p.13) see divorce as increasing the propensity for redefining one's identity and the desire to fulfil the task of intimacy not yet accomplished. Only when the two tasks are completed will individuals feel that they can respect and appreciate their wholeness.

- There are many different developmental theorists (e.g. Rhodes, 1977; Bowen, 1978; Huges, Berger and Wright, 1978; Haley, 1973; and Levinson, 1978) all of whom have contributed to the study of the developmental process.

Erikson's (1963, in Louw, 1996, p.58) developmental tasks centre around behaviour that causes the child's personality to develop and, as important, his sense of identity. Erikson's ideas are similar to those of Freud, Piaget, Mary Ainsworth and Selman. Erikson views the basic motives of humans as:

- The development of their inherent potential (self actualisation)
- The knowledge of themselves and acceptance of their limitations and capacities.
- The knowledge that they can feel safe in this self-understanding (Louw, 1996).

Erikson (1963, in Louw, 1996) states that people are not aware of these motives. They manifest in a lifelong progression from one stage to another.

## **2.2 Childhood development**

### **2.2.1 Introduction**

In normal development there is a recognition of cognitive and affective realism in the mature child (Rosen, 1985). Disturbances in developmental transitions are reflected in fluctuations in behavioural responses, which may imply that disturbed children may experience difficulty in assimilating different perspectives in cognitive and role taking (social tasks). This may reflect the emotional need for non-contradiction to enable the child to conform to affective demands in their social environment (Epanchin & Paul, 1987).

### **2.2.2 Social development**

Social development involves the reciprocal influence of society on the individual and the individual on society. It includes aspects such as attachment theories, expansion of the child's interpersonal contacts, sex role identity, and moral development (Louw, 1996).

Socialisation is the process whereby the individual learns what is right or wrong, role expectations and standards of prevailing acceptable behaviour in his society (Plug et al, 1986, in Louw, 1996). Although this process may differ from individual to individual, social mechanisms are present in all children from all cultures. Four mechanisms have been identified as:

- The desire for affection, acceptance and recognition;
- The desire for identification;
- Avoidance of unpleasant feelings resulting from rejection;

- A tendency to model behaviour in their social environment.

**Table 2.1 - Social development**

Infants	Pre-school	School age	Adolescents
<p>-Active role in social interactions are primary (Hodapp &amp; Mueller, 1982).</p> <p>- Infants trust anyone who has responded to their needs.</p> <p>- Mothers and infants interact in more task-oriented and verbal manner.</p> <p>- Fathers and infants interact with physical playing.</p> <p>- Peer interactions are more motoric.</p>	<p>- Ability to co ordinate one's thoughts with those of a another (Chandler &amp; Boyes, 1982)</p> <p>- Selman (1981) focuses on the child's interpersonal negotiation strategies and their social understanding.</p>	<p>- Piaget (1932 in Louw, 1996, p. 285) suggests that the child begins to understand that the event may not always be consistent with another's understanding.</p> <p>- Selman's Level 1 behaviours focus on bossiness, threats or power-orientated obedience. Level 2 behaviour focus on persuasion, bribery and battering.</p> <p>- Children begin to co-ordinate another's perspective and are able to step into each other's shoes.</p>	<p>- Ability to recognise that others may construe events differently since different interpretations, values and beliefs may influence them.</p> <p>- Selman (1981) suggests that the ability to realise that the need for social conventions to promote social understanding is important. Level 3 – realisation that both the process and the outcome of the negotiation are important.</p>

### (1) Erikson's Theory of Psychosocial Development

Erikson's theory of development expanded upon Freud's theory of psychosexual development, and while similar in many respects it differs fundamentally in that it is less deterministic and more optimistic in its overall focus on the multifaceted potential of the individual, and the capacity of the individual to overcome hardship, and his/her ability to adapt and change throughout life. Erikson is concerned with the developmental opportunities people experience, which assist us to overcome hardship. Fundamental to his theory is the idea that growth is ongoing throughout the life. Erikson emphasizes

the impact of early development while at the same time stressing the endless possibility for relearning and growth throughout the life - span. Erikson believed that the development of the individual is determined by the interplay of a genetically fixed progression of development, or an inherent developmental behavior pattern which is designed for adaptation to the environment, namely the social context in which one grows (Meyer, Moore & Viljoen, 1989). The basic motive of human beings, then, is to develop inherent potential, to achieve congruence between self-image and social aspects of life, thus creating identity.

Erikson's theory is known for its focus on the concept of identity and in particular the identity crisis of adolescence, about which he wrote several books, hence the relevance for this study. His theory reflects his concern with the influence of the social context on the development of identity. His theory focuses on the processes of socialization, the relationships between the developing individual and his or her social environment, and recognizes the relativity of individual identity formation within a social system, which impacts on and informs the meaning of that identity for people.

Erikson pioneered the idea that development is ongoing throughout the life span, and is not ever arrested. The theory addresses the individual in relationship with significant others and the wider social settings, (the family and society at large). Erikson's concern is with the developmental opportunities for growth in individual's lives, considered social crises, which help him/ her adapt to life successfully. Erikson, like Freud, accepts the assumption that people are born with energy and drive, a motivating force that is instinctual, also known as the libido (Maier, 1965). This force is conceptualized as constituting two opposing tendencies, one to live and grow, extend and gratify the self, the other to regress, or return to a former state, implying self-destructive tendencies. A polarity thus exists as an innately human reality manifest in the intrinsically human dilemma of having and experiencing choice, whether consciously or unconsciously. All behaviors then originate from the tension or energy between polarities. Life, thus, is a relative experience, conflict and resolution continuously ongoing throughout the life span in an inevitable progression, like the crest and fall of a wave, until physical death, and no doubt, beyond, all this, natural and inevitable and intrinsically, the human condition. It is this tension between polarities and this consciousness that is the bedrock of Erikson's stage theory.

Libidinal energy manifests on three levels of consciousness, conscious, pre-conscious and unconscious. Three major analytic processes or hypothetical structures exist then, the id, ego and superego. Erikson places most emphasis on the ego, which controls conscious action, the synthesis of past experience with present in the present social context. The ego gives direction and the superego

constitutes personal experiences with ideas and attitudes of significant others in the social context (family, caregivers, teachers, peers, societal role models). The ego binds together inner life with outer life, it is an autonomous agent. Ego functions are thought, play, actions and speech (Maier, 1965). The focus then, is the nature and quality of the relationships between people, rather than personality as such, as this determines emotional content. Personality is not fixed and is continuously changing. How a person behaves is a product of the interrelationship between id, ego and superego. Implications, then, are that a balance between the three represents healthy development, whereas pathology represents an imbalance. In the latter case this is never irreversible. Alongside innate psychological and biological processes there are physical, social and ideational environments.

Erikson proposes a stage theory, in which he identifies eight stages of development covering the total life - span. Writing within a humanistic paradigm, his theory is particularly optimistic in its view that the individual can at each stage spontaneously rectify unresolved problems that may have developed at earlier stages of development and in the basic premise that the individual has multifaceted potential. Erikson believed that through the continuous interplay between individual and environment, the individual encounters a series of crises or challenges in development in which the ego makes choices that impact on future development, in order to resolve creatively, the dissonance, change at each stage brings. The theory thus complements the cognitive stage developmental theory of Jean Piaget whose conceptualization of natural stages in cognitive development support the notion of a genetically predetermined ground plan for development. Personality traits are thus viewed as transformations of behavior patterns developing out of this natural inclination and their interaction with the social environment. According to an epigenetic principal, an individual's potentials and needs arrive and change in a particular sequence at specific stages of development, and in such a way that the individual is constantly developing as a whole. The latter point has been misunderstood by many authors oversimplifying the idea of the eight stages as Erikson himself describes these stages and their lessons are viewed incorrectly by many as a rosary of achievement, or device for counting the fruits of each stage, e.g.: trust or autonomy, as a permanent trait, permanently conquered. Erikson stresses the need for the healthy personality to reconquer all of these tasks continuously throughout the life-span. A person learns means and mechanisms for retaining and regaining mastery (Erikson, in Muuss & Porton, 1998). These eight stages represent the principal times Erikson thinks certain characteristics become overt and dominant in development.

Each stage of development Erikson envisages as characterized by a developmental crisis that presents itself as a challenge to the individual for resolution. The resolution will be between two complementary

and opposite possibilities involving needs, expectations and opportunities distinctive of that stage of development of the self or ego. The individual, or as Erikson describes, the ego, then attempts to resolve that crisis by choosing one or the other opposing possibilities, however they are not mutually exclusive and for healthy development the individual should be able to find the balance between these polarities in order to eventually progress to a state of maturity and wisdom (Meyer, Moore & Viljoen, 1989). At each stage the personality is said to develop or attain ego strengths to a greater or lesser degree, enabling the easier or more difficult resolution of crisis at subsequent stages. Often oversimplified, because of the clear structure of this theory, the intention that development through the stages should be viewed holistically is often overlooked and misunderstood. Of significance here is that according to Erikson's conceptualization, each stage of crisis involves the application of all previously acquired ego-strengths, and endless opportunity to relearn previously unlearned ego-strengths in new circumstances (Erikson, 1963). In this way Erikson makes allowance for the non-linear corrective experiences in development, viewing the self as self-rectifying, acknowledging the self as autonomous and development as non-deterministic and to some extent unpredictable, as the context which is ever changing, continually influences the agent of the ego. Erikson's first five stages are an expansion of Freud's psychosexual stages of development.

- **Stage 1: Trust versus mistrust: realization of hope:** Erikson believes that the foundation of all later development is based on the resolution of this crisis whereby the individual attempts to acquire a sense of hope. Trust is built when the infant experiences physical comfort and little uncertainty. If he/she experiences this consistently, he/she is likely to be able to extend his trust to other experiences (Erikson, 1963). This sense of trust is important for the individual to be able to embrace and accept change (new experiences). While the young baby experiences mistrust of new territory, she/he learns to trust that mistrust if she/he experiences trustworthiness in her/his immediate experience. At this early stage bodily needs such as breathing, digestion, and motor movement need to be met for healthy development. The infant is completely dependent on others for external care and nurturance. Initially, according to Erikson, all needs and behaviors are charged with libidinal energy, and sucking, crying and reflexes slowly become more cortically controlled as the neuropsychological developments begin. Ego development involves neurological maturation. The infant's first experience then with society is oral; it is through this mode that he/she experiences satisfaction and a sense of security. Erikson stresses that it is the quality of physical and psychological comfort in the personal interactions associated with oral functions that are important in whether the infant develops a sense of satisfaction and trust. If the interpersonal contact around oral functions is

experienced as positive and satisfying, a sound sense of security is ensured. Mother is the context and determines her infant's experience. The infant learns to receive and trust, from the degree of relaxation and warmth experienced by the primary caregiver a thereby. Receiving involves appropriating everything in his/her grasp and testing it orally. Receiving leads to grasping, the second modality (Erikson, 1963). The inner sense of well being is directly related then to consistent caring in the caregiver behavior. The child learns to trust mother, self and the world, so he/she will be able to take on change and new experience, unknown challenges and experiences. A symbiotic relationship exists between mother and child so that the positive feelings towards mother within the child become the child's inner reality. Attachment to a single caregiver becomes significant around 6 months of life, and separation can run the risk of creating mistrust. Important for successful development at this stage is the support the caregiver receives, as this directly affects the infant's experience of him/herself and life. Quality of maternal care is directly related to quality of care experienced by the mother for herself.

- **Stage 2: Autonomy Versus Shame And Doubt: Realization Of Hope:** The infant learning to trust the environment is able to recognize ownership of his or her own behavior. As the infant begins to exert this independent behavior he/she at the same time still experiences dependency, which now creates a sense of doubt in his ability to be free of it and assert autonomy. His/her new growth and development involves to some extent a loss of the comfort zone while at the same time freedom in his/her new sense of ownership of his/her world. Resolving the conflict between assertion and shame in asserting the right to dependency, becomes the task of this second stage (Meyer, Moore & Viljoen, 1989). Healthy resolution is dependent on guidance and support in his/her endeavors. Motor development is rapid in this stage, bringing the child into willed action, so that skills mastered such as grasping, releasing, crawling and walking become means to further ends, launching her/him into goal directed activity. The child can control elementary functions with newly refined muscle control (Maier, 1965). Superego functions begin to develop, alongside strong impulsive libidinal energy and growing ego development. The child begins to integrate controlling and regulating functions in his/her new command and control of the world, which were previously provided for him/her. The perception of boundaries between the child and the caregiver creates a greater sense of trust within the self, and this marks healthy ego development (Maier, 1965).
- **Stage 3: Initiative versus Guilt: Realization of purpose:** This stage involves the child at pre-school age and covers the ages three years to six years of age. The social context expands for



the child who now explores and experiences an enlarged unpredictable world of new friends, new authority figures and new rules (Maier, 1965). There are new adjustments to be made in negotiating this world, and new psychological and motor developments equip the child to make these necessary adjustments. The new world into which she intrudes actively she discovers to be exciting and dangerous. With energetic learning engendered by the development of speech and locomotive skills, the child's inner and outer world expands dramatically, actively and imaginatively (Erikson,1963). She discovers that his words have consequences and he develops a sense of purpose because his speech and actions become meaningful in that he feels their consequences directly. Her teachers and other adults recognize her as one of a group, like others, with a role and function. She is counted and given tasks, she is treated the same as others by her teachers and is regarded as significant as a member of the group. With this new meaningfulness comes an experience of self as significant in his social context. The child is equipped now with a greater sense of control over his body and his environment finding himself experiencing a sense of ownership of his body, behaviors and actions, and likewise experiences an awareness of self as active and purposeful. The newfound ability to initiate behavior brings with it the awareness of accountability, as ownership of action is discovered. The child therefore can now feel guilty about his behavior, as he feels responsible and is expected to take responsibility for his actions. (Meyer, Moore & Viljoen 1993). As she actively engages new others and initiates action she learns the repercussions of her behavior for others and himself, learning a new sense of responsibility. The voices of significant others (parents or previous attachment figures) now become internalized and he experiences them as self-judgement, the voice of the developing super-ego. She wishes to please and is keen to adopt to and apply new rules, at the same time her insatiable need to explore and know, which elicits fear and uncomfortable feelings as she acts without full understanding of the outcome of behavior on others and the world, presents a constant tension challenging the child to find a balance between restraint and control (his conscience) and initiation of action, between what Erikson terms, guilt and initiative. The instinct fragments, which before had enhanced the growth of his infantile body and mind now become divided into an infantile, set which perpetuates the exuberance of growth potentials, and a parental set which supports and increases self-observation, self-guidance, and self-punishment (Erikson 1963, p.256.) This is a time when the social context demands more from her, when the social sphere grows to accompany important relationships with siblings and school friends through which the child enjoys and feels her own extended significance and self as an effective active agent in life, which becomes meaningful because of her ability to act purposefully (Maier, 1965). The child at

this stage initiates behavior, tests his own abilities and limits and engages others more in his world. She discovers the impact of other's behavior on her, resulting in discomfort and frustration at times, as she extends beyond the comfortable arenas of interactions with primary caregivers that she has learned to depend on and trust as supportive. The trusting autonomy she has hopefully attained comes into conflict with others' autonomous action, now interacting more with those of her own age and experiencing the reactions to her intrusions into other's worlds and the consequences thereof (Maier, 1965). Erikson proposes that guilt is the salient feature intrinsic to this conflict as the experience of unharmonious meetings of self with the world results in negation of previous trusting relationships. This, in turn, fuels the conflict inherent then in the relentless movement towards greater initiative (growth) and desire to explore more those opportunities for initiative. Gender identity becomes important at this age as the child becomes aware of his differences physically from the opposite sex and identifies with the same sex parent, who becomes a significant role model, while there exists a somewhat romantic relationship with the parent of the opposite sex. She, also, through these observations identifies with being the same as an adult and compares himself with adults. The child experiments with and questions her sex role and practices his new behavior through play. Naturally the social roles of what it means to be male or female start to exert influence at this early age when the child is discovering how to be a girl and how to be a boy. Erikson believes that young girls at this stage of development practice behavior that expresses a desire to make oneself attractive, that would engender others to involve and include her in their worlds (Maier, 1965). Maier (1965) states that Erikson viewed the significant modality in girls as involving inception, and goes on to describe that libidinal drives are translated into behaviors that concern themselves with rendering oneself attractive to others, which involves scheming and teasing amongst other things. It may be significant that for little girls the expression of drives concerns others directly whereas for boys of this age it involves action, motor intrusiveness, and thrusting into new spaces and experiences not necessarily mostly in relationship. For the little girl, conquests and mastery are lived out in relationship and her behaviors are person centered, she depends upon relationship with another for the resolution of conflicting drives possibly more so than boys, who have also at this age had an experience of discontinuity with the maternal figure as he identifies with father or a significant male of the same gender. For the girl this shift is not learned or necessary. She also practices nurturing behavior and social relations, which are reflective of her future maternal role. Boys at this stage demonstrate intrusiveness very physically, with intense locomotive activity, active exploring of space, curiosity in finding new information and confronting people and problems proactively. For both girls and boys play

becomes the tool through which the child works through conflicts and problems and needs to be able to explore alone as well as with his peers in the safety of the non-reality. The environment needs to allow the child experimentation and play so that he can work out for himself his sex role identity, and explore his boundaries socially, verbally and physically, learning appropriate behavior without fear of too much recrimination, which would impinge on his developing a sense of purpose.

- Stage 4: Industry versus inferiority: realization of competence: This stage involves the school going years from six years to twelve years of age. The child enters formal schooling. Having mastered the various organ modes, the child now focuses energy on producing things (Maier 1965). Erikson emphasizes the learning at this stage of handling the tools of her culture and the shaping of this productive process by the culture in its provision of learning opportunities in school which involve individual skills and collaborative efforts in a formal school setting. The child learns writing, reading, arithmetic and various other skills within a social context that measures those skills and places importance on the accomplishments of these, covertly communicating to the child the promise of goodness and success should she master them. The child directs all her energy to participating in learning in order to master skills, improve herself, and working hard to achieve success as measured by the goals set for her by the social institution she learns in. As meaning generating beings it becomes important therefore for the child to excel and prove herself according to the standards set by the status quo, which largely imbues all of this activity with values and meaning for her. She embraces these looking for acknowledgment more and more from her peer group for what she is, and can do, rather than from parents (Maier, 1965). It is very important for her to feel good at something at this stage and to receive affirmation for producing outcomes (Meyer Moore & Viljoen, 1989). She needs to achieve in this competitive arena with peers in order to avoid feeling inferior and incapable. A sense of competence is achieved if she is able to successfully meet the challenges of this period. Extra-familial identification becomes significant as the child now interacts with a wider range of people finding she is dependent on the social institution for affirmation of herself. She needs to measure herself against her peers and contemporaries and is dependent on their acknowledgment for her self-esteem. Energies move further from playing towards working and her future attitude to work and experiencing herself as a meaningful contributor to her society is founded in to what extent she perceive herself as successful in industry at this time.

- **Stage 5: Identity Versus Identity Diffusion: Realization Of Fidelity:** This study looks more closely at the fifth stage of development: the adolescent stage in which the task of the individual experiences the crisis of identity and faces the task of establishing an identity, as opposed to diffusion of identity. Erikson is known for his popularization of the term identity because of his focus on the adolescent stage of identity formation and his theoretical contribution to the construct (Wilkinson-Ryan, & Western, 2000). His work has generated further research and theoretical work on the subject such as the extension of his theory of identity statuses by James Marcia (1966), who operationalized it. This stage begins with the onset of puberty, around eleven or twelve years of age, and ends with the beginning of maturity and adulthood, this could be found at any point between eighteen years and twenty-five years of age (Meyer, Moore & Viljoen, 1989). Erikson identifies the quest for self-image, which he calls the search for identity, as the major task of this stage. The challenge is to find a sense of 1) authenticity and personal sameness or continuity over time and across various situations, 2) congruence between self-image and the role expectations of society, 3) role commitment and a loyalty to a chosen role, and affirmation thereof by the larger society as well as a 4) sense of inner agency (Erikson, 1968). The task of this stage is to: integrate all identifications (from childhood) with the vicissitudes of the libido, with the aptitudes developed out of endowment, and with the opportunities offered in social roles. The sense of ego identity, then, is the "accrued confidence that the inner sameness and continuity of one's meaning for others, is evidenced in the tangible promise of a career." (Erikson, 1968, p. 235). Positive identity is necessary for the adolescent to successfully meet the challenges of adulthood involving appropriate choice of vocation, life partner and the capacity for intimacy to allow for the possible fulfillment of adult roles. As with any natural system, large change in that system produces chaos as a natural phenomenon. The adolescent turbulence is such an example of a system in chaos, experiencing dramatic change and growth in the physiological developments at this age, marked by rapid physical growth and maturing sexuality in the adolescent who must now renegotiate and question all that she has known before about herself and her world in order to accommodate and integrate these changes. The processes, self-assertion and integration, which Capra (1997) describes as essential to any living system, manifest in attempts to reach homeostasis or balance, the kind Erikson would label for the searching adolescent, a sense of identity. Self assertion then takes the form of exploration and experimentation of social roles and various possible identities, the questioning of sameness and continuities relied on earlier, and integration would embody the synthesis of old and new and the connection of roles and skills cultivated earlier with the occupational prototypes of the day (Erikson 1968). Integration would manifest then in a sense of

authenticity, agency, and continuity over time and sameness of self. Therein an ability to commit to an appropriate vocation and values, in short an identity that is meaningful within the social context. The adolescent in chaos will make meaning from this in one way or another, that being some form of identity or naming of self in relation to past, present and future and in relation to her frame of reference, the social context within which he finds herself. Being meaning generating beings in a relative world some form of meaning will arise under the heading of identity, be it presented as psychosis or healthy adjustment and that meaning called identity will have everything to do with others as much as the self, as we cannot define anything out of relationship. The goal according to Erikson is to find the position of meaning that is described as positive identity as opposed to negative identity or identity diffusion. The "chaos" which Erikson calls identity diffusion or Wilkinson-Ryan and Western (2000) call identity confusion throws the adolescent into crisis, characteristic and expected in the early stage of adolescence, the outcome of which can be varied according to the extent to which the individual successfully mastered the resolution of previous stages of crisis in development. The possible outcomes, according to Erikson then are 1) achievement of positive identity, 2) premature self-definition 3) unresolved identity: a sense of failure and ambivalence 4) attainment of a negative identity (Maier, 1965).

- **The positive identity:** The task of establishing a positive identity has to do with finding where the adolescent fits into society. The social context from which individual's meaning is derived involves more consciously now the values, rules, expectations, promises and meanings of life according to a wider range of voices, namely those of peers, significant adults, authority figures and political as well as religious leaders representing the ideology and norms of the status quo and the other or counter voices of the culture within which she finds herself in, and not primarily the voices of parents. The socio-cultural context requires the adolescent find congruence between self-image and the role expectations of society, as well as continuity in life. Integration of inner and outer demands is necessary in order to achieve balance and prevent diffusion, which may lead to enduring disturbance (Maier, 1965). The attainment of a positive identity provides the adolescent with an awareness and acceptance of personal continuity with her past and a positive secure and confident attitude towards her future. She attains a new view of herself and has stabilized values and purposes (Erikson, 1968). From this evolves a willingness to commit to roles and a value system and a readiness to enter intimacy with the other. Orlofsky, Marcia and Lesser (1973) show

that subjects that demonstrate identity achievement have a significantly greater capacity for interpersonal intimacy. A commitment to specific roles selected from alternatives is required and this is possible if previous identifications are integrated. From this arises fidelity to a new position as a person in all spheres, social, economic and cultural.

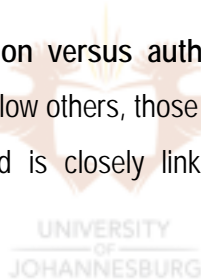
- **Identity diffusion:** The chaos, which characterizes the state of identity diffusion, is viewed as necessary and normal for the process of identity achievement and in the early stages of adolescence is expected. It serves the function of forcing the growing adolescent to re-evaluate herself and her position in society, to explore alternatives and seek out authentic meaning, which she can only do by experiencing and living differences and alternatives and coming to some decisions about what she wishes to be, what she believes in and what she is prepared to commit herself to, in other words the process involves finding meaning for herself through personal experience. However if the individual is not able to do this and thereby discover a positive or healthy identity, a negative identity may emerge as an escape from the state of diffusion. The implications seem to be that remaining diffuse cannot persist and may be terminated by the attainment of positive or negative identity, regression into insanity or suicide. Wilkinson-Ryan and Western (2000), describe identity diffusion as manifest either, in a subjective sense of incoherence and/or as difficulty in making decisions and committing to a vocation. Furthermore these authors describe the diffused adolescent as fearing the loss of self in intimacy because of the inability for these adolescents to discriminate between their own feelings, desires and thoughts from the other with whom they are involved, which poses a threat to loss of self, if the relationship ends.
  
- **The social moratorium:** The chaos intrinsic to identity exploration and resolution is supported by what Erikson calls a *social moratorium*, which sanctions the exploration of various identities, values, and roles without the expectations of adult responsibility, and provides a kind of safety zone in the form of apprenticeships and tolerance of deviance at this stage (Erikson, 1968). According to Erikson this is essential in the developmental process progression towards establishing a healthy identity. The adolescent can only choose from an experience of difference and the necessary changes of wardrobe whereby various identities are tested, require tolerance and a time delay provided by the moratorium. Erickson describes this moratorium as characterized by:

*“A selective permissiveness on the part of society and of provocative playfulness on the part of youth; and yet also a period of deep (if often transitory) commitment on the part of youth and ceremonial acceptance of commitment on the part of society”.* (Erickson, 1956, p5).

During adolescence the individual with the help of the moratorium works through what Erikson describes as seven dimensions. Speech is a necessary means of searching for meaning and it is common to find that adolescents spend a great deal of time working through their ideas and feelings with excessive communication with peers. Role plays and escapes into fantasy are ways of coping with and working through diffusion. In the healthy adolescent this does not become unhealthy denial of inner conflict, which excessive substance abuse would represent. Significant others at this stage are ordained by the adolescent depending on their significance for her at this stage and can include teachers, other adults besides parents, media figures. Imbued with significance at this intense stage of development they can play a vital role in the shaping of her identity. The focus on parents as value givers subsides and makes way for the peer group. Projections of diffused ego identities onto others at this intense and diffused time creates extreme loves and rejections of others (Erikson, 1963). A commitment to a continuous development is put on hold as the adolescent samples various identities. The moratorium provides a context and time for the working through of several things intrinsic to positive identity development. Erickson categorizes seven areas, namely the dimensions representing partial polarizations of developmental crises on the developmental continuum to be worked through in moratorium stage (Maier, 1965):

- **Time perspective versus time diffusion:** If her perspective of time is problematic the adolescent may commit too soon to an identity or may immobilize herself in attempts to avoid progression and feared failure. The adolescent needs to delay planning in order to integrate the past. Being able to see her life in perspective enables her sense of time to lead to full identity.
- **Self certainty versus apathy:** Self doubt and confusion about her own autonomy should give way to a greater certainty of self sealed when the ways others see him and the way he sees himself coincide. The alternative is an escape into apathy.

- **Role experimentation versus negative identity:** Role experimentation is essential for sampling self-images. This involves exploring a wide range of roles and extremes and opposites that are not without dangers and commitments.
- **Anticipation of achievement versus work paralysis:** A sense of adequacy in his skills and ability needs to be proven by the development of a consistent pattern of industry. Completing tasks and committing to seeing them through is a challenge to his sense of confidence in his ability. Persistence is crucial for forging an occupational identity.
- **Sexual identity versus bisexual diffusion:** Adolescents need to resolve bisexual conflicts and establish identification with her sex role. A firm sense of self as male or female will assist with feeling comfortable with the opposite sex so that she can move towards appropriate behaviors of her gender in adult sex roles.
- **Leadership polarization versus authority diffusion:** Being able to lead, to take responsibility and to follow others, those in authority, is necessary for the acceptance of a positive identity and is closely linked with the mastering of previous tasks in development.
- **Ideological polarization versus diffusion of ideals:** In order to progress through this difficult phase the adolescent must find a sense of trust in living and society and needs to find some philosophy, religion or ideology to be meaningful in order to secure this faith in life. Loyalty to group ideals and uncompromising in their views, the adolescent finds the need to express the self as a contrast to something in attempts to solidify their sense of themselves. For many adolescents the opportunities to explore are limited by external factors beyond their control. Although Erikson acknowledges that ego identity formation is a socially embedded process, and that one cannot separate personal growth and communal change he does not account for the external socially imposed constrictions on internal psychological processes, thereby placing the responsibility of identity attainment upon the individual (Erikson, 1968). Yoder (2000) makes the relevant point in his article on barriers to ego identity, that traditional theories such as Erikson's assume, in spite or recognizing the relationship between personal growth and communal change, that adolescent exploration and commitment occur in a static





environment composed of a defined social structure in which there exists understandable (to the adolescent) and identifiable life options or choices, no physical or economic restrictions, and a clear social structure, which, for many adolescents there are not. The assumption of a passive environment poses difficulties in understanding the attainment of identity statuses as individual internal processes for which the individual is responsible, and raises questions as to how we interpret identity status in socio-economically disadvantaged populations.

- **Negative identity:** The negative identity Erikson views as that which is contrary to what is expected from the adolescent by society and encapsulates all that is contrary to what others wish her to be, arriving from the desperate position of needing to define oneself as something rather than nothing (or find meaning) in the face of positive identity elements canceling each-other out (Erikson, 1963). Negative identity is a desperate attempt at regaining competence in the face of possible failure, a way of avoiding becoming invisible. In other words negative identity is the identity defined according to what one is not or what one is against. Examples thereof include the delinquent (Erikson, 1960.) Erikson (1963) comments in his discussion on delinquency that it is often the attitudes of significant adults in the media and professional and social institutions which push an adolescent into a negative identity by judging and labeling too harshly the actions and outcomes of experimental behavior, and in so doing fail the youth at this exquisitely vulnerable stage by promising her a negative identity which she may choose for fear of being invisible, or by defining or labelling her according to a small aspect of herself, which she may be portraying temporarily. Adolescents need to be allowed to not define themselves too early or be defined too early so that they can be given the time and freedom necessary to find what is most congruent for them.

## (2) Marcia's four structural ego-identity statuses

Marcia expanding on Erikson's theory, provides four structural identity statuses which define the structure of the adolescent ego. He called these *ego-identity statuses* and they describe four ways of coping with the identity crisis of adolescence (Marcia & Friedman, 1970). These are not a rigid topology, each is always an ongoing process. Marcia presents four identity statuses through which an individual moves in the developmental progression towards finding her identity. To the extent that previous negative outcomes from previous stages eg: mistrust, doubt, guilt, inferiority exist, identity resolution is impaired and psycho- social problems such as

delinquency, substance abuse, suicide, self-injurious behavior, suicidal ideation and sexual promiscuity prevail. The latter behavior can be understood in terms of developmental deficits from earlier stages (Muuss & Porton,1998). The four statuses are arrived at through the application of the presence or absence of explorations/crisis (period of decision making) and commitment (individual's personal investment in alternatives chosen), the two essential variables for a healthy identity according to Erikson (Marcia, 1987).The ease with which a person moves through these statuses is dependent upon the extent to which the child resolved earlier stages as defined by Erikson (Marcia,1966).

Identity is not a fixed point nor is it permanent, and according to Marcia an individual can move backwards and forwards among the various statuses. He also states that a person can become fixated at any stage, but it seems this would determine the direction of a path along which there is continued movement rather than a permanent stagnation. Some paths render the individual more likely to achieve maturity and wisdom than others, however all involving continued states of stability and change, chaos and balance to varying degrees of success. The defining criteria and the characteristics of these identity statuses are:

- **Identity diffused or confused status:** This individual has not actively reevaluated anything or searched or considered personal alternatives. These subjects have no apparent commitments to occupation or set of beliefs. They cannot attempt commitments, have no desire to pursue identity issues and have no zest to explore, conveying no sense of struggle. There is no established consistent set of personal standards for sexual behavior or for goals values and choices. They are vulnerable to self- esteem manipulation and score lowest on a measure of overall identity (Marcia, 1966). This status manifests in different ways presenting as aimlessly drifting, manipulation and self-centered in a morbid way. Muuss and Porton (1998) points out that research findings on this stage of identity status is inconsistent and attributes this to the variety of faces this stage displays as described by Archer and Waterman (1990) who subdivide the identity diffused subject into types namely: apathetic, alienated, pathological, marginally involved and commitment avoiding types.


As Erikson explains, this state is normative for the young adolescent who is still to confront identity issues and is developmentally necessary. However there is also a narcissistic picture pertinent to this stage, which presents as selfishness, evident in the use of others to fulfil ones own needs. Muuss and Porton (1998) correlate this with the suffering of the unresolved ego

crisis of the trust versus mistrust stage of Erikson's theory, hypothesizing that as the adolescent has not learned to trust people she resorts to manipulating them. He also alludes to the diffused adolescent's tendency to abuse substances as a means of escaping the anxiety and challenges of this state, by denying their existence. Those who manifest a state of psychological fluidity and non-commitment to personal values are particularly vulnerable to accepting whatever seems the order of the day in terms of values and ideologies, fluctuating easily and superficially without personal investment to any ideas and beliefs. Others are simply alienated from the institutions they find themselves in, and do not challenging anything (Muuss & Porton, 1998).

Persistence of this state beyond the normal time expected and into late adolescence could manifest later as delinquency, schizophrenia or suicidality (Muuss & Porton, 1998).

- **Foreclosure:** Foreclosed persons are committed to goals, values and an ideology, however they reach this without having explored and searched for this in a personally invested way, and so have not considered alternatives while they appear, and are, committed to their position. They have adopted their beliefs from role models that they hold in esteem and with whom they identify, either parental or social. Choices have been made, sometimes at a very young age and they have not been questioned. Socialized values rather than personally chosen ones have been assumed. The danger here is that there is no further exploration and a rigidity prevails in their personality structure making the challenges of adulthood difficult to manage because of inflexibility and because of the premature commitment to values and goals primarily prescribed may not in fact fit the person but rather her authority figures. The foreclosed identity seems to be most widely viewed as being shaped by identification processes with parents. Peer group conformity is normal for a certain developmental period. Adolescents can define themselves primarily according to their group membership taking on language dress and behaviour supported and rendered acceptable by their peer group. Over-identification can lead to the loss of personal values as well as an inability to question those she assumes are right and the ability to make independent decisions. If the conformity to peer group norms merely replaces conformity to parental norms without real self-regulation and independence is achieved, adolescent development is foreclosed. This can be different from individual behaviour outside the group and straddling the two worlds can be difficult for adolescents.
- **Moratorium:** As has been described in Erikson's views of moratorium, the moratorium status is characterized by a time of exploration, when there are unresolved questions concerning

identity. The individual is in a stage of actively struggling to find solutions, to try different roles and experiment with different values and identities. Temporary adaptive regression occurs and if this leads to rational evaluation and purposeful choices, the former is constructive in establishing synthesis of identity. Blisker and Marcia (1991) note that females have a greater tendency to use adaptive regressive tendencies (such as openness to unconventional, alternative experiences, tolerance for unfamiliar ideas, fantasy, unconventional behaviour, subjectivism, artistic creativity and distrust of logic,) which involve temporary withdrawal from reality in order to achieve identity integration. There is an experience of subjective discomfort at this stage, and questioning reveals imperfections adolescents voice and challenge with a fervour to change institutions and values, as they discover contradictions, hypocrisy, and the imperfections of the adult world. They are however unable often to provide the viable alternatives to change their world as they lack experience, are not willing to compromise or commit, and lack maturity. The stage of moratorium is threatened by the social pressures exerted on youths to achieve goals, and make visible progress, and the focus on rapid success may disadvantage youths in disallowing this critical period of exploration without accountability (Mead, 1961).

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- o **Identity achievement:** After exploring the moratorium stage the adolescent has explored identity issues and started to develop more permanent personal commitments thus achieving an identity. The adolescent now has a personalized value structure and often this reflects the parental value system, however it has been personally evaluated and chosen. The results of achieving an identity are increased self-acceptance, a stable self-definition, a willingness to commit to vocational roles, a religious and political belief system and ideology and a personal commitment in an intimate relationship. Stephen, Fraser and Marcia (1992) claim that identity achieved individuals may move in and out of this stage, sometimes regressing to former stages of moratorium, as they enter a period of exploration or crisis, if their chosen identity is challenged for some reason. A *moratorium -achievement- moratorium -achievement* cycle (MAMA) can be set off. The earlier success in resolving moratorium challenges will probably assist the individual to resolve subsequent challenges or crises. Furthermore movement to identity diffusion can also occur as a result of the loss of meaning or failure in an established commitment, either in work (sometimes occurring through burnout) or a relationship. The progression to young adulthood which Erikson calls the stage of intimacy versus isolation emerges regardless of identity resolution issues because stage progression is generated


epigenetically and socially. The ability to establish intimacy is enhanced by the degree of success in establishing an identity.

### (3) Selman's Theory

Selman (1981) looks at the functional relationship to understanding the social interaction and interpersonal negotiation strategies that children exhibit. Selman's model suggests that these strategies become hierarchically integrated and more complex as the child matures. The assimilative orientation is where the child uses negotiations to seek to transform the other's thoughts, feelings or actions.

The accommodative orientation is where the child seeks to transform the wishes of self and to reach a balance between self and the environment. The low-level strategies should not be seen as pathological or maladaptive, but can be an adaptive strategy (Selman, 1981).

**Table 2.2 - Selman interpersonal negotiation strategies at each developmental level (Epanchin & Paul, 1987).**

Interpersonal Orientation	
Assimilative	Accommodative
	
Level 0	
1. Unprovoked grabbing	1. Running away
2. Screaming to blot out other's wishes	2. Blank stare
3. Tantrum- unprovoked	3. Fear, motoric or verbal panic
4. Actions imply intentions ( projections)	4. Robot-like obedience
5. Impulsive intrusion into other's affairs	
Level 1	
1. Interruption at will	1. Acting victimised-powerless
2. Threats and verbal abuse	2. Squealing as coping
3. Peer power for extortion-bullying	3. Weak serve
4. Bossy style	4. Hovering behaviour
5. No compromise	5. Poor reassertion
6. No forgiveness-one way fairness	6. Power oriented obedience
7. Power vs. power	

8. Mocking of others' obvious weakness	
9. Deflection of all blame-rejection of all responsibility	
10. Power and affection brides or extortion	
Level 2	
1. Peer pitting	1. Confronting of injustices of others
2. "Friendly" persuasion	2. Following other's lead
3. Spontaneous expression of empathy	3. Reaching out for/to help
4. Ties that bind	4. Self's inadequacies as a negotiation tool
5. Seeks alliance	5. Use of reasoning to manoeuvre out of coercive situations
Level 3-Equilibrated orientation	
1. Long term relations- orientation to process	
2. Anticipation of possible reactions of others to self's suggestions	
3. Taking a group orientation	
4. Expectation of consistency in self and other's actions	
5. Use of humour and perspective as healing techniques	

**(4) Attachment**

Based on Bowlby's theory of child-parent attachment, Herbert (1991, p. 119) defined attachment as "...a process of the operation of an internal control system." Children are regarded as being predisposed to respond to social attributes in forming relationships with others. When the mother is not bonded within the first few hours after birth this may lead to reduce interest and some insensitivity in the relationship. This may result in the child not functioning optimally for the next five years (Klaus & Kennell, 1976). However, these research findings have not been able to be replicated. Schaffer (1971) states that the bonding process does not have to start at birth. The existence of mutual feelings of attachment may become formed through the simple process of living together. Parke (1981) indicates that it takes about six to nine months to for a baby to form

an attachment to specific others. Bowlby (1969) suggests a specific time limit of two and a half years on children's capability of forming their first attachment. Tizard (1977) found that by the age of four, children were found to establish meaningful emotional attachments with no subsequent adverse consequences. Bowlby (1969) reports that signs and symptoms of attachment problems may be the result of the child's behaviour towards the parent, their environment and their own psychological traits. Research suggests that a clear link seems to exist between insecure attachments and the development of behavioural problems, but that the outcome is dependent on substitute care and support. Children's recuperative powers should never be underestimated. It is clear that young children are capable of establishing and sustaining attachments and this could explain how they are able to make up for any deficiencies that exist in the relationship with the primary care giver (Herbert, 1991).

Children are capable of simultaneously maintaining and sustaining a meaningful relationship during their first two years. However, a young child has the need for consistency and satisfactory care arrangements, otherwise feelings of bewilderment and distress will result (Herbert, 1991).

Attachment theory places immense pressure on the parent. Research reveals that some children are more difficult to care for than others, possibly causing maladaptation in the dyadic interaction. As a result difficulty arises in the interpretation of the child's signals (Herbert, 1991). However, Bowlby (1970, in Herbert, 1991, p.120) found that unattached children experience difficulties in relating normally to others - from the child's first relationship he should learn what to expect from others, experiencing a healthy reciprocity and expectancies.

The consequences of a lack of attachment may be manifested in the following behaviour (Bowlby, 1969):

- Children may withdraw from the company of others becoming socially isolated from their peers, and not allowing themselves to become emotionally involved with others. This may result in depressive symptoms and poor interpersonal relations. Depending on the developmental stage, an identity crisis and poor awareness of self may develop, possibly resulting in further social withdrawal
- Child who experience chronic anxiety may also tend to become aggressive or clingy
- Talkative behaviour is accompanied by physical overtures, frequently having seductive overtones.

- Children who appear to be over-competent may seem not to need their parents. Their behaviour is characterised by over-independence extreme competence. When they need assistance they are likely to call for adult permission
- Children who lack self- awareness tend to be sensitive to their environment but not to their own bodies.
- A lack of trust and power struggles within the family may result in the children having trouble staying in defined boundaries.
- 'The two or twenty syndrome' as set out by Bowlby (1969) describes children who may be characterised as being too old for their numerical age.
- Delayed conscience development may be characterised by conduct disorders.

As a result of a lack of attachment, children may exhibit behaviours that are often associated with minimal brain dysfunction (hyperactivity, distractibility, impulsivity, learning disabilities) and experience extremes of emotions (Herbert, 1991).

### 2.2.3 Cognitive development



#### (1) Introduction

Cognitive development concerns all levels of the individual's perceptive faculty ability. This ability is closely related to the individual's sensory perception, the ability of the individual to gather assimilates information about his social, cultural and physical environment and general ability to process information (Louw, 1996).

An essential Piagetian concept is sometimes called a schema or scheme. He produced four main causes of cognitive development: two that are internal and two that are found in the child's environment (Bee & Boyd, 2003). Piaget believed that to reach a next stage of cognitive development equilibrium was the process to be used. The process of equilibrium is innate an automatic response to conflicts between a child's current schemes and the challenges faced in its environment. The different rate at which a child progresses through the stages of cognitive development is due to the different rates of brain maturation; this may be the result of environmental factors or inborn differences. Environmental factors include social transmission (information that the child receives from others) i.e. teachers, parents, caregivers and experience (the child's own opportunities to act and to observe the results of those actions (Bee& Boyd, 2003). Piaget believed that the child could stimulate their own cognitive



development through experimentation and modifications of actions. The result of the interaction and support between internal and external variables cognitive development can proceed.

Piaget believed that reality is a dynamic system of continuous change and can therefore be defined in reference to the two conditions that define dynamic systems that change, namely, transformations and states (Demetriou, Doise & Van Lieshout, 1998). Transformations refer to any kind of change that can be undergone by a thing or a person; states refer to the condition in which a thing or person can be found between transformations (Demetriou, Doise & Van Lieshout, 1998). For example there can be changes in shape and form, size or distance and even in placement and location in space and time. As such, Piaget posited that for human intelligence to be adaptive it must possess functions that represent both the transformational and the static aspects of reality (Demetriou, Doise & Van Lieshout, 1998).

According to Piaget, operative intelligence is responsible for the representation and manipulation of the transformational aspects of reality and figurative intelligence is responsible for the representation of the static aspects of reality (Demetriou, Doise & Van Lieshout, 1998). Operative intelligence is the active part of intelligence, that is, it involves all actions that are undertaken so as to anticipate, follow or recover the transformations of the objects or persons of interest; figurative intelligence is the static part of intelligence that involves any means of representation used to keep in mind the states that intervene between transformations i.e., it involves perception, drawing, mental imagery, language and imitation (Demetriou, Doise & Van Lieshout, 1998). Because states cannot exist independently from the transformations that interconnect them, it is the case that the figurative aspects of intelligence derive their meaning from the operative aspects of intelligence.

According to Piaget, operative intelligence frames how the world is understood and if understanding is not successful, operative intelligence changes; as such, Piaget posited that this process of understanding and change involves the two basic functions of assimilation and accommodation (Demetriou, Doise & Van Lieshout, 1998). Assimilation refers to the active transformation of information so that it may be integrated into already available mental schemes; accommodation refers to the active transformation of the mental schemes so that the particularities of whatever the individual is interacting with may be taken into account (Sternberg, 1996). These functions will be discussed in greater detail later on in this paper. What is important to note is that when these functions are in balance with each other they generate mental schemes of operative intelligence; when one function dominates over the other they generate representations belonging to figurative intelligence (Demetriou, Doise & van Lieshout, 1998). According to Piaget intelligence is both active and constructive. It is active because it

depends on the actions carried out by the individual in order to construct and reconstruct his/her models of the world; it is constructive because mental actions are coordinated into more inclusive and cohesive systems and in this way are raised to more stable and effective levels of functioning (Demetriou, Doise & Van Lieshout, 1998). The relations between the different functions and aspects of intelligence can be seen in figure 2.1.

Piaget's explanation of cognitive development includes four main stages, namely sensorimotor, pre-operational, concrete operational and formal operational (Weiten, 1995). These stages occur from infancy through to the adolescent years. Piaget hypothesized this time period as one during which children are continually adapting to their environment, which facilitates the various developmental stages. Thus, he proposed that with increasing learning and maturation, both intelligence and its manifestations become differentiated or more highly specialized in various areas (Sternberg, 1996). This study will investigate the relationship between concrete operational thinking, formal operational thinking, OBE results and traditional academic results.

The range of these stages is presented using chronological age. It is clear, however, that the ages given for certain levels of thinking can only be viewed as guidelines for the child's development. Deviation from these norms can be expected and indeed observed; some children reach a given stage earlier or later than others, and some never reach Piaget's final stage of formal operational thought (Richmond, 1970). According to Piaget, although each stage provides the foundation for the next, this does not imply that earlier modes of thinking disappear; because of this, it is possible that on occasion, children may revert to modes of thinking which are more characteristic of earlier years (Crain, 1992). Hence, an adolescent can think concretely as well as formally, and may even, on occasion, make use of pre-conceptual thought processes.

It is clear that the mental structures of the adolescent are not the same as the mental structures of the newborn baby. There must be changes in between these two extremes which can explain how the first condition becomes the last. Thus Piaget found it necessary to try to find out what these changes are, how they occur and why they occur (Richmond, 1970). The first problem for Piaget was to find some method that would highlight the patterns in the mind at various intervals between birth and adolescence. As such, Piaget chose a number of very original experimental situations into which he placed children of varying ages (Piaget, 1966). Some of these experiments will be discussed in greater detail in a later section of this paper. These situations involved Piaget asking the children probing questions whilst they worked at the experiments. The purpose of his questioning was to clarify various aspects of the

children's thinking which were produced by the experiments (Richmond, 1970). In this way he was able to abstract the fundamental patterns which he discerned must underlie the children's responses. He then pieced these patterns together such that one pattern was the necessary precursor to the next and so on. Piaget then arranged these patterns in a time sequence, using chronological age to separate one pattern from the next (Richmond, 1970). Support for Piaget's thesis that different competencies emerge in an ordered age-related sequence comes from studies conducted by Muller, Sokol and Overton (1999), and Overton (1998), who found that the various competencies, for example class inclusion and propositional reasoning are attained in the order predicted by Piaget.

Piaget thus describes the stages in intellectual development as a logical series of self-supporting changes which can be set out with approximate chronology, given that some children mature faster or slower than others (Maier, 1969). It is also the case that although the age at which the stages occur can only be approximate, the order of progression is still absolute (Richmond, 1970).

Piaget held that his stages of intellectual development are holistic structures or "coherent modes of thinking that are applied across a broad range of tasks" (Shaffer, 1996, p. 274). The concept of stage can be objected to on a number of fronts. Firstly, it can give the false impression that development proceeds by a series of abrupt jolts rather than smoothly (Cockcroft, 2002). Secondly, there is more fluctuation in intellectual functioning at any one age than suggested by the concept of stage (Boyle, 1969). Thirdly, the usefulness of the concept is limited by cross-cultural variability and the environment may be more influential than Piaget allows (Boyle, 1969). Ausubel (1970) refutes the first two objections by pointing out that they make unwarranted assumptions about the nature of stages. He posits that the only thing that the concept of stage implies is the occurrence of qualitative distinctions in modes of cognitive functioning and their appearance in an identifiable sequence in development (Ausubel, 1970). The concept of stage does not require that transitions between stages be abrupt, nor does it entail the environment being unimportant. With regards to the variations in intellectual functioning at any one age it is true that the transition from one mode of thinking to another can happen at different times in different subject areas, however it is still possible to designate an individual as being at a given level on the basis of his/her overall functioning (Ausubel, 1970). The third objection will be discussed in greater detail later on in the paper.

Another query that is pertinent to Piaget's concept of stage is whether there is a coherent universal structure amongst operations in a given stage (Brown & Desforges, 1979). Piaget contends that although mental contents might differ radically, the processes which they apply in thinking do not; thus,

according to Piaget, mental contents differ, mental processes in a given stage do not (Brown & Desforges, 1979). It is essential to Piaget's theory that a stage is defined by a coherent organised body of operations or mental processes; thus if a child is able to deduce that X is bigger than Z having been told that X is bigger than Y and Y is bigger than Z, then he/she ought to be able to solve the problem whether the X, Y and Z refer to heights of buildings, sticks or people. This is because, according to Piaget, the particular content does not matter if the child possesses the underlying intellectual processes necessary to the task (Brown & Desforges, 1979). Hence, if a child is in the concrete operational stage, he/she ought to be able to demonstrate this status consistently on tasks judged to demand concrete operations. There is a great deal of evidence however that contradicts this theory by suggesting that content does matter (Brown & Desforges, 1979). Experiments have been carried out with children of different cultures using apparatus with which the children were unfamiliar. Very few of the children were able to solve the problems until they were given analogous problems using materials with which the children were familiar (Brown & Desforges, 1979). This may imply that being familiar with the materials about which one is asked to reason is important if one is going to apply a cognitive skill one has. Thus, it is necessary to possess the underlying capacity in order to be able to solve a particular problem, but it is very possibly not sufficient; familiarity with the materials may also be very necessary in evoking the pertinent intellectual processes.

The question of whether cognitive development occurs in stages is still debated and much of this debate revolves around the understanding of the word 'stage'. Some theorists are of the opinion that cognitive development is coherent and does progress through a series of stages (Flavell, Miller & Miller, 1993). A number of other theorists, however, hold that cognitive development is a complex, multifaceted process during which children gradually acquire skills in a wide range of areas, for example, mathematical reasoning, visual-spatial ability and so forth (Bjorklund, 1995). While development in each of these areas may occur in a series of stages, it cannot be assumed that there is consistency across them. It would seem that cognitive development may not occur in stages that are as discrete or clear-cut as those proposed by Piaget.

## **(2) Equilibration, Assimilation & Accommodation**

Piaget posited that development occurs during the four stages via a process which he called equilibration. He explained this as a process in which "children seek a balance (equilibrium) between both what they encounter in their environments and what cognitive processes and structures they bring to the encounter, as well as the cognitive capabilities themselves" (Sternberg, 1996, p.428). The

principle of adaptation explains that organisms are born with the tendency to adapt to the environment (Ginsberg & Opper, 1969). The organism attempts to adapt to its environment by changing itself and in a sense its environment so as to achieve a state of maximum equilibrium (Rotman, 1977). For the child to enter the next stage of development, an environmental stress needs to occur to push the individual to adapt; this is because Piaget views cognitive acts as acts of organisation of and adaptation to the perceived environment (Beilin, 1980). In order to fully comprehend the processes of organisation and adaptation as seen by Piaget, four basic concepts need to be looked at, namely, schema, assimilation, accommodation and equilibrium.

- **Schemata:** Piaget posits that the mind has structures in much the same way as the body does (Richmond, 1970). In order to explain why people all make rather stable responses to stimuli, and to account for the many phenomena of memory, Piaget used the word schema (Sternberg, 1996). Schemata are the cognitive structures by which the individual intellectually adapts to and organises the environment; that adapt and change with mental development (Sternberg, 1996). An adult has many schemata which are used to process and identify incoming stimuli, and in this way the person is able to differentiate between stimulus events and to generalise (Ginsberg & Opper, 1969). The newborn child, by comparison, has few schemata, as he/she develops so his/her schemata become more generalised, more differentiated and more adult (Sternberg, 1996). The child has a number of schemata and when confronted with a stimulus, he/she tries to fit the stimulus into an available schema; thus, for example, it would be logical for the child to call a cow a dog because the child is able to see the similarities but not the differences between a cow and a dog (Sternberg, 1996). During early childhood, the individual has a few reflexive schemata that allow him/her to make very few differentiations in the environment; by comparison, an adult has a vast array of comparatively complex schemata that allow a large number of differentiations (Sternberg, 1996). The adult's schemata evolve from the child's schemata through adaptation and organisation (Ginsberg & Opper, 1969). As the child becomes more able to differentiate between stimuli, so the schemata become more numerous; as the child becomes more able to generalise across stimuli, so the schemata become more refined (Sternberg, 1996). "every schema is... coordinated with all other schemata and itself constitutes a totality with differentiated parts" (Piaget, 1952b, p. 7). Piaget posits that schemata are structures of cognitive development that change. The cognitive schemata of the adult are derived from the sensori-motor schema of the child. According to Piaget, the processes that are responsible for the change are assimilation and accommodation (Wadsworth, 1996).

- **Assimilation and Accommodation:** Adaptation has two complementary aspects: assimilation and accommodation. When a child is adequately accepting and dealing with the environment's various circumstances, this is what Piaget termed assimilation (Crain, 1992). Assimilation is the cognitive process whereby the individual integrates new stimuli into existing schemata. This involves an individual's adaptation of the environment to him/herself. Experiences are assimilated only as far as the child can preserve and consolidate them in terms of his/her own subjective experience (Goswami, 2001). The child has experiences, i.e., he/she sees new things or sees old things in new ways, and he/she hears things. He/she then attempts to fit these new stimuli into the schemata that he/she has; as such, the child may see a cow and will then sift through his/her collection of schemata until he/she finds one that seems appropriate and that can include the object (Maier, 1969). In the child's view, the cow has all the characteristics of a dog, i.e., it fits in his/her dog schema, thus the child concludes that the object is a dog; the stimulus is assimilated into the dog schema. As such, assimilation can be seen to be the cognitive process of placing new stimulus events into existing schemata (Pinard & Laurendeau, 1969). Assimilation is a part of the process whereby the individual cognitively adapts to and organises the environment. This process of assimilation permits the growth of schemata, it does not account for change in schemata. Piaget accounts for the change with accommodation (Brown, Metz & Campione, 1996). During other times, stimuli may be presented that do not fit into existing structures so that cognitive disequilibrium occurs, and so changes in the structures must be made. Piaget called this process accommodation (Brown, Metz & Campione, 1996). This is directly converse to assimilation and represents the impact of the actual environment. When the child is confronted with a new stimulus he/she attempts to assimilate it into existing schemata. However, sometimes this is not possible; sometimes a stimulus cannot be assimilated into a schema because there are no schemata into which it fits (Maier, 1969). The characteristics of the stimulus fail to approximate those required in any of the child's available schemata. In this case the child can either create a new schema into which he/she can place the stimulus, or he/she can modify an existing schema so that the stimulus will fit into it; both options are forms of accommodation (Maier, 1969). Both these actions result in a change in or the development of schemata. To accommodate is to incorporate the environmental experience as it really is, i.e., the individual does not only adapt the environment to him/herself, he/she also adapts to the environment (Maier, 1969). Once accommodation has occurred, the child again attempts to assimilate the stimulus; because the structure has changed, the stimulus can readily be assimilated (Maier, 1969). According to Piaget, the child is always actively seeking the end-product of assimilation (Maier, 1969).

- **Equilibration:** These processes always act together; assimilation is always balanced by the force of accommodation, while accommodation is only possible with the function of assimilation. They provide complimentary but opposing pulls, the pull to think, feel and act as previously experienced is challenged by the pull to think, feel and act according to the realistic demands of the new situation. Hence, equilibration is the process whereby equilibrium between the processes of assimilation and accommodation is sought (Cohen & Kim, 1999). If the individual only assimilated and never accommodated, he/she would end up with a few very large schemata and be unable to detect difference between things (Sternberg, 1996). If the individual only accommodated and never assimilated, he/she would end up having a large number of very small schemata with little generality, and be unable to detect similarities (Sternberg, 1996). As such, it is important that there is a balance between the two processes, an equilibrium (McNally, 1977). Assimilation and accommodation come into balance only to prepare the individual for a new disequilibrium. Thus, these processes are very necessary for cognitive development. Disequilibrium is an imbalance between assimilation and accommodation (Maier, 1969). Disequilibrium provides motivation for the child to seek equilibrium, that is, to further assimilate or accommodate (Maier, 1969). According to Piaget, disequilibrium occurs most prevalently during these four stages of transition, as they are discrete, discontinuous stages of development (Wadsworth, 1996). The process of disequilibrium encourages the individual to discover new cognitive abilities in order to cope with or adapt to the stress. The child will ultimately assimilate all stimuli with or without accommodation and this results in equilibrium (Sternberg, 1996). As such, equilibrium can be seen to be a state of cognitive balance that is reached upon assimilation. It must also be noted that equilibrium relevant to any particular stimulus may only be temporary, but it is nonetheless important (Maier, 1969). According to Piaget, everything has to be assimilated by the child and the child's organisation will always be internally consistent even though the schemata he/she uses may not be in agreement with those of adults, for example, classifying a cow as a dog (Wadsworth, 1996). Piaget posits that the manner in which the child places stimuli into schemata is always appropriate for his/her level of conceptual development; thus, there are no incorrect placements, just better and better placements (Wadsworth, 1996). This process of seeking equilibrium via assimilation and accommodation proceeds at all levels of development, from birth through adulthood (Sternberg, 1996). Accommodation results in a qualitative change in schemata, whilst assimilation simply adds to the existing structures, i.e., a quantitative change (Sternberg, 1996). In this way do assimilation and accommodation account for the growth and development of cognitive

structures.

### (3) The Cognitive Developmental Stages

Jean Piaget devised a model to describe how humans go about making sense of their world by gathering and organising information. The concept of maturational stages, through which the child passes consecutively, is central to his developmental structure. Piaget identified four stages; each characterised by its own distinctive cognitive process.

- **Sensori-motor period:** This period extends from birth until the age of two. The major development task during this period centres on the co-ordination of motor activities and perceptions to act on the environment (Bee & Boyd, 2003). Development at this stage is based on information obtained from the senses (vision, hearing, touch) and the body movements of the infant. The activity of the child is purely reflex in character (sucking, grasps objects, cries and throws his arms and legs about) These activities are directed towards the child's own body, but after four months it is directed towards objects external to himself as he experiments with objects and situations within his own environment by trying out different actions to see what the results will be. The following tasks are seen as important during this period:
  - 1) The child needs to learn to integrate his motor and perceptual systems.
  - 2) The development of object permanence. The greatest cognitive achievement is the realisation that objects in the environment exist whether he is perceived them or not. For example, the infant will look for a toy that is hidden because he realises that it still exists although he cannot see it.
  - 3) The ability to imitate.
  - 4) The ability to represent things symbolically.

During the sensori-motor period, the infant begins to make use of imitation, memory and thought. The child masters the concept of object permanence and moves from reflex actions to goal-directed activity (Louw, 1996). At this stage observations can be made regarding the development of self-esteem. The aspect of competence within self-esteem, which the child exhibits when achieving self-directed goals for example the child, discovers the effects of the relationship between child and environment and environment to child. The competence that the child feels when he is able to pull himself to a sitting position. A second facet of self-esteem, the development of self-worth is based on the experience that the child has from his experiences with adults who care for him. The parent needs to empathically respond to the needs of the



child need, wishes and feelings; it is these joyful experiences that becomes incorporated into the child's sense of self. Any disappointments or failures in parental care may help the child to learn to deal with reality- orientated disappointments and to build a copy strategy repertoire. The growth of coping strategies can be observed in the manner in which the child relates and interacts with others (Garbarino & Stott, 1990). Piaget divided the sensori-motor period into six further sub stages. Each stage represents new development and adaptation to his environment. The sub stages of Piaget's sensorimotor stage are summarised in Table 2.2.



Table 2.2 The Developing Child( Bee & Boyd )

Sub stage	age	Piaget's label	Characteristics
1	birth-1 month	Reflexes	Use of build in schemes or reflexes such as sucking or looking; no imitation; no ability to integrate information from several senses.
2	1- 4 months	Primary circular reactions	Accommodation of basic schemes (grasping ,looking, sucking), as baby practices them endlessly. Beginning coordination of schemes from different senses, such as looking towards a sound; baby does not yet link bodily actions to some result outside the body.
3	4- 8 months	Secondary circular reactions	Baby becomes more aware of events outside its own body and makes them happen again, in a kind of trial- and error learning. Imitation may occur, but only of schemes that are already in the baby's repertoire. Beginning understanding of the "object concept."
4	8- 12 months	Coordination of secondary schemes	Clear intentional means-ends behaviour. The baby does not goes after what she wants but she may combine two schemes to do so, such as knocking a pillow away to reach a toy. imitation of novel behaviours occurs, as does transfer of information from one sense to the other (cross-modal transfer)
5	12-18 months	Tertiary circular reactions	"Experimentation begins, in which the enfant tries out new ways of playing with or manipulating objects. Very active, very purposeful trial-and error exploration.
6	18 -24 months	Beginning of representationa I thought	Development of use of symbols to represent objects or events. Child understands that the symbol is separate from the object. Deferred imitation first occurs at this stage.

- The pre-operational stage:** This period is noted by the considerable development in cognitive and physical development. The development of the child is mainly influenced by his immediate family environment, social environment and his culture. This period is sometimes known as preschool periods, which lasts from the age of two until the age of seven years (Louw, 1996). Therefore, the cognitive development of the preschool period depends on the information that

the child receives. However, his thinking is still limited and this can be explained on the basis of Piaget's theory, pre-operational stage. According to Piaget the first step from action to thinking is the internalisation of action. Therefore, the children are action -orientated when they enter the pre-operational stage. The child begins to use symbolic schemes rather than action schemes. Children at this age begin to use pretend in their play(Bee & Boyd, 2003). The pre-operational stage can be divided into pre-conceptual thought (two to four years) and intuitive thought (four to seven years).

The pre-conceptual thought (two to four years) involves:

- 1) Transductive reasoning a type of reasoning that proceeds from one particular fact to another. For example, we caught a bus to visit granny therefore all buses go to granny. involves.
- 2) Intuitive thought (four to seven years) not based on logic but on perceptions drawn.

The principle cognitive structures now used by the child are as follows:

The preoperational stage is characterised by language development, the ability to think in symbolic form, the ability to think operations through logically in one direction and egocentricity. Egocentricity is the ability to see the world from their point of view and assume that others share their feelings, reactions and perspectives. This is a self centred point of view of the world and therefore does not allow the child to be critical. logical or realistic in thinking. Piaget believed that the child's thinking to be rigid insensitive to inconsistencies as the child uses herself as the only frame of reference(Bee& Boyd, 2003). Conservation is that the amount or number of certain things remain the same, even if the arrangement or appearance is changes, as long as nothing is added or taken away. For example, a piece of material is cut into many pieces remains the same amount of material. Pre-operational children are unable to understand conservation or irreversibility. Irreversibility is the ability to work backwards to a starting point (Louw, 1996). However, there is research that contradicts this assumption as cited in Bee and Boyd (2003) children are able to understand conservation if the task is made simple. The child's cognitive development is characterised by the following tasks:

- 1) Motor control-the development of fine and gross motor skills in order to gain greater control over his body.
- 2) Acquisition and improvement of skills- skills to enable the child to become more self-reliant i.e. feed dress and handle objects.
- 3) Cognitive development to learn to form simple concepts i.e. big small little few many

- 4) Language development- communication skills become more complex. Learn to express their needs and verbalise more in social interactions, which implies that the child can function on a symbolic level.
- 5) Socialisation-learn how to cope with social interaction and relationships in amore appropriate way.
- 6) Integration with the community-learn to internalise the community's value and moral standards.
- 7) Development of self concept-the development of self consciousness and understanding about themselves.
- 8) Sex-role identity- are able to identify their gender correctly.
- 9) emotional development-their ability to recognise and interpret emotional reactions of their parents and siblings correctly.
- 10) Self-control- are better to control intense emotions.
- 11) Moral development -a concept of right and wrong is developed.

- **The Concrete Operational Stage:** Piaget posits that by the age of about seven, children begin to enter the concrete operational stage of development, wherein their thinking becomes more organized and logical, but only with regard to concrete objects and situations, not yet to verbally stated hypotheses (Piaget & Inhelder, 1969). Due to the fact that the cognitive processes are flexible and rigorous, they are classified as operations. During this period the child's thought processes become logical; he/she develops what Piaget termed logical operations, i.e., the child develops logical thought processes that can be applied to concrete problems (Wadsworth, 1979). The child who is developing concrete operations is no longer bound by perceptions, that is, when the child is faced with a discrepancy between thought and perception (as in conservation problems) he/she can now make cognitive and logical decisions rather than perceptual decisions (Wadsworth, 1979). According to Piaget and Inhelder (1969) entry into this stage should be viewed as the most decisive turning point in the entire course of cognitive development. This is when several features of adult intelligence become evident for the first time. One of the most important developments of the concrete operational stage is the attainment of logical operations, internalised cognitive actions that permit the child to arrive at conclusions that are logical (Wadsworth, 1996). Actions are now directed by cognitive activity rather than being dominated by perceptions. Logical operations, like all cognitive structures, evolve out of prior structures as a function of assimilation and accommodation (Bybee and Sund, 1982). According to Piaget, an operation always has four characteristics. It is an action that can be internalised or carried out in thought as well as materially; it is reversible; it always

supposes some conservation and some invariance; it never exists alone but is always related to a system of operations (Piaget, 1970a). During the concrete operational stage, operations become truly logical, that is, they now meet all the above criteria, whereas in previous stages operations were pre-logical, never meeting all the above criteria (Voyat, 1982). The pre-operational child's thought process is characterised by egocentrism, centration, inability to follow transformations, inability to reverse operations and a dominance of perception over reasoning (Pulaski, 1980). It is these obstacles to logical thought that prevents the child from being able to solve conservation problems. In contrast, the concrete operational child develops schemata for the operations of seriation and classification as well as improved concepts of causality, space, time and speed. The child is now able to decentre his/her perceptions and attend to transformations (Weiten, 1995). This phase is marked by an equilibrium between accommodation and assimilation, which is shown by a more extensive use of reversibility in thinking (Boyle, 1969). Reversibility is the essential condition of solving problems involving the understanding of invariance of certain properties despite changes in others (Richmond, 1970). The term concrete is important to note. The child clearly develops logical operations but these operations are only useful to him in solving problems involving concrete (observable) objects and events. The child is as yet unable to apply his/her logic to hypothetical, purely verbal, or abstract problems (Pulaski, 1980). In other words, if a concrete operational child is presented with a purely verbal problem, he/she will most probably be unable to solve the problem. However, if the same problem is presented in terms of physical objects, the child will more than likely be able to apply his/her logical operations and solve the problem. The preoperational child's thinking is characterised by egocentrism, i.e., an inability to assume the viewpoint of others and a lack of a need to seek validation of his/her own thoughts (Crain, 1992). In contrast, the concrete operational child is aware that others can come to conclusions that are different from his/her own, and because of this, he/she begins to seek validation of his/her thoughts (Crain, 1992). Being able to look at something from another person's point of view, to question one's own reasoning and to seek validation from others are all acts of accommodation (Wadsworth, 1979). The preoperational child's thinking is also characterised by centration (Wadsworth, 1996). This is when perceptions of events tend to centre on a single perceptual characteristic of a stimulus and do not take into account all the salient features of the stimulus. This is why preoperational children tend to focus on the length of stimulus configurations when attempting to solve conservation of number problems (Pulaski, 1980). In contrast, the concrete operational child's thought process is not characterised by centration. Instead, concrete thought becomes decentred. In other words, concrete thought takes all the salient features of objects

into account (Bakken, Thompson, Clark, Johnson & Dwyer, 2001). Decentring is one of the concrete abilities that allow logical solutions to concrete problems. In the preoperational stage, the child is unable to coordinate and focus on the successive steps in a transformation. Instead, the child tends to view each step in a transformation as independent of the other steps. There is no awareness of the transformation involved (Pulaski, 1980). In the concrete operational stage however, the child develops a functional understanding of transformations. He/she can now solve problems involving transformations and understands the relationship between successive steps (Pulaski, 1980). As has been said, a number of operations develop during this stage. Among the operations to develop are the principles of conservation, transitivity, reversibility and class inclusion. Animism may still be present, but egocentrism will have almost disappeared, i.e., social competence is increased by the development of understanding of the relativity of viewpoints (Piaget, 1924). The child's knowledge and understanding of the world also begins to shift from myth to science. Piaget grouped the operations of conservation, transitivity, reversibility and class inclusion together under the heading of logico-arithmetic operations (Brainerd, 1978). Logico-arithmetic operations involve discontinuous information that is received from the environment (Brainerd, 1978). Discontinuous/discrete information is received when an object, e.g., a circle is viewed in relation to other circles, e.g., what is this circle's diameter relative to other circles? (Brainerd, 1978). Logico-arithmetic operations are concerned with relations between objects (Brainerd, 1978). These relations can fall into one of two categories, namely difference relations and equivalence relations (Brainerd, 1978). In other words two objects may be different with respect to some property, there is an asymmetrical relationship between them; or they may be the same, there is a symmetrical relationship between them (Brainerd, 1978). Some of the operations that fall under the logico-arithmetic heading are exclusively concerned with asymmetrical relationships, e.g., seriation; some are exclusively concerned with symmetrical relationships, e.g., classification; others are concerned with both, e.g., conservation (Brainerd, 1978).

- **The Concrete Operational Stage:** In the concrete operational stage, assimilation and accommodation become less of an experience of opposing pulls and more an experience of 'mobile equilibrium' (Piaget, 1957). Up until this level of maturity, the two processes have always competed for dominance, now the child has the ability to consider several points of view simultaneously, he/she can explore several possible solutions to a problem without necessarily adopting any one because he/she can always return to his/her original outlook (Maier, 1969). This awareness of several possibilities "elasticises his previously rigid and intuitive approach"

(Maier, 1969, p. 136). The child is now shifting from inductive to deductive modes of thinking; his/her reasoning now takes cognition of the larger whole and the logical relationship to it (Foltz & Overton, 1995).

- **The Formal Operational Stage:** At about age eleven, children begin to enter the formal operational stage, wherein thinking enters the realm of the purely abstract and hypothetical (Crain, 1992). The beginning of this phase coincides approximately with the onset of adolescence and thinking is now more coherent in structure than the child's thinking was (Boyle, 1969). The child has now developed the reasoning and logic to solve all classes of problems. According to Piaget, formal operational thought is the pinnacle of cognitive development because the individual's cognitive structures reach maturity during this period (Weiten, 1995). After this stage, there are no further structural improvements in the quality of reasoning that one is capable of; the child with formal operations typically has the cognitive structural equipment to think as well as an adult (Wadsworth, 1979). However, this does not necessarily mean that the child's thought is as good as an adult's thought in a particular instance, but simply that the attainment of formal operations means a new potentiality has been achieved (Wadsworth, 1979). The two processes of assimilation and accommodation will continue throughout life to produce changes in schemata; from the end of the formal operational stage changes in thought abilities are quantitative instead of qualitative with respect to logical operations and structure (Wadsworth, 1979). After this stage, the quality of reasoning does not improve, but this does not mean that the use of thought cannot improve after adolescence; the uses to which thought is put may vary and improve after this stage, which may help to explain some of the differences between adolescent and adult thought (Wadsworth, 1979). Formal thought and concrete thought are functionally the same; both make use of logical operations (Wadsworth, 1979). The main difference between the two types of thought is that there is a much larger range of application of logical operations available to the individual with formal thought (Wadsworth, 1979). As has been said, concrete thought is limited to the solution of tangible concrete problems of the present. The child with concrete operations is unable to deal with complex verbal problems, hypothetical problems or problems involving the future; as such the concrete child is not completely free of his/her perceptions. The child with formal operation, on the other hand, is able to deal with all classes of problems, present, past, future, hypothetical and verbal (Marini & Case, 1994). In this way, the child with formal operations is freed from concrete problems. The child is now able to think about his own thoughts and feelings as if they were objects, i.e., he/she is now capable of introspection (Boyle, 1969). The child with concrete

operations has to deal with each problem in isolation because operations are not coordinated; he/she is unable to integrate solutions by means of general theories (Boyle, 1969). The formal operational child has now gained the ability to employ theories in the solution of many problems in an integrated manner; he/she is able to bring several operations to bear on a single problem (Boyle, 1969). Formal operations are characterised by the ability to reason scientifically, build and test hypotheses and to understand causation. This is the first time that the child is able to operate on the logic of an argument/problem independent of its content (Butterworth & Harris, 1994). The child now becomes aware that conclusions that are derived logically have a validity that is independent of factual truth (Boyle, 1969). The reasoning of this stage is said to be hypothetico-deductive, scientific and reflective-abstractive (Brainerd, 1978). Individuals demonstrating this level of thought are able to reflect on their thinking, reason abstractly and resolve problems through systematic consideration of possibilities (Bybee & Sund, 1982). The child is able to order his/her thoughts about a particular problem such as difference in heights, in his/her mind alone, i.e., without actually having to place people in order and compare their heights (Crain, 1992). In other words, the adolescent's thinking is now more concerned with propositions than with physical situations. He/she can now deal mentally with what is conceivably possible rather than just with what is actual. He/she will now also be able to understand the relationship of the possible to the actual. According to Boyle (1969) the adolescent is at first less able to distinguish the possible from the actual and behaves as if he/she believes in the omnipotence of thought. Hence we see another form of egocentricity, which later gives way to an understanding of social realities. Although Piaget perceives formal operations as the pinnacle of development, other theorists remind educators that the period of adolescence is one of physical, social and personal turmoil (Bybee & Sund, 1982). Formal operations entails the learner developing higher order problem solving skills and abstract thinking. Traditionally, it is considered the 'final equilibrium' in cognitive development (Arlin, 1976).

Aspects of deductive and inductive reasoning develop during this time, where the individual does not have to experience environmental stimuli in order to make sense of it (Foltz & Overton, 1995). Although formal operational thinking brings about changes in reasoning abilities, the structures of reasoning are established during this stage but will have the potential to achieve the higher reasoning of an adult (Wadsworth, 1996). Therefore the quality of reasoning will improve as the individual moves into adulthood. Thus, formal operational thought does not imply a completion of abstract, higher thought reasoning, only that certain structures are in



place (Wadsworth, 1996). The child now becomes "...an individual who thinks beyond the present and forms theories about everything, delighting especially in considerations of that which is not" (Piaget, 1950, p. 148). Problems are approached with logical and systematic mental representations whereby the individual develops the potential quality of reasoning (Wadsworth, 1996). Piaget called this stage formal operations because the type of reasoning generated is systematic and involves logical, complex processes (Bybee & Sund, 1982). The individual can now solve problems that can only be resolved through the use of reasoning strategies such as

- Hypothetical-deductive thinking
- Using ratios and proportions
- Inductive reasoning
- Reflective abstraction
- Systematic isolation and control of variables
- Combinatorial logic

According to Piaget, the cognitive development during adolescent years has these recognizable elements of several basic patterns of thought. As listed above, these can be explained as follows:

- the ability to reason without reference to concrete experience (reflective abstraction);
- the ability to reason about the theoretical consequences of changes to objects and events (proportional reasoning);
- the ability to reason about the possible combinations of variables in a problem (combinatorial logic);
- the ability to reason from particular to general conclusions (inductive reasoning);
- the ability to reason from general premises to particular consequences (deductive reasoning) (Bybee & Sund, 1982).

The formal operational child gains the ability to reason on the basis of assumption, something he/she could not do before (Wadsworth, 1979). As has been said, the formal operational child is now aware that logically derived conclusions have a validity that is independent of their factual truth. For example, if a concrete operational child is told to suppose that grass is blue when asked to a logical problem, he/she will most likely declare that grass is green and therefore he/she cannot answer the question (Wadsworth, 1979). The formal operational child will readily accept the assumption that grass is blue and will most likely proceed with the logic of the

argument. This is because the formal operational child is able to extract the structure of the argument from its content and submit only the structure to logical analysis (Wadsworth, 1979). The child who is still in the concrete operational stage is unable to deal with a problem independent of its content; grass is green and the problem cannot be solved (Wadsworth, 1979).

## (2) Conclusion

It would appear from the above exegesis that Piaget assumed that if a child fails on one of the tasks, it was because the child lacked the underlying competencies necessary to perform that task. This is however an invalid assumption because there are many factors other than a lack of the underlying concepts that may undermine performance on a cognitive task. For example, young babies would seem to lack object permanence because they may be being assessed on tasks that require them to perform motor actions that they are not yet capable of producing. If assessed with more age appropriate methods they would probably display object permanence. As such, Piaget has been criticised for making premature inductions based upon limited observations (Dworetzky, 1981). Later on, Piaget (1972) seemed to realise that he may have been mistaken in this regard. This was when he discovered that adolescents are more likely to use formal operational thinking when solving familiar problems and concrete operational thinking when attempting to solve unfamiliar problems (Piaget, 1972).

As a descriptive endeavour, there can be no doubt that Piaget's theory is masterful. Piaget and his colleagues recorded the responses of thousands of children to various cognitive tasks for over fifty years, observing the way in which children respond to these tasks at different points in their development and discovering many similarities in the way in which children develop throughout the world (Dworetzky, 1981). However, this masterful description is also one of the reasons that Piaget has been criticised (Kuhn, 1992). His critics claim that he has not clearly explained the mechanisms that enable a child to move to progressively higher levels of intellectual functioning (Kuhn, 1992). As a result, many researchers regard Piaget's theory as a detailed description of cognitive development rather than as an explanation of how cognitive development occurs (Kuhn, 1992).

Piaget's research contributions to our understanding of cognitive development are considerable, however, he has been criticised because his work seems to focus almost exclusively on the use of

logical patterns of reasoning and thus largely neglects other important cognitive processes such as creativity, problem-solving and right hemisphere processes (Boden, 1979). Boden (1979) also criticises Piaget for not designing his experiments carefully enough to exclude alternative explanations. This will need to be taken into account when carrying out and interpreting the results of this study.

Piaget's theory has also been criticised for not being scientific, with critics citing lack of controls, small samples and absence of statistical analyses in his research (Modgil & Modgil, 1982). According to Bybee and Sund (1982) Piaget's view of scientific psychology was different to that of the empirical and positivist positions. Piaget seemed to be of the opinion that scientific psychology should be a science of humans in general; should be built on the interaction between subject (*sic*) and object; should be a key to all sciences because it explains ideas and operations used in the development of science; should basically be a science of interdisciplinary cooperation and it should not be possible to dissociate psychology from epistemology (Piaget, 1978). Piaget's position appeared to be that small samples and clinical methods are adequate if the investigator does identify structures common to all individuals (Bybee & Sund, 1982). However, it is still reasonable to question the reliability of Piaget's observations, the many theoretical concepts derived from his original research and the generalisability of his results (Bybee & Sund, 1982).

It has often been queried whether Piaget's theory is universally applicable (Bybee & Sund, 1982). This raises the issue of cross-cultural research, which Piaget himself deemed necessary for the verification of his research (Bybee & Sund, 1982). According to Bybee and Sund (1982) cross-cultural studies have investigated whether Piaget was correct in stating that progress through developmental stages is invariant and whether developmental stages have common cognitive content. These studies have generally confirmed the invariant sequence of developmental stages; although, according to Brown and Desforges (1979) it has been frequently found that the formal operational stage is not attained in some cultures. In fact Wason and Johnson-Laird (1972) as well as Bybee and Sund (1982) have found that formal operational thinking is by no means universal amongst the highly educated. The fact that formal operational thinking may be absent in certain societies or in the majority of adults in any society presents no problem to the theory as such; Piaget (1972) acknowledged that a large number of adults may never attain this stage of formal operations and that those who did, may only do so in areas of specific interest to them. Piaget also noted that "the growth of formal thinking [...] remains dependent on social as much as and more than on neurological factors [and that] a particular social environment remains indispensable for

the realisation of these possibilities" (Inhelder & Piaget, 1958, p.337). These studies have also found that the ages at which stages are attained vary widely among cultures and also that cognitive performance within the stages varies (Bybee & Sund, 1982). These mixed findings leave open the question of the universal applicability of Piaget's theory and this will need to be borne in mind when carrying out and interpreting the results of this research study.

It has already been pointed out that the formal operational stage may not be attained by everyone. It has been proposed that only fifty percent (50%) of the United States of America's population ever attain the Piagetian stage of formal operational thinking (Sternberg, 1996). These Western norms for cognitive development may not be applicable to non-western cultures such as those found in South Africa. According to Piaget's theory, there may be a lack of sufficient environmental changes to facilitate the disequilibrium to motivate further cognitive development. Although the statistic may appear to be discouraging as a substantial proportion of the American population never advance beyond concrete operational reasoning, Piaget would argue that most have every potential for acquiring formal operational thought (Wadsworth, 1996). This study may prove that disequilibrium has occurred but that further cognitive development is still not occurring, for some unknown reason.

A fifth stage beyond formal operations has been proposed by neo-Piagetian theorists (Sternberg, 1996). This expansion of Piaget's theory may prove to be crucial to the further understanding of adult and adolescent development. Formal operations may proceed further into dialectical thinking, which entails the recognition that there is no one, final answer, but rather a variation of beliefs that all need to be considered. It is loosely based on post-structuralist thinking techniques of acknowledging the various discourses operating in the world around certain phenomena (Wadsworth, 1996).

It has been postulated that after formal operations, a stage of post-formal thinking may be attained (Berninger, 1993). The fifth stage was hypothesized as the problem finding stage wherein those with a more refined thought process could identify and discover problems and solve them at a sophisticated level (Arlin, 1976). This stage indicates that the ability to manipulate the variances and inconsistencies of everyday situations in which complicated situations are being dealt with, is present. *"Through post-formal thinking, we can consider and choose among alternatives, recognizing that other alternatives may offer benefits not obtainable from the chosen one"* (Sternberg, 1996, p. 438). These developmental considerations are important in their implication

for education. A policy may be chosen but it may not be compatible with the cognitive development of the learner subjected to it. It is highly unlikely that this research will encounter any individuals who have attained this 'fifth' stage of cognitive development since this research will only be exploring cognitive development up until the ages of eleven or twelve, and the fifth stage is hypothesized to develop after formal operations.

#### 2.2.4 Moral development

There are very few studies on the specific influences of divorce on the moral development of the child. In a study conducted by McDermott (1964, in Pfeffer, 1981, p. 27) it was found that children found it difficult to internalise the parent's moral demands during "messy" divorce proceedings. Moral development is studied from the individual's point of view at that particular developmental stage.

**Table 2.3 - Moral development**

MORAL DEVELOPMENT		
Pre school	School age	Adolescents
<p>Until the age of 6 years the child uses heteronomous morality (following rules from a respected authority) Thereafter autonomous morality is utilised, (understanding the need for rules in order to structure co-operation) (Carol &amp; Rest, 1982).</p>	<p>Kohlberg's Moral development stage 2 is used. Children may seek to help others and want the approval of others. Intentions play a more important role. Events judged to be right or wrong according to the consequences of the action (Louw,1996).</p>	<p>Kolberg's moral development stage 4 in which elements of fairness are based on the concept of "do unto others as you would have others do unto you."( Louw,1996).</p>

The pre-conventional level of Kohlberg (1964, 1981, 1984 in Bee, 1996, p. 333) is found in most children under the age of nine. The child sees the rule as external to himself. Children may insist that the 'rules' must be adhered to and that fairness is crucial. When parents with children at this age separate or divorce the common reply from most children is "It's not fair!" (Bee, 1996). The behaviour at this stage may manifest itself as aggression shown towards the parent considered to be in the wrong or confusion on the part of the child.

At the conventional level the child or adolescent begins to internalise the rules and expectations of their social environment. Bee (1996) suggests that another way to regard Kohlberg's moral development is to see it as a decentralising process. (Piaget (1932, in Louw, 1996, p.317) used the term decentration. A child's reference point starts at the consequences of his actions and the rewards that may be gained. Later this reference point shifts from the individual to the social environment and, later still, one searches for a reference point within a set of principles or meaning systems in adult life (Bee, 1996).

**Table 2.4 - Kohlberg moral development (Bee, 1996, p.334).**

<b>Level II: Preconventional Morality</b>	Stage 1: <i>Punishment and obedience</i>
<i>orientation</i>	In this stage, the child decides what is right or wrong based on what is punished. The child obeys individuals if they have superior power.
<i>and</i>	Stage 2. <i>Individualism, Instrumental purpose, Exchange.</i> The child defines what is right and wrong in terms of what brings pleasure. Reciprocal advantage is emphasised.
<b>Level II: Conventional Morality</b>	Stage 3. <i>Mutual interpersonal expectations, relationships and interpersonal conformity.</i> 'Being good' is important in and of itself. Living up to the expectations and standards of the social group is emphasised. Therefore if Mom and Dad say it is OK then it must be.
<b>Level III: Principled or rights</b>	Stage 4. <i>Social system and conscience.</i> Right and wrong is defined by society. Laws are seen as nearly absolute definitions of what is right or wrong. Stage 5. <i>Social contract or utility and individual</i>

<b>Post conventional Morality</b>	<p>Adults are usually present in this level. Laws and regulations are seen as relative but it should be normally upheld to sustain the basic social order. Importance of life and liberty is seen as a basic non-relative value.</p> <p>Stage 6. <i>Universal ethical principles</i>. The adult follows and develops self-chosen ethical principles in determining what is right.</p>
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Kohlberg and Piaget believed that children go through different stages of cognitive development and moral development. Unlike Piaget who believed that the child's moral development is developed by middle childhood, Kohlberg believed each new stage will be replaced by a more complex and integrated development stage (Bee, 1996). Kohlberg sees this as a continuous process: the individual has reached moral maturity once the autonomous and individual principles of conscience are fulfilled (Louv, 1996).

Kohlberg's model, and the theories of Piaget and Selman are vital for understanding behaviour of children when they are in a crisis. Following a crisis, children may show regression to earlier stages and will thus be faced with a series of moral dilemmas. These models may serve as a useful tool in forming a basis for therapy and an understanding of the source of the manifested behaviour during the divorce process.

A developmental-interactional perspective assumes that development reflects the child's ability to adapt to the environment. Excessive reliance on one process to the exclusion of the others may reveal themselves in behaviour that is considered regressive or maladaptive .

The developmental-interactional approach allows the child to participate in therapy, in actively constructing their own-based reality and in assisting them to find the best fit between themselves and their environment (Epanchin & Paul,1987). The children are allowed to explore the strategies and coping mechanisms that will allow them to best deal with situations that may arise from the effects of divorce.

## 2.2.5 Effects of divorce in development

Divorce is a multi-faceted process. The effects influence children differently according to their age, sex, how the process is managed and at which developmental stage they are during the process, the effects of which may produce adverse results on developmental tasks (Richards & Dyson, 1982).

To see divorce as a process rather than an event makes it easier to recognise short term and long term consequences. Rutter, Yule, Quinton and Berger (1975b) found that it was not the disruption of the relationship with the parents which impacts on the child's self-esteem and confidence, but the distortion of the family relationships that occur before, during, and after the divorce process,

Rutter, Cox, Tupling Berger and Yule (1975a) suggests that the fear of separation before the divorce be replaced by the actual fear of separation from one parent that may result in long term insecurity in relationships. Richards and Dyson (1982, in Clulow & Vincent, 1987, p. 19) estimated that 20% or more of the children of divorce showed distress, manifesting in school performance or delinquency.

Rutter et al. (1975b) used epidemiological research to provide basic information about the distribution of childhood disturbance, revealing the following causative factors:

### **Family discord**

- Marital discord
- Children in care
- Children not living with both natural parents

### **Parental deviance**

- Maternal psychological disorder
- Criminal record of the father

### **Social disadvantage**

- Large family size
- Overcrowding
- Father in unskilled occupation

### **Schooling**

- High pupil/staff ratio
- High turnover of teachers



The nature of the attachment formation, the effects of disrupting bonds and the quality of parenting will influence the propensity to develop disorders. It will also affect the child's future interpersonal relationships with others (Clulow & Vincent, 1987).

Boys tend to react more poorly to divorce than girls (Kaslow & Schwartz, 1987). The difference may lie in the way that girls and boys show their distress. Wallerstein and Kelly (1980) found that the reaction of pre-school children was fear, fantasies and bewilderment. Six to eight year olds expressed sadness and a sense of loss. The study showed that the response from the nine-year-olds and the adolescents was anger and conflict in loyalty. Wallerstein (1984, in Clulow & Vincent, 1987, p.20 ) found in a follow up that the children who were the youngest at the time of the divorce fared better than those who were able to remember the divorce.

Children's stress appears to be positively correlated with parental stress, negative parental contact and the length of time since the separation occurred. Jacobs (1982, in Kaslow & Schwartz, 1987, p. 51) found that children from divorced families are more likely to suffer from low self-esteem, depression, aggression and poor school performance. This was even more common when families were uninvolved, distant and not supportive.

The most salient stress factors associated with learning and behavioural problems that Werner and Smith (1982) found in their research were prolonged separation from the father, death of a sibling, replacement of a natural father by a stepfather, marital discords, maternal mental health problems, and low social class.

It is difficult to separate the effects of separation from other intervening variables such as disagreements arising between the parents, the child's experience of the separation and the disruption of the bond.

Table 2.5 - The various feelings and emotions that children of different ages feel during and after the divorce process (Herbert, 1991; Louw, 1996).

Younger Children	Pre school	School going	Older children
<ul style="list-style-type: none"> <li>Realise that relationships do not last for-ever</li> </ul>	<ul style="list-style-type: none"> <li>Appear sad and frightened when their parents separate and tend to become clinging and demanding. Bedtime fears and refusal to be left alone is a common occurrence.</li> </ul>	<ul style="list-style-type: none"> <li>School refusal. Vivid fantasies about - abandonment.; -death of parents; - aggression towards other children.</li> </ul>	<ul style="list-style-type: none"> <li>Grief and sadness may persist. This may later develop into anger directed at the parents especially focused on the parent with whom the child is residing.</li> </ul>

The emotions and feelings cited above are the child's reaction to the fear of abandonment by one or both of the parents. Richards (1981, in Herbert , 1991) found that the fear of separation before the divorce was replaced by the actual experience of actual separation from one or other parent, which could result in long term insecurity in relationships.

## 2.2.6 Best interest of the child

Herbert (1991) notes that children of all ages express the wish for their parents to be reunited. Frequently they express anger towards their parents' separation. Children resort to personalisation. Anna Freud in McDermott (1970, p. 424, as in Pfeffer, 1981, p.25) stated "...the reason that the broken home is destructive for the child's development is less in the absence of a parental figure of identification than in the fact that the remaining parent will tend to cast the child into the absent parent's place". Children may blame the one or other parent for the divorce. Many children feel that their parents have not taken their interests into account (Herbert, 1991).

Common reactions included a reappraisal their own relationship with their parents and the later questioning of the permanence of all social relationships. To allay any fears that the children experience the parents should, as far as possible, strive for a supportive and intact relationship (Richards & Dyson, 1982).

Children who consider themselves 'damaged' noted the following (Herbert, 1991):

- They felt that their parents did not inform them about the pending divorce or separation;
- They did not get along with at least one parent after the divorce;
- They were dissatisfied or felt that they were disadvantaged due to the custody and access arrangements.

Some parents do expect their children to side with them in an attempt to resist the end of the relationship or in a struggle to gain the upper hand in the divorce negotiation. However, the problem does not lie in taking sides but being put in the position of having to choose which parent they prefer. Most children's desire is that their parents stop fighting (Emery, 1994).

The following strategies are recommended for parents in assisting their children through the divorce process (Wentzel & Engelbrecht, 1999):

- Inform the child of the pending divorce and relate the concept in terms by which he child will understand;
- Accept and encourage the child to express his feelings;
- Allow the child time to come to terms with his feelings;
- Set routine and guidelines;

- Be available to talk about what is happening' in terms of the parents feelings and reactions to certain events;
- Never offer false hope of reconciliation;
- Allow the child to love both parents;
- Allow the children to participate in the religious affiliation of both parents;
- Do not blame everything on the divorce.

In an ideal world divorcing parents may come together and facilitate a preparatory phase. The parents can explain the divorce to the children and work through fears, fantasies and future changes in the family system (Pfeffer,1981). However, parents going through the divorce process may themselves be confused or even ignorant of the needs of the child (Pfeffer, 1981).



Table 2.6 - The appropriate action that may be taken to assist the child through the difficult stages of divorce (Wentzel & Engelbrecht, 1999).

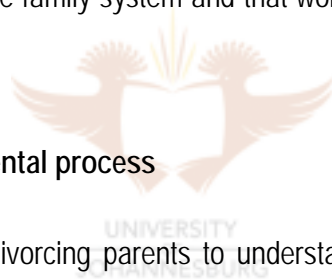
Age	Developmental Task	Parenting Task	Critical Element	Possible Reaction	Recommended Response
Birth to 1 year  BABY	Development of basic trust Failing to achieve this may result in mistrust	Time and attention from the caregivers Patience is essential	Child's first bond may be with the person who provides regular and consistent childcare	Appearing nervous, listless. Failure to thrive Delays in development. Become reactive when the parents become upset.	Physical contact between parents Follow a consistent routine.
1-3 years  TODDLER	Development of Autonomy. Failure to achieve this will lead to shame and doubt.	Encourage child's social development by expanding the bonds to include others.	Demanding behaviour is part of the child's normal development- temper tantrums not excluded	Regression i.e. exhibiting behaviour of a younger age Fearful, demanding and withdrawal behaviour Changes in sleeping patterns	Follow protective routines that establish security. Set consistent limits. Reassure verbally and physically
3-6 years  Pre- scholar	Development of initiative. Failure will lead to development of guilt	The child will develop inner security.	Children may feel responsible for the cause of the divorce.	Denying that the divorce is happening. Not wanting to separate from the parents. Changes in sleeping patterns.	Read age related divorce books to the child. Offer simple but Repeated explanations. Help the child to verbalise feelings.
6-11 years  School beginner	Development of industry. Failing this a sense of inferiority will develop.	Children need a sense of family in order to adjust to the divorce. Parents need to reassure the children that they will not be abandoned.	Family and a sense of belonging are important. Children may wish their parents to unite.	Loyalty between parents. Feelings of rejection and loneliness. Blaming the one parent of being bad and making the other parent leave. Uncooperative with conciliation problems.	Accept and experience the child's feelings. Avoid power struggles. Support the child's relationship with the other parent. Do not offer false hope at reconciliation.
11-20 years  Adolescent	Development of Ego Failing this will lead to role confusion.	Allow the child to develop as an individual by maintaining a balance between the child's independence and guidance from the parent.	Children may be concerned with how the divorce will effect their school and social structures. Adolescents may have trouble accepting parent's new partner.	Increased reliance on peers. Child may side with one parent. Presence of acting out behaviour. May become upset and not accept the parent's dating behaviour. Presence of somatic complaints	Encourage appropriate release of emotions. Promote access to both parents. Allow child's wants in the access \ visitation schedules. Develop and adapt a support system so that the child is not placed in an adult role. Allow the child to love both parents.

The parents involved in a custody battle believe that if custody is granted then the best interest of the child is served (Clulow & Vincent , 1987).

## **2.3 Parent**

### **2.3.2 Introduction**

In studies conducted by Holmes & Rahe (1967, in Emery, 1994, p.215) divorce was ranked second only to death of a spouse in terms of the amount of stress experienced. Divorce may be initiated by personal acts and decisions, the end result of which is not always in the control of the parents. The interaction between the social and legal process may produce behaviour that either parent would not condone in ordinary circumstances (Clulow & Vincent, 1987). The emotional impact of the divorce on the two parties may lead to emotional adjustment problems in themselves and their children. This may result in developmental tasks remaining unfulfilled in both the children's and the parent's lives. Divorce is a process that takes place within the family system and that works parallel to the developmental stage of the child (Pfeffer, 1981).



### **2.3.3 Divorce as a developmental process**

It helps the therapists and the divorcing parents to understand and organise their interventions and experiences if divorce is viewed as a process. There is, however no clear conceptualised view on the divorce process. Rather the divorce process is viewed either as psychological tasks or various social, psychological, legal and economic aspects of divorce (e.g. Bohannon, 1973). The most recognised model when discussing the divorce process is the dialectic model. This model highlights the known emotions experienced and actions exhibited and the tasks accomplished during the divorce (Kaslow & Schwartz, 1987). Bohannon (1973, in Kaslow & Schwartz, 1987, p.25 ) clearly shows that there are six stations in the divorce process.

Figure 2.7 - The Dialectic model of stages in the divorce process (Kaslow & Schwartz, 1987).

Divorce stage	Station	Stage	Feelings	Actions and tasks
Pre-divorce A time of deliberation and despair	1. Emotional divorce	I          II	Disillusionment Dissatisfaction Alienation Anxiety Quarrelling Deliberation Disbelief And despair  Despair Denial Dread Anguish Ambivalence Shock  Emptiness Anger Chaos Inadequacy Low self-esteem  Loss	Avoiding the issue. Sulking and/or crying Confronting partner. Quarrelling. Denial Withdrawal (physical and emotional). Pretending it is OK. Attempting to win back affection. Asking friends, family and clergy for advice
During divorce A time of legal involvement	1. Legal divorce.	III	Depression Detachment Anger Hopelessness Self pity Helplessness	Bargaining Screaming Threatening Attempting suicide Consulting an attorney or mediator Separating physically

Post divorce A Time of Exploration and re- equilibrium	2.Economic divorce	IV	Confusion Fury Sadness	Filing for a legal divorce Considering economic arrangements
	3.Co- parental divorce	V	Loneliness Relief Vindictiveness	Grieving and mourning Telling relatives and friends. Entering the work world. Feeling empowered to make choices.
		VI	Indecisiveness Optimism Resignation Excitement Curiosity Regret Sadness	Finalising the divorce. Begin reaching out to new friends. Undertaking new activities. Stabilising a new life-style and daily routine for the children. Exploring and possibly taking on a new job.
	4.Communit y divorce	VII	Acceptance Self- confidence Energy	Re-synthesis of identity.
	6.Psychic divorce		Self-worth Wholeness Exhilaration Independence	Completing psychic divorce. Seeking new love and making a commitment to some permanency. Becoming comfortable with a new life-style and friends. Helping the children to accept the finality of the parent's divorce. Continuing the children's relationship with both parents.



Each stage must be experienced and the tasks set out must be mastered before an equilibrium is established. When the needs of the partner are not met that partner becomes increasingly angered, augmenting feelings of being unloved or feeling cheated. This is manifested in aggressive behaviour or outbursts directed towards the children and the social support system. The party that did not initiate the break as they are left with shock and feelings of disbelief often feels the impact of divorce more keenly. Denial is sometimes used as a mechanism of anxiety management (Clulow & Vincent, 1987).

Coogler (1978) and Hayens (1981, in Kaslow & Schwartz 1987, p.26-27) suggest that during Bohannon's second and third station if there is co-operation in seeking an amicable solution, the parties may feel empowered to make their own choices and become responsible for their own decisions, becoming more of serving the best interests of the children.

Adults need to understand how their actions impact on the lives of their children (Wallerstein & Kelly, 1980). The children's needs include the need to have access to both parents, to feel that both parents will continue to love them and will still be actively involved in their lives. The children need to feel that they are still allowed to remain loyal to both parents without any repercussions (Kaslow & Schwartz, 1987).

During the divorce process, parents feel tense and hurt, and their energies are directed towards the physical and financial separation or entering the work environment again or for the first time. The children often seem 'neglected' during this stage, and may experience a variety of feelings and emotions that may range from loneliness, worthlessness, abandonment, to feeling that the divorce is their fault (Kaslow & Schwartz, 1987).

It is therefore important when the parties approach a therapist for assistance, that the therapist and the parents are cognisant of the following aspects of the divorce:

- A good understanding of the Divorce Act;
- Aspects of child custody (sole custody, joint custody, parental responsibility, guardianship)
- Any orders that may be outstanding or temporary arrangement the may become permanent.

When using a reality-oriented approach, the therapist must clarify his own value stance regarding the best interest of the child. The therapist is then able to create an environment in which the parties or party is can ventilate their emotions, explore their issues and gain a greater understanding of the

divorce process as well as gain insight into their motives and behaviours. The party or parties are then able to learn coping skills for handling the difficult effects of divorce (Pfeffer, 1981).

The aftermath of the divorce is the planning for continuity of care for the children and the continuity of the child's relationship with the parents as well as the establishment of a realignment of the relationship of the parents with each other (Pfeffer, 1981).

#### **2.3.4 Effects of divorce**

Uncoupling, a need to develop a new self-image, changes in legal status, and the management of financial matters are all common to the resolution of the divorce process. The psychosocial effects of divorce will depend on age, gender, religious affiliation, duration of marriage, level of education, extent of social support system and the life stage of the adult (Kaslow & Schwartz, 1987).

Some couples may be more predisposed towards divorce than others (Kaslow & Schwartz, 1987). The most vulnerable are parents with young children, isolated with few friends, lacking in financial support, ill health and psychologically maladjusted. Brannen and Collard (1982, in Clulow & Vincent, 1987) found that women were more at ease in disclosing their emotions than the men, with the result that the woman sought help more easily. It is the woman who creates a social network and maintains this network throughout the marriage. The husbands were found to prefer to express their feelings primarily with their wives and after the separation experienced divorce as a loss of support.

Research has found that men in England find it more difficult to come to terms with the divorce than are women. This may be due to the 'maternal preference' in which the Court usually awards custody to the mother, unless definite evidence shows misconduct on her part (Burman & Rudolph, 1990, in Clulow & Vincent, 1987).

#### **2.3.5 Maternal preference**

In England women were conferred rights that was once denied to them (for example, to vote). With these new found rights the law gradually shifted towards maternal preference accompanied by the 'tender years presumption' (see *Bashford 1957 1 SA 21 ( N ) 24*). This was applied in order to give a temporary custody arrangement to the mother until the child was old enough to return to the father for moral training (Luepnitz, 1982). This preference was intended to apply to children under the age of six

years old in England and has become fixed under English and American law. In *Leder v Grossman* 1939 WLD 41, the child was placed in the custody of his mother until the age of eight when custody was transferred to the father. (see *Myers v Leviton* 1949 1 SA 203(T) 214).

This preference was also enforced by the psychoanalytic school of Freud, whose theory focused on the mother-child attachment relationship and ignored the role of the father in the child's development. Goldstein, Freud and Solnit (1973) suggested that custody should be awarded to the 'psychological parent'. It is that parent who then determines the extent of the remaining parent's involvement with the children. It was the 'tender years' doctrine that introduced the psychologist to the courts to present the court with parent-child relationships, emotional needs of the developing child and parental environment. The court started to scrutinise the behaviour of the parents before finalising a custody order (Sadoff & Billick, 1981).

In the 1960's with the rise in the feminist movement and equal protection in most American states and father's objections to being disenfranchised, the best interest of the child was introduced. From the 1970s Court decisions were made in line with the needs of the child and their interests rather than the gender of the parent (Schafer, 1981).

There is no legislated preference in favour of either mother or father in the allocation of custody in South Africa (Hahlo & Kahn, 1973).

The effects of divorce may arise from the traditional role distribution in the marriage, where it has meant that the father spends most of his time outside the home supporting the family whilst the mother has remained at home and cared for the child. This has led to social isolation of many mothers, impairing their ability to seek a well-paid job after divorce and resulting in a drop in living standards and a downward shift in their social mobility (Clulow & Vincent, 1987).

The consequences of the loss of financial support may compel the mother to sell the family home and buy a new home in a new neighbourhood, which may mean that the children are forced to change schools. In commencing a new job, the mother may be forced to spend longer hours at work than at home. All these factors may contribute to ill health and stress of the mother and the children (Clulow & Vincent, 1987).

The Courts and parents should take into consideration the following factors that influence a positive outcome of divorce on children:

- a continuing relationship from both parents (Saposnek, 1983)
- the parental ability of the non-custodian parent
- substitution of what has taken the place of the past marriage, e.g. step parenting (Clulow & Vincent, 1987).

Research (Clulow & Vincent, 1987) indicates that in the first year after the divorce the children are still confused and need reassurance and support from their parent. During this stage the parents are unsettled, still recovering from the divorce and settling into a new job. They are also in need of reassurance and support. However, Thompson and Spanier (1984, in Clulow & Vincent, 1987, p.26) found that between two to four years after the divorce the parties tend to accept their life style. It must be borne in mind that children never see the decision to divorce as a good one.

### 2.3.6 Parental quality

Parental quality may be described as ability to respond in a sensitive manner to the needs of the child. The differences in sensitive responses may stem from the parent's own personality and context in which they find themselves. Factors that allow for a healthy relationship include seeking support from friends, lack of financial problems, enough living space, clean hygienic living areas and spacing of the children (Werner & Smith, 1982).

Werner and Smith (1982) found that children who come from an environment characterised by parental support, family closeness, democratic rule setting, disciplined and a respect for individuality, were more resilient. Resilient children are more active, socially responsive and autonomous. They are also more able to face stress.

Schutz, Dixon, Lindenberger and Ruther (1989) suggest that parents should be aware of the following during the divorce process:

- the developmental needs of the children
- the setting down of limits and teaching good coping skills.
- the child's need for expression and autonomy.

Parents should empathise and effectively communicate needs to and from the child.

In child rearing variations that the 'authoritative' parental style sets clear boundaries for the child, increases moral development, independence, social responsibility and self-assertion as well as the avoidance of extreme psychological closeness or distance (Schutz et al., 1989).

## 2.4 Court

### 2.4.2 Introduction

In Roman law, children were regarded as the property of the father. His legal obligation was to protect, support the children, but he was entitled to sell the children and to enter the children into enforced labour (Hahlo, 1985).

Aquinas argued that each person is created by God and thus entitled to fundamental rights. Aquinas believed those people who deny the rights of others are no longer human (Flekkoy & Kaufman, 1993).

"Rights are relationships; they are institutionally defined rules specifying what people can do in relation to one another." Freedman (1992, p.28). Thus rights are only as useful as they are allowed to be implemented. The concept of rights is based on the concern for the person's dignity, integrity and for equal standing in society.

Human rights are transcribed into legal rights through national law and international conventions. This process forms part of the foundation for self-respect and the respect for and of others. Rights involve responsibility, dignity and respect (Flekkoy & Kaufman, 1993).

### 2.4.3 Definitions

The Child Care Act 74 of 1983 defines a child as a person below the age of eighteen years. In South Africa it is generally accepted by the layperson that childhood terminates with the twenty- first birthday.

The law divides childhood into different categories since age affects the child's status in Court (Hahlo, 1985). All children below the age of twenty-one are considered as minors. At the age of seven the child ceases to be an *infant*. The age of puberty is fourteen years for boys and twelve years for girls.

Table 2.8 - The different categories of children and their rights (Hahlo & Kahn, 1973; Kleyn & Viljoen, 1995).

Rights	Nasciturus fiction (unborn foetus)	Infants	Puberty	Attaining Majority
Age	At conception	At birth	Attainment of fourteen years old for boys and twelve years old for girls	<ul style="list-style-type: none"> <li>• Attainment of 21 years old</li> <li>• Marriage</li> <li>• According to section 2 of the Age of Majority Act 57 of 1972</li> </ul>
Capacity	No legal capacity	No legal capacity <ul style="list-style-type: none"> <li>• Not able to conclude any juristic act.</li> <li>• Guardian has to act for him.</li> <li>• <i>Doli incapax</i> (not liable for his criminal act)</li> <li>• Above 10 years old must consent to adoption.</li> </ul>	Limited legal capacity <ul style="list-style-type: none"> <li>• Over the age of fourteen may witness a will and at sixteen may take out a will.</li> <li>• At the attainment of puberty and with the consent of the guardians and the Minister of Home Affairs may enter into marriage</li> </ul>	Full legal capacity

			<ul style="list-style-type: none"> <li>• At eighteen may:- take out a life insurance policy - may vote - take out a driver's license</li> </ul>	
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The law recognises the mental capacity of the child at different ages. It may be inferred that, the law may also be aware of the developmental stages of the child. Even though the developmental tasks are not always recognised, it may be considered with the best interest principle.

#### 2.4.4 Developmental tasks of the child according to their rights

The State has difficulty in determining children's rights since their rights are not parallel to the rights of adults. It is important that children be conferred similar legal rights and legal safeguards as adults (Stuart & Abt, 1981). This decision should be made with the developing stages in mind (Sadoff & Billick, 1981).

The UN Committee (hereafter known as the Convention) on the rights of the Child (1989) philosophy states that, children are equal as adults. Arguments against children conferring equal status is that children can not take on the responsibilities that go with the adult rights.

But from a learning aspect, learning to take on responsibility is important aspect in the developmental stage of the child. It is, however, difficult to match the level of responsibility as the child matures and for the child to the expectations that society demands (Louw, 1996).

#### 2.4.5 The Convention and Maslow

The Convention states that children rights should be implemented and the responsibility of these rights should rest with adults. It is the responsibility of the parent to provide information to develop sharing of

decision-making skills. This will develop respect for the dignity and integrity of the child as an equal and result in many repercussions in the family, in the social environment and the courts (Flekkoy & Kaufman, 1993).

By using the Convention as a basis it makes it clear to what standards are expected for the country to follow. The rights in the Convention are divided into four categories:

1. Survival.
2. Protection
3. Development
4. Participation.

When compared to Maslow's need hierarchy the different categories of the convention are easier to understand. Keep in mind that the rights in the Convention are not mutually exclusive but are interrelated and mutually reinforcing. The principle of the best interest is applied across the categories.

Maslow's needs show that rights are in relation to others. Thus, it implies reciprocal responsibilities. These connections are inseparable. Maslow's hierarchy of needs is as follows (McCormick & Ilgen, 1992):

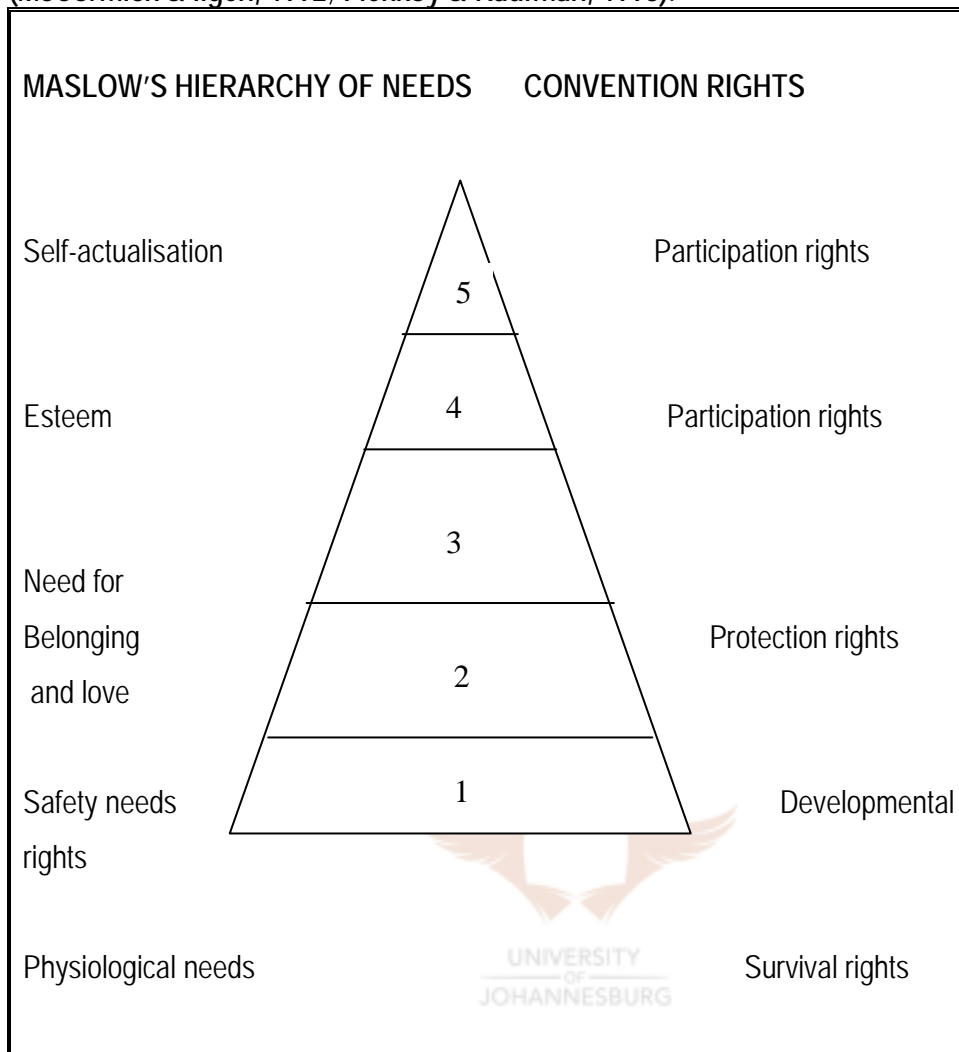
1. Physiological needs. These needs include the need for air, food, drink and rest. Needs that enable the body to survive.
2. Safety needs may include the following, the need for security, stability and freedom from fear, anxiety and chaos. These needs are assisted with the help from laws and societal limits.
3. Need for belonging and love. The need for affection and intimacy that is provided by the family, friends and lovers.
4. Esteem - a need for self-respect and the respect of others.
5. Self-actualisation. This is the sense that one is doing what one is suited for. As Rogers states "the individual can make whatever choices they like in terms of total experiential fields to which they become increasingly open". (Meyer, Moore & Viljoen, 1997, p.479).

The manner in which the rights are implemented and responsibilities are carried out will be depend on that society's culture (Flekkoy & Kaufman, 1993). Rights enhance the possibilities of reaching self-actualisation in Maslow's hierarchy.





Figure 2.3 - The comparison between the Convention rights and Maslow's hierarchy of needs (McCormick & Ilgen, 1992; Flekkoy & Kaufman, 1993).



### 1. Survival rights

Survival rights include most of the protective provisions and physiological needs found in Maslow's hierarchy of needs. Without these needs, the life of the child would be endangered. This right of survival must be fulfilled before developmental rights may be attained. It is implied that survival rights are seen as the basis to other rights (Article 6, par. 2) (see appendix).

Survival rights include the following:

- Health (Article 24) (see appendix).
- Adequate standard of living (Article 27) (see appendix).

## 2. Developmental rights

Developmental rights focus on the fostering and nurturing on the many facets of the Child. These rights may be compared to level 2 on Maslow's needs. Having developmental rights the child is able to cultivate self-esteem and respect learnt through education. The right of development may include the following:

- Development (Article 6) (see appendix).
- Right to education (Article 28 & 29) (see appendix).
- Benefit from social insurance (Article 26) (see appendix).
- To obtain a high level of health care (Article 6) (see appendix).
- Developmental rights for the mentally handicapped and physically abused child (Article 23) (see appendix).

## 3. Protection rights

Protection rights focus on the right to dignity. Protection rights may include the need to be loved and belong. Without this right exploitation may become easier. This right includes:

- The right to be protected from economic exploitation (Article 32) (see appendix).
- Against drug abuse (Article 33) (see appendix).
- From abduction (Article 35) (see appendix).
- From being denied access to due process and judicial safeguards (Article 40) (see appendix).

Protection rights are found in the preamble of the Convention as 'childhood is entitled to special care and assistance'. Children are seen as active members of the family unit using the family as a support unit in order to promote the development of the child's personality. Here the participation rights are implied but not explicit.

## 4. Participation right

Participation right is the right of the children to participate in the family, societal activities as, ethnic identity, religious activities, education, neighbourhoods and other societal units. Participation in these

areas will allow for a feeling that, one is true to ones own nature and self. This may result in the attainment of self-actualisation as found in Maslow's hierarchy of needs in level 5.

No provision has been made on how these rights should be implemented. Determining what is in the best interest of the child is subjective but this opens the way for the opportunity for the child to participate. This idea is dealt with in article 12.1 in that " We also listen to the voices of the children themselves.' These aspects imply that children should be given special protection.

A reason for protecting children involves, protecting their vulnerability and their role as future parents. It also involves protecting society and an optimum outcome. (Flekkoy & Kaufman, 1993). This should be seen in the context of the evolution of child development from the 1920's to present day.

#### **2.4.6 Protection of children by parents**

The law vests the parents with certain rights and duties, which they are legally obliged to perform (Schafer, 1993).

The right of recipient (welfare rights) is the right to be provided with goods or services, which the children are unable to provide for. These may include (Van Bueren, 1993, in Flekkoy & Kaufman, 1993):

- Basic needs for food, shelter, clothing and medical treatment.(survival and protection rights)
- Protected from significant harm (protection and developmental rights).
- Receive full education during school years (protection rights).

Parental responsibility can determine the minimum standard of parenting. If parental responsibility is not met the Courts or society must assist the parents to meet their obligations towards their children. It is the parent's responsibility and their parental power that must ensure that the best interest of the child is served (Van Bueren, 1993, in Flekkoy & Kaufman, 1993).

Parental power is the sum total of the rights and duties that the parents hold over the child (Schafer, 1993). This right is given to both parents on the birth of the legitimate child. The parental right of an illegitimate child vests on the mother. On the event of the death of a parent, that parental right cannot be carried over to another via a will. Parental power can only be taken away as a result of a court order.

The father of the child may appoint somebody else to be a guardian with the mother. Should a dispute arise the mother's wishes are followed. Any disagreements arising between the parents, the court intervenes to act as the upper guardian and ensures the best interest of the children is protected.

There are three aspects to parental power namely, guardianship, custody, maintenance

#### 2.4.7 Guardianship

Guardianship includes the custody and maintenance of the child. The latter two may be separated. Guardianship on its own relates to the estate of the child, in other words, the capacity to administrate and to assist the child in legal acts i.e. buying. Administration means protecting goods, buying goods or ratifying contracts (Schafer, 1993). A parent with parental power is not allowed to sell any goods belonging to the child without his consent if the value is above R10 000 (Administration of Estates s 80).

#### 2.4.8 Custody and its effects

When custody is separated from guardianship it then relates to the child's personal life. The duty of the parent to cloth, accommodate, provide medical services, educate and to support the child (Schafer, 1993).



Both parents have custody, unless the court finds that they are not fit and proper parents (Schafer, 1993). Custody can change because of a divorce. Custody orders are changed according to the following:

- In terms of section 5 (1) of the Matrimonial Affairs Act as amended by section 16 of the Divorce Act 90 of 1979.
- In terms of section 6(30) of the Divorce Act 90 of 1979.
- In terms of section 15(1) of the Child Care Act 74 of 1983
- In terms of section 290 (1)(b) of the Criminal Procedure Act.

The effect of the custody order may be as follows (Schafer, 1993):

- The custodian assumes the responsibility to the child to shelter, food and education- the daily life of the child.

- The custodian may determine with whom the child may associate with, the religious training, health care and the type of education the child may receive.
- A parent with sole custody may appoint another person in the event of death to become the new custodian to the child (Matrimonial Affairs Act s5 (3)(a)).

#### 2.4.9 Criteria for determining custody

In determining whether the order should be made the Court considers what the best may be effected in the circumstances and this entails looking at the factors that will ensure that the best interest of the child will be served.

The Court has wide discretionary powers to make any order, which it considers to be in the best interest of the child. Thus the Court may award custody to (Schafer, 1993):

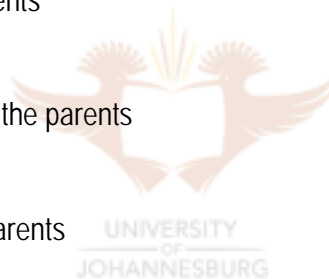
- The father.
- The mother.
- Joint custody. This implies shared legal custody; both parents participate in the decisions about the child's future. The permanent home is with one parent while the other has access. There is still a reluctance in South Africa to grant joint custody, based on the presumption that parents are incapable of co-operating and communicating after the divorce (Schafer, 1981).
- Custody for the first specified time to one parent and then to the other parent.
- To a third party.

#### 2.4.10 General factors that influence custody decisions

A custody order is not a final order it may be varied at any time with a good cause.

In America the general factors that influence custody decisions are as follows (Schutz, Dixon, Lindenberger & Ruther, 1989, p.10):

- Any instance that there is or was child or spousal abuse
- Ages and sexes of the children
- Adjustment of the children to their environment
- Length of time in their present environment
- Child's need for special emotional or physical care
- Economic position of the parties (there are exceptions to this in certain states)
- Child's wishes (if of sufficient age)
- Parent's desires
- Educational needs of the child
- Agreements between the parents
- Separation of the siblings
- Mental and physical health of the parents
- Prior custody orders
- Hostility levels between the parents
- Flexibility of the parents
- General parenting skills
- Religious concerns
- Substance abuse history of the parents
- Care taking arrangements before and after the divorce
- The likelihood of child abduction from either parents.



#### 2.4.11 Termination of the custody order

A custody order may terminate (Schafer, 1993)

- Via court.
- When both parents become reconciled and live together again.

- After the death of either parent the surviving parent becomes sole guardian and will have sole custody of the child. Unless the Court has awarded sole custody and this parent then is able to appoint another as a custodian to the exclusion of the other parent.

The granting of sole custody does not affect the non-custodian parent all parental rights. It must be kept in mind that the non-custodian parent has the right to reasonable access that can be agreed on the time of divorce (Hahlo, 1985). Thus the father (usually) is entitled to access, either by court order or by private arrangement. The custodian may not take the child out of the jurisdiction of the court unless the non-custodian gives his consent or the Court has varied the order to allow for this (Schafer, 1993). A Court may refuse a right of access if it determines that it will not be in the best interest on of the child.

#### 2.4.12 Protection of children against parents

The Court serves as the upper guardian to the child. The child is protected against his parents (Constitution of the Republic of South Africa 1996, section 28).

The following Acts may it possible for the child to be given protection:

- The Matrimonial Affairs Act
- The Divorce Act 90 of 1979
- The Marriage Act
- The Prevention of Family Violence Act
- The Mediation in Certain Divorce Matters Act 24 of 1987



As the Upper Guardian, the Court is allowed to intervene between the parent and the child. This intervention is only justified in exceptional circumstances such as where the child's life, health or morals may be endangered (Schafer, 1993).

The Court is able to deprive either party of parental power, custody guardianship or place the child into care (Schafer, 1993). According to the Matrimonial Affairs Act and the Divorce Act, the Court has discretionary powers to make any order with regard to the custody Guardianship and access to any child. According to the Child Care Act 74 of 1983, the Court may order a child to be placed into care if protection of the children against their parents are necessary.

The Court regards a person to be unfit or unable to have custody if he is so mentally ill that he is unable to provide for the child physically, mentally or socially or if he has maltreated the child or in terms of any contravention of section 10 of the Child Care Act 74 of 1983. When the child is removed from the



parent's custody they lose their right to custody. A custody order is not final as it can be varied at any time if it is seen in the best interest of the child (Schafer, 1993).

#### 2.4.13 Best interest

The no-fault principle divorce was promulgated in the Divorce Act of 70 of 1979.

This Act incorporated the interests of the child of the divorcing parents where custody allocation was necessary (Hahlo, 1983). This Act makes it possible for couples to get a divorce without assigning blame to one party, this results in less litigation and the promotion of negotiation. The question of guilt only becomes relevant when the best interest of the child is not clear.

Children have certain rights conferred to them by the Constitution of the Republic of South Africa 1996 in section 28 as follows:

#### Children

- 28 (1) Every child has the right-
- (a) to name and nationality from birth;
  - (b) to family care, parental care, or appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services, and social services;
  - (d) to be protected from maltreatment, neglect, abuse, or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) not to be required or permitted to perform work or provide services that
    - (i) are inappropriate for a person of that child's age; or
    - (ii) place at risk the child's well being, education, physical or mental health, or spiritual, moral, or social development.
  - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
    - (i) kept separate from detained persons over the age of 18 years; and
    - (ii) treated in a manner, and kept in conditions, that takes account of the child's age;
  - (h) to have a legal practitioner assigned to the child by the state, and at the state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict
- (2) A child's best interest is of paramount importance in every matter concerning the child.
- (3) In this section, "child" means a person under the age of 18 years.

#### 2.4.14 Criteria to determine the best interest of the child

In *McCall v McCall* 1994 (3) SA 201, Judge King used the following criteria in determining what is in the best interest of the child. The Court must decide which parent is better able to ensure and promote the child's physical, moral, emotional welfare. Legislators and Judges in the Western world have become more conscious of the individuality and developmental needs of the children (Flekkoy & Kaufman, 1993).

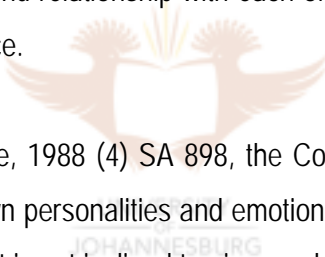
In order to improve the state of childhood, children rights must be taken more seriously and so must the recommendations and input of the child in the legal proceeding. (Flekkoy & Kaufman, 1993). Children can easily become innocent victims when they are not conferred the right to dignity and respect. Children are labelled as a problem in divorce proceedings, or reduced as property (Flekkoy & Kaufman, 1993).

In *McCall v McCall* 1994 (3) SA 201, the following criteria was used to ensure that the best interest of the child may be served:

- "(a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs—generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;

- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environment development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching;
- (m) any other factor which is relevant to the particular case with which the court is concerned."

Judge King further made reference that if the Court is satisfied that the child 'has the necessary intellectual and emotional maturity to give his/her expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents". The court should listen and give weight to the child's preference.



However, in *Greenshields v Wyllie*, 1988 (4) SA 898, the Court held that the children involved in this case aged 12 and 14 had their own personalities and emotional preferences. However, the court stated since their needs change the Court is not inclined to give much weight to their preferences.

#### 2.4.15 Acknowledgement of the developmental needs of the child

The best interest principle was an acknowledgement of the developmental needs of the child (Du Plessis, 1995). The best interest of the child principle can be used to determine the degree to which and the extent of rights, to justify or support actions during custody disputes. The Judge uses the best interest principle to provide endless application and interpretation. Judges have been given wide discretionary powers (Goldstein, Freud, Solnit, 1979). The best interest principle is a “means of differentiating the need of the children from which everyone else involved in the process” (Goldstein, Freud, Solnit, 1979 ,p.1). Judges may try and place themselves in the position of the children but will inevitably bring his own parental socially construct to consider the best interest of the child as in *Greenshields v Wyllie*, 1988 (4) SA 898.

The best interest principle should not be treated as a social interest but as a right inherent to the child, otherwise it has the potential of becoming paternalistic (Clulow & Vincent, 1987)

#### 2.4.16 Summary

*Ubi ius, ibi remedium* (where rights exist, there is a remedy). Legislation facilitating divorce has been accompanied by measures to protect the welfare of the children (Clulow & Vincent, 1987). Neither the Court nor its procedures are designed to help the parents understand their part in the divorce conflict to assist them in the mourning process after the divorce. The Courts should not be looked upon as a social agency (Schafer, 1981).

A justification for the involvement of the State into the sanctity of married life is to protect children from experiences that may be harmful. The State has a obligation to protect the weaker members of society (Clulow & Vincent, 1987). Since divorce is potentially damaging to the child’s functioning, the State should ensure that the child exposed to potential harm is adequately safeguarded. The State steps in and undermines the authority of the parents and encourages them to give their responsibilities over to the State (Clulow & Vincent, 1987).

Efforts should be directed towards empowering the parents to exercise their responsibilities in a mature manner, rather than the Courts intervening to undermine those responsibilities. This will require the Court to surrender part of the divorce process, which it has traditionally held. In England the cited aim is

to shift the emphasis of courts away from the divorce suit to the consequences of the breakdown of marriage (Clulow & Vincent, 1987).

In South Africa the likelihood of children to lose contact with one of their parents is high. The reluctance that the Court to assign custody to both parents often mean that the children in effect have only one parent and have to deal with issues of loss (Schafer, 1981).

Psychologists regard that the quality of interaction between parents and children is more important than physical care: a child's needs for stimulation is to be accorded more importance than the need for proximity. The biological mother may not be the primary object of attachment and the infants might be attached to more than one person. These findings are critical implications for judicial practice in relation to the children of divorce (Clulow & Vincent, 1987). The task of helping to establish place for fathers in post- divorce families may require the special attention of judges and psychologists. The ability of the Courts to respond to the social sciences findings are depend upon the extent to which the judiciary is close to society of which it is part (Schafer, 1981).

Our precedent system creates bargaining opportunities in which the lawyers may instruct or advice the father not to pursue custody since the precedents indicates that mothers are more likely to win (Schafer, 1981). Our Courts are expensive and this may prejudice the non- earning parent, usually the mother if the father is willing to embark upon a costly custody claim (Hahlo, 1985). Disputed custody proceedings are still settled by awarding blame to one party promoting an adversarial proceeding (Hoare, 1993).

Marrow (1985, in Du Plessis, 1995) suggests that the court should view the divorce process and custody matters differently:

- Divorce should be viewed as a personal event, recognising the emotions and feelings that are attached to such an event.
- The family in the process of divorce should be viewed as a family in crisis, as all their relationships are in turmoil and threatened.
- Legal practitioners should not lead the parties to believe that there are legal answers to personal questions.
- Self –determination should be promoted in the appropriateness, or is not in their lives.
- An ongoing relationship between the parents with the children should be encouraged. Divorce should not end the relationship with both parents.

- Feelings of hurt, depression, disappointment and anger should be addressed and should not prevent the parents finding an agreement that will address the best interest of the child. The court process should not exacerbate the feelings that the parties express.

The court should take into consideration the interest of the child against the happiness of the child (Barrette, 1986).

This equilibrium is delicate since it may be important for the child to come under the father's authority although the child may not wish it as in *Gallaghan v Gallaghan* (1976, 9 F.L.R 331, in *Flekkoy & Kaufman*, 1993). Children do not know the term's 'marriage' or 'divorce' these are legal terms. Children understand that their routine and life change. These changes may include a change of residence, school and in other circumstances a new parental figure. Children seldom have information about the decisions made on their behalf (Barrette, 1986).

It may be a useful exercise for all parties involved in the divorce process when signing the final papers to include the children any misunderstandings may be then addressed. This however does not mean that the Court will be used as a social agency but rather the Court exercising its right as the upper guardian to the children (Schafer, 1981).

The pain of a marital separation changes relationships among the parents and the social support but it is the children who are the most vulnerable and at least able to understand what is happening to them (Kaslow & Schwartz, 1987). Divorce must be seen as the end of a marriage but not as the end of a family (Barrette, 1986).

## CHAPTER 3

### 3 THE PRESENT SYSTEM - SERVING THE BEST INTEREST OF THE CHILD

It is a gross injustice that the future care of the child should depend on the level of income of the parents. This is offensive towards the constitutional rights of equal access to the law (Burman & Derman, 1997). The Department of Justice is concerned with the transformation of the justice system to become a fast, efficient and cost efficient service that reflects the basic constitutional ideals (Department of Justice, South Africa, 1997, p.3).

Given the trauma that the children experience with the disintegration of the family system and the consequences of the arrangements made for the children often without their input and knowledge all of which have a detrimental result on their emotional adjustment. Initiatives have recently come into force with the aim of rescuing these children from their unfortunate positions. The Family Advocate and the establishment of the Family Court are two such initiatives. These initiatives are examined to assess the way in which they are able to best serve the interest of the child.



#### 3.2 The adjudication of family matters in South Africa

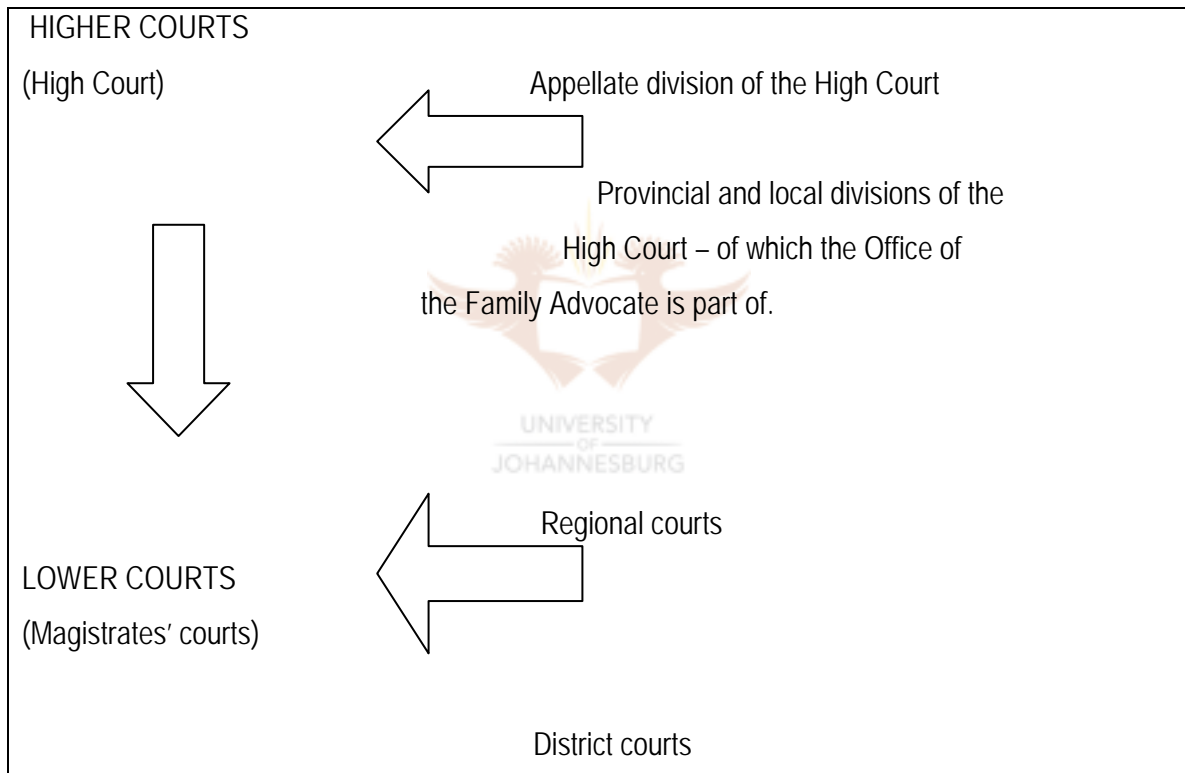
“Family law” deals with the problems of husbands and wives arising from the breakdown of marriages. It deals with problems of the protection and support of children arising from the breakdown or lack of family relationships, and the problems arising from unlawful conduct of children and juveniles” (Hoexter, 1983).

The courts that are concerned with the family matters are the provincial and local divisions of the High court; the Magistrates’ Court, which incorporates the Children’s Court, Maintenance Court and the Juvenile Court. Magistrates and Commissioners are also marriage officers and commissioners of child welfare. The Minister of Internal Affairs has certain powers in respect of family matters.

### 3.3 The structure of the Courts in South Africa

South Africa applies a system of judicial precedent also called the *stare decisis* doctrine (to stand by previous decisions). Previous decisions create binding precedents that must be followed. This system means that the lower courts are bound by the decisions of the higher courts (*ratio decidendi*) and that a court is bound by its own decisions unless it is wrong from (result from a higher court decision: (Van djikhorst,1994). The hierarchy of the ordinary courts implies that there are two kinds of courts: the higher courts and the lower courts. Figure 3.1 illustrates the hierarchy of the courts in South Africa).

Figure 3.1 - The hierarchy of the Courts in South Africa (Kleyn & Viljoen, 1995).



#### 3.3.2 High Court



The Appellate division is the highest court. This division is situated in Bloemfontein (Kleyn & Viljoen, 1995). Five judges preside in civil and criminal matters. The judgement of the court lies with the majority decision of the judges (Supreme Court Act 59 of 1959 s12 (2)). Leave to appeal is required in civil matters (see Supreme Court Act 59 of 1959 s 20(4)(a)). The judgements of the appellate division bind all subordinate courts (Kleyn & Viljoen, 1995).

### 3.3.3 Provincial and local divisions

The Constitution of South Africa (1996) established nine provinces. Every province has a high court (Kleyn & Viljoen, 1995). These divisions are bound to the decisions made by the Appellate Court. However should there be no decision, the courts are bound by their own previous decisions, unless they are wrong.

A provincial division consists of a judge president and one or more deputy judge's president and so many judges, as the President may need (Supreme Court Act 59 of 1959 s 3(2)). Local divisions function within a certain territory of the provincial divisions. The local and provincial divisions have co-ordinated jurisdiction, such a court is known as a circuit court (Du Plessis, du Plessis & Hees, 1995). The court of a local division is presided over a judge with the same standing in the corresponding division (Supreme Court Act 59 of 1959 s3 (4)). The Judge President may divide the area of jurisdiction into circuit districts. The local division may hear divorce actions (see *Buffel v Buffel* 1989 2 SA 771 (NC)).

The High Courts have jurisdiction in all matters in family matters. The Court has exclusive jurisdiction to hear divorce matters and ancillary matters such as maintenance, custody of and access to or guardianship. Thus as upper guardianship to all minor children the Court has inherent jurisdiction in all matters that may affect these children.

The Children's Court has concurrent jurisdiction with the High Court in respect of children. Children's Courts order can not compete with an order from the High Court. The High Court takes preference. The Children's Court may only deal with children in need of care but the court may not deal with arising from divorce (Hoexter, 1983).

Every Magistrate's Court is a maintenance court for maintenance inquiries and for and against non-payment. The High Court is the only court that may order the dissolution of a marriage of person that is presumed dead (Hoexter, 1983).

### 3.3.4 Lower Courts

The Lower Courts' Act 32 of 1944 s89 (1) creates and amends the various courts within the Republic. The Magistrates' courts are bound by the decisions of the appellate division and where is an absence of such a decision then they are bound by the judgements of the provincial and local divisions in their own provinces. Since the cases heard in the lower courts do not serve as precedent to other courts they are not reported (Kleyn & Viljoen, 1995).

The Minister of Justice may constitute:

- (a) a magistrate's court for the district;
- (b) a regional court for the regional district;
- (c) a civil court for a district;
- (d) a family court for a family division (Lower Court' Act 32 of 1944 s9(1)(a)(i)).

Magistrates' courts and regional courts have criminal jurisdiction and family court has civil jurisdiction.

### 3.3.5 Global international child instruments:

Various international statutes, conventions and declarations are available as a legal remedy to ensure that the rights of the child are recognised and protected. This enables the principle of the best interests of the child to become recognised and enforced in those countries to which they are signatories to global international child instruments. The following is a demonstration of some of the important global international child instruments available:

- League of nations Declaration of the Rights of the Child 1924
- United Nations Declaration of the Rights of the Child 1959.
- United Nations Declaration of the Rights of the Child 1989.
- Rules of Procedure of the Meetings of the State Parties to the Convention on the rights of the Child 1991.

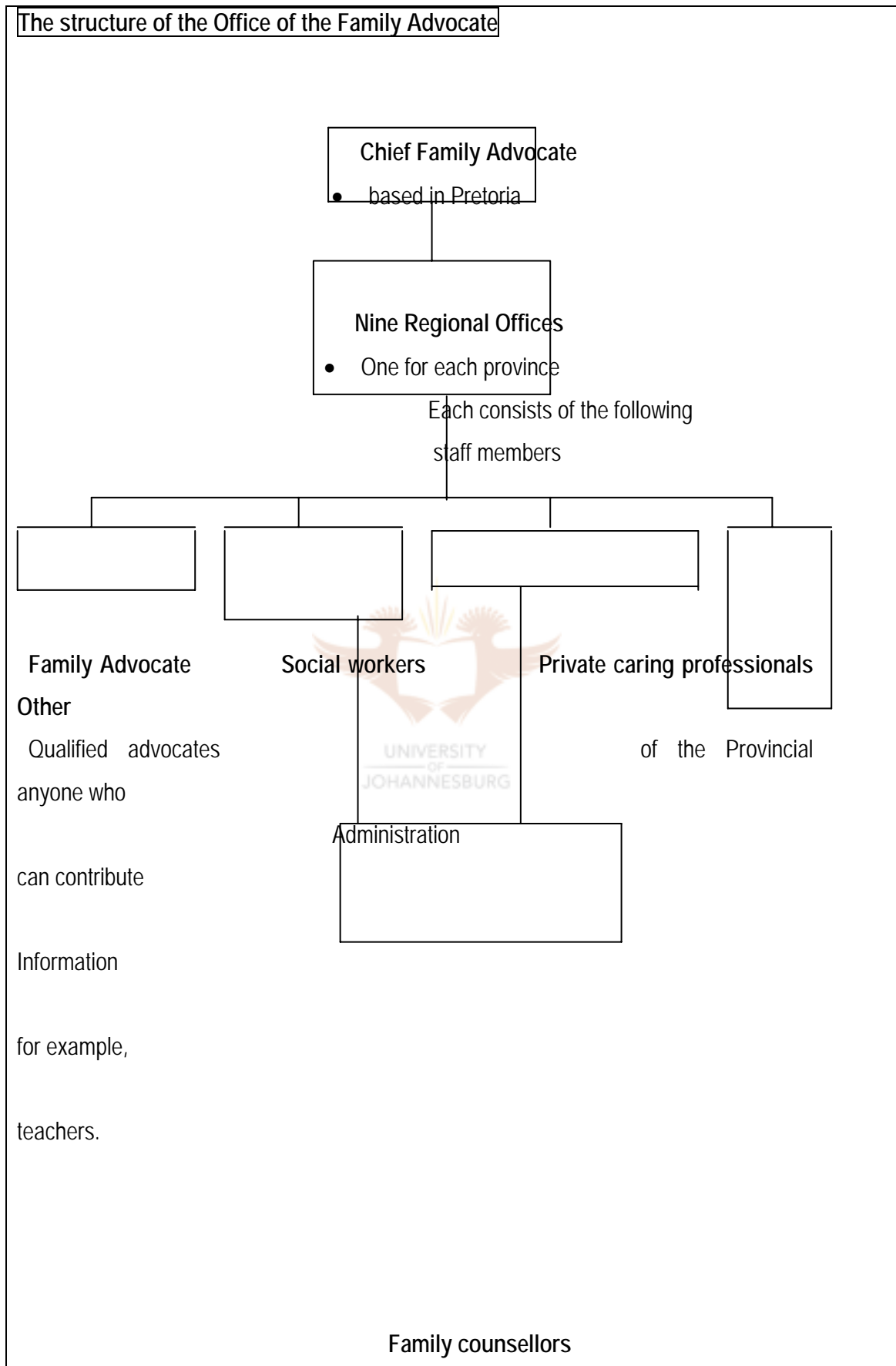
- Declaration of the Rights and Welfare of the African Child 1979.
- African Charter on the Rights and Welfare of the Child 1990.
- Universal Declaration of Human Rights 1948.
- International Covenant on Economic, Social and Cultural Rights 1966.
- International Covenant on Civil and Political Rights 1966.
- Convention on the Elimination of All Forms of Discrimination against Women 1979.
- International Convention on the Protection of the Rights of All Migrant Workers and their Families 1990.
- American Declaration of the Rights and Duties of Man 1948.
- American Convention on Human Rights 1969.
- Additional Protocol to the American Convention on Human Rights in the areas of Economic, Social and Cultural Rights 1988.
- European Convention for the protection of Human Rights and Fundamental Freedoms 1950.
- Protocol No. 1 1952.
- Protocol No.7.
- European Social Charter 1961.
- Conference on the Security and Co-operation in Europe, Helsinki Final Act 1979.
- African Charter on Human People's Rights 1981.



### 3.4 The Family Advocate

The Family Advocate system came into existence in South Africa in 1990. It was established in terms of the Mediation in Certain Divorce Matters Act 24 of 1987. This Act ensures that the Office of the Family Advocate (OFA) is responsible for the arrangements relating to dependent children in the divorce process or other disputes about custody, guardianship, or access (Burman & McLennan, 1995). The aim is to settle matters between the parties that will ensure that the conflict is reduced and the best interest of the child is served. Therefore, the Family Advocate is there "to assist the judiciary into the determination of guardianship and/or custody of, and access to, children, and to propose improvements" (Burman & Derman, 1997, p.1).

Figure 3.2 - The structure of the Family Advocate Office (Burman & Derman, 1997).

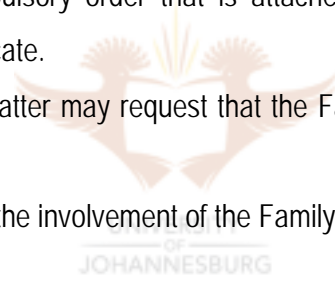


1990	<p style="text-align: center;">Appointed in terms of regulation 6 Of GG R 2385 dated 3 October</p> <p style="text-align: center;">To assist in the inquiry</p>
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### 3.4.2 Involvement of the Family Advocate in the Court process

There are three ways that the Family Advocate becomes involved in the divorce process:

1. Annexure A. this is a compulsory order that is attached by the Court for perusal and approval by the Family Advocate.
2. The parties involved in the matter may request that the Family Advocate (FA) investigate the situation.
3. The High Court may request the involvement of the Family Advocate.



### 3.4.3 The procedure followed by the Office of Family Advocate

In Cape Town there is no procedure. In Guateng, the Office of the Family Advocate (OFA) are finding the following procedure be beneficial:

On the day of the interview the Family Advocate (FA) and the Family Counsellor (FC) come together and discuss the various aspects of the case that they deem to be of importance or which may adversely influence the best interest of the child. The Family Advocate and The Family Counsellor usually interview both parents together. Young children are interviewed separately from the parents. Children are made to understand that they are not asked to choose between the parents but are told that the important aspect is to protect their best interests. The children are told that the reports will be released to the attorneys of the parties and a report will be send to the judge. The children are asked what they feel the judge should take into

consideration when deciding their best interest. This gives the child the opportunity to state problems or enlighten the FA to difficulties that the child may be experiencing.

The Family Advocate and the Family Counsellor may wish to mediate a settlement or try to settle any arising problems, which may relate to the best interest of the child. The aim of the Family Advocate is to settle matters between the parents that will result in the reduction of conflict and serve the best interest of the child (Burman & Derman, 1997).

#### **3.4.4 Problems that may influence the best interest of the child**

- Most matters that appear in the files of the Family Advocate are a result of objections by the parties. The Family Advocate requests mini-evaluations a second opinion. This results in a multi-disciplinary approach in becoming acrimonious.
- Using a mini-disciplinary approach may involved lengthy delays because of home visits, psychometric testing, clinical interviews and the assembly of collating evidence. The distances that the social worker must travel for the home visits may be far and in some cases dangerous if the social worker is not acquainted with the area. This may result that professional make arrangements to travel together or in-group and often must arrange home visits in some area to minimise on their cost. The result is a long delay whilst reports from social workers become available.
- Usually found amongst the with the health care professionals clinical interviews may be time consuming and arrangements of interviews are only on specific days that are assigned charity cases.
- Delays in finalising reports may be a result in an overload in casework. There are a few health professional who are willing to participate in volunteer services on the long term for no or little pay and spend a substantial deal of their time conducting assessments on the poor.
- The legislation outlining the functioning of the Office of the Family Advocate has been criticised for not making more use of mediation procedures (Burman & Derman, 1997).

#### **3.4.5 The benefits offered that promote the best interest of the child**

- According to Burman and Derman, 1997, with various interviews that they conducted the OFA is seen as an impartial office that really looks after the best interest of the child. They are seen as being effective in uncomplicated cases. The team usually consists of a multi-disciplinary approach.
- The effective service is seen to be due to part of their procedure and the use of referrals. According to Burman and Derman, 1997, practitioners felt that the OFA alleviated the stress of the state psychologists or social workers services since the OFA used the occasional *pro amico* services of private practitioners.
- The OFA affords the parties the opportunities to use this procedure set down by law as a forum as a way to mediate or resolve points of disputes.
- The OFA may be used as a tool in which the parents may become aware of the position of the child and the needs of the child. This time may be used to offer additional services to the parents for example to attend a parenting program, workshops dealing with issues arising from the divorce process. Thus the OFA is seen as speeding up the process of settling disputes.
- The Office of the Family Advocate may use the opportunity to engage the parties in post divorce counselling and looking after the best interest of the child.
- The Office of the Family Advocate makes final recommendations to the judge. If private professionals are involved reports and discussions are then submitted to the judge. The report may include custody and or access arrangements that the Family Advocate may feel to be in the best interest of the child.

#### 3.4.6 Serving the best interest

Many Family Advocates in the Cape Town office felt that the tender years principle was more preferable in serving the best interest of the child (Burman & Derman, 1997). (See *Dunsterville v Dunsterville*, 1946 NPD 594 and 597 & *Myers v Leviton*, 1949 (1) SA 203 (T)).

The influence of the Office of the Family Advocate (OFA) should be seen in the context of the changes that have taken place in South Africa that may have influenced the allocation of custody to fathers.

Even though the Family Advocate may not closely adhere to the legal principles, custody recommendations have become more creative dealing with matters concerning custody from the African customary unions and unrecognised religious marriage. These marriages are not covered by the present ambit of the law therefore at present the Family Advocate may not become involved with marriages that are not deemed to be a legal marriage according to South African law. As a result of conducted interviews with the Family Advocate, Burman and McLennan (1995) anticipate that the law will be amend to accommodate or legalise customary unions and religious marriages with priests who are as yet not recognised as marriage officials. Role-players may then become more formally involved in the legal process to safeguard the best interest of the child.

Since the existence of the Office of the Family Advocate, an increase in the number of fathers requesting custody of their children was noted (Burman & McLennan, 1995). The study conducted by Burman and McLennan (1995) reveals that this increase may be due to a desire by the father for revenge on the wife or a wish to escape the payment of maintenance. The fault in the payment of maintenance studies suggests that about 85% of fathers default on their maintenance payments to the mothers (Burman & McLennan, 1995, p.1). Burman and McLennan (1995) suggest that several attorneys claim that they discourage fathers from claiming custody if they felt it was not in the best interest of the child. However, fathers still feel that the tender year's principle still applied despite a study conducted in 1996, that a young child is better off with his mother (Burman & McLennan, 1995).

Despite the fact that the OFA was created to decide the best interest of the child, no socio- legal studies have been conducted. The Institute of Socio- legal research at the University of Cape Town has received a grant to studying in which manner Office of the Family Advocate brief is interpreted within the South African multi cultural society.

#### **3.4.7 To counteract the limitations of the Family Advocate**

- The Mediation in Certain Divorce Matters Act 24 of 1987 has made no provision was for the appointment of a psychologist on the Family Advocate's staff. This would be advantageous to the Office considering the complex nature of the custody and access disputes dealt with by the office (Burman & Derman,1997).



- Complex evaluations are required of the Family Advocate, an evaluation that they are not necessarily skilled or experienced to make. This places the children in a difficult position especially when parties are unsuitable because either the presence of alcohol or drug abuse with harsh living circumstances are some of the difficulties that are experienced when making a recommendation that must fulfil the criteria of best interest of the child.
- Training in child psychopathology and child development will serve as a good foundation in understanding the needs and recognising the family system dynamic in the lives of the children. According to Burman and Derman (1997) in an interview conducted it was found that Family Counsellors were inadequately trained and lacked experience in working with children and family matters. It was also found that students even though supervised by the ACVV (Afrikaanse Christelike Vroue Vereniging) are not able to stand against the Family Advocate who is much older and more experienced. To protect the best interest of the child the Family Counsellor should be well acquainted with the law to be able to identify situations in which clients may be about to make a major legal mistakes.
- The Family counsellor and Family advocate should be able to recognise the grief like process that may accompany the parents because of the fear of losing personal power to the legal system and the ignorance of the divorcing process. It is important for the therapist involved in the process to reduce the feelings of helplessness, depression and anger by informing the parents about the divorce process (Swenson, 1993).
- If neither the parent is deemed to be suitable then common laws comes into operation in which both parents have custody. This situation may make the Family Advocate feel obliged to recommend the more suitable parent. This may present the child with a Hobson choice.
- Many mental professionals feel that one parent is better than no parent is or institutionalisation their assumption may be correct since there are so few children homes. With limited funding in children home projects this could put the child in a disadvantageous position, nevertheless inadequate parental care puts the child in a vulnerable position where he is open to abuse and exploitation (Burman & Derman, 1997). The Family Advocate may highlight and develop awareness in the community to the plight of such children.

### 3.5 Family Courts

#### 3.5.2 Historical overview

Family Courts originated in the American juvenile court movement (Schafer, 1981).

The theory behind the establishment was originated from the social sciences viewpoint rather than that of the legal sciences.

The proceedings were engaged to be civil in order to determine the best needs of the child and that of society than as a role of prosecuting. The objectives were to provide for guidance and protection rather than to punish and pronounce guilt (Joske, 1976).

### 3.5.3 Definition

There are numerous definitions of a Family Court. The definitions depend on the way in which the Family Court functions and since this differs widely in many parts of the world a comprehensive definition of a Family court is difficult to formulate.

Schafer, 1981 (p.xxxv) gives the following as a definition for a family court:

“A family court may be defined as a Supreme Court of law having jurisdiction over all family law matters, which are to be adjudicated upon in an informal and confidential manner so that emphasis may be placed on the resolution of problems rather than the settlement of disputes.”

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### 3.5.4 The ideal characteristics for a Family Court

According to the South African Law Commission' summary (Hoexter, 1983, p.23) the ideal characteristics for a Family Court are the following:

- Have extensive jurisdiction in family matters;
- Promote an approach that solves problems rather than disputes, however it should not serve, as a social agency but must retain its status as a court of law. Social auxiliary services are seen as an indispensable aid.
- Court proceedings should be informal;
- The Family Court should strive to promote the Government's Vision 2000, it should be within easy reach of, and accessible to the majority of the citizens for the benefit it is established.
- The Family Court should be seen as arriving at a synthesis between the social sciences and the legal profession.

Thus the fundamental characteristic of a family court is the linking of the legal sciences to the social sciences, that is, social workers and /or psychologists (Schafer, 1981).

### 3.5.5 The jurisdiction of the Family Court

The Magistrates' Courts Amendment Act 120 of 1993 makes provision for the establishment of Family Courts with divorce jurisdiction and for the conversion of the Black Divorce Courts into Family Courts. The enactment of this Act was postponed as it was felt that the Black Divorce Courts should become de-racialise.

At present the Family Court Pilot Project operates within the existing fragmented legislation .The Divorce Courts, Maintenance Courts, Children's Courts and courts hearing family violence are situated in the same location in Gauteng, that is the Magistrate Court building. Magistrates preside over in Maintenance Courts, Children's' Courts and family violence as in terms of existing relevant legislation. The Department of Justice (1999) has drafted a new rule that the procedures are modelled on the previous Black Divorce Court in order to make the procedure in the proposed Family Court less cumbersome and onerous than the rules followed in the High Court.

However the present system does not make provision for the following (Du Toit, Wentzel & Hechter, 1997):

- A multi-disciplinary approach in reaching the ultimate decision-making of matters, such as custody and access of a child as opposed to a system in which a multi-disciplinary professional team actively contributes to a final decision in the best interest of the child;
- A system wherein the principle of the best interest of the minor child is applied in one central court such as a Family Court as opposed to the present multi-level and decentralised system, that is, a Maintenance Court, a Children's Court, a High Court and a Magistrate's Court;
- A Crisis Clinic to screen and/or attend to matters after hours, as well as office hours, concentrating on promoting the interest and ensuring the rights of, minor children.

### 3.5.6 The functions of Family Court judges

- In America the Family Court judge's function is generally supervisory in nature. The Judge reviews all the husband and wife agreements hands down a court order much in the same way as the South African Courts makes a consent paper an order in the divorce proceedings (Schafer, 1981).
- The judge presides over contempt proceedings and has the power imposes penalties if court orders are not adhered to (Schafer, 1981).
- The judge may grant interim relief orders, such as restraining orders if it is sought (for example in South Africa a rule 43 application).
- The judge may perform a public relation function to publicise the functions and the achievements of the court This is more common in the family courts in the United States of America) (Schafer, 1981).
- The judge becomes involves in the follow up operations by communicating to the couples who have reconciled (Schafer, 1981).
- The Judge will try to see all minors involved in domestic disputes, especially where custody and access are at issue. Privately and informally in his chambers (Colorado State Statute 14-10-126).
- Every effort is made to keep the clients lawyers informed of the progress made.



### 3.5.7 The function of different Family Courts

The Family Courts were established to provide a forum in which a multi-disciplinary team may function to ensure that the best interest of the child is protected. The Family Courts have extensive jurisdiction in matrimonial and in familial proceedings. The creation of Family Courts was developed from the viewpoint that the family is the most important social institution. Problems arising from such an institution calls for a special approach, which originated from the social sciences viewpoint rather than that of the legal sciences (Hoexter, 1983 & Schafer, 1981).

Family Courts originated in the American juvenile court movement. The first family court was established in Cincinnati, Ohio, 1914. It was called the ' Division of Domestic Relations of the Court of Common Pleas'. This court acquired an integrated jurisdiction over both divorce and problems of juvenile delinquency (Schafer, 1981).

The proceedings in court were conducted in a civil manner in order to determine the best needs of the child and that of society than as a role of prosecuting. The objectives were to provide for guidance and protection rather than to punish and pronounce guilt (Schafer, 1981).

Family Courts mean different things to different people, therefore an understanding on how family courts operate in various countries will facilitate an understanding on how Family Courts would best serve in a South African context (Schafer, 1981).

It is therefore proposed to examine the family court of Australia and the Family Court of the first Circuit of Hawaii. No useful purpose would be served by merely copying other systems without having cognised of the circumstances prevailing in South Africa.

**Table 3.1 - Family court of the State of New York, Los Angeles and State of Hawaii (Hoexter, 1983; Schafer, 1981).**

Name	Family Court in the State of New York	Family Court in Los Angeles	Family Court in the State of Hawaii
Type of Court	Mainly a juvenile court	Circuit Court supplemented by district family courts	Circuit court (First Judicial Circuit)
Jurisdiction	Family matters: Child neglect Maintenance of children Paternity Juvenile delinquency Adoption Termination of parental power	Offers a social auxiliary service in three different situations: Counselling conciliation: to the custody of and access to minor children referred by the divorce court Consultation to access the maturity for marriage to couples where one or both are under the age of 18 year and who have applied for a marriage licence.	The age of 18 years, particularly juvenile offenders, and juveniles in need of care. Applications relating to the custody of minors; Adoptions; All matters affecting children under Termination of parental power; Consent to marriage; Employment involving a minor; Military service involving a minor; Referral of a mentally handicapped or mentally defective children in a psychiatric unit. Limited jurisdiction over adults in criminal cases in offences against a minor by parent/guardian or custodian in: Child desertion;

		<p>Counselling and conciliation for families where the final degree of divorce has not yet been obtained but action has already been instituted. Reconciliation counselling is included and where there is no prospect of reconciliation separation counselling and counselling affecting issues of custody and access to the children is offered</p>	<p>Non-support of children; Assault by one parent on other. In civil cases: Actions for divorce Annulment of marriage Paternity; Maintenance; Orders to place mentally handicapped children in care or referral to a psychiatric unit. This Family court provides marriage counselling and conciliation services</p>
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Los Angeles has significance to South Africa. Similar to South Africa it is made up a diverse population. The conciliation Court has derived to break down these barriers. The services have been extended into the community, which operate in a non-court setting. Some counsellors are multilingual (Schafer, 1981).

To determine how the best interest of the child principle is able to fit into a Family Court structure the best principle needs to be determined. The best interest principle means different things to different role players and the common elements highlighted will ensure that the children's' best interest is served.

## CHAPTER 4: THE PROPOSED FAMILY COURT MODEL

### 3.6 Introduction

Research has suggested that a small significant group of children from separated parents experience long term psychological, social and academic difficulties which can persist into adult life (Walton, Oliver & Griffin, 1999).

Two essential variables that are associated with psychological and emotional adjustment of children are exposure to inter-parental conflict before, during and after the separation and the psychological well-being of the custodial parent (Shaw & Emery, 1987). This is even more problematic for children whose parents are verbally and physically aggressive in resolving conflict or when children must make frequent transitions between parents in high conflict or when children feel that they are used or are caught up in the dispute (Buchanan, Maccoby & Dornbusch, 1991).

In order to protect and serve in the best interest of these unfortunate children a proposed family court model is examined to investigate alternatives to litigation and the efficacy of interventions to ameliorate the difficulties experienced by separated and divorce families.

### 3.7 The justification to establish a Family Court in South Africa

In 1984, the Fifth report of the Hoexter Commission found that South Africa was in need of a family court with comprehensive jurisdiction in all-family matters. The Constitution of 1996 proclaims in Sect 9(1) that everyone is equal before the law and has the right to equal protection and benefit of the law and in section 9(2) provides that equality includes full and equal enjoyment of all rights and freedoms.

The Honourable Madam Justice Kathleen Satchwell states that "Presumably we all accept the current system is a titanic. It is cumbersome, lethargic, expensive, inefficient fraught with contradictions of adversarial action and conciliation...The result has been public disillusionment and discontent." (Satchwell, 1997, p.4).

This is based on the following arguments:

- An inability to express the best interest of the child
- The distress experienced during the divorce proceeding.
- The lack of recognition of the contribution that the social sciences may offer to the resolution of disputes and complications that may arise during and after the divorce.
- The existing court procedures are costly and time consuming.
- The fragmentation that exist between the various courts.

Family justice should ensure that the following is maintained (Du Toit, Wentzel & Hechter, 1997):

- Family justice should strive to treat families holistically. The legal case should be place in the context of the overall family history.
- Families should be provided with safety as a priority. The safety of all families should be seen as essential.
- Families going through the traumatic experience of divorce should be treated humanely and efficiently. The court should attempt to ensure that the court process offers and co-ordinates efficient services. The Honourable Madam Justice Kathleen Satchwell states that " people should not die or lose heart or find that successful countervailing/ defensive action has been taken in the months and years it takes for their problems to be resolved by the Court" (Satchwell, 1997. p.6).
- Families are treated fairly and all rights are protected and are respected. Families should be viewed as an important social system. Each member should be respected for the strengths and contribution towards amicable settlement. If choices have to be made between the interest of the family and that of the child, the interest of the child should be viewed with priority (Satchwell, 1997).

- The final report of the Hoexter Commission (1983) recommended the following:
- A single Family Court to be established with comprehensive jurisdiction over family matters. The functioning of this court should operate on the level of the Regional Court and should serve the population by means of a circuit system.
- The various courts, that is, the Children's' Court, Juvenile Court and the Maintenance Court should have concurrent jurisdiction with the High Court (then known as the Supreme Court).
- The judicial officers become independent of the civil service, with appropriate legal qualifications, experience in and interest in the adjudication of family matters.
- The Family Court should be seen as a court with two interdependent components:
  - (a) A social component (conciliation service) known as the Family Court counselling service.



- (b) A court component (court of law) in which rules of procedure and evidence would apply.
- The Family Court to be launched as a pilot project in each of the four metropolitan areas.

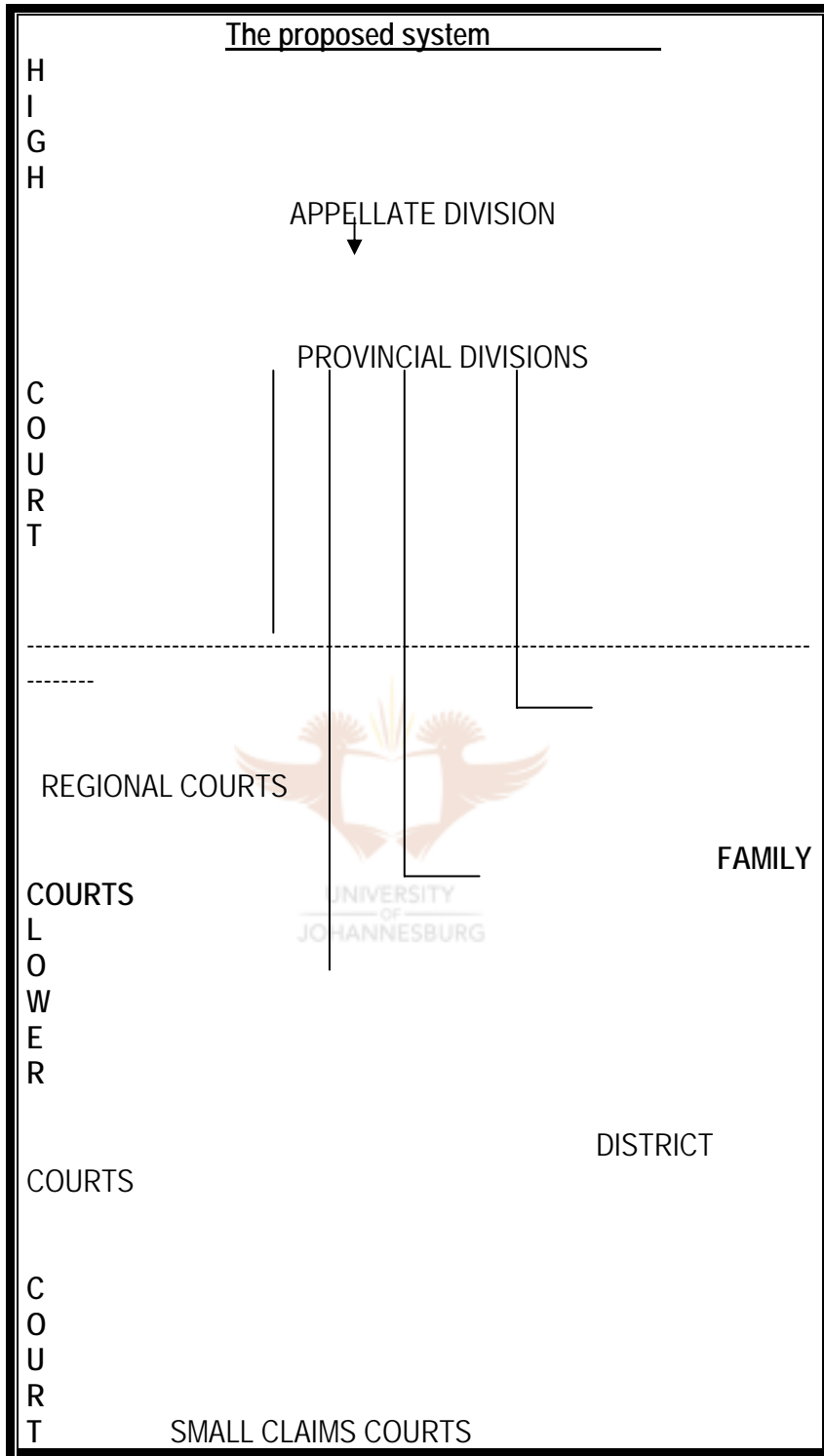
In 1985, the Family Court Bill of 1985 and the Divorce Amendment Bill 1985 was rejected by a parliamentary sub-committee. The Mediation in certain divorce matters Act no.24 of 1987 was promulgated. This led to the establishment of the Office of the Family Advocate (OFA).

The second Hoexter report proposed the following:

- That Judges in the Family Court will have the appropriate legal qualification, practical legal experience in Family Law, have an inclination for family work and a compassionate personality. These Judges would be assisted by Family Court Commissioners, whose duties will include the hearing of unopposed divorces and maintenance cases, pre-trial conferences and conciliation conferences as ordered by a Family Court Judge.
- Each division of the Family Court will appoint an Administrative officer, who will be in charge of the social agency component.
- The jurisdiction will be concurrent with the High Court, ancillary to divorce, rule 43, maintenance, custody, access and guardianship of minor children, interdicts in matrimonial matters and other familial matters.
- The rules of the Family Court should steer away from the adversarial and towards an inquisitorial litigated procedure.
- The Divorce Courts Amendment Act 65 of 1997, was authorised by the President on the 14 November 1997, in which the Divorce Courts was established in terms of Section 10 of Act 9 of 1929 became de-racialised.
- The aim of the Pilot project is to replace the Section 10 Courts (Amendment Act 129 )and to implement the formation of a Family Court.

In 1997 the Minister of Justice recommended that the judicial officers and staff of the maintenance courts, family violence courts and children's courts be transferred from the magistrates court into a family court to operate with the divorce court as established in terms the Divorce Courts Amendment Act, 1997 (Du Toit *et al.*, 1997).

Figure 4.1 – The proposed system (Hoexter, 1983).



### 3.8 The role-players

In February 1997 the Minister of Justice, appointed a Family Court Task Team. The National Task Team recommended the establishment of a pilot project family court that would address the needs of the community and provide a foundation upon which a permanent family court structure could be established. The Task Team recommended that the first pilot projects should be established in the following areas; Cape Town, Durban, Johannesburg and Lebowakgomo. The chief Magistrates of these areas establish a local steering committee (Du Toit *et al.*, 1997).

In Gauteng all the role-players in the Family Court Pilot Project were identified: The Department of Justice with specific reference to the Minister of Justice, the National Task force, the local Management Committee in conjunction with the NGO Network formed 3 sub-committees:

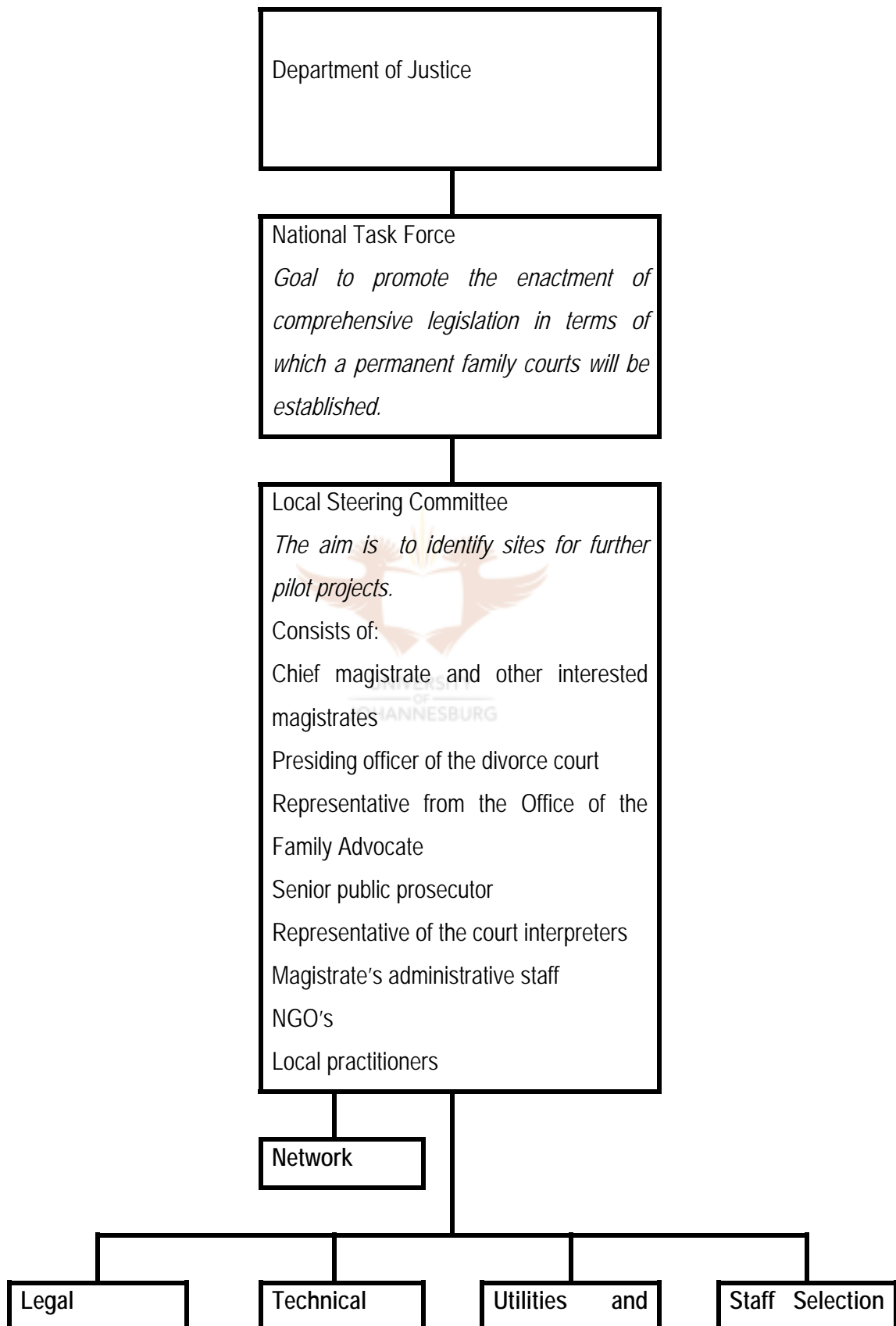
- The Legal Technical Research Group;
- The Utilities and Faculties Sub-committee;
- The Staff Selection and Training Sub-committee (see appendix for list of members).

The Staff Selection and Training Sub-committee drafted a Proposal for a Model to serve as a “Blue Print”. This committee worked in conjunction with CHILDS – Children in Legal Disputes, InfoCat AM CC – an information and training specialist group, Studio MFS Graphic and Environmental Design, as well as Blue Print/Shawu Fundraising, PRO and Management Consultant Group.

The Working Committee recommended workshops with all the relevant role players to facilitate the timeous implementation of the Family Court Pilot Project. The Working Committee was aware of modification of certain proposals.

The Working Committee recommended that international trends in family law and mental health procedures should be considered in the institution of a Family Court in South Africa (Du Toit *et al.*, 1997). As a result many consultants from all over the world were asked for their assistance

Figure 4.2 - The hierarchy structure of the proposed Family Court Pilot Project (Du Toit, Wentzel & Hechter, 1997).



<p>To provide counselling and mediation support services.</p> <p>To lobby for the establishment of a permanent family court in South Africa</p>	<p>Research</p>	<p>Facilities</p>	<p>and Training</p> <p>To ensure that all judicial officers, professional staff and administrative staff have through training and understand the expectations placed on them.</p>
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The Working Committee suggested the following during the transitional period (Du Toit *et al.*, 1998):

- a) The services offered will run concurrently for a period to be determined by the Implementation Committee. Duplication of services to be identified and amalgamated.
- b) All staff must be informed about changes through regular progress meetings.
- c) Specific medium and long-term goals.
- d) Each sub-committee to provide the implementation committee with detailed goals with target dates as to the specific procedures and/or tasks.
- e) The medium term goal for the Divorce division should be that all unopposed matters be referred to the Family Court. Settlement agreements should apply the principle of the best interest of the child. Both parties and their respective legal representatives and/or mental health specialists should become signatories to an affidavit confirming that the best interest of the minor will be served. The original of this affidavit should be attached to the agreement and a copy filed with the Family Court. The draft copy is attached to the working document.

### 3.9 The process

#### 3.9.2 Screening

Screening is to be conducted by means of a pro-forma affidavit. This will determine the appropriate action(s) for the particular family (Du Toit *et al.*, 1998).

### 3.9.3 Premarital Counselling

The best treatment for the trauma of divorce is to avoid the divorce process by restoring the marriage to a health state. However, success can not be measured on the number of divorces avoided rather in resolving potentially harmful practices and situations with recognising and deal with issues arising from the conflict (Margolin,1982).

The main purpose of premarital counselling is (Margolin,1982).

- To inform the parties of the nature of marriage, the responsibilities, realities and common problems the usually beset the marriage.
- To determine the motivation behind the reason to marry
- To clarify the their role expectations of each other.
- To evaluate the emotional, economic readiness for their intended marriage.
- To familiarise the couple to a system of communication with each other and to make them aware of each other's strengths and weaknesses.
- To create an awareness to the alternatives to marriage.
- To give an opportunity to think about their decision to marry
- To provide the parties with sex education
- To explore any differences that may hinder the marital process, such as cultural differences, different religious needs, age parental pressure, emotional or physical handicaps, etc.
- To build relationship the will serve as a good foundation upon which the couple may grow as individuals and in confidence in the couple in such a way that they feel that are able to think in terms of getting help if the marriage finds itself its trouble.

### 3.9.4 Divorce Parent Information Programmes

The first three international conferences hosted by the Association of Family and Conciliation Courts have highlighted the need for parenting educational programmes.

The Los Angeles County Conciliation Court was one of the first courts to introduce programmes to address families caught up in conflict situations as a result of the divorce in the adversarial process (Kibler, Sanchez, & Baker-Jackson, 1994). This model emphasised learning and content. Learning to reduce destructive conflict and to teach problem –solving resolution skills. McIsaac and Finn (1999) feel that if parents think differently about each other and their shared task of raising the children , they will

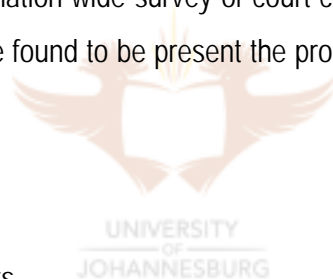
better co-operate and solve problems jointly, this improvement will be reflected on the child's behaviour in a positive and reinforcing way. Most divorce programs in the United States only require the attendance of one parent (Di Bias, 1996).

In the United States of America there is a growing consensus that one parenting program will not necessary accommodate the needs of the participants. Programs are designed that specifically target the specialised needs of distinct parents.(for example step- families, never married, high-conflict parents) (Di Bias, 1996).

The current challenge is to provide generic programmes (Fuhrmann, McGill & O'Connell,1999). In America 18% of the courts provide its own program It was also found that they would be more likely to offer its own mediation services. Whereas 82% of the courts referred to outside community non-profit agencies (Di Bias, 1996).

In Geasler and Blaisure's 1998 nation-wide survey of court-connected divorce education programs, a wide variety of professionals were found to be present the programs. They included the following, listed in order of frequency:

- Social workers
- Counsellors
- Marriage and family therapists
- Mediators
- psychologists
- Court workers
- Family life educators
- Lawyers
- teachers



The minimum level of education required was found as follows (Geasler & Blaisure, 1999):

- 12% of the courts indicated that no minimum level was required.
- 59% of the courts required a master's degree.
- 22% of the courts required a bachelor's degree.

On average the number of hours of training was three to six hours attendance at training sessions, observation of an on-going class and facilitating a group while being observed (Gleasler & Blaisure, 1999).

Majority of the programmes are opened to post divorce parents. One third of the programmes were opened to parents litigating child-related issues.

If parents failed to attend a parent program 40% faced contempt of court charges. The courts were found to be reluctant to grant the final degree of divorce until the parents attended the parent program . Gleasler & Blaisure (1999) found that the courts might respond to the parents' failure to attend the parent program in the following ways.

Consequences of non-attendance of parent program are as follows: (Gleasler & Blaisure, 1999).

- Contempt of court
- Decree delayed
- Decree not granted
- Hearing not granted
- Cannot file motion
- Subsequent action disallowed



The primary goal of parenting programmes is to reduce the negative impact of divorce on families and especially children and the impact of parental conflict on child support and access compliance (Schepard, 1994).

The aim of parenting programs is to teach the parents some basic legal terms related to divorce, the effects of divorce on children, problem-solving techniques and non-conflictual co-parenting (Ricci, 1980; Peterson & Steinman, 1993).

The program goals of parent programmes (Gleasler & Blaisure, 1999).

- Increased knowledge of the effects of divorce on children.
- Reduce children's exposure to conflict.
- Increase parental communication.
- Facilitate child's divorce adjustment.
- Improve parenting skills.
- Facilitate parental divorce adjustment.
- Prevent behavioural problems in children.



- Decrease complaints to court.
- Increase understanding of court procedures.

The process of investigating and learning about the unique aspects of parent programmes enriches our knowledge of the complexity of education programs for parents and children who are caught up in the process.

Characteristics of parenting programmes are as follows: (Gleasler & Blaisure, 1999).

- Programmes serve all parents irrespective of their marital status, who are litigating child issues.
- Interactive teaching strategies are used to assist parents in learning co-parenting and communication skills.
- Written standards to guide the implementation of programs.
- Court documents the program effectiveness through evaluation activities (follow up evaluation).

Divorce Parent Programmes should be offered by in-house staff and/or by private accredited and trained professionals and/or organisations.



### 3.9.5 Counselling

The Family Court will assist clients with regard to counselling in the following manner: The Intake Officer can make a referral with regard to counselling according to information obtained during intake. Volunteer counsellors will offer brief (once-off) counselling sessions at Court. The Intake officer can provide clients with the name(s) of accredited counsellors that can render a professional service (Du Toit *et al.*, 1998).

Counselling may be seen as a tool of assistance to:

- To stem the parents' antagonism, which is often reflected in the behaviour of children (Mental Health Center, 1980).
- To develop greater insight into the position of the children and promote a better awareness of themselves as individuals and as parents (Mental Health Center, 1980).
- To recognise and strengthen common ground which the children may use as a foundation for interaction (Emery, 1994).

- To prepare the children for changes in their lifestyle and promote a better understanding of the divorce process.

### 3.9.6 Mediation

Mediation services play an integral part in a Family Court. Mediation services are practised in most Family Courts in the United States of America, Canada, Israel, New Zealand, Australia, the Scandinavian Countries, the United Kingdom and European Community and proposed in the Southern American Countries (Goldberg, Green & Sander, 1989).

Mediation may be defined "as a process in which third parties facilitate(s) the disputants' own attempt to resolve their dispute." (Swenson, 1993, p.301). Mediation therefore focuses on the issues and not the emotions (Emery, 1994).

Mediation takes place when the parties have a dispute and ask a third impartial party, the mediator to assist in finding a solution through negotiation. It is not the task of the mediator to judge or to hand down a decision, but merely to assist and encourage the parties to find the solution themselves (Goldberg, Green & Sander, 1989). In most states such as California familial disputes must first be submitted to mediation or arbitration before appearing before the judge. The divorcing parents must first attempt to negotiate a settlement. This negotiation may be under the supervision of a judge (Schafer, 1993) In South Africa section 19 of the Supreme Court Act 59 of 1959 provides for certain matters to be referred to the court with the consent of the parties to the referee (see *LTA Construction LTD v Minister of Public Works and Land Affairs* 1992 1 SA 837 C). Mediation may be seen as a tool in which all parties must consider the children caught in the middle and work towards a settlement in which all parties including the children are accommodated.

Parents can avoid the high costs of litigation and trauma of an opposed divorce if mediation is used. The Short process Courts and Mediation in Certain Civil Cases Act 103 of 1991 allows for parties involved in a civil suit in the Lower Court (Magistrate Court to mediate at any time before the court's judgement). The goal of mediation is not therapeutic rather the resolving of dispute issues (Emery, 1994).

The goals of mediation are:

- To facilitate communication between parties.

- To reach a settlement that is fair and proposed by the parties.
- To address the underlying emotional component of a dispute, as well as the factual aspects thereof.

Mediated issues include:

- Property.
- Spousal support.
- Child support.
- Custody \ access.

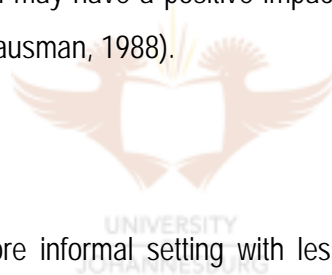
All or some of the above factors may be mediated. Mediation may influence the adversary system to focus more on the child than on the financial issues and set down a time limit in which a mediated settlement must be reached. This may force the parents to highlight certain issues that they may feel is the essential problem. (Emery & Wyer, 1987).

The attorneys have the expertise to look onto the financial matters but may not be trained in the psychological aspects of the divorce process or in custody issues. However money and child are often intertwined resulting in disputes often becoming a battleground. Parents and trained mediators either from the behavioural sciences or the law play a vital role in protecting the interest of the child (Emery, 1994). There are certain instances where mediation is not possible :

- Child abuse
- If one or both of the parents are:
  - ◆ mentally retarded;
  - ◆ severe mental illness diagnosed;
  - ◆ substance abuse , since this will seriously impair their level of functioning;
  - ◆ history of intimidation/ spousal abuse;
  - ◆ Familial violence (an allegation alone may not exclude the parent because of the possibility of parental alienation syndrome or false allegations).
  - ◆ formal charges pending against one of the parents.

The above may not be conducive to protect the best interest of the child because of the question of unequal bargaining power is a great source of controversy.

The mediator should be in position to end mediation if they find that the inequality between the parents are too great and the best interest of the child will not be protected (Emery,1994). It is therefore important for the mediator to inform the parents of their bias in the matter. If neutrality must be upheld at all times the mediator must then conform to the legal norms. If, however, the mediator states his bias this may open the way to explore procedural innovation in embracing new ideas such as joint custody and customised parenting plans. The process of mediation may include the following an introduction to mediation in which the rules are set and focussing on the child and highlighting the perceived important issues. Identification of the main disputes and the establishment of an emotional alliance to reviewing of agreements or disagreements (Emery, 1994). By highlighting the position of the child in the divorce process the divorce will not cease but the equality of communication and parenting may change. Mediation in custody matters assume that the parents know what is in the best interest of their children and that their actions will influence the future adjustment of their children to new relationship and/ or new family circumstances. Thus the negotiation of a fair agreement is the primary goal of mediation (Emery & Wyer, 1987). Mediation may have a positive impact on the co-parental adjustment ( Emery, 1994; Kelly,1991; Kelly, Gigy & Hausman, 1988).



### **3.9.7 Arbitration**

Arbitration is conducted in a more informal setting with less interpretation of the rules that govern evidence (Goldberg, Green & Sander, 1989). Arbitration and mediation are called alternative dispute resolution (ADR). Millen (1991) states the ADR will not succeed unless there is a fundamental change in the reasoning of the legal profession. The legal profession must be trained to conceptualise as a whole, encourage the parties to seek resolutions to the disputes, empathise with both the parties and to communicate with each other (Swenson, 1993).

### **3.10 Evaluations**

#### **3.10.2 Mini evaluations**

All urgent applications, as well as those matters that the Intake Officer and/or the Presiding Officer deem necessary which should include an evaluation to serve the best interest of the children on the short term, will be referred for a mini-evaluation. (Du Toit *et al.*, 1998).

A mini- evaluation will include the following:

- Scrutinising of the papers;
- Individual consultations with all the parties and their partners as well as the children;
- Joint meetings between the individual parents and their individual children; and
- Oral feedback on the same day to the parties and their attorneys.

Structured and semi-structured procedures will be followed during this process.

### 3.10.3 Full evaluation

A full evaluation will be conducted when the Intake Officer and/or Presiding Officer deem it necessary to serve the best interests of the children. The parties will be referred to an accredited professional in this regard (Du Toit *et al.*, 1998).

It is argued that the court should supply the evaluator with a set of specifically relevant questions intended to guide the evaluation (Gould, 1999). The Association of Family and Conciliation Courts (AFCC) 1995 (in Gould, 1999, p.65) have developed custody guidelines that emphasise the child's best psychological interest principle.



The American's Psychological Association's (APA) 1994 " Guidelines for Child Custody Evaluations in Divorce Proceedings" (p.677 in Gould, 1999, p.65-66), emphasis the focus of a child custody evaluation as ' to assess the individual and family factors that best affect the best psychological interest of the child...'

The APA suggest that a child custody evaluation should include :

- An assessment of each of the parent's capability for parenting.
- An assessment of the psychological functioning and developmental needs of the child and the wishes of the child (a child evaluation in particular ,should include different sources of information.).
- An assessment of the ability of the parent to meet the needs of the child (this would include an evaluation of the interaction between each parent and the child/ren.
- Development of a plan for custody and access using age appropriateness as a criteria that will serve the best interest of the child.

- A written report that will provide the court, parents and their respective attorneys with the recommendation and supporting data.

A forensic evaluation should include the following: (Gould, 1999).

- A structured interview format.
- Self report data.
- Standardised psychological tests that have relevant psycho-legal questions.
- Collateral interview data and record review.
- Direct observational data.

In a study conducted by Jamesin, Ehrenberg and Hunter (1997, in Gould ,1999, p.68 ) they identified a hierarchical structure of the best interest criteria. They rated the relative importance of each criterion within three predetermined scales. The scales were the following:

- 1 Needs of the child
  - a) Developmental issues- preferences of the child at various stages of development.
  - b) Basic needs- emotional, relational, academic and health.
- 2 Abilities of the parent
  - a) Stability for the child
  - b) Parental history- current ability to function as a parent.
  - c) Parenting skills- ability to provide the child with supportive emotional and physical environment.
- 3 Relationships among the family members.
  - a) Shared parenting
  - b) Quality of parenting
  - c) Parental commitment to the child

This study may greatly aid the mental health professional in operationalising a specific assessment within the field of child custody. In general the court orders do not specify clearly the specific issues about which the evaluator may gather as relevant data that will be useful for that particular family. The most general court order directs that all parties undergo psychological testing and evaluation to determine the best interest of the child with regard to custody or access. The base is broad since it does not specify an evaluation of parenting skills, potential abuse or neglect, behavioural problems etc. (Gould, 1999).

The Family Court model should adopt a co-operative model. Gould (1999) suggests that the judge, attorneys, clients and the evaluator should meet prior to the issuing of the court and identify a list of legal questions that needs to be addressed in the evaluation. The evaluators translated the questions into psychological questions that will guide the evaluator. The questions are then incorporated into the court order. In determining the scope and the clarity of the custody evaluation, all parties are then served. The judge will receive information that is relevant and concise and applicable to the unique family situation, Attorneys are better served questions answered would directly reflect their client's concerns about the other parent. The children are best served when concerns and emphasises is placed on their developmental needs and preferences (Gould, 1999). An accurate recommendation is only as good as the clarity and precision of the psycho-legal question that it answers.

The child interview accuracy may not be measured as statically in psychological tests , since the accurate versus biased data from interviewees in custody issues have been extensively investigated (Ackerman,1995; Bricklin,1995;Schutz, Dixon, Lindenberger, & Ruther, 1989). Certain statements from interviews results in no consensus being reached about how to make a clinical conclusion (Stahl,1994; Ash & Gyer, 1991; Ackerman, 1995; Bricklin,1995; Schutz, Dixon, Lindenberger, & Ruther, 1989). Bricklin (1995) cautions evaluators that a child who volunteers information without having been asked may not actually be based on actual parent-child interaction. Controversy has been generated on the accuracy of children's statements and this provides a tremendous challenge for the evaluator (Johnson & Campbell, 1988). The task of the evaluator is to identify whether the child is able to distinguish fantasy from reality and be able to provide accurate statements free from social pressure (Hynan, 1998). Young children tend to respond very little to open ended questions, other types of questions are needed (Faller, 1996). Within the proposed family court model CHILDS uses the Child interview designed by Schutz, Dixon, Lindenberger, & Ruther (1989). As yet no research has been conducted into the success by *prima facia*, this instrument when used with specific psychological test has proved to serve it purpose in protecting the interest and rights of the children.

CHILDS full evaluation will include the following:

- Scrutinising of the papers;
- Clinical interviews with parties, their children and if and when indicated their attorneys;
- Psychometry;
- Obtaining collateral information;
- Joint meetings and evaluation with the respective parties and their individual children;

- Home visits; and
- Written report to the Court, the parents and their respective attorneys.

### 3.11 Litigation

- Referral to Legal Aid (if indicated).
- Referral to Paralegal (if indicated).
- Referral to a Legal Representative.
- Legal process to follow its course.

#### 3.11.2 Legal and forensic aspects

The court is likely to ask for assistance from the psychologist in the following ways:

- To prepare for a court report
- To appear as a witness

Both these ways need considerable skill and expertise to fulfil the responsibility successfully and to assist the Court in finding a solution in the best interest of the child. But this ideal of serving the best interest principle is not always possible, 'the least detrimental available alternative' (Goldstein et al., 1979) becomes the preferred solution.



A professional witness

In this capacity the psychologist is to inform the Court about his professional contact with the child and the family. The psychologist is called to report on the progress of treatment outlining the referral problem.

An expert witness

"An expert is a man who has made all the mistakes which can be made in a very narrow field"(Niels Bohr in Swenson, 1993,p.190.).

In this capacity the psychologist uses his specialised knowledge about child behaviour and his competency to make a comment on the child and the family. Usually the fields of expertise will be in the following areas:

- Child development
- Factors that may influence the child's development.



- Childhood disorders and/or disturbances.
- The likely prognosis or treatment.

Thus, the role of the psychologist is to:

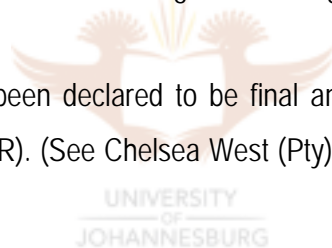
- provide such a report and/or
- To act as a witness to comment on the evidence heard. (This is procedure seldom used).

To become a successful expert witness the psychologist will depend on the following factors:

Formal litigation presents with the following problem:

- In civil matters it may be very expensive and out of reach to the majority of South Africans.
- Long delays in the finalisation of a cases may be experienced;
- Courts may be situated out of the reach of the majority of citizens and travel time and experience may be constraints.
- Litigants may find the proceedings difficult to follow and may make them feel culturally alienated. The language of the court maybe not be clear or not understandable.
- The litigants may feel they have no control over the proceedings in the adversarial system.' The winner takes it all' may produce further feelings of hurt, anger and revenge.

The decision of the expert has been declared to be final and binding on the parties participating in alternative dispute resolution (ADR). (See *Chelsea West (Pty) Ltd v Roodebloem Investments (Pty) Ltd* 1994 1 SA 837 C).



The final decision lies with the Court and not with the psychologists. The psychologist is seen as one of a number of recommendations. However, this does not lessen the degree to which the psychologist plays in enabling the Court to reach its final informed decision.

### 3.11.3 Preparation of the Court report

Given the increase in the divorce rate written standards would seem necessary to maintain clear guidance as they implement the directions and desires of the court (Gleasler & Blaisure, 1999).

Irrespective of the psychologist's theoretical perspective, all reports should consider the following aspects (Clulow & Vincent, 1987):

- All language should be simple ,clear and comprehensive to the lay person
- No psychological terms or jargon should be present.
- The report should be precise.

#### **3.11.4 Presentation of a mediated report**

The presentation of the conclusions reached may be reported jointly or in a written report, which is then presented to both sides and the court (Mental Materials Health Center, 1980). Throughout the entire process, the mental health professional should actively explore the possibility for an agreement and help the parties come to an agreement and if no agreement is reached the task of the mental professional should be to decrease the fighting between the parties through the recommendation of therapy or, workshops or attendance of parenting programmes. By encouraging both parents to mediate a settlement some form of co-parenting may become a viable option. This will promote the parents to openly communicate and promote the child to continue his relationship with both his parents.

Many children suffer from temporary resolutions in their lives; it is necessary that adequate information and practical guidelines be established to develop a long-term plan based on the psychological interest of the child. The legal profession is not prepared to do this alone and to fulfil a complete advocacy role for children (Westman, 1979).



#### **3.11.5 Case management including implementation of orders**

The Intake Officer will act as a case manager to ensure that a given Court Order is implemented. Any professional and/or volunteer working with the family will be obliged to send in three monthly and/or any other progress reports that are deemed in the interest of the minor and dependant children to the Intake Officer. The Intake Officer will bring all relevant information to the attention of the Presiding Officer and/or do the appropriate referral in consultation with the Presiding Officer. Regular case management conferences should be conducted to ensure that the best interest of the minor and dependant children are served on a regular basis (Du Toit *et al.* 1998).

#### **3.11.6 Monitoring of access**

This service includes monitoring of supervised access and/or counselling or related procedures. It is envisaged that the actual service will be offered by appropriately trained professionals either in-house or accredited members (Du Toit *et al.* 1998).

#### **3.11.7 Referral and related information services**

Information services include oral, written, audio and/or video presentation of material housed in the Resource Centre. Included in this service are information of the policy and philosophy of the Family Court, services offered by the Family Courts, Directories of Accredited Professionals, as well as specialised information programmes such as a Divorce Parent Information Programme (Du Toit *et al.* 1998).

### 3.11.8 Crisis Clinic (24 Hours)

It often happens that divorce elicits real and perceived fears, worries and concerns in families and/or individual family members (Engelbrecht & Wentzel, 1999). The common is the fear that a parent will lose his/her children, the possibility of a parent moving out of the present geographical area that will result in contact being severed with the other parent and/or members of the extended family.

A crisis intervention could be created where a panel consults with the parents, advising on both short- and long-term interventions.

Crisis Clinics should be available in various geographical areas of the High Courts and should be Court Annexed in order to facilitate accessibility (Du Toit *et al.*, 1998).

The first Crisis Clinic volunteers manned by a multi-professional team opened its in February 1997 in Horison, Johannesburg. The clinic initially started its services from the offices of a private practice. The intake officer/co-ordinator was a student completing an internship assisted by two undergraduate students in psychology and law respectively. Lay counsellors were available to assist with supervision of access if so indicated and arrangements are under way with a security firm to provide the necessary security on a voluntary basis. The team consisted of a lawyer, a psychologist, a psychometrist, a mediator and a social worker. Supportive services were negotiated with a medical practitioner, the Child Protection Unit (CPU) and other relevant organisations (Du Toit *et al.*, 1998).

### 3.11.9 Follow-up

An educational parenting program is associated with the reduction of litigation (Kramer & Kowal, 1989). The presence of relitigation may forewarn the courts that the family is experiencing difficulties in coordinating their parental responsibilities (Kramer & Kowal, 1998). The litigation process creates difficulties on the children because they have to endure additional episodes of interparental conflict and possible upheaval (Koel, Clark, Straus, Whitney, & Hauser, 1994). To offer continual services, support,

information, referrals and other educational services may help to decrease post divorce litigation and prolonged interparental conflict. Parenting programs should ensure that the family is supported along the transition from a nuclear family to two households in a way that will minimise conflict (Kramer & Kowal, 1998). Research is needed to evaluate educational program to identify those components to ensure success.

### 3.11.10 Post divorce counselling

It was first introduced in 1974 in the Los Angeles Court (Schafer, 1981). The divorce is made up of many facets as seen in the dialectic model of divorce. The Los Angeles Court recognise these facets and makes a distinction between the legal divorce and the emotional divorce. The emotional divorce is that process that continues beyond the legal experience.

The aims of the services that are offered are set out in the Conciliation Court Report 1977. It is as follows:

- To ensure that the best interest of the child is served by assisting the parents to reach an amicable agreement.
- To incorporate such an agreement into a written form that becomes an order of the court.
- To ensure that the channels of communication remain open.
- To resolve any issues, for example anger, that may impede in the serving the best interest of the child.
- To assist the parties to accept the realities of an ended marriage and to deal with the issue of shared parenting.
- To help the parent recognise the potential negative consequences of their conflicts on the children.
- To involve stepparents in the family system in a constructive way.
- If needed to make the appropriate referrals to another community counselling resource for ongoing needs for the parents or for the children.
- To provide for the children the opportunity to discuss matters that that may be of concern to them.

The Los Angeles Superior Court adopts the practice of referring a post divorce case to the Conciliation Court. Once the referral has been made the custody or access dispute is postponed for sixty days (Schafer, 1981).

The Conciliation Court interviews the parties in one to six sessions. The parties such as the children, and stepparents are also interviewed. If long term counselling is preferred, they are referred to the community resource services.

All counselling is conducted on a confidential basis, reports are not submitted to court since this would be inconsistent with the role of the Counsellor who is there to advise the referring court of the outcome of the counselling. A copy of the agreement is placed in the court file and is signed by the referring court, in effect of an order of court. The attorneys are informed by post. Parties are given the opportunity to work out their own order. The probability that the order is then complied with is greater (Schafer, 1981).

### **3.12 Psychologists and the Courts**

The mental health professionals are made up of a diverse group who are joined by a common goal of helping people through the application of psychological principles (Swenson, 1993).

The legal profession and the mental health professionals are routinely responsible with the responsibility of making decisions in the lives of the children without having the necessary tools to protect their best interest. Courts are not designed to effect the meeting of minds and are not prepared to help the parents in their responsibilities to their children (Westman, 1979).

The growing role for the mental professional is to aid the courts and the families to arrive at a rational decision that will protect the child's or children's interest. The mental health professional is prepared to support people who are temporarily overwhelmed by turbulent circumstances and is thus able to offer a unique advantage in minimising the adverse effects of family conflicts on children (Westman, 1979).

In Clulow and Vincent (1987), psychologists regard that the quality of interaction between parents and children is more important than physical care: a child's needs for stimulation is to be accorded more importance than the need for proximity. The biological mother may not be the primary object of attachment and the infants might be attached to more than one person. These findings are critical implications for judicial practice in relation to the children of divorce. The task of helping to establish a place for fathers in post-divorce families may require the special attention of judges and psychologists.

The ability of the Courts to respond to the social sciences findings are dependent upon the extent to which the judiciary is close to society of which it is part. Legislation facilitating divorce has been accompanied by measures to protect the welfare of the children (Schafer, 1983).

### **3.13 The role of non-governmental organisations in the proposed Family Court Pilot Project**

Indicators of Poverty Report (1996) (in De La Rey, C., Ducan, N., Shefer, T., & van Niekerk, A. (1997) , shows that 50% or more of South Africans live in extreme poverty – earning less than R 300 per month. It was found that 61 % of children live below the breadline. The majority of South Africans are not able to afford those services that will ensure that the rights and interest of the children are safe-guarded. The role of the non-governmental organisations may offer services to the people according to the ability –to-pay condition.

### 3.13.2 The need for the establishment of CHILDS

- To be able to utilise the skills from a multi disciplinary team
- Social sciences have a meaningful contribution to make in the field of the family law.
- With the present existence of multiple jurisdictions, this has created inconstancy of the various courts with regard to differing jurisdiction and law problems (Du Toit *et al.*,1998).

Some attorneys take pride in providing therapeutic services to their clients and children and using their communication skills are able to facilitate a quicker resolution that is less painful (Rocklin, 1984).



### 3.13.3 The role of CHILDS

CHILDS entered into partnership with the Regional Office of the Department of Justice through Justice Vision 2000. In a press release in The Star of 20<sup>th</sup> April 1998 the Minister of Justice stated that" The two biggest obstacles facing transformation of the Justice System, apart from finance, are making the Department representative and ensuring that staff become service orientated".

CHILDS suggests that the Family Court Model should follow the ecosystemic approach (interview conducted with Mrs Wentzel , 1999). There should be partnership between:

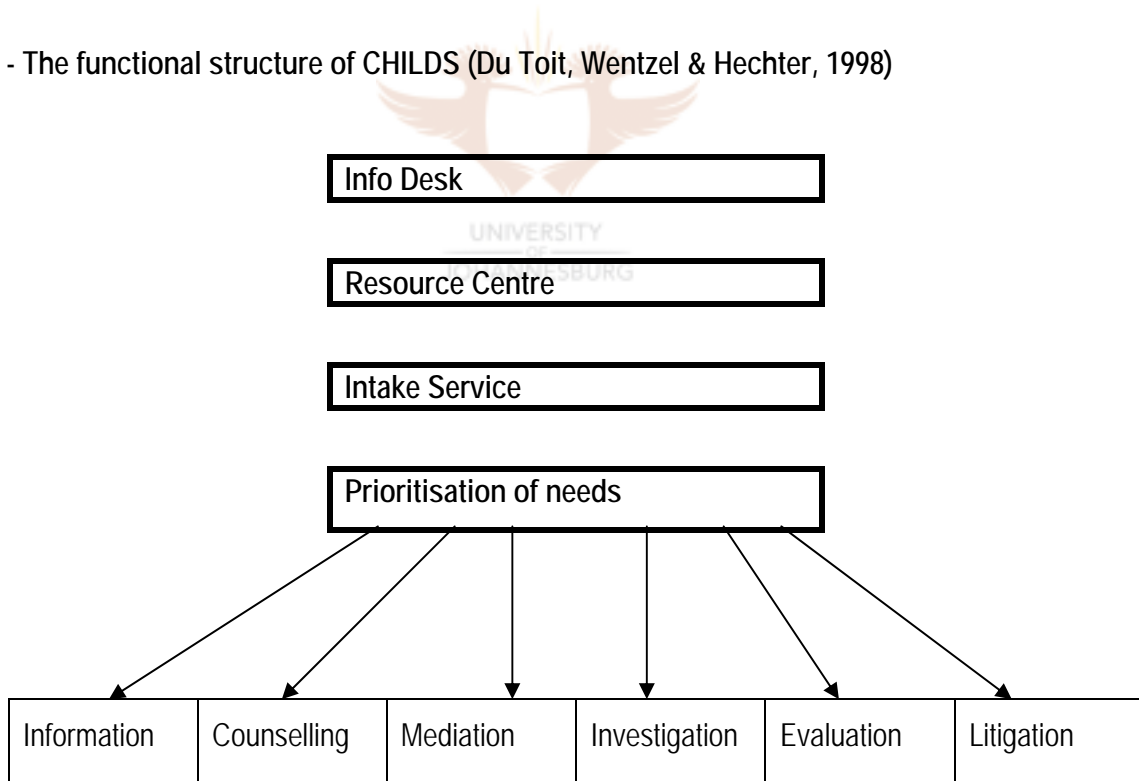
- The Department and Commerce;
- Officials of the courts and volunteers from various organisation to ensure that services offered are not duplicated;
- Children of South Africa and their parents;
- Professionals and administrators from various other related sectors.

An Ecosystemic framework , implies (Du Plessis, 1995):

- A system where mental health professionals are active members of the legal team;

- A system where parents are encouraged to consider alternative dispute resolutions (ADR) services and are participants in the judicial process. The parents are able to accept responsibility for their lives and ensure their children's' best interest.
- Preventative strategies form part of the judicial system that will improve the relationship between and with the parents and the children.
- The rights and developmental needs of children are recognised and adhered to. Ensuring a better understanding of child pathology and developmental psychology through training.
- Encouraging the use of alternatives of the adversarial system; as in *Bethell v Bland and Others*, 1996(4) SA 472 (W), Judge Wunsh stated that "while it was true that a custody dispute should not be seen as an adversarial contest in the ordinary sense but rather as an enquiry into the best interest of the child, it could not be denied that in most cases the litigants were advancing their own preferences and seeking satisfaction of their love of the child." It appears that matters relating to the family should be encouraged to seek alternatives and the Family Court role should be seen as an confirmation and ratifier of agreements found.

Figure 4.3 - The functional structure of CHILDS (Du Toit, Wentzel & Hechter, 1998)



### 3.13.4 The characteristics of CHILDS (Du Toit *et al.*,1998):

- User friendly to deal in all aspects of family matters;

- A service oriented philosophy that ensures that the client knows he has been assisted;
- Integrate services and procedures to ensure an effective and efficient service;
- An adequately trained personnel on the administrative and the professional services;
- A multi-professional, multi-disciplinary and multi-linguistic approach to cater for the heterogeneous population in South Africa;
- Co-operation and partnership between officials and volunteers from related organisations.

### 3.13.5 The Mission Statement

The mission statement of CHILDS is as follows:

- ◆ To assist the Department of Justice by helping to create and implement an infrastructure to deal with and resolve disputes in family matters in a healthy, efficient, cost effective and cohesive ways.
- ◆ To help and prevent children from becoming dysfunctional individuals in society due to family related legal disputes.
- ◆ To ensure that every child's constitutional rights are acknowledged, respected and adhered to.
- ◆ To ultimately ensure that family justice is improved.

### 3.13.6 Involvement of CHILDS with Office of the Family Advocate

The Office of the Family Advocate (OFA) may feel that a psychological report or evaluation is needed. The Family Advocate (FA) may use the following options:

- Mental professional from a state run institution (free of charge) or find a mental professional who may be prepared to charge a lower fee (this is very rare according to Burman & Derman, 1997).
- CHILDS works closely with the OFA and is prepared to render mini-evaluations under the industry's set fees. The quality of the service is not influenced by the e the lack of payment. Those parents who are indigent are rendered a service free of charge. The fee structure may be based on a sliding scale. The ability to pay does not prejudice the services rendered. The aim is to ensure that the best interest of the child is served.

CHILDS (Children In Legal Disputes) is a non- profitable, multi- professional organisation. CHILDS consists of volunteers offering services to children and families caught up in legal disputes. CHILDS opened offices at the Office of the Family Advocate in Johannesburg and the Johannesburg Family Court (Du Toit *et al.*,1998).



Du Toit *et al.* (1998) suggest that, the participants should include specially trained professionals. Since the nature of the disputes are multi-faceted , a diverse range of professionals are needed. Therapeutic services are seen as needed for families caught up in the divorce process and the legal proceedings. Due to serious lack of funding and interest from the health care professionals and the wide discretionary powers given to the Judges ,it was felt that an NGO should be established whose task would be to protect the best interest of the child and work in close conjunction with the Office of the Family Advocate . CHILDS offers the following services:

- mini-evaluations
- Full evaluations
- Home visits
- Referral system
- Training

A lack of knowledge of the law as it interacts with psychology may result in the lowering of the professional effectiveness and a possible increase in malpractice (Swenson,1993).

- Parenting programmes
- Post divorce counselling
- Supervised access
- A crisis centre
- Child minders at the court (to be implemented).



The team of evaluators consist of:

- registered psychologists
- Psychometrist
- Interns: Psychometrist, psycho-technicians
- Social workers and student social workers working under strict supervision
- Child care minders qualified or students under supervision (to be opened later)
- Professionals from other related fields

The target time of the completion of the report is between two and three weeks (Du Toit *et al.*, 1998). An integrated report is then handed to the Office of the family Advocate whose report is the integrated then makes it available to the parent's attorney legal representatives. If an unfavourable report is anticipated

from the Family Advocate (FA) or if the parties should wish to dispute the FA report additional evidence may be needed. The attorney may then consult with another mental health professional to conduct an investigation and who then submits a report. This report is send to the FA who may use the report to re-evaluate or mediate a settlement in order to avoid costly proceedings.

The lack of understanding and involvement of health professionals in the legal process by may be traced back to the disinterest of the various training institutions. The formation of non-governmental organisations in specific areas of the law and the up surge in mental health professionals in the law has promoted researchers to investigate alternative forms to the adversarial system practised in South Africa . The commitment of the Department of Justice to ensure that the legal system is to be seen as easily accessible to the vast majority many of whom live below the breadline has led to other clinical alternatives to litigation being investigated .



## CHAPTER 5: QUO VADIS?

### 5.1 The adversarial system

The philosophy of the adversary adjudication is based on the most favourable and convincing evidence to one's own side : it is that which is presented. Negative evidence from the opposing side is relevant since this is used as argument to win the 'best interest of the child'. The result is that, justice and not the truth becomes the goal in the present legal system (Emery, 1994).

Judge Byron F. Linsey in Mental Health Materials Center (1980) states that " the adversary process.....is not properly suited to the resolution of most family relations problems....Where there are children and the parties cannot or will not recognise the impact of the disintegration of the marriage upon the children, where they fail to perceive their primary responsibility as parents.....-we make it possible for parents to carry out that struggle by the old, adversary, fault finding, condemnation approach....This kind of battle is destructive to the welfare , best interests, and emotional health of their children."

Research has found that children suffer from negative effects of extended and unresolved conflicts between their parents (Amato, 1993; Emery,1982; Grych & Ficham, 1990; Johnston, Kline, & Tschann, 1989). Children snared in the adversarial process tend to experience poor adjustment, low self-esteem and behavioural problems (Camers & Resnick, 1989).

The ultimate task of the professional is to change the attitude from a battlefield situation to an environment in which all parties are comfortable. At present the formal litigation environment fails the parents to complete a psychic divorce (Mental Health Materials Center, 1980; Kaslow & Schwartz, 1987).

The mental health professionals may use this forum to push the parties towards a mediated settlement or a compromise. Changing the power and the authority of the court to be seen as a balancing positive power will urge the parents towards empowerment and taking responsibility for their lives and ensuring that the best interest of the child is protected.

The mental health professional may serve several tasks (Mental Health Materials Center, 1980; Kaslow & Schwartz, 1987; Camers & Resnick, 1989).

Firstly, to explore negotiation and mediation as a possible compromise. Secondly, to examine the family members with particular attention to the quality of the parent-child relationship and the ability of the parents to communicate with each other for the benefit of the child. Thirdly, the mental health professional is able to provide the court with essential data on the developmental needs of the children, attachment consequences, family dynamics and the children's attitudes, cognitive functioning and perceptions.

If these issues are critical to what is in the best interest of the child, then it is not reasonable to expect that the Family advocate alone serve as the advocate of the child (Westman, 1979).

By working together in a multidisciplinary team true advocacy for children will ensure that an overall picture can be given to the judge, who will have enough information to take an appropriate decision (Mental Health Material Center, 1980; Westman, 1979).

The traditional role of the mental profession is to work on one side of the case that results in a one sided report (i.e. over identification with the one side) (Mental Health Materials Center, 1980). Many legal professionals may see the mental professional as a string puppet that mimics the attorney's thoughts and theory of the case. It is therefore important to structure the case so the parties who are being examined feel the objectivity of the examiner. This will open the possibility to reach an agreement between the parties and circumvent the court battle (Emery, 1994).

A mediated settlement is preferable to a court-imposed verdict because the role of the mental health professional is to evaluate the family system and to explore the requirements of the divorcing parents to result in an agreement for the care of their children (Emery & Wyer, 1987).

An advantage in using a team is that different members can deal with different members (similar to conjoint marital therapy). The team would meet together and develop joint recommendations with the focus on the best interest of the child but with the view of facilitating an agreement between the parents (Mental Materials Health Center, 1980).

The team will be able to assess the true meaning of the child's wishes, evaluate conflicting needs, deal with ambivalence towards the parents and assess the implications for personality development. The legal professional will ensure due process. Emery (1994) suggests that there is little evidence that mental health professionals can predict how alternative environments will effect the child's psychic or future psychological health, especially when there is little difference in the child rearing practice between

the parents. It is here that the debate about the best interest of the child becomes scathing. Is it here that the position of the mental health professionals is essential to fulfil the functions as a finder/ mediator and not an evaluator. A mental health professional taking the side of one party may result may eventually result in the 'battle of the experts' (Emery, 1994). This process becomes confused rather than instrumental in finding a considerate compromise.

## 5.2 Improvements under an adversary process

Recommendations fall into three parts: (Emery, 1994)

### 1. Procedures

Reduction of formalities of the hearings

- Increase the use of conferences in chambers
- Courts to make referrals for post divorce counselling as early in the process as possible (Schafer, 1981).
- Courts should become more aware that divorce may result in adverse effects on the child and sooner the issues are resolved the better (Emery & Wyer, 1987).
- Whilst the court has the final decision as regards to the best interest of the child the court should however develop enough expertise in mental health so that it may discern a good evaluation from a poor one (Hjoppe, 1998).

### 2. The decision –making process

- The court should allow the child to continue his relationship with both parents as possible. The will reduce the feeling that the non-custodial parent is a visitor in the child's life (Du Toit *et al.*, 1998).
- The court should not damage the bond of trust by condemning one parent by the other. This may serve in the best interest of the child in the long term (Kibler, Sanchez & Baker-Johnson, 1994).
- The court should not look upon the child as a passive recipient of parental care but as a person that has a need to express and channel concern about his future relationship with the other family members (Mental Health Center, 1980).
- Post divorce litigation
- The divorce does not end with the decree issued. When post divorce quarrelling and litigation are continued, then the equilibrium is disturbed and post divorce counselling should be encouraged in order to decrease the fighting and to enforce the common goals related to the development of the child (Mental Health Center, 1980).
- The goal of minimum judicial interference should not allow the court to change its role into a silent collusion of choices made for the parents' convenience. The court should interfere in re-evaluating

custody determinates that are no longer in the best interest of the child's role (Mental Health Center, 1980).

- The courts can help the divorce process by creating and promoting the growth of responsibility in the parents and thereby protecting the best interest of the children.
- Children in the adversarial system have become more involved. It is argued that this may be beneficial to the child since he is given some control over the decision that will effect his live in the future (Melton & Lind, 1982). However, giving control over a decision that will impact the child's life will not always serve in the best interest because benefits are not always limitless. The child who has to choose which parent may view this event as a negative experience. Feelings of learned helplessness may be experienced which may in turn become associated with future mental problems such as depression (Peterson & Seligman, 1984).
- A consequence of asking the child to choose his preferred parent may be inappropriate for the child in that particular developmental stage, this may cause the child distress especially if the child is caught in the middle of the conflict. The court should therefore note the importance of psychological training in the aspects of child psychology and pathology (Kibler, Sanchez & Baker-Johnson, 1994).

Kessel and Deutsch (1977, in Mental Health Materials Center,1980, p.895) suggests that it is during the legal divorce stage that the parent often profess their support for the best interest of the child to be seen as the better parent in order to win the 'battle'. It is unusually during this time the parents are often unaware of the adverse consequences of their conflict and position of the child in this conflict.

- The adversary system does not help the parents to acknowledge their anger and gain sufficient insight into their conflicts to allow them to reach a negotiated settlement. (*Ibid*).
- The task of the mental health professional is highlight the importance of the context in which the child is, the developmental stage, the mental and psychological attributes and the relationship that exists. Mental health professionals should be seen as a neutral friend of the court serving and protecting the best interest of the child (Emery, 1994). The task of the legal professionals and the health care professionals is to develop a process in which the parents can deal with their anger and negative feelings and move forward to final an amicable divorce (Materials Health Center,1980; Swenson, 1993; Emery, 1994).The mental health professional should encourage those couples in the divorce process who are under financial constraints to explore other available options that may include alternative dispute resolution. The mental health professional should be aware of the government's policy to legal clinics, legal aid facilities or other legal resources. It is the ethical duty of the mental health professional to be knowledgeable as a part to becoming competent (Freed & Walker, 1986).

- Psychologists are usually asked to assist in situations that, involve childcare, protection work, and custody and access disputes. The purpose of writing the report is to convey findings and conclusions in a clear, and unambiguous manner possible. The report represents the expert witness and may be relied on as a basis or part of a decision (Berger, 1997). The format of court reports may differ from mental health professional. Apart from the differences, the reports should contain the essential ingredients that will make it accessible and understandable for most lay people. It is important that the source of the information is reliable and correct. The intake form used by CHILDS is used as a source from which the supervising psychologist and other mental health professionals are able to use as a basis for therapy or recommendations (Du Toit *et al.*, 1998).

The final decision lies with the Court and not with the psychologists. The psychologist is seen as one of a number of recommendations. However, this does not lessen the degree to which the psychologist plays in enabling the Court to reach its final informed decision.

There are many alternatives to the adversarial system available. European inquisitorial legal systems allow the judges to hire the experts and all the attorneys to find the truth. It is the judge that screens the experts for competence and objectivity, unlike the adversarial legal system in which lawyers select the expert who will deliver the testimony for their side. The players are included in co-operative problem-solving alternative dispute resolution procedures, for example mediation. The alternatives are found to be less protective to individuals and more protective to society, and less expensive than the adversary system. The current trend is to make the adversarial legal system less adversarial (Swenson, 1993).

Countries that do not use the adversarial legal system use less lawyers. In the United States of America the adversarial tradition is being replaced by less adversarial procedure that include arbitration and mediation. Since 1995, the South African Law Commission has investigated arbitration as an alternative dispute resolution. In 1996 it published a draft International Act for information and comment. The same year the Law Commission broadened its investigation to include all facets of alternative dispute resolution (ADR). It was seen that ADR would relieve the overburdened court system (South African Law Commission issue paper 8, 1997).

### **5.3 Clinical alternatives to litigation**

The purpose of the Family court is to attempt to provide a speedy and less expensive settlement of disputes. However, due to the lack of resources the courts are not equally successful and therefore the use of other alternatives may help the parties in reaching a solution to their dispute.

"Disputed custody arrangements and the visitation problems that follow such disputes cannot really be handled by the adversarial system." Kubie (1964, in Mental Materials Health Centre, 1980, p.929) proposed joint custody, the appointment of a confidential adult ally of that child, and a committee chosen by the parents to decide questions on which the parents are unable to agree. This was further developed by Solow and Adams (1977, in Mental Health Materials Center, 1980, p.929) that, cases are only excepted if both sides agree to be examined and to accept the psychological report as binding.

Thus stressing the psychological report above legal reports. The parties agree that that they will meet the psychologists six months later for a follow up evaluation and that during this time neither parent reopens the matter. The researches found that there was no misuse

'we found that aiding parents to understand and to co operate with the terms of the agreement has indeed reduced some of the painful sequels, and some of the continuing strife, which often attend custody litigation.... The involved household and their individual members have discovered that being required to deal in the arena of psychiatry, rather than the law, gives them a recourse preferable one to the adversary system in which they were previously embroiled. In this manner, the agreement has promoted continuity of intra familial relationships for the children, thus forestalling impulsive and stressful requests for change in the custody degree." LS Kubie (1964, in Mental Health Materials Center, 1980, p.90).

The legal system resolves the custody conflicts between parents through the adversarial procedure the courtroom, whereas the mental health professionals aids parents to reach an agreement out of the court and opens the channel of communication between the parents to enable them to take on the responsibilities that affect their children (Swenson, 1993).

The courts have been forced to assume the responsibility as upper guardian in family decision making when it would be more preferable to encourage the use of a mental health professional in managing their own families (Westman, 1979).



The adversary system is not appropriate in family law, where the aim is to find a balance in the interest of the family by negotiating between the rights of the parents and the rights and the developmental needs of the child. Family law is to establish and work out the complex interpersonal, social and economic problems of the family (Westman, 1979). In law the age of the child influences the manner in which the child is treated giving rise to age-appropriate responsibilities and their involvement in the legal process (Westman, 1979). The psychological interest plays an important role in protecting the developmental stages of the child. It is essential that the mental health and the legal professionals recognise the importance of working together to speed the adjudication of matters involving children because meeting and protecting their developmental needs.

#### 5.4 Implications for further research

- Relationship among family members post divorce.

Research in the which factors that influence adjustment problems in families in post divorce, This would enable the team to predict and offer services to ensure that high conflict situations are decreased. Research designs would have to ensure it is able to adapt to the social context in which child develop this would include broadening the definition of a family.

- Examining cultural and ethnic differences.

Very little research is available in establishing how various backgrounds experience and cope with divorce. In designing interventions, support services (parenting programs, children programs) it may be particularly be salient to understand the divorce experience from perspectives other than the white middle class.

- Promoting positive post divorce father-child relationships

Father-child relationships tend to benefit children post-divorce (Whiteside, 1998). Research to examine the factors that promote positive and close post divorce relationships between the father and child will enable programs to be incorporated that will eventual result in the child's adjustment within his social context.

- Promoting co parental co-operation and reducing co parental conflict

Research into which factors or interventions would help in examining the relationship between conflict and co-operation, that will help increase co-operation and decrease conflict and the relation to the parental roles and personal adjustment of the parents.

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## Appendix : Survival rights

- Survival rights as a basis to other rights (Article 6, par.2)  
2 States Parties shall ensure to the minimum extent possible the survival and development of the child
- Health (Article 24).
  1. State Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right to access to such health care services.
  - 1 State Parties shall pursue full implementation of their right and, in particular shall take the appropriate measures:
    - (a) to diminish infant and child mortality;
    - (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
    - (c) to combat disease and malnutrition, including within the framework of primary health care, through *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;
    - (d) to ensure appropriate pre-natal and post natal health care for mothers;
    - (e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation, and the prevention of accidents
    - (f) to develop preventative health care, guidance for parents and family planning education and services.
  - 2 State Parties shall take all effective and appropriate measures with the view to abolishing traditional practices prejudicial to the health of children.
  - 3 State Parties undertake to promote and encourage international co-operation with the view to achieving progressively the full realisation of the right recognised in the present Article, In this regard, particular account shall be taken of the needs of developing countries.
- Adequate standard of living (Article 27).

1. State Parties shall recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
  2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child's development.
1. State Parties, in accordance with national conditions and within their means shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
  2. State Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child. State Parties shall promote the accession of international agreements to the conclusion of such agreements, as well as the making of other arrangements.



### **Developmental rights**

- Development (Article 6).
  1. State Parties recognise that every child has the inherent right to life
  2. State Parties shall ensure to the minimum extent possible the survival and development of the child
  
- Right to education (Article 28 & 29).
 

Article 28:

  1. State Parties recognise the right of the child to education, and with the view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
    - (a) Make primary education compulsory and available free to all;
    - (b) Encourage the development of different forms of secondary education including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.
    - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
    - (d) Make educational and vocational information and guidance available and accessible to all children;
    - (e) Take measures to encourage regular attendance at schools and the reduction of drop- out rates.

- 3 State Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's dignity and in conformity with the present Convention.
- 4 State parties shall promote and encourage international co-operation in matters relating to education, in particular with the view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard particular account shall be taken of the needs of developing countries.

#### Article 29

1 State parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) the development for respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development for respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she originated, and for civilisations different from his or her own.
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace. Tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

2 No part of the present Article or Article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present Article and to the requirements that the education given in such institution shall conform to such minimum standards as may be laid down by the State.

- Benefit from social insurance (Article 26).

1 State Parties recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.

2 The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

- To obtain a high level of health care (Article 6)
  1. States Parties recognise that every child has the inherent right to life.
  2. States Parties shall ensure to the minimum extent possible the survival and development of the child.
- Developmental rights for the mentally handicapped and physically abused child (Article 23)
  1. State Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions, which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
  2. State Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parent or others caring for the child.
  3. Recognising the special needs of the disabled child , assistance extended in accordance with paragraph 2 of the present Article shall be provided free of charge whenever possible , taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education , training, health care services, rehabilitation services, preparation for employment and recreational opportunities in a manner conducive to the child receiving the fullest possible social integration and individual development, including his or her cultural and spiritual development.
  4. State Parties shall promote, in the spirit of international co-operation , the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling State Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

### **Protection rights**

- The right to be protected from economic exploitation (Article 32).



- 1 State Parties recognise their right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or physical, mental, spiritual, moral or social development.
- 2 State Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present implementation of the present Article, To this end, and having regard to the relevant provisions of other international instruments. States Parties shall in particular:
  - (a) Provide for minimum ages for admission to employment;
    1. Provide for appropriate regulation of the hours and conditions of employment
    - (b)
  - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article.

- Against drug abuse (Article 33).

State Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in illicit production and trafficking of such substances.

- From abduction (Article 35).

State Parties shall take all appropriate national, bilateral and multilateral measures To prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

- From being denied access to due process and judicial safeguards (Article 40).

- 1 State Parties shall recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human right and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
- 2 To this end, and having regard to the relevant international instruments, State parties shall, in particular, ensure that:
  - (a) no child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed

- (b) every child alleged as or accused of having infringed the penal law has at least the following guarantees:
- (i) to be presumed innocent until proven guilty according to law;
  - (ii) to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal representation of his or her defence;
  - (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to the law, in the presence of legal or the appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
  - (iv) not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witness on his or her behalf under the conditions of equality.
  - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
  - (vi) To have free assistance to an interpreter if the child cannot understand or speak the language used;
  - (vii) to have his or her privacy fully respected at all stages of the proceedings.
- 3 State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, and recognised as having infringed the penal law, in particular:
- (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
  - (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
- 4 A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and the alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.

## 8. CASES

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## 9. STATUTES

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Mediation in Certain Divorce Matters Act 24 of 1987

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Colorado State Statute 14-10-126

Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991

Black Administration Act 1927

The Maintenance Act, Act 23 of 1963.

The Divorce Act, Act 70 of 1979 and specifically related to Section 6.

The Guardianship Act, Act 192 of 1993.

The Mediation in Certain Divorce Proceedings Act, Act 24 of 1987.

The Child Care Act, Act 74 of 1983.

