

THE DECISION-MAKING CAPACITY (POWER) OF A MINOR CHILD IN A DIVORCE CASE: GUIDELINES FOR PSYCHOLOGICAL ASSESSMENT

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INTRODUCTION

Divorce cases often develop into acrimonious affairs. When minor children are involved, custodial tugs-of-war are regular concomitants. Parents often disagree vehemently with regard to the question of whom should be awarded custody of minors. The following high-profile custody case illustrates the point:

“Millionaire show-jumper Philip Tucker has lost his lengthy and acrimonious court battle against his former wife, former Miss World Anneline Kriel Bacon, to have sole custody of their two daughters In a battle that lasted for more than a year, with hundreds of documents that formed part of a very hefty court file There had been a fair amount of mud-slinging between the parties” (Venter 2001: 2).

If the experience of the researchers (both psychologists) is anything to go by, these battles often rage on for years after the divorce had been finalised. The following case studies perhaps typify the kind of problems which may arise in post-divorce custodial battles:

- Initially, a father is satisfied when the mother is awarded custody of a very young boy. However, when the child grows up, the father claims shared custody. At this stage, long forgotten grudges and bitterness again come to the fore and a bitter battle ensues.
- A mother is awarded custody of a young boy, who indicates his preference to stay with the mother. However, when the boy enters puberty, he

begins to see matters in a different light and indicates his preference to stay with his biological father. The mother is extremely upset, claiming unfair influence on the father's behalf and the case is again referred to the lawyers. The father, on the other hand, 'jumps' in, often with little experience in this regard, and the potential for social pathology is enhanced.

- A father is awarded custody of a very young girl on the grounds that the mother (who is an alcoholic) is unfit to be awarded custody. When the mother is rehabilitated, she claims custody of her child, on the grounds that her husband stays with, but is not married to, his girlfriend. The child indicates her preference to be with the mother and another bitter round in the continuing battle for custody starts.

In cases such as the ones mentioned here, the decision-making capacity of the minor child in divorce is often disputed when such a child indicates a decided preference for a specific parent's custody. The previous approach relating to disputed custody of minor children was associated with awarding custody to the non-guilty parent and the best interests of the child, which were often related to the mother's care, promoting maternal custody (Mudie 1989: 2). Currently, with more emphasis on the protection of minor children's rights (Davel 1999) the 'new' paradigm emphasises the protection of the minor child's rights and the promotion of the minor child's 'best interests'. With this approach, the wishes of the parents are deemed subordinate to the rights and 'best interests' of the minor child.

Furthermore, custody of minor children was granted by virtue of the previous paradigm on the evidence of one parent's competence or incompetence to function as a parent (Evans & Havercamp 1994: 235-244; Fox & Kelly 1995: 693-707; Jamieson 1995). As yet, the criteria for determining the competence (ability) or incompetence of one parent have not been defined clearly. This aspect makes it difficult to prove *prima facie* that the minor child's 'best interests' are served by when he or she is assigned in this way, or that the involved minor child's rights are being protected and promoted when this procedure is followed (Wall & Amadio 1994: 39).

This article does not attempt to develop criteria for evaluating the competence of parents, but rather, to evaluate the minor child's decision-making capacity.

CONCEPTUALISING

To prevent confusion over conceptualising, strategic terminology that will be used in this article, will now be defined.

- Basic needs. This concept refers to the physical, psychological, emotional and social requirements that are fundamental for the welfare of the child (Government Gazette, 31 March 1998, no 18770: 79).
- Discipline and educational style. These concepts refer to the positive guidance and behavioural management offered to a minor child to improve the internal control of the child and to promote his or her healthy development (Government Gazette, 31 March 1998, no 18770: 79).
- The term "ecological circumstances" refers to the circumstances of the child involved within the context of, and in relation to his or her family and community (Government Gazette, 31 March 1998, no 18770: 79).

- "Psychological parent" means the parent to whom the child turns in times of distress for the necessary psychological and other care, to be cherished and protected and who probably satisfies the minor child's needs most in this regard.

RESEARCH QUESTIONS

The research questions that this article investigates are as follows:

- How can the psychological and juridical elements of the concept 'decision-making capacity of the child' be converged so that guidelines could be formulated for assessing minor children's capacity to choose the parent in whose custody they wish to be placed? Put otherwise: In which ways can the decision-making capacity of the child in divorce be determined, so that there will be convergence between the psychological and juridical elements of the concept 'decision-making capacity', of the minor child?
- Which psychological tests are available to help assess a child's decision-making ability in cases where parents cannot agree on the best potential course of events (that is, the 'ideal' or 'best' course of events for the child)?

RESEARCH METHODS

To answer these questions, an action research approach is adopted. Firstly, the current research comprises the qualitative analysis of scientific texts. Because no systematic cataloguing of the legal aspects of the concept 'decision-making capacity of the child' has been done, a relevant literature review was undertaken of both a number of primary and secondary scientific sources. These sources

are viewed as narratives, and the approach is seen as an alternative method of research to experimental methods. Secondly, a number of discourses (court cases and personal interviews) are analysed and summative responses are given. Within this approach (discourse analysis), the problem-saturated narratives are analysed and put into context.

LITERATURE STUDY

The decision-making capacity of the minor child should be evaluated in context with the juridical concepts *accountability* and *the (in-)ability to stand trial*. An individual is deemed accountable

- (a) when he or she is considered to be able to distinguish between 'right' and 'wrong'; and
- (b) when he or she is regarded as having the ability to direct his or her behaviour in conformity with such a notion (De Wet & Swanepoel 1985: 109-110; Snyman 1999: 156).

It is evident that those who are mentally unfit (mental patients) and young children cannot be held accountable for their illegal behaviour. If one of these abilities is lacking, the person involved is unaccountable and such a person cannot be held responsible, according to criminal law, for the illegal act he or she has performed while he or she did not have said ability (Bergenthuin 1985: 190-245, 577-586). According to the Rumpff Report, presence of the above-mentioned factors make persons responsible for their deeds and this aspect forms the basis for their accountability (Report of the Commission of Inquiry to the Accountability of Mentally Deranged Persons and Related Affairs, RP 69/1967). These two factors refer to two different functions of the human mind, which will now be discussed individually.

The cognitive function of the mind

The first function of the mind refers to the individual's ability to distinguish between right and wrong, that which is permissible and not permissible, and it forms a part of the individual's *cognitive function*. This function refers to the individual's intellect, that is to say, his or her ability to observe, reason, and remember (Report of the Commission of Inquiry to the Accountability of Mentally Deranged Persons and Related Affairs RP 69/1967). Here the emphasis is on insight and comprehension. In law practice the cognitive function is not always defined consistently. Sometimes, as in Section 78(1) of the Criminal Procedure Act, the ability to realise the unlawfulness of the action is mentioned (Criminal Law Procedure Act 51 of 1977: 164-174). In other instances, the ability to recognise the wrongfulness or illegality of an action is alluded to, whilst sometimes the ability to differentiate between right and wrong is referred to. However, usually it does not matter which of these expressions are used, because in law practice they are simply used as synonyms (Snyman 1999: 160).

The conative function of the mind

The ability an individual has to direct his or her behaviour in accordance with his or her insight into right or wrong, refers to the individual's *conative function*. The conative function has to do with the ability human beings have to control their behaviour in accordance with their insights, unlike animals. This means: to have an aim, to make a volitional decision, to pursue an object and to resist temptation (Report of the Commission of Inquiry to the Accountability of Mentally Deranged Persons and Related Affairs, RP 69/1967). Here the basic idea is 'volitional control'. To be concise, the cognitive and conative functions may be expressed as 'the power of discrimination and resistivity' respectively. If an individual is to be accountable, both of the mentioned psychological functions or abilities must be present. Even if only one of

them is lacking, the individual is unaccountable (Snyman 1999: 160).

Determining a child's ability to stand trial

First of all, it should be noted that section 77 of the Criminal Procedure Act makes provision for an alleged mental disorder during the trial ("the ability of the individual to understand the proceedings"), but section 78 deals with a mental disorder while committing the crime.

According to Blau (1984: 8) "Essentially, the law requires that a defendant must be able to understand the nature of charges against him or her, must be able to understand the proceedings and the participants in the trial, and must be able to cooperate with his or her attorney to a reasonable degree. When the court is in doubt about a defendant's competency in any of these areas, expert opinion is sought to aid the court in deciding whether to postpone the proceedings until the defendant is found competent."

Individuals, who present an inability to stand trial, are unable to understand court proceedings properly and cannot give suitable evidence. They cannot defend themselves, nor consult in a proper way with their legal representatives and cannot give instructions to their legal representatives (Snyman 1999: 173). Furthermore, the individual's contact with reality should be intact.

Accountability may be totally eliminated by an adolescent age. Children who have not completed their chronological seventh year, are 'irrebuttably presumed to be unaccountable' (Snyman 1999: 174; De Wet & Swanepoel 1985: 111-112). According to this definition, a child who has not yet reached seven years of age cannot be found guilty of any crime. Children who have completed their seventh year up to their fourteenth year (this means just before their fourteenth birthday), are 'rebuttably presumed unaccountable' (Snyman 1999: 174). Therefore children may

be found guilty of a crime on account of their actions while in this age group, on condition that the state can refute the presumption of unaccountability during these years beyond all doubt. Also, the state has to prove all the other elements of the crime of which such children have been accused. The closer a child is to the age of seven, the stronger is the presumption of unaccountability, and the nearer a child is to the age of fourteen, the weaker is this presumption (Snyman 1999: 174).

It must be proved that the child, at the time of the action, could have known that the action referred to, and the particular circumstances in which it was executed, was wrong. All the circumstances of the case, such as the nature of the offence, the child's age, intellectual development level, character traits and personal experience, must be taken into account to determine whether the state has refuted the presumption.

The test for determining the accountability of a child between seven and fourteen years corresponds in principle with the general test for accountability as explained above. So, for instance, the former Transvaal court clearly implied in 1986 in *Mbanda* (1986 2 PH H108(T)) that the test for determining the accountability of children under the age of fourteen years should be the same as the general test for accountability. The question may well be asked whether such a child, in spite of his or her tender years, nevertheless has the capacity to realise the nature and consequences of his or her behaviour. These children should also realise that this behaviour is unlawful (this aspect forms the cognitive part of the test) and the question also arises whether they are capable to direct their actions in accordance with their insights (this aspect constitutes the conative part of the test).

The cognitive part of the test, then, refers to the intellectual development level (maturity) the child has already attained, in other words, the child's *capacity* for understanding his

or her actions and its consequences. The cognitive part of the test also refers to the child's ability to discriminate between right and wrong, in other words, the level of knowledge he or she has attained of social-ethic standards and normative rules of conduct. Passages quoted from a few court cases refer as follows to this intellectual development level: "... that such a person had sufficient capacity to know that the act was wrong" (*Kenene* 1946 EDL 18); "had sufficient capacity to know that the act he was doing was wrong ... that the accused's mind was sufficiently mature to understand, and that he did understand the wrongful character of the conduct" (*Tsutso* 1962 2 SA 666 (SR)); "sufficiently mature mind to understand ... sufficient intelligence to know the nature and consequences of his conduct or to appreciate that it was wrong" (*M* 1978 3 SA 557 (Tk)); "The Crown must show affirmatively that the child knew what the reasonable and probable consequences of his act would be" (*K* 1956 3 SA 353 (A) 357H).

The conative part of the test refers to the child's ability to make an independent volitional decision on the one hand, and, on the other hand, to display resistivity power. This part of the test therefore refers to both the intellectual and emotional maturity of the child.

CRITERIA TO BE TAKEN INTO CONSIDERATION WHEN THE MINOR'S PREFERENCE FOR A SUPERVISORY PARENT IS DISPUTED

The test for determining whether children between the ages of seven and fourteen years have the capacity to make decisions, corresponds in principle with the general test for accountability as explained above. The Child Care Act of 1983 (Act 74 of 1983) and the Children's Child Care Amendment Act, 1996 (Act 96 of 1996) make provision for considering the preferences and wishes of the minor when decisions have to be made over custody during divorce. Custody over minors above the age of approximately

fourteen years is very rarely disputed, because parents, the family advisor and the family advocate readily consider the wishes of children in this age group. However, it is usually minors between the ages of seven to fourteen years whose choices for custody are disputed, and whose preferences and wishes are rarely heard, in spite of the fact that children in this age category are deemed by the law to be *rebuttably accountable*.

Using the two parts of the test for accountability as criteria for evaluation, it is evident that the following criteria should be taken into consideration when the minor's preference for a supervisory parent is disputed:

- Children's general intelligence and their attained level of intellectual maturity have a bearing on the cognitive part of the test for accountability. The first-mentioned aspect refers to the measurement of intelligence on the deviation scale, while the last-mentioned refers to the child's mental age. It follows that the mental ages and the chronological ages of children may differ. Therefore it is essential that the percentile ranking should also be considered when a deviation scale is used to determine intelligence.
- When children have to make a choice, the level of insight and also the degree of insight they have into the consequences of such a choice, relate to the cognitive part of the test for accountability. This level of insight is apparently determined by three factors. The first is children's age appropriate self-insight in relation to their *basic and psychological development needs*, while the second is their capacity to identify their *psychological parent*. Thirdly, their capacity for evaluating objectively and rationally those factors that relate to their *best interests* is taken into account (Evans & Haverkamp 1994: 235-244; Fox

& Kelly 1995: 693-707). Children's best interests are associated with a parent who:

- (1) displays stability and adequate parental skills;
- (2) has a stable and satisfactory relationship with the minor child;
- (3) can provide for the minor's financial and other needs;
- (4) can facilitate and promote the stable emotional development of the minor; and
- (5) facilitates and promotes solid ties with home, family, school and community (Mudie 1989: 4).

The choice made by children in these circumstances should reflect a balance between the above-mentioned determinants and the capacity of the preferred parent to provide for these needs.

- The knowledge level the child has attained of social-ethic standards and normative rules of conduct also relate to the cognitive part of the test for accountability. The child's evaluation of his or her own behaviour as well as of his or her parents' type of discipline, of their educational style and of their mode of behavioural management, is significant in this case. If the parent's educational style and general mode of behavioural management is in conflict with the child's personality development and his or her need for emancipation and self-actualisation, there are grounds for presuming that the child's wishes should be heard in this regard.
- The child's capacity for making an independent volitional decision is related to the conative part of

the test for accountability. A number of negative factors may discredit the child's choice if there is no indication of a balance between the child's best interests and the specific skills of the preferred parent. These factors include being influenced by a specific parent, the presence of a parent-child symbiosis, egocentricity, a high degree of conformity, group dependence and dependence on the opinions of others and also manipulation. In instances such as these, it may appear as if the choice made by the child has been contaminated by external factors.

- Conversely, a number of positive factors may support the child's choice. These factors include a high level of intellectual maturity, a thorough knowledge of social-ethic standards and normative rules of conduct, the absence of excessive anxiety and compulsiveness, the absence of subservience, higher ego power, dominance as personality trait, high super ego power, self-assurance and control, individualism, non-dependence on the group and the absence of excessive tension.

DETERMINING A CHILD'S CAPACITY TO TESTIFY

A reformulation of the set of guidelines by Bromberg (1979: 1343-1347), which refers to the capacity to testify, also provides useful guidelines with regard to the minor's decision-making capacity. The level attained with regard to the decision-making capacity of the minor child, and his or her ability to testify in a court of law, may be evaluated in terms of the following guidelines:

- The extent to which the minor's intellectual functioning and attained level of maturity influences his or her capacity to consult with the family advocate, psychologist and/or other people

who are involved.

- The extent to which the minor's intellectual functioning and attained level of maturity influences his or her capacity to testify in person to further his or her own cause.
- The extent to which other evidence (psychological test results and collateral information) describes the intellectual functioning of the child, and the level of maturity and decision-making capacity he or she has attained.
- The extent to which the minor's attained level of maturity reflects his or her self-insight and his or her capacity to reach a rational decision, and also the insight the minor has into the consequences of decisions he or she has taken.

The choice made by the minor is usually disputed when he or she prefers to live with a specific parent and the non-preferred parent opposes such an application. In this case, the question that is of the utmost importance is whether the claim of the non-preferred parent is of such a nature that it can be refuted with reasonable defences. If the minor child already possesses the required maturity to make a rational and independent decision, and if the non-preferred parent's claim leaves room for any reasonable possibility that the minor could set a different claim, it is presumed that the minor child is able to testify. In other words, his or her wishes and needs should be heard in court (Davel 1999; Child Care Amendment Act of 1996 – Act 96 of 1996).

ASSESSING DECISION-MAKING CAPACITY

A number of psychological tests, which are available for the assessment of children's decision-making capacity, will now be discussed.

Revised South African Individual Scale (SSAIS-R)

The test results of the *Revised South African Individual*

Scale (SSAIS-R) should throw more light on the cognitive part of the test for accountability (Snyman 1999: 156; Van Eeden 1992). The SSAIS-R is used to obtain a differential image of the specific cognitive abilities of children between the ages of 7 years 0 months and 16 years and 11 months. The sub-tests of the SSAIS-R cover a wide field and involve a variety of behavioural aspects that are representative of general intelligence. The total count for these sub-tests of the intelligence scale represents the general intelligence, while general intelligence represents intellectual ability that is constantly developing under certain environmental influences (Van Eeden 1992: 3). Apart from the quantification of general intelligence, the SSAIS-R may also contribute valuable clinical-diagnostic information.

The verbal scale relates to both the cognitive part of the test for accountability and to the child's capacity to testify, because it gives an indication of the child's intellectual potential, including his or her language development level. Naudé (1999: 92) asserts that "On the one hand cognitive skills enable the child to master more complex language. The child who is well versed in cognitive skills can observe more critically, see connections, understand meanings and can discriminate between differences in meaning. On the other hand, cognitive processing may be positively influenced by good language development. Language and cognitive development is therefore interactive and very closely intertwined."

The non-verbal scale gives an indication of the individual's problem-solving skills, and probably measures the individual's ability to contemplate various aspects of a matter and then come to a decision, as described in the cognitive part of the test for accountability (Snyman 1999: 160). The non-verbal scale primarily measures the individual's inductive and deductive ability to reason logically, as well as his or her ability to consider all possibilities and arrive at synthesising and concept forming. The rationale is that these skills are also related to

general intelligence (Van Eeden 1992: 8).

The sub-tests *Vocabulary* and *Comprehension* are related to the cognitive part of the test for accountability, and also to the individual's capacity to testify (Bromberg 1979: 1343-1347; Snyman 1999: 156). The sub-test *Vocabulary* measures the individual's receptive vocabulary and, among others, it gives an indication of the individual's language development level, word comprehension, concept formation and long-term memory (Van Eeden 1992: 5). The individual's expressive language use is reflected in the sub-test *Comprehension*. A sufficient performance in these two tests imply that the individual's language-related abilities are so well developed that he or she will probably be able to understand the elements of a specific case properly. This implies that he or she should be able to testify in a fitting manner; express him- or herself adequately (defend), and will be able to duly consult with the psychologist, the legal representative, the family adviser and family advocate.

The sub-test *Comprehension* also measures the individual's comprehension of various social situations, and his or her level of intellectual functioning (Van Eeden 1992: 5). This sub-test is thus directly connected with the realisation of unlawfulness as contained in the cognitive part of the test for accountability (Snyman 1999: 156). Furthermore, the sub-test *Comprehension* measures the individual's knowledge of conventional standards of behaviour, as well as the ability of the individual to understand conventional standards of behaviour. It also measures the individual's ability to use this knowledge in a meaningful and emotionally relevant way. The sub-test functions on the assumption that social adjustment and social discernment are acquired by means of everyday life experiences and formal instruction.

A sufficient performance in this sub-test implies that the individual's ability to reason is developed to the extent that he or she can evaluate the information acquired from this

experience, and can then use it in other situations that are socially acceptable (Van Eeden 1992: 5). A sufficient performance in the sub-tests *Comprehension* and *Missing Parts* indicates a good understanding of reality (Van Eeden 1992: 9), relating to both accountability and the individual's capacity to testify.

The sub-test *Similarities* measures the individual's cognitive level of reasoning, namely abstract, functional or concrete. If individuals reason mainly on the concrete level, they will probably find it difficult to see any relation between two concepts (Van Eeden 1992: 6). If this is the case, it is probable that these individuals may be incapable of realising the nature and consequences of their behaviour because they are not capable of making adequate connections. This aspect relates directly to the cognitive part of the test for accountability and with children's ability to testify satisfactorily for the furtherance of their own cases (Bromberg 1979: 1343-1347; Snyman 1999: 156). A sufficient performance in this sub-test means that the individual has at least a functional to abstract level of logical reasoning. This implies that he or she has the ability to see connections between divergent concepts and situations and that he or she can conceptualise in an adequate way. The expectation is thus that the individual could consider various factors and reach a significant synthesis, which would reflect the level of his or her decision-making capacity.

According to the cognitive part of the test for accountability, it is important that the child's power of resistivity should be investigated, for instance, whether the child has made a decision under the influence of older people (whether family or friends). In this context, valuable deductions could be made on the basis of test results of the *Personality Questionnaire for Children* (PQC) (Du Toit & Madge 1972), the *High School Personality Questionnaire* (HSPQ) (Laubscher, Steyn & Wolfaardt 1976; Madge 1974; Minnaar 1976; Van Dijk 1982) and the *Interpersonal*

Relations Questionnaire (IRQ) (Joubert 1981; Joubert & Schlebusch 1983).

The Personality Questionnaire for Children (PQC)

The PQC aims to obtain maximum information about a variety of character dimensions in children who are of a relatively young age, and to identify those who present emotional and behavioural problems. Although PQC norms are available for the ages eight to 13 years, it is recommended that the *High School Personality Questionnaire* (HSPQ) be used for children who have already completed their primary school education (Owen & Taljaard 1989: 378). Both the PQC and the HSPQ measures fourteen character traits (factors) that could be useful when predicting and evaluating the course of personal, social and academic development in children. Every factor is presented on a bipolar continuum. Information about the following character traits (factors) probably reflects the child's ability to make a *conscious decision* and *his or her resistivity power* (conative part of the test for accountability) (Snyman 1999: 156): +B (more intelligent), +C (higher ego power), +E (dominance), +G (high super ego power), -O (self-assurance), +Q₃ (control) and -Q₄ (absence of excessive tension). Ego power is defined as the individual's hypothetical resistivity power and it plays an important role in determining the degree of an individual's mental health (Plug, Meyer, Louw & Gouws 1987: 79). Super ego power is defined as that part of the psyche that represents the moral codes of society. It develops during the first five years of life by incorporation or introjection of the parents' rules of conduct. It is composed of the ego ideal (which rewards good behaviour) and the conscience (which punishes immoral behaviour with feelings of guilt) (Plug *et al* 1987: 355). The ego power and super ego power therefore refer to an individual's internalised system of values.

Each of the above factors is, to a greater or lesser degree, connected with the individual's decision-making capacity

and locus of control. If individuals have an internal locus of control, they accept responsibility for that which happens, because they feel that they themselves are in control of occurrences which affect them. Individuals who have an internal locus of control personally accept responsibility for bringing about certain results and they are more inclined to make independent decisions (Gerdes 1988: 113). Each of these aspects is, to a greater or a lesser extent, related to the conative test for accountability (Snyman 1999).

The Interpersonal Relations Questionnaire (IRQ)

The IRQ measures eleven components of psychosocial adjustment in the younger child (norms are available for children in Grades 7, 8 and 9), and these components are divided into four primary adjustment fields. Adjustment may be described as the dynamic process through which persons strive to gratify their inner needs by means of mature, effective and healthy responses. At the same time they learn to deal successfully with the demands made by their environment so that they may achieve a harmonious relationship between the self and the environment. The development of healthy relationships within the self and the environment indicates a healthy adjustment, while maladjustment develops when these relationships are ineffective, unsuccessful and immature. Here the question is not about character traits as such, but rather the expression and dynamics of the person's endeavours towards harmony between the self and the environment (Owen & Taljaard 1989: 388). Although poor adjustment on many of these scales are actually typical of conduct disorders or oppositional deviant disorders, the following three scales probably reflect the child's power of resistance (conative function of the mind), namely: *Personal relationships* (self-control), *Domestic relationships* (family influences) and *Social relationships* (moral impact). The degree to which the child can establish successful harmony within the self and between the self and the environment, probably reflects his or her power of resistance as

contained in the conative part of the test for accountability (Snyman 1999: 156).

DETERMINING THE DESIRABILITY OF THE CHILD'S CHOICE

The desirability of the minor child's choice (and his or her ability to testify) should be evaluated consistently, in context with assessment of the following factors (Blau 1984: 106; Evans & Haverkamp 1994: 235-244; Fox & Kelly 1995: 693-707; Wall & Amadio 1994: 39-55):

- current psycho-social functioning of the minor child;
- current psychological development needs of the minor;
- current emotional needs of the minor;
- possible 'vulnerability' and special educational needs of the minor;
- determining the psychological parent;
- determining the option that will cause the least damage; and
- determining that which is in the best interests of the child.

Assessment results that relate to the above areas should either support or discredit the choice made by the minor.

RECOMMENDATIONS

In addition to the above-mentioned recommendations, the following, more general guidelines may also serve a useful purpose:

- Measures to facilitate consistent decisions in child custody cases:
 - S** The first and most important recommendation is the drawing up of a set of written (and workable)

guidelines. These rules should be compiled co-operatively by a panel, which should, ideally, at least comprise facilitators and consultants (which may, for instance, include experts from the field of psychology and of law and experts on the constitution), parents and children. These codes and rules should be implemented **consistently** and should be revised on a regular basis (at least annually). Also, codes should be fair, should take into account accepted legal principles pertaining to general law and should be concise and clear, leaving little or no room for misunderstanding.

S Setting up of workable and appropriate channels for dealing with parents and children's complaints.

- Educating and supporting children and their parents

S The facilitation of advocacy groups, where a group of persons (which should include lawyers and psychologists) acts as intermediary between parents, between parents and lawyers, and between children and their parents.

- The role of consultants and psychologists
 - S** Consultants should be approached to work with both children and parents.

S More sufficient educational guidance and counselling services

should be facilitated, specifically with a view to improving children's decision-making abilities.

- The role of the state
 - S A national indaba should, perhaps, be held on these issues.
 - S The co-operation of children, parents, lawyers and psychologists during every stage of this process should be facilitated.

CONCLUSION

In most divorces or dissolutions, custody of the minor children is traditionally awarded to the mother without contest from the father of the minor child. Moreover, the court usually determines custody in accordance with the best interests of the child. However, a number of different scenarios, which often lead to bitter legal battles, may ensue, especially when the capacity of the minor child in a divorce case to make a decision regarding his or her preferred custodian is disputed by the non-preferred parent. For a number of reasons, it is often argued that such a decision is biased. Furthermore, in the experience of the authors of this article, fathers often tend to wait until a child grows up before they decide to reopen a custodial court case. The court considers all relevant factors before making a decision regarding the granting of custody to a specific parent. This includes the wishes of the child's parent(s) regarding his or her custody, the wishes of the child regarding his or her custodian, the interaction and interrelationship of the child with the parents, siblings and any other person who may significantly affect the child's best interests, the child's adjustment to his/her home, school, and community, and the mental and physical health of all individuals involved.

In recent years, minor children have started to make known

(or have been allowed to make known) their wishes regarding their preferred custodians. This development coincided with the evolution of the view that children have a right to choose with which parent they want to reside. However, many lawyers and judges have serious questions about the child's ability to act decisively. Traditionally, psychologists have been called upon for evaluation and expert testimony in such matters of disputed custody. Currently there are no standards for the delivery of psychological services to families in legal conflict or to courts seeking help from expert witnesses in dealing with such difficult and complex custodial decisions. There are also no standards for the assessment of the minor child's ability to make decisions regarding his or her custodians. It has, therefore, been the aim of this article to propose such standards and criteria for psychological assessment of the minor child's decision-making capacity.

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