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COURT SERVICES FOR THE CHILD IN NEED OF ALTERNATIVE CARE: A CRITICAL EVALUATION OF SELECTED ASPECTS OF THE SOUTH AFRICAN SYSTEM

By Frederick Noel Zaal

SUBMITTED TO THE UNIVERSITY OF THE WITWATERSRAND IN FULFILMENT OF THE DEGREE OF DOCTOR OF PHILOSOPHY
MARCH 2008

TO MY WIFE CARMEL AND MY CHILDREN LORIN AND JARRIN

Declaration

I, Frederick Noel Zaal, declare that this thesis is my own, unaided work. It has not been submitted before for any degree or examination in this or any other university.

_____ _____

Signature Date

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I would like to thank Gloria Attlee, Dudu Bopela, Ella Gandhi and Priscilla McKay and also acknowledge the late Esther Maharaj. In different ways they all assisted me to gain access to child welfare society file records of unreported children's court cases dating from the apartheid period. Other South African colleagues shared their more recent experiences of the 'hidden world' of children's court practice. Although they are too numerous to mention here their names have been separately listed as personal communicants in the bibliography.

Dr Jewel Koopman, director of the Struggle Archives and Alan Paton Centre in Pietermaritzburg, patiently guided me through the late Dr Alan Paton's personal papers. Meda Couzens, whilst undertaking her own research in the United Kingdom, found time to assist my access to copies of foreign law reports not available to me in South Africa. Nicola Ross directed me to website information about the history of the Australian children's courts. Professor C Theophilopoulis and the late Professor Andrew St Q Skeen of the University of the Witwatersrand kindly read and commented on an early draft of chapter 6. Professor Ann Skelton of the Centre for Child Law, University of Pretoria, sent me copies of unreported South African cases on state failures to implement child placements. Arlene Henry sent me information about her personal approach to child protection mediation in British Columbia.

My two teenaged children, Tristan Jarrin and Lorin Rose, readily accommodated a mentally absent father during the years of preparation. In particular, I owe a substantial debt of gratitude to my wife, Carmel Rose, for unfailing support which freed me to complete the thesis. Finally, my most grateful thanks are due to my promoter, Professor Elsje Bonthuys, for always-prompt and numerous constructive suggestions as the work progressed.

SELECTED ACRONYMS AND ABBREVIATIONS

ABA -American Bar Association

ACC -1990 African Charter on the Rights and Welfare of the Child

ADR -Alternative Dispute Resolution

AP Archives -Alan Paton Centre and Struggle Archives

art -article

BCLR -Butterworth's Constitutional Law Reports series [South African]

CRC -1989 UN Convention on the Rights of the Child

Col -Column

ECHR -1950 European Convention for the Protection of Human Rights and Fundamental Freedoms

GG -Government Gazette

GN -Government Notice

HMSO -Her Majesty's Stationery Office

LJ -Law Journal

LQ -Law Quarterly

LR -Law Review

MPP -Member of Provincial Legislature

NP -no publisher

NPl No place of publication indicated

p -page

para -paragraph

r -rule

reg -regulation

s -section

SA -South African Law Reports series.

SACJ -South African Journal of Criminal Justice

SAJHR -South African Journal on Human Rights

SALJ -South African Law Journal

THRHR -Tydskrif Vir Hedendaagse Romeins-Hollandse Reg.

UN Guidelines, 2007 -2007 Draft UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children

UP - unpaginated source

Vol -volume.

1937 Act -the Children's Act 31/1937 (South African)

1960 Act -the Children's Act 33/1960 (South African)

1983 Act -the Child Care Act 74/1983 (South African)

2005 Act -the Children's Act 38/2005 (South African)

ABSTRACT

This thesis focuses on aspects of the work of South Africa's unique children's courts in care cases. Chapter 1 provides an outline of the scope of the thesis. It also explains a methodological utilisation of selected primary evaluative criteria. Throughout the thesis extensive use has been made of these to assess the sufficiency of relevant law and practice. In chapter 2 the historical origins and early impact of the children's courts are explored. It is shown that these courts have been shaped by a complex interaction between English colonial influences, progressive and liberal initiatives asserting the appropriateness of serving all children, and contrary government policies driven by racial prejudice. Chapter 3 investigates whether there is still a need for specialised care courts in a world where ADR is becoming increasingly prominent. Based upon a comparison of the respective advantages and disadvantages of courts and other resolution methodologies (including the Scottish children's hearings system) it is concluded that an interactive model involving both courts (as authoritative partners) and ADR is ideal. In chapter 4 the feasibility of encouraging direct participation at court by children and other family members is considered. It is asserted that, contrary to the situation in some systems, a direct participatory system is feasible, accords with South Africa's international obligations and for some cases is a superior method. Chapter 5 evaluates the reasons for insufficient and often inadequate legal representation of parties in the children's courts. It provides recommendations on a selection process for state subsidisation, training and what the basic functions of lawyers should be. Chapter 6 focuses on presiding magistrates. It asserts that there is an urgent need for rules of court to transform their function from an accusatorial to a predominantly inquisitorial one. It provides some discussion on the wording of these rules. It is contended that the Children's Act 38/2005, whilst expecting much more from children's court adjudicators, counterproductively diminishes specialisation and staff resources. Chapter 7 presents an argument for considerably greater and better-guided use of the children's courts to provide emergency and interlocutory relief. It proposes guidelines in the form of rules of court to enable this. Chapter 8 provides a critique of the new approach to dispositive care proceedings in the Children's Act 38/2005. It appreciates

the significance of some valuable advances but also shows that there are fundamental structural and other deficiencies. It contains recommendations on how the Act should be both amended and supplemented by means of regulations. Chapter 9 summarises the main findings of the thesis. It is concluded that, whilst our law is still poorly developed in many important respects, the lag in systemic progress which resulted particularly during the apartheid period can now quickly be overcome. This can be done by introducing solutions proposed in the thesis which are, on the whole, financially modest. Children's courts could at last become a highly effective mechanism within our child protection system (possibly within a family court network) if these solutions are implemented.

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CHAPTER 1
INTRODUCTION

1.1 General Introduction

This thesis has two primary aims. Firstly, to provide a structured and theoretically consistent critical examination of selected aspects of the South African law pertaining to court-imposed, legally-binding alternative care measures for children. And secondly, to formulate recommendations for improvement of our law. The concept of alternative care is broadly interpreted in the thesis to include not merely measures requiring removals of children from dysfunctional familial groups but also supportive measures intended to avoid the need for such removals.[1] It is asserted that our child care law framework remains inadequate in many important respects despite recent major reform initiatives. The thesis further aims to demonstrate, however, that the shortcomings in our law can be overcome by means of appropriate solutions such as legislative amendments or supplementary provisions.

The thesis evaluates relevant substantive and procedural law, and some of the court-related functions of the professionals most commonly involved in care cases. Personnel whose services are considered include investigative social workers, the staff of the children's courts and lawyers who appear in those courts.[2] Care proceedings at the children's courts[3] have been selected as the main focus. These courts are an important

[1] The conception of alternative care utilised in this thesis is thus broader than that in art 29 of the Draft UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children (18 June, 2007). In this provision 'alternative care signifies a formal or informal arrangement whereby a child is looked after at least overnight outside the parental home…'. The Guidelines were accessed at <http://www.crin.org/docs/DRAFT_UN_Guidelines.pdf>. Final dates of access for materials electronically sourced are indicated in the thesis bibliography and not in footnotes.

[2] Additionally, aspects of the work of other professionals such as psychologists and psychiatrists in providing expert assessments and rehabilitative services are briefly referred to in parts 7.2.1.1, 7.4.2 & 8.3.2, below. Unless otherwise specified all references to 'parts' are cross references to different locations within the thesis. The first digit indicates the chapter. A two-digit reference indicates introductory material in a main part prior to commencement of any subpart.

[3] Despite the importance of their functions children's courts are not courts of senior status. The present hierarchy of South African courts is established in the Constitution as contained in the Republic of South Africa Act 108/1996. As indicated in s 166(3)(a) of that Act the constitutional court 'is the highest court in

component in our child protection system. One of their functions is to serve as forums of first instance when alternative care hearings are required on behalf of children. The importance and inherent difficulty of many of these cases cannot be overemphasised. Court rulings in care matters obviously tend to have serious consequences. An incorrect decision to leave a child in her current situation might result in her death being caused by an abusive or neglectful caregiver.[4] But a decision to remove a child from her family or community must only be taken as a drastic last resort because it will be likely to affect bonding (and the child's healthy development in other respects) by separating her from those who have previously nurtured her.[5]

Recognition was accorded to the work of children's courts by Goldstone J of the constitutional court in *Minister for Welfare and Population Development v Fitzpatrick*.[6] Rather than viewing them only narrowly as performing limited functions within strict statutory parameters he described them more generally as 'charged with overseeing the well-being of children'.[7] For much of their history, however, children's courts have been restricted by statute to the provision of only a few alternative care remedies. This is certainly true under the Child Care Act 74/1983 (hereafter 'the 1983 Act') which currently governs the services of children's courts. It is only recently with the promulgation of extensive new legislation in the form of the Children's Act 38/2005 (partially implemented

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all constitutional matters'. Next in seniority is the supreme court of appeal. It is laid down in s 168(3) that this 'is the highest court of appeal except in constitutional matters'. As is clear from s 166 read with s 169 the high courts (prior to 1996 entitled 'supreme courts') are next in seniority. Section 166(d)-(e) of the Constitution indicates that the least senior courts are magistrates' courts or other courts of similar status. As is further explained in parts 2.3.3 and 6.2.4 below children's courts have since their inception fallen into the latter category. On the status of children's court see also N12, below. On a point of clarity it should be noted that in the South African system the terminology 'juvenile court' refers to a magisterial criminal court in which young offenders are prosecuted. Modern South African children's courts do not try children who are alleged to have committed crimes. On the development of different functions for juvenile courts and children's courts see generally the next chapter.

[4] In the thesis a reference to one gender should be taken as including the other except where the context indicates otherwise. Although equivalent statistics are not available for South Africa it has been estimated that in the USA approximately 2000 children die from maltreatment each year: BL Bonner, SM Crow & MB Logue 'Fatal Child Neglect' in H Dubowitz (ed) *Neglected Children: Research, Practice and Policy* (1999) 156 at 159.

[5] On the last resort principle see further B Van Heerden 'Judicial Interference with the Parental Power: The Protection of Children' in B Van Heerden, A Cockrell & R Keightly et al (eds) *Boberg's Law of Persons and the Family* (1999) 497 at 612 N386.

[6] 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC).

[7] Ibid at para 31.

at the time of writing[8] and hereafter 'the 2005 Act') that the legislature has favoured broadly empowered children's courts which will be able to order a wide range of care services. This is the most important development since the official establishment of children's courts in 1937 and relevant aspects of the 2005 Act are considered throughout the thesis.

In part 1.2 of this chapter a motivation for the thesis is provided. In part 1.3 the methodology is explained. In part 1.4 the scope of the thesis is explicated in more detail and a brief overview of subsequent chapters is included.

1.2 Motivation for the Thesis

Three related reasons may be advanced as indicative of a need for this thesis. These are, firstly, insufficient attention to the work of the children's courts by researchers and commentators; secondly, a lack of development in our law; and thirdly, the extreme vulnerability of affected families in the absence of such development. These arguments are developed in turn.

The South African children's courts, despite the fact that they have been officially in existence since 1937 (and unofficially for more than a decade previously), have remained largely unstudied. This is particularly true for the period prior to the 1990s[9] because subsequently researchers have begun to investigate some aspects of children's

[8] In terms of Proclamation 13/2007 published in Government Gazette No.30030 of 29 June, 2007 the following parts of the Act came into force on 1 July, 2007: ss 1-11, 13-21, 27, 30, 31, 35-40, 130-34, 305 (1)(b) & (c), 305(3)-(7), 307-311, 313-315; and items 2, 3,5, 7 & 9 of Schedule 4. Some of these provisions - notably ss 1, 10, 14 & 18-21- have immediate implications for the functioning of children's courts: see the discussion in parts 4.2.5, 4.3.1, 4.3.2.2 & 8.2.2, below. Before other parts of the Act providing new functions for children's courts can be implemented it will be necessary to repeal the 1983 Act, publish regulations, train children's court staff and budget for court-ordered services. It is thus likely to be some time before the new legislation governing children's courts is fully implemented.

[9] L Chisholm *Reformatories and Industrial Schools in South Africa: A Study in Class, Colour and Gender, 1882-1939* (Unpublished PhD Thesis: University of the Witwatersrand, 1989) referred to some aspects of their functioning prior to 1939 although she focused mainly on institutional care. TH Van Reenen *Handbook on the Children's Act* (1953) provides some information for the mid 20th century.

court work and analyse parts of underpinning legislation.[10] Although a start has been made there has been no analysis of consequences of the historical evolution of relevant legislation and no substantial study of the work of the children's courts. It is thus not surprising that, aside from views recorded and proposals put forward by the South African law commission during its inquiry into child care legislation in 1997-2002,[11] there has been little debate about how the role and functions of these courts needs to change in a new, democratic South Africa. A low status accorded to the children's courts and the fact that it is difficult to obtain information about them because their hearings are held *in camera* and their decisions have never been published in law reports may have rendered them unattractive to potential investigators. This perhaps accounts for the absence of major studies.[12] By comparison with other courts children's courts have been neglected by researchers and legal commentators despite the fact that they are performing crucial functions in a society confronted, for example, with the consequences of an AIDS pandemic.[13]

A second reason which may be cited as a motivation for the thesis is that as suggested above our law concerning the state's responsibilities towards children who require alternative care measures is generally poorly developed.[14] This is in spite of the fact that South Africa is fortunate in having a part of its Constitution[15] -s 28- which lists fundamental rights for children. Of particular importance to the concerns of this thesis is s28(1)(b)-(d). These provisions indicate that every child in South Africa has the right:

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[10] The modern South African studies are referred to in subsequent chapters, below. However, at the time of writing no commentaries on relevant aspects of the 2005 Act had yet appeared. It is for this reason that the analysis of the Act in this thesis is that of the candidate without supporting secondary sources.

[11] South African Law Commission: *Review of the Child Care Act: First Issue Paper* (Issue Paper 13, 1998) 70-78; *Collation of Comments on the Review of the Child Care Act Discussion Paper 103* (2002) 61-68; *Report on the Review of the Child Care Act* (RP 17/2003) part 2 pp290-310.

[12] The department of justice noted in 1996 that very little research had been done on the children's courts and that these had 'an extremely low status in relation to other structures of the judiciary': Department of Justice *National Plan of Action for the Children of South Africa and the Role of the Department* (File Reference: 8/6/*Kind*/1 of 19th April, 1996) 14.

[13] J Sloth-Nielsen & B Van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' (1996) 12 *SAJHR* 247 at 252 referred to children's courts as 'the most "hidden" from scrutiny of all our courts'.

[14] The reasons for this are explored in the next chapter.

[15] The Constitution of the Republic of South Africa op cit note 3 above (hereafter 'the Constitution').

'(b) to family care or parental care, or to 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;'

Also of significance is the powerful enunciation in s 28(2) of the Constitution that '[a] child's best interests are of paramount importance in every matter concerning the child'. Section 28 clearly has the potential to provide a foundation for the development of more detailed law pertaining to alternative care cases but our courts are still in the early stages of interpreting it.[16]

Although the constitutional court has begun to address the nature and extent of the state's obligations towards children in need there are many aspects which remain unsettled. And, of course, the extent to which courts can direct the executive in regard to socio-economic rights for children is a thorny issue. In *Government of the Republic of South Africa and Others v Grootboom and Others* (hereafter '*Grootboom*') the constitutional court considered the nature of children's right to alternative care in terms of s 28(1)(b) of the Constitution in conjunction with their right to shelter under s 28(1)(c).[17] In an interpretation which Friedman and Pantazis have described as 'impoverished' it held that even where children were shown to be in need of shelter the state could only be compelled to address this outside its ordinary scheduling of social services if they had been removed from their parents into the child protection system.[18] Although the court was primarily seized with the state's obligation to provide accommodation for a group of homeless persons of all ages *Grootboom* appeared generally to limit its responsibility to provide care measures of a kind that might enable children to remain with their families.[19]

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[16] See generally A Friedman & A Pantazis 'Children's Rights' in S Woolman (ed) *Constitutional Law of South Africa* (2004) 47-1; and J Sloth-Nielsen 'Children' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2005) 507.

[17] 2000 BCLR 1169 (CC); 2001 (1) SA 46 (CC).

[18] At paras 76-77. See Friedman & Pantazis (2004) op cit note 16 at 47-6. For a detailed discussion of the judgment from a children's rights perspective see ibid at 47-6 to 47-13.

[19] As noted by J Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *SAJHR* 210 at 225 this was because the court did not expressly restrict its limitations upon the claims of children still in the care of their parents only to shelter. See also Friedman & Pantazis (2004) op cit note 16 at 47-12.

Subsequently, in *Minister of Health and Others v Treatment Action Campaign and Others* (hereafter '*TAC*') the constitutional court considered whether the state could be compelled to supply a drug free of charge to impoverished mothers.[20] The drug was one which reduced the chances of mother to child transmission of HIV/AIDS. In an approach which could be interpreted as somewhat different to that taken in *Grootboom* the court ordered that the drug be supplied. In *Bannatyne v Bannatyne*,[21] in the context of a dispute concerning the maintenance obligations of parents, Mokgoro J held that under s 28 of the Constitution:

> 'children have a right to proper parental care …While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the state to create the necessary environment for parents to do so'.[22]

It could not be said that the *TAC* and *Bannatyne* cases dealt specifically with the alternative care needs of children in dysfunctional families. However, the judgments generated by them arguably showed a somewhat wider recognition than in *Grootboom* of the need for proactive measures that can benefit children whilst they are still under parental care.[23]

In a situation where the constitutional court had so far been able to provide only limited and somewhat confusing guidance about the state's responsibilities the legislature, in the 2005 Act, decided to provide the children's courts with broad new powers to order social services at state expense for children who needed these in order to remain with their families.[24] It is important to note, however, that the Act provides merely an initial framework for a new model of court-directed alternative care. It currently requires but lacks regulations to guide its implementation and has very little to say about procedures. The Act is incomplete in another sense. Parts of the draft Bill on which it was based were

[20] 2002 (5) SA 721 (CC).
[21] 2003 (2) BCLR 111 (CC).
[22] Ibid at para 24.
[23] See Sloth-Nielsen (2005) op cit note 16 at 520-21.
[24] For a detailed discussion of this aspect of the legislation see part 8.3.2, below. See also parts 7.2.2.2 & 7.4.2, below.

left out for possible introduction in parliament at a later stage.[25] These included clauses providing for additional measures supporting abused and neglected children.[26]

With the currently-applicable 1983 Act being silent, deficient or different in relation to many aspects of care cases[27] it will need to be entirely repealed when the 2005 Act is fully implemented. Since the children's courts have never had their decisions reported and with relatively few litigants in care cases able to afford the cost of higher court appeals or reviews in recent years[28] we do not have a substantial body of recently reported cases to assist with interpretation of the new legislation. It may therefore be suggested that a thesis such as the present one is timely because there is a need for a structured, critical evaluation to indicate appropriate interpretation, amendments and supplementation (by means of rules of court and regulations) of the 2005 Act.

As a final part of the motivation for this thesis attention may be drawn to the typical characteristics of children and families involved in cases where welfare personnel seek mandatory alternative care measures. It has been internationally recognised that in these cases family members tend to be affected by severe problems such as poverty, domestic violence, alcoholism, drug abuse, psychological disabilities and serious illnesses.[29] A great challenge in South Africa is how to address these and other social

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[25] These have been published as the Children's Amendment Bill 19/2006. For an explanatory memorandum see Government Gazette No. 29030 of 14 July 2006.

[26] As noted by Sloth-Nielsen (2005) op cit note 16 at 523 the two-stage process was because parts of the Bill were regarded by parliament as requiring input from government representatives at provincial level. Aspects of the 2006 Bill are referred to in parts 8.3.2 & 8.3.3, below.

[27] Gaps, deficiencies and differences in the 1983 Act will be noted in the more detailed discussion which follows in subsequent chapters, below.

[28] See part 2.3, below.

[29] While statistics are not available for South Africa this has been recognised in other systems. RS Sackett J 'Terminating Parental Rights of the Handicapped' (1991) 25 *Family LQ* 253 at 290 mentioned that '[c]ases involving the termination of parental rights because of inability to parent almost always involve poor parents. There are many parents who suffer mental illness, drug addiction, or alcoholism, whose parental rights are never subject to court scrutiny because they have the financial resources or family support to supplement their parental responsibilities'. See also H O'Donnell 'What's Wrong with the Picture: the Other Side of Representing Parents in Child Protection Cases' (2005) 4 *Appalachian Journal of Law* 73 at 74 & 76. J Waldfogel 'Protecting Children in the 21st Century' (2000) 34 *Family LQ* 311 at 327 stated that evidence from a number of countries indicates a close relationship between low incomes and child neglect. She also noted (ibid, at 325) that data collected in the USA indicated that drug addiction by parents is a factor in at least 70% of child abuse and neglect cases which come before courts. See also SH Ramsey 'Child Protection: New Perspectives for the 21st Century' (2000) 34 *Family LQ* 301; and RF Kelly 'Family Preservation and

problems in ways that will benefit children. And a consequential question is whether there are new and creative ways in which courts can support families and encourage community-based approaches to child care. Can courts become supportive facilities that offer remedies that will strengthen natural support systems? It may be argued that there is a need at the present time for research to help establish how children's courts can be more creatively used. Amongst other benefits this would bring relief to an overburdened protection system and the free up social workers to deal with the most serious cases.

From a Canadian perspective Grover has rightly argued that in view of the vulnerability of those involved in care cases it is essential that well-developed systems of law governing mandatory state interventions be evolved. These must effectively protect the rights of highly vulnerable family members. They must do so by clearly indicating the responses required of the state in specific situations and by compelling appropriate positive action.[30] In this thesis it is hoped to contribute to the evolution of such a system of care law in South Africa. This will be done by undertaking comparisons with other jurisdictions and applying the evaluative criteria which will be described in the next part below to aspects of our law governing the work of children's courts in care cases.

1.3 Methodology

The methodology applied in this thesis has been formulated in accordance with the two primary purposes of critically evaluating aspects of South African law and practice regarding children's court services for children in need of alternative care and recommending reforms. In relation to sources, pre-existing local, international and foreign-national materials have mainly been utilised. The only data generated specifically for the

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Reunification Programmes in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy' (2000) 34 *Family LQ* 359 at 389. Professor MCJ Olmesdahl, having represented caregivers in South African children's courts for more than twenty years, expressed the view that these problems similarly affect many adult parties in this country (personal communication, 28 Oct 2002).

[30] See S Grover 'Nowhere to Turn: the Supreme Court of Canada's Denial of a Constitutionally-Based Governmental Fiduciary Duty to Children in Foster Care' (2004) 12 *International Journal of Children's Rights* 105 at 106-07 & 111-14.

thesis came from some interviews with practitioners. It was found necessary to include interview data to fill gaps in information resulting from the current situation of few reported cases and limited available published research concerning the work of children's courts as referred to above.[31]

Comparative research has been undertaken. Materials drawn from selected foreign systems have been used (keeping in mind local differences) to explore the possibilities for solutions that might improve our system. Categories into which foreign national systems were divided for the purposes of the thesis, and the methodological implications of these categories for comparative analysis, are explained in part 1.3.1, below.

An important aspect of the methodology is the application of evaluative criteria. As further discussed in part 1.3.2, foreign national materials, the South African Constitution and also selected international sources were used to develop primary evaluative standards (hereafter 'criteria') against which to test our law. South African law and practices in the children's courts have been analysed in the light of these criteria. They are utilised both for criticism of existing approaches and to discern how the law pertaining to children's court services in care cases ought to be improved.

1.3.1 Utilisation of Foreign-National Materials

Although local differences have been kept in mind foreign solutions to problems which need to be overcome in developing our law governing children's court services in care cases have been considered throughout this thesis. Since the potential pool of foreign-national materials is vast and rapidly expanding, materials have been selectively drawn upon for the limited purpose of illuminating and solving specific problems in the South

[31] Since children's court proceedings are conducted *in camera* and never reported practitioner-interviews were essential for obtaining detailed information about practices and procedures. The interviews were conducted in accordance with the 'conventional' validity criteria noted by EG Guba & YS Lincoln 'Competing Paradigms of Qualitative Research' in NK Denzin & YS Lincoln (eds) *The Landscape of Qualitative Research: Theories and Issues* (1998) 195 at 213 para 3. They were semi-structured and included open-ended questions for eliciting both factual and qualitative information. Direct quotations have only been reproduced where they were transcribed verbatim.

African system. As a means of assisting with selection foreign-national sources have been broadly categorized as explained below. It has been assumed that in assessing the value of foreign solutions from a comparative perspective it is important to appreciate the historical contexts within which they have evolved. As the worldwide search for ways to more effectively implement international instruments such as the CRC continues it has become clear that in many jurisdictions child care law is still inadequately developed.[32] Even foreign legislation which appears modern since it is relatively recent may be flawed because it is based upon a limited experience of children's rights within the country concerned.[33]

In some systems there has been a lack of development because children are still almost exclusively seen as subject to the authority of their families rather than that of the state. Mandatory interventions are thus uncommon.[34] In other countries large and regimented alternative care institutions which remain isolated from surrounding

[32] JK Peters 'How Are Children Heard in Child Protective Proceedings in the United States and around the World in 2005: Survey Findings, Initial Observations and Areas for Further Study' (2006) 6 *Nevada LJ* 966 at 968 found that most signatories to the CRC have only recently begun to consider how to enable children's voices to be heard in protection proceedings. And almost three quarters of children are living in countries where compliance with art 12 is poor. G Van Bueren & R Wanduragala 'Annual Review of International Family Law' in A Bainham (ed) *The International Survey of Family Law: 2001 Edition* (2001) 1 at 3 noted poor development of child care law in many systems and concluded '[t]he existence of street children in many parts of the world points to a situation where State responsibility is either minimal or nonexistent'. For the slow pace of reform in Malta see R Farrugia 'It's All Happening in Family Law in Malta' in Bainham (ibid) 285 especially at 288 & 290. On inadequate development of Chinese law see H Lihua 'Chinese Adoption: Practices and Challenges' LXXX (2001) *Child Welfare* 529 at 534-35. For the problem of underdevelopment in Bulgaria see generally V Todorova 'The Bulgarian Child Protection Act: the Start of the Child Welfare Reform?' in A Bainham (ed) *The International Survey of Family Law 2002 Edition* (2002) 91. For similar concerns about South Korea see S-H Baek 'Crisis of Family Dismantlement in Korea' (Paper: 11th World Conference of the International Society of Family Law, 2002. Accessed at <http://www.jus.uio.no/ifp/isfl>).

[33] Awal cited s 20 of the Malaysian Children Act 2001. Poor wording in this provision allowed for a child to be subjected by a welfare officer to medical or psychological treatment or assessment without either the child's or a court's prior consent: see NAM Awal 'Rights of Children: The Malaysian Experiences' (Paper: 11th World Conference of the International Society of Family Law, 2002: accessed at <http://www.jus.uio.no/ifp/isfl>) 9. In some legal systems child care law has only recently begun to achieve recognition as worthy of separate treatment in a specific organisational category.

[34] See S Minamikata & T Tamaki 'Family Law in Japan during 2000' in Bainham (2002) op cit note 32, 221 at 227-28. K McK Norrie 'The Rights of Children' (2004) *The Juridical Review* 55 at 61 noted that in most countries in Europe 'a parent's right to bring up his or her child as he or she thinks fit is given almost unfettered reign'. He is critical, ibid, of the European court's support of this by a focus more on parents' than children's rights in some judgments.

communities have been too heavily relied upon.[35] These have been a legacy of Western colonialism in some parts of Africa.[36] In the postcolonial period a lack of resources has retarded the development of alternatives to congregate institutional placements in many African countries.[37] This combined with significant demographic changes has made it difficult to re-establish original indigenous approaches which emphasised child placements within extended families rather than in institutions.[38]

For providing authoritative decisions on mandatory alternative care measures some systems have relied mainly or exclusively upon administrative tribunals which do not have the status of courts. Even decisions to forcibly remove children from their families have thus been treated as merely administrative rather than juridical in nature.[39] In other systems which do use courts for key decision-making specially trained staff with expertise in alternative care measures are not employed.[40] It must be concluded, therefore, that

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[35] See H Agathonos-Georgopoulou 'Greece' in MJ Colton & W Hellinckx (eds) *Child Care in the EC* (1993) 96 at 101-02 & 107; and M Calheiros, M Fornelos & JS Dinis 'Portugal' ibid 177 at 182.

[36] See, for example, MN Wabwile 'Child Support Rights in Kenya and in the UN Convention on the Rights of the Child 1989' in Bainham (2001) op cit note 32 at 267 N1. The problem was also noted by P Kakama 'Parental Responsibilities and Children's Rights in Uganda' (Paper presented at the Conference: 'The Trend from Parental Rights to Parental Responsibilities and Children's Rights' (Cape Town, 13 April 2000). The historical significance of this approach in South Africa is discussed in the next chapter.

[37] The widespread problem of insufficient resources has adversely affected the development and implementation of child care law in a variety of ways. See, for example, F Nyalali 'The Child and the Court' (1997) February-May Issue *The Tanzania Lawyer* 26 at 27; and B Maripe 'The Recognition and Enforcement of Children's Rights in Domestic Law: An Assessment of the Child Protection Laws in Botswana in Light of Prevailing International Trends' (2001) 9 *International Journal of Children's Rights* 339 at 343-44.

[38] See B Rwezaura 'The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 82 at 83; B Rwezaura 'Competing "Images" of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa' (1998) 12 *International Journal of Law, Policy and the Family* 253 at 261-62; B Rwezaura ' "This Is Not My Child": The Task of Integrating Orphans into the Mainstream of Society in Tanzania' in Bainham (2001) op cit note 32, 411 at 434; and R Sayson & AF Meya 'Strengthening the Roles of Existing Structures by Breaking down Barriers and Building up Bridges: Intensifying HIV/ AIDS Awareness, Outreach, and Intervention in Uganda' LXXX (2001) *Child Welfare* 541 at 547. Despite the problems, in some African systems there have been innovative attempts to give modern legislative form to indigenous approaches: see J Sloth-Nielsen & B Van Heerden 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1997) 3 *Stellenbosch LR* 261 at 266-76.

[39] See J Melbye 'Denmark' in Colton & Hellinckx (1993) op cit note 35, 34 at 41-42. In relation to Bulgaria see Todorova (2002) op cit note 32 at 103. See also the discussion of 2001 amendments to the Slovenian Marriage and Family Relations Act of 1976 by M Gec-Korosec & S Kraljic 'Judicial and Administrative Interventions in Legal Relations Between Parents and Children (In Parental Rights) With Intention to Protect Child's Best Interests' (Paper: 11th World Conference of the International Society of Family Law: Copenhagen and Oslo, 2-7 Aug 2002. Accessed at <http://www.jus.uio.no/ifp/isfl>).

[40] For the example of Spanish rural courts hearing appeals from administrative panels see F Casas 'Spain' in Colton & Hellinckx (1993) op cit note 35, 195 at 199.

limitations which have affected many systems require a cautious approach when considering the value of remedies developed within them from a comparative perspective.

By contrast with what have been referred to above as undeveloped foreign national systems it is postulated for the purposes of this thesis that there is a second category of relatively better-developed systems. A distinguishing characteristic of these is extensive experience in courts over at least the last decade with the implementation of child care legislation which allows for a range of measures including support for a child in her family. Some salient developmental influences and characteristics which need to be kept in mind when drawing upon these systems for solutions that might be effective in improving South African law are briefly described below.

In relation to evolutionary influences an important development that was to impact significantly upon the law in many jurisdictions was the formulation in the USA in the early 1960s of the concept of the 'battered child syndrome' by Kempe, Silverman, Steele, Droegmueller, and Silver.[41] Parton argues that, whereas child abuse was '(re)discovered' in the 1960s as a result of their work and characterized 'as essentially a medico-social problem, where the expertise of doctors was seen as focal', it had by the late 20th century been reconstituted as a socio-legal problem requiring pre-eminently legal expertise.[42] This was encouraged by a discrediting of the social work and medical professions as the media continued to publicise failures to remove children who were subsequently murdered by caregivers[43] and a belief that child protection systems could be legally ordered.[44] It led initially to attempts to develop child-abuse prevention laws emphasising criminal

[41] See generally CH Kempe, FN Silverman, BF Steele, W Droegmueller & HK Silver 'The Battered Child Syndrome' (1962) 181 *Journal of the American Medical Association* 107. This led to what Gelles has termed 'the rediscovery of child abuse in the 1960s' (particularly in English-speaking countries) and 'focused attention on life-threatening acts of physical violence directed at young children': see RJ Gelles 'Policy Issues in Child Neglect' in Dubowitz (1999) op cit note 4, 278 at 286.

[42] N Parton 'Protecting Children: a Socio-Historical Analysis' in K Wilson & A James (eds) *The Child Protection Handbook* (2002) 11. See also ibid at 15-16 for a detailed discussion of how the 'battered baby syndrome' has been reconceptualised and extended since the 1960s.

[43] See ED Hutchison & LW Charlesworth 'Securing the Welfare of Children: Policies Past, Present and Future' (2000) 81 *Families in Society: The Journal of Contemporary Human Services* 576 at 581. On the discrediting of other professions see also the so-called Cleveland affair as referred to in note 48, below.

[44] M King *A Better World for Children? Explorations in Morality and Authority* (1997) 72 concluded that legal systems began to dominate because they were able to characterise child welfare systems as 'in need of, and amenable to, legal ordering'.

proceedings and subsequently to attempts to refine non-criminal law covering alternative care for children.[45] The general shift to legal decision-making led to an expanded role for courts as the most important forums for selecting outcomes in care cases.

When considering aspects of the work of courts in developed systems in subsequent chapters below it is assumed that a basic distinction needs to be drawn between two fundamentally different approaches to care cases which emerged within them in the late 20th century. For convenience, these are referred to as the legalistic and anti-legalistic approaches. In this thesis the legalistic approach denotes developed foreign national systems based on the view that a detailed body of legal rules is ideal for child care law in general and for court care-proceedings in particular. These systems are premised upon the idea that if sufficiently nuanced authoritative guidance can be built up to cover all conceivable situations serious mistakes by practitioners will become a rarity.

Because of their ability to provide a constant stream of new rules on points of detail as experience builds up courts (and especially those of higher status which set precedents) tend to play an essential role in legalistic-approach systems. Since their function is intended to be neutral and focused on the development and correct application of legal rules adjudicators tend to interact with families in a somewhat formal, authoritative manner. An authoritative function for judicial officers is also sometimes seen as necessary to control the actions of welfare. It may therefore be justified as helping to shield vulnerable families against welfare intrusiveness.[46] Examples of legalistic jurisdictions are found within Canada,[47] the United Kingdom[48] and the USA.

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[45] For example, by 1967 all US states had enacted child-abuse reporting laws but improvements in child care law in the USA came only later: see JM Wilton 'Compelled Hospitalization and Treatment During Pregnancy: Mental Health Statutes as Models for Legislation to Protect Children from Prenatal Drug and Alcohol Exposure' (1991-92) 25 *Family LQ* 149 at 161.

[46] For example, in England in *Re G* [1993] 2 FLR 839 at 845 Waite LJ stressed the importance of courts protecting children and families by having 'the ability to maintain strict control of any steps taken or proposed to be taken' by welfare representatives in a care case. For a similar approach in the US see note 49, below.

[47] See N Freymond 'Using Intermediary Structures to Support Families: An International Comparison of Practice in Child Protection' 1 (Canadian Partnerships for Children and Families Project, 2001 -accessed at <http://www.wlu.ca./pcfproject>). On the motivation for the use of detailed rules in Canada see RB Howe 'Implementing Children's Rights in a Federal State: The Case of Canada's Child Protection System' (2002) 9 *International Journal of Children's Rights* 361 at 371.

In the USA, guidance provided by the US supreme court has caused care law to develop from the axiom that the family (and, by implication therefore, the parents) have a strong right to freedom from interference by the state except in the most compelling circumstances.[49] Provision of alternative care for children has thus been approached from the perspective of overcoming legally-powerful nurturing rights of parents -and the terminology 'termination of parental rights' is thus often applied to alternative care cases.[50] The onus placed upon state welfare representatives has encouraged a legalistic approach by requiring strict and correct applications of increasingly-detailed substantive and procedural law in many US state systems.[51] From a comparative perspective the US emphasis on protecting families from undue interference makes its care law a useful point of reference when considering reforms in South Africa although it must be kept in mind that US courts tend not to accord the same weight to the best interests of the child[52] and the US has not bound itself to apply the CRC.

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[48] In England, Wales, Scotland and Northern Ireland reliance on detailed legislation to guard against serious errors in care cases was encouraged by the so-called Cleveland affair in 1987. In the space of a few weeks, two paediatricians and some social workers assisting them at a hospital in Middlesbrough in England caused more than 100 children to be removed on grounds of sexual abuse. Most of these cases were later found to be unsubstantiated and some previously accepted diagnosis techniques such as anal dilation tests and the use of anatomically correct dolls were discredited as a result: see Parton (2002) op cit note 42 at 17.

[49] A seminal authority was *Meyer v Nebraska* 262 U.S. 390 (1923). Subsequently, as noted by TB Harding 'Involuntary Termination of Parental Rights: Reform Is Needed' (2000-2001) 39 *Brandeis LJ* 895 at 903, the supreme court 'has continued to reach decisions on the premise of the constitutional right to raise children free from government intervention'. See also J Wriggins 'Parental Rights Termination Jurisprudence: Questioning the Framework' (2000) 52 *South Carolina LR* 241 at 248-49. US judges have sometimes been concerned to guard against a perceived danger of overzealous welfare officials misusing their powers to overwhelm the rights of parents to keep their children: see, for example, *In the Interests of La Rue* 366 A.2d 1271 (Pennsylvania 1976) at 1275.

[50] See, for example, the US supreme court decisions in *Stanley v Illinois* 405 U.S. 645 (1972) and *Santosky v Kramer* 455 U.S. 745 (1982).

[51] As noted by Harding (2000-2001) op cit note 49 above at 897 '[a] State may only terminate parents' rights involuntarily in an adversarial proceeding while still complying with strict constitutional and statutory safeguards'.

[52] It has been held by US courts that to terminate parental rights on the ground of the child's interests alone is unconstitutional. It is instead essential to determine whether the parents are unfit: see the New Mexico cases of: *In re J.J.B.*, 868 P.2d 1256 (N.M. Ct. App. 1993); and *In re Termination of Parental Rights of Eventyr J.*, 902 P.2d 1066 (N.M. Ct. App. 1995). BB Woodhouse ' "Who Owns the Child?" *Meyer* and *Pierce* and the Child as Property' (1992) 33 *William & Mary LR* 995 especially at 997 criticised this approach as insufficiently child-centred.

Despite the arguments in its favour the legalistic approach is by no means universally regarded as the ideal for care cases. Its central premise has been challenged by anti-legalistic practitioners and commentators. In their view a constant attention of courts to establishing fine points of practice and procedure steadily erodes the scope of action for social workers and also ultimately restricts courts themselves.[53] It has more generally been argued that legalism causes professionals to focus disproportionately on technical requirements -such as whether there is sufficient proof- rather than on working constructively with children and their families.[54] Legalism has therefore sometimes been characterised as antithetical to appropriate care services.[55] In some systems where this view is accepted an effort has been made to reduce both the accretion of detailed rules and formality in court proceedings.[56]

In New South Wales, France and Germany, in an attempt to avoid stigmatising caregivers, no legislatively prescribed threshold criteria for state intervention need be proved in court.[57] In what is sometimes described as a family service model, in some developed European systems presiding officers avoid a rule-based technical approach. They interact supportively and informally with children and their families.[58] In Germany, for example, family members are encouraged to speak out on almost equal terms with

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[53] See the views of Australian social workers cited in R Sheehan *Magistrates' Decision-Making in Child Protection Cases* (2001) 62. Canadian commentator Freymond generally characterises Anglo-American systems as inappropriately adversarial ones in which legislatures 'have narrowed definitions and tightened procedures' to the extent that legal responses to child maltreatment have become far too restricted: see Freymond (2001) op cit note 47 at 25. See also G Cameron & N Freymond 'Canadian Child Welfare: System Design Dimensions and Possibilities for Innovation' (2003) 9: accessed at <http: www//.wlu.ca/documents/7180/Canadian_child_welfare_systems_design.pdf>.
Some English concerns about problems created by an overly technical and legalistic approach in care cases are noted by Parton (2002) op cit note 42 at 22.

[54] Cameron & Freymond (2003) ibid at 33. See also King (1997) op cit note 44 at 78.

[55] G Cameron, N Freymond & D Cornfield *et al* 'Positive Possibilities for Child and Family Welfare: Options for Expanding the Anglo-American Child Protection Paradigm' (2001) 86: accessed at <http:www//.wlu.ca/documents/7171/positive.pdf>.

[56] P Parkinson 'The Child Participation Principle in Child Protection Law in New South Wales' (2001) 9 *International Journal of Children's Rights* 259 at 263 described the philosophy behind the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, Australia as one which allows for proceedings to be based on requests for assistance by children or caregivers 'without any need for labelling or categorising the situation in terms of abuse or neglect'. On France and Germany see Freymond (2001) op cit note 47 at 13.

[57] Sheehan (2001) op cit note 53 at 214-15. See also part 8.2.1, below.

[58] Cameron, Freymond & Cornfield *et al* (2001) op cit note 55 at 79 & 83; Howe (2002) op cit note 47 at 371.

judges[59] and even children are encouraged to speak directly to them if they are able to cope well with this.[60] In these systems judges focus particularly on whether support services could be used to enable a child to remain with her family.[61]

In anti-legalistic systems judges exercise a wide degree of discretion and every effort is made to reach agreement with families about care arrangements. Courts tend to impose orders that are against their wishes only as an absolute last resort.[62] The relationship between courts, families and welfare thus differs in some respects from what tends to apply in legalistic systems. It requires courts to act as partners (albeit ones with authority) and to negotiate with families and social workers.[63] Waldfogel noted that this entails a 'more active' role for courts which involves case management, case monitoring and more use of discretion.[64] In her view a limitation of many modern reform proposals in legalistic systems 'is that they have tended to be silent about the role of the courts, and how that role would need to change' to achieve more active engagement.[65]

In this thesis it is not suggested that either a legalistic or anti-legalistic approach should be exclusively chosen as the model upon which to base all reforms. Instead, the respective strengths of both have been kept in mind when considering how best to improve South African law. Following this flexible approach legalistic solutions have been proposed where detailed rules appear to be the best means of solving problems. Elsewhere, however, it has been contended that other difficulties or shortcomings can best be dealt with by indicating realms of discretion for involved professionals such as

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[59] Howe ibid. Kuhlman noted that German court staff tend not to stand on status and frequently sit down together with parties round a common table (Ute Kuhlman -visiting researcher at the People's Family Law Centre, Cape Town: personal communication, 4 April 2003).

[60] H-C Prestien J 'The German Child Law Reform of 1998 As Seen by a Practitioner: Does It Go Far Enough in Making the Child's Voice Heard?' (Autumn 2003) VI *The Judges'Newsletter/La letter des juges* 44 at 45-47. Referring to the role of adjudicating officers N Lowe 'The 1996 Hague Convention on Protection of Children -a Fresh Appraisal' (2002) 14 *Child and Family LQ* 191 at 202 stated 'Germany, for example, sets great store by making extensive provision for listening to children and would certainly do so in cases where England might not'.

[61] Sheehan (2001) op cit note 53 at 15-16 mentions the examples of France, Germany and the Netherlands. See further part 8.3, below.

[62] Freymond (2001) op cit note 47 at 13.

[63] Waldfogel (2000) op cit note 29 at 322; Cameron, Freymond & Cornfield *et al* (2001) op cit note 55 at 81.

[64] Waldfogel ibid 322-23.

[65] Ibid 311.

children's court adjudicators. Both legalistic and anti-legalistic proposals have been put forward in different parts of the thesis according to which appears the better for resolving specific problems.[66] The two approaches have thus been drawn on as alternatives and used as secondary analytical tools to assist with the application of the primary evaluative criteria referred to in part 1.3.2., below. A final point is that because of our historical roots as explained in the next chapter particular attention has been paid in this thesis to successful attempts by Anglo-influenced jurisdictions to modernise their care legislation and improve the services of courts.

1.3.2 Utilisation of Primary Evaluative Criteria

In relation to the methodology used for analysis this thesis applies selected criteria as primary evaluative tools. They are used implicitly and sometimes explicitly to test the efficacy of our present law and discern what reforms are required. They are drawn primarily from authoritative formulations of fundamental rights for children.[67] The formulations are ones designed to create entitlements which are widely regarded internationally as vitally important. They are to be found in our Constitution, the 1989 UN Convention on the Rights of the Child (hereafter 'CRC'), the 1990 African Charter on the Rights and Welfare of the Child (hereafter 'ACC') and the 2007 Draft UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children (hereafter 'UN Guidelines, 2007'). [68] The criteria are described immediately below.

A foundational criterion against which our care law must be evaluated is the extent to which it protects children against unnecessary or premature removals from their families

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[66] This is consistent with an application of the primary criteria described below. As noted by A Griffiths & RF Kandel 'Hearing Children in Children's Hearings' (2000) 12 *Child and Family LQ* 283 at 295 the CRC contains a combination of both technical, rights-based wording and broader references to interests and is therefore 'a hybrid of two approaches to the law of children'. The same may be said of the ACC; and our Constitution (as is clear from the discussion above) generally frames children's rights in very broad terms.

[67] Regard has been had to the fact that similar rights sometimes appear in varying formulations in different authorities. Examples of this are noted below. In this situation different aspects covered have been treated as providing further scope for measuring our law but, when necessary, the formulation providing the most extensive protection for children in need of care has been favoured.

[68] On the UN Guidelines see note 1, above.

by the state.[69] As directed in art 13 of the UN Guidelines, 2007 removal must 'be seen as a measure of last resort' and be maintained only 'for the shortest possible duration'. In particular, as indicated in art 20 of the UN Guidelines, 2007, institutional placements of children should be limited as much as possible.[70] And as further recommended in art 22 placements in large residential facilities are to be seen as the least desirable of all.[71]

Reducing removals entails effective support for families. As noted above s 28(1)(b) of the Constitution states that every child has the right 'to family care or parental care, or to appropriate alternative care when removed from the family environment'.[72] The sequence of this wording is important.[73] It implies that in subsidiary law such as our care legislation nurturing by a family or parents must wherever possible be accorded priority over other forms of care. In relation to support for familial care arts 14(2) and 18 of the CRC specifically require states parties to respect the nurturing rights and duties of parents and legal guardians and provide them with 'appropriate assistance'.[74] And art 19(2) requires implementation of programs to support caregivers.[75] Article 20(2) of the ACC is to a similar effect although there is more emphasis in its wording on basic material support.[76]

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[69] As noted in part 1.1 above these are inherently damaging to children.

[70] As Van Heerden (1999) op cit note 5 at 612 N386 has noted 'it is universally agreed that institutionalization of children should be a step of last resort'.

[71] This article directs states to develop 'de-institutionalisation' strategies in order to eliminate these.

[72] For a detailed discussion of this provision see E Bonthuys (revising author) 'Children' in I Currie & J De Waal *The Bill of Rights Handbook* (2005) 599 at 605-11. Article 20(1) of the CRC refers to the position of children in alternative care as follows '[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State'.

[73] Sloth-Nielsen (2005) op cit note 16 at 518-19 has postulated that the frontal placement of 'family care' in s 28(1)(b) suggests that the intention of the legislature was to align our law with indigenous African culture by strengthening children's ties with their extended families.

[74] The latter in terms of art 18(2).

[75] It requires (in relevant part) that states-parties establish 'social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow up of instances of child maltreatment, and, as appropriate, for judicial involvement'.

[76] This provision reads: 'States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures:
(a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;
(b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and

In the UN Guidelines, 2007 there is an extremely strong emphasis on measures to support children within their families. In art 3 it is stated that 'efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members'. And art 35 proposes, inter alia, that states must implement 'social protection measures' which include:

> '(a) Family strengthening services such as day care, parenting courses and sessions, the promotion of positive parent-child relationships, conflict resolution skills, opportunities for employment, income generation and, where required, social assistance;
> (b) Supportive social services such as mediation and conciliation services, substance abuse treatment, financial assistance, and services for parents and children with disabilities …'

It is further recommended in art 54 that states must develop care legislation which gives 'priority to family- and community-based solutions'. Clearly then, an important measure of the South African children's courts is the extent to which they are empowered to provide remedies that can, in suitable cases, assist children to remain in or rejoin their families.

In terms of process, art 9(1) of the CRC, whilst not providing detailed directions, provides that:

> 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'

From this provision it is clear that a standard against which our system needs to be tested is whether grounds for state intervention in the lives of families include wording that appropriately balances the need to avoid unnecessary interference with sufficient protection for children.[77] The reference to procedures in art 9(1) is important. Gerwig-

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(c) to ensure that the children of working parents are provided with care services and facilities'.

[77] K McK Norrie 'The Children Acts in Scotland, England and Australia: Lessons for South Africa in Rhetoric and Reality' (2002) 119 *SALJ* 623 at 624 has made the point that application of child law generally 'is and always has been an uneasy balance between conflicting principles and interests'. As he further notes, ibid at 624-25, frequently 'the court's role is to identify a reasonable and rational compromise between factors pulling in different and sometimes opposing directions'. On the tension between family care and child protection see Norrie (2004) op cit note 34 at 61-62.

Moore and Schrope have made the point that the sheer vulnerability of children means that their rights will often receive scant attention even in courts unless detailed procedural rules are in place.[78] As they also point out another reason in favour of detailed procedures is that they make it easier for higher courts to provide effective oversight when receiving appeals or reviews.[79] The UN Guidelines, 2007 at art 76 directs that '[a] regulatory framework should be established to ensure a standard process for the referral or admission of a child to an alternative care setting'. Thus, a test which is applied to children's courts in this thesis is whether sufficiently developed procedures are in place to enable a fair and uniform approach to care decision-making.

In order for our law to uniformly facilitate the most appropriate kinds of care remedies in each case it must promote an appreciation (especially by court adjudicators) of the views of the persons who will be most affected. This requires firstly an openness to hearing the voices of children who will be the subject of care orders. Article 12 of the CRC is of course widely recognised as a significant provision which requires attention to the opinions of children who are capable of forming them in all kinds of proceedings and other situations where their interests are at stake.[80] Article 4(2) of the ACC requires that an 'opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative' in all judicial or administrative proceedings affecting the child.[81]

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[78] S Gerwig-Moore & LS Schrope 'Hush, Little Baby, Don't Say a Word: How Seeking the Best Interests of the Child Fostered a Lack of Accountability in Georgia's Juvenile Courts' (2007) 58 *Mercer LR* 531 at 567.

[79] Ibid.

[80] This provision reads (in relevant part):

'1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative… '. In 2003, the UN Committee on the Rights of the Child stressed the crucial importance of art 12 and made the point that it requires not merely listening, but more importantly creating ways to ensure that due weight is given to the views of children: *General Comment No 5* (34th session: 19 Sept-3 Oct 2003) para12, pp 4-5. Accessed at <http://www.unhchr.ch/tbs/doc.nsf/>.

[81] For a detailed comparative discussion of the wording of art 12 of the CRC and art 4(2) of the ACC in relation to the right of children to participate in family law proceedings in South Africa see D Kassan 'The Voice of the Child in Family Law Proceedings' (2003) 36 *De Jure* 164 at 165-67. A wide recognition of the importance of children's right to be heard is shown by the fact that it is also included in other international instruments; for example: art 13 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, art 13 of the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of

The UN Guidelines, 2007 at art 6 proposes that all decisions on alternative care 'should respect fully the child's right to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities'. The potentially drastic consequences of state-imposed care measures for children -including frequently a deprivation of liberty-[82] also make it particularly important to facilitate communication by them in care cases wherever they have the capacity. For the purposes of this thesis, therefore, an important measure of our children's courts is how well geared they are, not only to passively hearing children, but also to encouraging communication by interacting supportively with them.

Since not only children but parents and other primary caregivers are likely to be significantly affected by mandatory care measures it is crucial that an appreciation of their views also be facilitated by our care legislation. In South Africa language differences and poor standards of education impact negatively upon the ability of many family members to communicate during children's court cases.[83] Article 9(2) of the CRC requires that where child placement proceedings are held 'all interested parties shall be given an opportunity to participate in the proceedings and make their views known'. And specifically hearing the voices of parents or other caregivers is essential because both art 18 of the CRC and art 20(1) of the ACC require states to recognise that they have 'the primary responsibility for the upbringing and development of the child'.[84]

Minors and r 14.2 of the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice [the 'Beijing Rules'].

[82] The freedom of movement and association of children is often curtailed whilst and after they are the subject of care proceedings. As will be further discussed in part 7.2 below under our system a child may be deprived of her liberty even before a matter is heard by a children's court. This raises constitutional issues because s 21(1) of the Constitution states that '[e]veryone has the right to freedom of movement' and this obviously includes children. Sloth-Nielsen (2005) op cit note 16 at 530 has noted that there is growing international support for the view that children who are placed in welfare institutions under circumstances where they are not permitted to leave are deprived of liberty.

[83] C Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* (1997) 49-52; N Zaal 'Hearing the Voices of Children in Court: A Field Study and Evaluation' in S Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 158 at 162.

[84] Article 18(1) mentions '[p]arents or, as the case may be, legal guardians' whereas art 20(1) of the ACC refers more broadly to '[p]arents or other persons responsible for the child'. The preamble to the CRC requires support for families 'as the fundamental group of society'.

It is noteworthy that the European court in interpreting the right to family life in art 8 of the European Convention[85] (hereafter 'ECHR') has required that parents be provided with opportunities to be heard in care cases.[86] In art 67 of the UN Guidelines, 2007 it is stated that '[t]he preparation, enforcement and evaluation of a protective measure for a child should be carried out, to the greatest extent possible, with the participation of his/her parents or legal guardians…'. An analytical measure used in this thesis, therefore, is the extent to which our care legislation has rendered children's courts accessible to hearing and interacting meaningfully with caregivers -and especially those whose parenting is in the best interests of their children but is adversely affected by factors beyond their control.

A system designed to facilitate meaningful participation by nonlawyers obviously requires care legislation with full explanations and language clear enough to be easily understood. As indicated in art 74 of the UN Guidelines, 2007 this is relevant even for older children because '[c]hildren in alternative care should be enabled to understand fully the rules, regulations and objectives of the care setting and their rights and obligations therein'. A measure which is therefore applied in this thesis -and particularly to the new 2005 Act - is the extent to which care has been taken by the drafters of statutory provisions to avoid unnecessary complexity in their structure and wording.

If children's courts are to hear and take sufficient account of the views of those most affected in care cases they must clearly be accessible. Section 34 of the Constitution is entitled '[a]ccess to courts' and provides a right for any person 'to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court…'. Whilst public hearings are not appropriate for care cases it is certainly important that

[85] The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
[86] A Pantazis & T Mosikatsana 'Children's Rights' in M Chaskalson, M Kentridge & J Klaaren *et al* (eds) *Constitutional Law of South Africa* (2005) 33-1 at 33-6. See also Norrie (2004) op cit note 34 at 61.

hearings be fair.[87] Article 37(d) of the CRC is especially relevant because it relates access specifically to children deprived of their liberty. It states:

> 'Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.'

As can be seen appropriate access does not involve merely being able to appear before a court or other forum. It entails a capability to test the state's proposed alternative care measures by subjecting them to real challenge. And this relates to the concept of a fair hearing because it will only be possible to offer a substantial challenge and put forward alternatives to the proposals of welfare where procedural law facilitates effective and uninhibited communication by vulnerable family members. The question of hearing appropriate voices is therefore related to our procedural law as applicable in the children's courts.

In some cases a necessary means for facilitating appropriate communication is legal representation. Section 28(1)(h) of the Constitution states that every child has a right 'to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result'. In this thesis the question of when substantial injustice would tend to result in the absence of representation for children is considered with reference to care cases in the children's courts. Concerning representation for parents it is recommended in art 48 of the UN Guidelines, 2007 that where removal of their child would be against their will parents must be provided with 'access to appropriate legal representation'. Because of the pervasive factor of parental vulnerability in care cases the extent to which our system provides appropriately for caregiver-representation in children's courts is considered in this thesis. Our system is assessed to establish the degree to which it facilitates access to competent legal representation and provides clarity about the functions of lawyers.

[87] In Europe the right to a fair trial in art 6 of the ECHR has been used to challenge court findings in care inquiries on grounds of procedural unfairness: see CM Lyon 'Child Protection and the Civil Law' in Wilson & James (2002) op cit note 42, 191 at 226.

In relation to the criterion of the best interests of children it has been noted above that s 28(2) of the Constitution requires these to be treated as paramount.[88] It thus notionally sets a higher standard than either the CRC or the ACC.[89] The best interests criterion has been expressly linked to alternative care, and also to establishing the wishes of children, in art 19(1) of the ACC. This provides a basic right for children to live with their parents and further states (in relevant part) that '[n]o child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child'. It thus requires a more direct role for a legally trained adjudicator than the equivalent art 9(1) of the CRC as quoted above.[90]

As has been recognised internationally, however, the best interests criterion must be carefully applied on behalf of children with due appreciation of its lack of specificity.[91] Legislation which facilitates uncritical applications of the best interests standard is dangerous because it may produce counterproductive results.[92] The approach taken in this

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[88] In *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17 the constitutional court, per Goldstone J, held that the paramountcy of children's best interests extends beyond their rights as enumerated in s 28(1) of the Constitution. It thus applies wherever their interests arise for consideration in our law. There are, however, limitations: see the discussion of cases in Bonthuys (2005) op cit note 72 at 600 N1.

[89] Article 3(1) of the CRC sets the best interests as 'a primary consideration'. Article 4(1) of the ACC requires it to be treated as 'the primary consideration'.

[90] The latter requires merely judicial review rather than primary decision-making.

[91] Amongst the problems that have been raised is that an inquirer attempting to establish what is in the best interests of a child may be faced with difficult and perplexing questions. See Robert H Mnookin as quoted by DN Duquette 'Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required' (2000) 34 *Family LQ* 441 at 447. Fifteen years later, Hutchison & Charlesworth (2000) op cit note 43 at 578 noted that there was still little consensus about what is in the best interests of children. Lansdown has contended that the best interest standard is so inherently vague that it may even be harmful rather than beneficial for children. He warned in 1994 that 'the operation of a best interests principle should not be seen as inherently beneficial to children. It can be, on the contrary, a powerful tool in the hands of adults, which can be used to justify any of their actions and to overrule the wishes and feelings of children'. See G Lansdown as quoted by C Hallett & C Murray 'Children's Rights and the Scottish Children's Hearings System' (1999) 7 *International Journal of Children's Rights* 31 at 47-48. Norrie (2002) op cit note 77 at 625 warned similarly that 'the test is used too often as a blind to furthering of adults' rather than children's interests'.

[92] In a criticism of proposed English legislation S Harris-Short 'The Adoption and Children Bill -A Fast Track to Failure?' (2001) 13 *Child and Family LQ* 405 at 423 warned that legislative provisions which establish the best interests of children as paramount may be interpreted in ways that result in insufficient attention being given to the responsibilities of parents. Bonthuys (2005) op cit note 72 at 620 cautioned that '[a]n individualistic focus on the rights of the child at the expense of parental interests would be

thesis is that in the context of care cases best interests must not be simplistically applied to support removals of children in a manner which artificially disregards related parental problems such as poverty or inadequate social services which are very relevant in South Africa. Article 3(2) of the CRC appropriately requires a balanced approach because it directs states parties to ensure protection and care for children in a way that takes into account the rights and duties of parents, guardians 'or other individuals legally responsible'.[93] In this thesis best interests is therefore not treated as a self-sufficient criterion –rather, consideration is given to whether there is sufficient clarification on how it is to be established.

An important measure of our children's court services arises from the need in many cases for alternative care remedies as an incremental, monitored process over time rather than as a once-off 'final' court order carved in stone. As recommended in art 55 of the UN Guidelines, 2007 states need to establish systems which are capable of producing separate decisions on emergency, short-term and long-term care. In order to protect children properly it is also important that there be a facility for effectively reviewing these decisions. Article 25 of the CRC directs that:

> 'State Parties recognise the right of a child who has been placed by the competent authorities for the purposes of care, protection, or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.'

And art 16(2) of the ACC states:

> 'Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child abuse and neglect.'

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counterproductive if it has the effect of impeding the ability of parents to provide for the social, economic an emotional needs of their children'. In relation to the particular difficulties posed by care cases see generally B Walter, JA Isenegger & N Bala ' "Best Interests" In Child Protection Proceedings: Implications and Alternatives' (1995) 12 *Canadian Journal of Family Law* 367.

[93] Article 3(2) is supported by art 5 which requires states parties to respect the responsibilities and rights and duties of parents or 'where applicable' members of an extended family or community, legal guardians or other persons legally responsible for a child.

It is clear that in care cases a periodic review of the child's circumstances by an authoritative body may potentially be needed at any time after the child comes to the notice of welfare authorities.[94]

Articles 5 and 69 of the UN guidelines, 2007 recommend specifically that mechanisms be created for thorough reviews of the appropriateness and success of alternative care arrangements. And art 13 proposes that these are essential where children have been removed from their families. On involvement of courts art 48 recommends that there must be a 'judicial review' of '[a]ny decision to remove a child against the will of his/her parents'. As further suggested in art 56 reviews should be broad enough in scope to evaluate the extent to which 'all entities and individuals engaged in the provision of alternative care' have fulfilled their obligations. It is again emphasised in art 108 that, rather than concentrating only on family members, involved agencies and facilities must also be reviewed. Given the importance of reviews and the fact that welfare agencies and facilities cannot conduct these because they themselves need to be reviewed, in this thesis the role of children's courts in providing monitoring is critically evaluated.

An incremental approach to care decision-making requires the flexibility to deal with consequential aspects. For example, if initial alternative care measures have separated a child from her family questions of an appropriate degree of contact may arise. Article 19(2) of the ACC states that '[e]very child separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis'. The UN Guidelines, 2007 at art 52 recommends that '[r]egular and appropriate contact between the child and his/her family specifically for the purpose of reintegration should be developed, supported and monitored'. And art 79 states more broadly that '[w]hen a child is placed in alternative care, contact with his/her family, as well as with other persons close to him or her such as friends, neighbours and previous carers, should be encouraged and facilitated, in keeping with the child's protection and best

[94] The final part of art 19(2) of the CRC could be read as supporting this approach wherever there is abuse or neglect because it refers to children's right to '…follow-up of instances of child maltreatment, and, as appropriate, for judicial involvement'. On the need for managing and monitoring see also the text accompanying note 64, above.

interests'. A test of our system that will be applied in this thesis, therefore, is the extent to which our law has empowered children's courts to be readily available to provide adjustable, ongoing support in relation to important consequential aspects such as contact.

A final measure applied to children's courts in this thesis is whether they are sufficiently effective in protecting children who are subject to alternative care arrangements. At different stages of a case issues concerning the current commitment or capacity of parents, involved welfare professionals or an alternative caregiver (including a state or private institution) may become urgent. In relation to institutions art 131 of the UN Guidelines, 2007 states '[a]gencies and facilities providing alternative care services should be held legally responsible' for ensuring suitable quality of care. And art 132 adds ' [a]gencies, facilities and professionals involved in case supervision should be accountable to a specific public authority'. In this thesis the role of children's courts in helping to ensure accountability is therefore considered.

1.4 The Scope of the Thesis

Child care and protection law is obviously an extremely broad field which traverses many sub-areas within public and private law, criminal and civil law, and statutory and common law. The thesis is not a general study of South African law in this field. As its title suggests the focus is upon selected court services for children whose care arrangements require investigation by representatives of the state. The services chosen for evaluation are those provided by our children's courts where social workers bring applications with a view to establishing that children are in need of mandatory alternative care measures. Relevant law evaluated in this thesis therefore pertains to determining whether children need court-ordered care services and deciding what these should be.[95] In terms of extent, the thesis primarily evaluates the law relevant to some important aspects of

[95] In the current South African terminology this would be the law relevant to children's court 'inquiries' to establish whether a child is in 'need of care': see ss 12-14 of the 1983 Act. The 2005 Act at s 156 refers somewhat differently to a children's court reaching a 'finding' on whether a child is in need of care and protection and then issuing a relevant 'order'. On the significance of the terminological changes see further part 8.2, below.

care proceedings from the time that a case is instigated through to the issuing of a temporary alternative care order at the completion of the case in court.[96]

Although the law providing for temporary care orders is critically evaluated, in order to retain a manageable scope this thesis does not extend to an analysis of subsequent adoption cases that might be instigated and brought before children's courts once a temporary care order has been issued. Permanent alternative care remedies are thus not covered. It should also be noted that the focus is primarily upon the role of children's courts rather than other courts. For reasons of space (and also because they have played a limited role in recent decades) the functions of higher courts in temporary care cases have been considered only briefly and primarily in relation to their impact on children's courts. Cases in criminal courts arising from neglect or abuse of children fall entirely outside the scope of the thesis and are thus not dealt with at all. In part 1.4.1 below the scope of the thesis is further explained by providing a brief overview of what is discussed in the following chapters.

1.4.1 An Overview of the Chapters

Chapter 2 traces the origins and most significant historical influences upon the South African children's courts. It is contended that an inherited English framework which blurred differences between crime and care, and locally-developed forms of racism against children, were the two main factors which produced an inadequate legislative framework for the children's courts as received by a newly democratic South African government at the end of the 20th century.

Chapter 3 places the modern South African children's courts in context as merely one of a possible variety of forums or means for dealing with care cases. It addresses the key question of whether courts should even be used for these cases. It is argued that in

[96] Although space has precluded a detailed analysis, in part 8.4.3 below some suggestions are offered on a further ongoing role for children's courts during the subsistence of alternative care orders. An aspect which has not been dealt with at all is the transfer of cases between children's courts in different jurisdictions.

South Africa at the present time there are strong reasons in favour of the continuance of courts as an important (although not necessarily exclusive) forum for providing significant decisions on alternative care measures.

Chapter 4 explores means for directly achieving effective communication by vulnerable children, family members and other persons who appear in the children's courts. It asserts that a participatory model which achieves this in care cases is essential and practicable. Chapter 5 follows the question of communication further by evaluating the role of legal representatives. It discusses the extent to which lawyers who represent children should focus on what is in their best interests or else what their wishes are. It asserts that our law governing the functions of representatives for children, caregivers and social workers needs to be clarified. It is shown that much better provision can be made for training and the employment of lawyers at state expense.

Chapter 6 focuses on the role of presiding officers in children's courts. It develops an argument that our current system of requiring them to rely primarily on procedures followed in civil magistrates' courts has caused confusion. It is contended that specialised rules on adjudicator role functions can and should be developed. It is shown with reference particularly to anti-legalistic systems that an ideal mode for adjudicators would be an inquisitorial one which emphasises supportive interactions with other participants. It is asserted that in the case of South Africa legislative provisions are required to introduce this.

In chapter 7 it is shown that a serious gap in our law results from a failure to utilise children's courts properly for the provision of interlocutory remedies. It is demonstrated firstly that there is inadequate access to children's courts where emergency removals of children are undertaken. It is more generally argued that a poor development of procedural law and failure to recognise sufficiently that care cases should often be incrementally managed by courts have tended to block access. It is shown that this problem subsists throughout interim periods after cases have been initiated but are still being investigated by

welfare instigators. Solutions for the improvement of interim court services are put forward.

Chapter 8 deals with what is often the most important stage in court involvement - the dispositive proceedings which follow completion of welfare's investigation. At this stage the two main issues are whether there is sufficient justification for mandatory care measures and, if so, what those should be. The chapter provides a critical evaluation of the new approach to grounds and dispositive children's court remedies in the 2005 Act. It is shown that the Act complicates dispositive proceedings unnecessarily by failing to distinguish sufficiently between grounds and remedies. It also enables technical defences by linking grounds to restrictive definitions and even allows grounds to be avoided entirely. The chapter provides recommendations for overcoming these deficiencies.

On the positive side, it is shown in chapter 8 that a significant advance produced by the 2005 Act is a considerably increased range of children's court orders. And further, the role of children's courts in care cases has been transformed and rendered potentially much more constructive. Instead of being mainly concerned with removals they are now expected to consider whether to order social services designed to enable children to remain in their families or else return to them in the future. It is argued that these sweeping changes in substantive law require a commensurate development of procedural law. It is shown that the key to such development would be the division of dispositive proceedings into logical phases. Proposals on these are put forward.

In the concluding chapter 9 the main findings of the thesis are drawn together. Some final recommendations are put forward in the light of the primary criteria and recurring themes. The latter relate to overcoming communication and access barriers, the need for more detailed rules and procedures, and the need for improved training and greater status and independence for children's courts in view of the introduction of a family service model in the 2005 Act. Finally, some recommendations on directions for further research are put forward.

The date up to which the law and related materials have been considered in this thesis is 30 September, 2007.

CHAPTER 2

A HISTORICAL OVERVIEW OF LEGISLATION AND COURT SERVICES FOR CHILDREN IN NEED OF CARE

2.1 Introduction

As Freymond has noted '[t]he relationship between private family matters and State authority is complex, value laden, and firmly rooted in the historical, cultural, political and economic foundations of society'.[1] For a proper understanding of our current approach to alternative care measures it is necessary to appreciate significant historical developments which impacted upon court services for children. In this chapter the primary aims are to identify the most important of these developments and evaluate their influence. The discussion proceeds in four stages. Some early external influences, the wording of South African care legislation, the implementation of that legislation by courts, and recent attempts to establish more effective courts and legal representatives for children are each briefly considered.

In part 2.2 of this chapter an attempt is made to uncover some seminal aspects of early Western and particularly English assumptions concerning responsibility of the state which led to the use of courts as gatekeepers for placements of children in need of alternative care. As might be expected, English influences were particularly important during the British-colonial period in South Africa. In part 2.3 key South African legislative provisions relevant to mandatory alternative care measures and court precedents in which these were interpreted are identified and discussed in chronological order. The main focus is on 20th century provisions providing for court services in care cases. Wording as it evolved in successive statutes dating back to the pre-Union period is

[1] N Freymond 'Using Intermediary Structures to Support Families: An International Comparison of Practice in Child Protection' (2001) 2: accessed at the Canadian Partnerships for Children and Families Project Website: <http://www.wlu.ca./pcfproject>.

analysed and compared in order to establish the most important developments. The origins and early work of children's courts are discussed.

It is argued in part 2.4 that an unduly positive impression of the work of children's courts might be obtained by merely considering the wording and not the application of care legislation as it evolved historically. It will be suggested that, in a manner which was often covert, racism had a long-term impact on the availability and quality of court services for children in need of care. Since racism exerted a subtle but powerful influence throughout the 20th century it has been singled out for thematic attention in part 2.4. It will be shown that a growing fixation on racial considerations grafted onto originally English thinking confusing crime and care does much to explain serious weaknesses in our care legislation and related children's court services inherited by the first democratic government in 1995.

In part 2.5 the history of recent attempts in South Africa to overcome some of the deficiencies by establishing more broadly-empowered courts, state-employed specialist legal representatives and improved legislation for children is briefly surveyed. Setbacks in these initiatives help to explain the persistence of many fundamental shortcomings in our modern care law. In the concluding part 2.6 the most important historical developments identified in the chapter are summarised and related to the primary evaluative criteria used in the thesis.

2.2 Early Influences in the Wider World

It is well-known that since the earliest times in many countries abandoned and orphaned children have been taken in and cared for by religious organizations or private benefactors. As noted in part 1.3.1 above according to the customary norms of many African tribes there would be no formal removal into alternative care institutions. This was because nurturing would be supplied automatically where needed by members of extended

families or local communities.[2] Children who needed substitute-parents would therefore often continue to grow up in their original home environments. Child-protective provisions for limiting the rights of abusive parents were by no means unknown in African customary law, but typically they did not require removal of a child from her community.[3] The Western concept of moving children to separate institutions was imported to South Africa during the colonial period.[4] Also imported was the system, dating from the Middle Ages and utilised in many European systems,[5] of boarding out selected children with private individuals to serve as apprentices.

By the 17th and 18th centuries the labour potential of destitute children was widely exploited in European countries. Harsh conditions were frequently imposed in 'children's houses' and foundling homes. This was allegedly to prevent poor children from flocking into them to receive free board and lodging; but in reality it was to keep out those who were not strong and healthy enough to work.[6] In European colonies such as those maintained by the Dutch East India Company at the Cape racial policies were an additional factor which influenced the selection of children for placement in child-rearing establishments.[7] In the 18th and 19th centuries the numbers of orphanages in European and European-colonised countries increased. Typically, children were accommodated in large

[2] For example, if a child's parent died the surviving parent and senior members of the child's extended family would typically decide what new care arrangements within the family would best suit the welfare of the child. This was recognised as the approach that would normally be taken under African customary law in *Esnad Ndebele and Josiah v Togo Ndebele* 1965 AAC 23. TW Bennet *Human Rights and African Customary Law under the South African Constitution* (1995) 96 has pointed out that care for children was often provided by non-parental members of the extended family because in customary law there was 'no fixed idea that children have constantly to be in the physical custody of their biological parents'. See also JG Storry *Customary Law in Practice* (1979) 64.

[3] Storry ibid at 67. A Shangaan custom that a father who kills his child must forfeit all rights to the custody of any other children by the same wife was recognised in *Hlomani v Mjayi and Mawengi* 1933 SRN 53.

[4] The earliest South African institution was established by the Dutch East India Company in Cape Town in the mid-17th century partly for the purpose of nurturing slave orphans: see FN Zaal 'The Ambivalence of Authority and Secret Lives of Tears: Transracial Child Placements and the Historical Development of South African Law' (1992) 18 *Journal of Southern African Studies* 372 at 380.

[5] W Hellinckx, B van den Bruel & C vander Borght 'Belgium and Luxembourg' in MJ Colton & W Hellinckx (eds) *Child Care in the EC* (1993) 1 at 2.

[6] J Melbye 'Denmark' in Colton & W Hellinckx ibid 34 at 39. See also H Colla-Muller 'Germany' ibid 71 at 76.

[7] At some stations, the Dutch East India Company resorted to forcibly removing partly white extra-marital female children from their Asian mothers. In pursuit of a 'whitening' policy these children were incarcerated in isolated institutions where they were trained to become future wives of Dutch colonists: see Zaal (1992) op cit note 4 at 377-78.

groups and impersonal social climates. As a result of thinking dating back to the early monastic orders these children tended to be kept cut-off from the outside world and education was mainly by rote and drill.

The idea that states should take over direct responsibility for managing at least some children's institutions was a significant mid-nineteenth century development. The earliest government care institutions were conceptualised as providing structured environments for large numbers of children similar to those in prisons and this was one reason why conditions tended to be harsh. In an important development in South Africa during the late 19th century a dual system of government 'reformatories' and 'industrial schools' for children was imported from Britain, where it dated from the mid-19th century.[8] As the term 'reformatories' suggests, the idea behind these was to use intensively-controlled regimes as a means of rehabilitating children. The primary aim was to transform delinquent children convicted by criminal courts 'into useful citizens and docile workers'.[9] British industrial schools took in unconvicted destitute children.[10] However, as noted by Cretney the regimented routine at the two forms of institution was often very similar.[11] Significantly, reformatories and industrial schools both carried the analogy to prisons to the extent of utilising court orders as an entry mechanism. These orders may be seen as the historical precursors of modern court care orders.

In the late 19th-century child-saving societies 'For the Prevention of Cruelty to Children' began to spring up in the US, England and continental Europe.[12] In 1889 a public and political campaign by the National Society for the Prevention of Cruelty to Children produced the first legislation in England specifically designed to outlaw cruelty to children

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[8] Reformatories in England dated back to 1838 but it was only in 1854 that English magistrates were empowered to commit young offenders to registered ones. The English Industrial Schools Act 1857 allowed unconvicted children thought to be in 'moral danger' to be similarly committed by magistrates to industrial schools. For a discussion of the English reformatory and industrial schools legislation see S Cretney *Family Law in the Twentieth Century: a History* (2003) 630-31 & 645-46.

[9] The quotation is from W Hellinckx, B van den Bruel & C vander Borght (1993) op cit note 5 at 3.

[10] Cretney (2003) op cit note 8 at 630.

[11] Ibid.

[12] The ideology of child saving was characterised by metaphors of religious conversion. It was advocated in Europe and the USA in the period 1890-1920. As will be shown it produced infant life protection legislation in England and subsequently in South Africa.

and give state authorities powers to intervene and even remove them from their families.[13] The idea that children could be rescued and moulded into good citizens underlay the ideology of child saving. This justified the removal of particularly lower class children from families where there were considered to be bad influences. Court orders provided the necessary legal authority.[14] Subsequently the idea that adjudicators needed to be experienced enough to recognise which children deserved rescue rather than mere punishment encouraged the development of specialised juvenile courts.[15] In South Africa the concept of child saving was eagerly embraced shortly after it emerged overseas.[16] The assumption upon which it was based of course provided a rationale for rejecting the indigenous African approach which (as noted above) required keeping children in family groups and communities rather than removing them.

Despite rhetoric of rescue and transformation, during the period of its greatest influence on South Africa delinquency of children of the lower classes remained the major preoccupation affecting child care legislation in England. Until the late 20th-century neglect of children was primarily of concern there because of its perceived linkages with juvenile delinquency and, as Parton puts it 'the threat to public order which this would entail'. [17] This can be seen in the way that court involvement in care cases was originally conceived. In England the courts could at first only be involved where a child needed to be removed into alternative care because either the child or a parent had committed a crime.[18] Punishable delinquency or maltreatment was thus usually required. Jurisdiction over care cases was accorded to juvenile courts staffed by magistrates who were accustomed to dealing with criminal cases. This was unfortunate because they treated

[13] The Prevention of Cruelty to, and Protection of, Children Act, 1889: see further N Parton 'Protecting Children: A Socio-Historical Analysis' in K Wilson & A James (eds) *The Child Protection Handbook* (2002) 11 at 12; and Cretney (2003) op cit note 8 at 633-34. It was only in 1948 that this legislation was significantly improved with the promulgation of the 1948 Children Act.
[14] Cretney ibid at 647.
[15] MDA Freeman 'Introduction: Rights, Ideology and Children' in MDA Freeman & P Veerman (eds) *The Ideologies of Children's Rights* (1992) 3. Cretney ibid at 647-48 points out that in practice specialised magistrates were not always appointed.
[16] L Chisholm *Reformatories and Industrial Schools in South Africa: A Study in Class, Colour and Gender, 1882-1939* (1989) 161 & 185.
[17] Parton (2002) op cit note 13 at 12-13.
[18] Hellinckx, Van den Bruel & Vander Borght (1993) op cit note 5 at 3.

children in need of care similarly to delinquents.[19] As will be seen, the idea that criminal courts could impose prisonlike placements and thus remove lower class children in need of care from society was to have a great impact in South Africa.[20]

Although in England for most of the 20th-century a quasi-punitive approach tended to be applied in care cases heard in the magistrates' courts there was also a much longer history of using courts supportively to protect certain interests of children. In 1660 what had come to be called the court of wards was replaced by the court of chancery. This now began to exercise powers of what was referred to as 'upper guardianship' over the property and persons of infants -initially mainly those who had inherited interests in land.[21] Largely as a result of English influence, the South African supreme court also began to exercise broad discretionary powers 'as upper guardian of all minors'.[22] This was significant because it created opportunities for wealthier litigants to avoid lower courts by going directly to the supreme court. As will be shown, the adoption of this dual-access system in South Africa led to some confusion about the respective roles of courts at different levels.[23]

2.3 The Development of South African Law

From the late 19th century onwards in South Africa the legal placement of children in mandatory alternative care was governed by a series of statutes which gradually became more detailed. A selection of the most important of these is discussed below. Particularly in the early decades much of their wording was influenced by English legislation. Although the majority of children in need of care in South Africa were black,

[19] Cretney (2003) op cit note 8 at 649 & 667.
[20] See part 2.4.1, below.
[21] OM Stone *The Child's Voice in the Court of Law* (1981) at 123-24.
[22] In *Botes v Daly* 1976 (2) SA 215 (N) at 222H, James JP stated that this was 'substantially in accordance with the power assumed by the courts in England'. However, continental European and particularly Roman-Dutch influences also shaped the exercise of upper guardianship powers: see B Van Heerden 'Judicial Interference with the Parental Power' in B Van Heerden, A Cockrell & R Keightly *et al*, *Boberg's Law of Persons and the Family* (1999) 497 at 500N7.
[23] See parts 2.3.3 & 2.3.4, below.

indigenous African norms had no effect on the wording and little influence on the interpretation of our legislation. Pre-existing Roman-Dutch common law also had little impact.

Until the number of appeals and reviews from lower courts dropped off sharply from the 1980s[24] South African supreme court judgments significantly influenced the development and implementation of care legislation. Both legislative recognition of its status and its own incorporation of the English concept of upper guardianship enabled the supreme court to play a decisive role. [25] As will be seen this not only impacted directly upon the small minority of litigants who could afford to appear before it but allowed it to influence the jurisdiction and practice of lower courts which heard the majority of care cases.

In relation to the role of lower courts it will be shown that it was particularly the adoption in South Africa of the English system of reformatories and industrial schools which led to magistrates playing a significant role in child care cases from the late 19th-century onwards. Their functions were increased even further at the turn of the 20th-century with the importation of infant life legislation designed to protect young children - again along English lines. From the 1920s until the mid-20th century some children benefited from lower court specialisation and innovative new legislative provisions which appeared as part of a progressive initiative to produce a new South African approach rather than merely copy English legislation. However, in the late 20th century there was a decline in South African care law. During this period legislation deteriorated and the care functions of courts were subverted.

[24] That such appeals and reviews were common until the early 1950s can be seen from the cases cited by TH Van Reenen *Handbook on the Children's Act* (1953) at xi-xviii. That they still occurred regularly although in much smaller numbers until the late 1970s can be seen from MCJ Olmesdahl *Parent and Child Casebook* (1998) part M. By contrast, Olmesdahl, ibid at pp M4 & M18, recorded only two post 1970s cases. And HM Bosman-Swanepoel & PJ Wessels *A Practical Approach to the Child Care Act* (1995) ix-x listed only three.
[25] On the changing nature of its influence see parts 2.3.3, 2.3.4, 2.4.2 & 2.4.3, below.

2.3.1 Pre-Union Legislation

From the beginning of the colonial period in South Africa orphanages and mission stations privately accommodated some children (especially those regarded as European or Christian) who were bereaved and had no suitable family members available to care for them. It was thus religious or charitable organisations rather than the state which were responsible for placement decision-making in these cases. Eventually during the period of British Empire courts became involved. Under s 7 of the Cape Act 15/1856 it was rendered possible for them to place juveniles convicted of less serious offences into apprenticeships with private individuals. This was mainly intended to benefit white farmers who needed labour.[26] The first state-run care institution in South Africa was established at the Cape in 1880. It was called Porter Reformatory and was intended for training youths convicted of less serious offences in agricultural work. It was modelled as closely as possible on the English reformatories of Redhill and Parkhurst.[27] It was established in terms of the Cape Reformatory Institutions Act 6/1879 [28] and was not racially segregated.

The 1879 Act was replaced by the Cape Reformatory Institutions Act 4/1892.[29] Section 4 of this Act considerably extended the role of magistrates' courts by according them functions relevant to children in need of care who had not been convicted of any crime. They were empowered 'to apprentice such child to any relative or any fit and proper person'. If this did not prove feasible they could recommend a ministerial placement of the child into an 'industrial home' or, if this was 'found impracticable,' a reformatory. The English binary system of 'industrial' and 'reformatory' institutions was thus now fully in place in the Cape and ostensible care placements of unconvicted children continued to be used for meeting the demand by white farmers for young labourers.[30]

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[26] Van Reenen (1953) op cit note 24 at 152.
[27] Chisholm (1989) op cit note 16 at 35.
[28] *Cape of Good Hope Statutes 1652-1895* vol 2.
[29] *Cape of Good Hope Statutes 1652-1895* vol 3.
[30] Referring to the previous century, Van Reenen (1953) op cit note 24 at 152 concluded that court directed apprenticeships had remained predominantly exploitative.

The next important legislative development at the Cape was the promulgation of the Destitute Children's Relief Act 24/1895. This was significant because it enabled more favorable treatment for 'European' children who required consideration for possible removals into alternative care. In terms of s 4 magistrates were directed 'forthwith to institute a full and proper enquiry' upon gaining knowledge of any such child. To protect these children, for the first time in South Africa grounds were introduced which magistrates were required to apply before reaching a decision that a child must be removed from her present situation.[31] If the magistrate found that a ground applied he was obliged to report the case to the colonial secretary. Section 5 of the 1895 Act provided that, upon receipt of a magistrate's finding, the colonial secretary could:

> '… issue an order directed to such Magistrate authorising him to take charge, control and custody of such child, and to commit such child either to such suitable institution as may be approved of by the Colonial Secretary, or to some public and denominational school available for the purpose as the Colonial Secretary shall name in such order.'

In one of the earliest South African legislative provisions designed to facilitate family reunification a proviso to s 5 directed magistrates placing out destitute European children as follows:

> 'Whenever it may be practicable such institution or school shall be situated within the town or district in which the father, mother or lawful guardian of the child shall be resident at the date of such committal and provided, further, that the managers of such school or institution shall be willing to receive such child.'

It would appear that the Cape Destitute Children's Relief Act of 1895 created a dual system for magisterial care inquiries. White children were protected by the need to prove

[31] A 'European' child could be held to be 'destitute' in terms of this section if she was found to have been:
'(a) habitually begging,
(b)…wandering and not having any home or suitable place of abode, or proper guardianship, or visible means of subsistence,
(c)… in a state of destitution without means of support, and who shall be without father, mother or lawful guardian, or whose father, mother or lawful guardian shall be unable to provide for its support and education, or
(d) … residing in a brothel or with a prostitute.'

grounds, placements in the best available alternative care situations near to their families, and post-placement oversight by a magistrate acting under the authority of the colonial secretary himself. Care cases involving children who were not regarded as European could be more quickly disposed of by magistrates since the 1895 requirements did not apply. Such children could therefore continue to be allocated to reformatories, industrial schools or apprenticeships with white farmers in terms of the simpler 1892 Act. Western concepts had thus been combined with a locally-developed form of racial discrimination in procedures and placements.

In the Cape the only further significant legislative development in the pre-Union period was the promulgation of an Act designed to protect very young children. In 1897 in England concern had been expressed by members of the child saving movement after sensational media reports about the evils of 'baby farms' where abandoned infants of poor single mothers allegedly died in large numbers. In response, the Infant Life Preservation Act had been promulgated.[32] Along very similar lines, the Infant Life Protection Act 4/1907 was enacted in the Cape.[33] The Cape version, like its English predecessor, provided for licensing and inspection of private care institutions for the very young.

Child legislation as developed in the Cape under British influence had a considerable influence upon that of the other South African colonies at the turn of the 20th-century and in the years immediately before Union. The Orange Free State utilised the Cape Destitute Children's Relief Act of 1895 (and particularly the idea of reserving certain care services for the more privileged European group) as a model for its Destitute White Children Law 3/1899.[34] Natal promulgated a less obviously titled Children's Protection Act 58/1901. The Transvaal drew heavily upon the 1907 Cape Infant Life Protection Act when formulating its Infant Life Protection Act 24/1909.[35] The latter shows how the role of magistrates in care matters was continuing to expand. This Act dealt only with 'infants'. These were defined in s 1 as children under the age of seven. Subsection 2(1) of the Act

[32] See Cretney (2003) op cit note 8 at 632-33.
[33] This was subsequently amended by the Cape Infant Life Protection (Amendment) Act 35/1909.
[34] With mainly other children in mind the Free State also passed a Juvenile Offenders' Removal and Apprenticeship Ordinance 5/1904.
[35] *Statutes of the Transvaal, 1909* (1909).

required all persons 'retaining or receiving an infant for the purpose of nursing or maintaining such infant apart from his or her parent or parents for a period longer than three days' to inform the local magistrate or field cornet in writing.[36] In terms of s 9 a magistrate receiving such a notice had to:

> '…cause inquiry to be made into the circumstances of the case and shall have power, should he be satisfied that it is not in the best interests of the infant to remain with the person giving such notice, to order the removal of such infant to the care, custody, and control of some other person or institution willing to receive and maintain such infant, as to such magistrate may seem meet.'

By comparison with the 1895 Cape Act it can be seen that here magistrates gained full decisionmaking powers and did not need to refer cases to a senior administrative authority. For older children a system of court placements into apprenticeships, industrial schools or reformatories became established in the Transvaal in the late 19th and early 20th centuries.[37]

It may be concluded that by the early 20th century a gradual shift in child-placement decisionmaking from private charities and administrative officials to magistrates had left the latter with extremely wide powers throughout South Africa. An alternative care system closely modelled on that in England was becoming established. Unlike in England, however, the best resources were already being reserved mainly for a separate class of children regarded as 'European' in physical appearance.

2.3.2 Early Union Legislation

In 1910 the erstwhile South African colonies were joined together in an independent Union of South Africa. Soon after Union the law providing for reformatories was standardised throughout the country in terms of the Prisons and

[36] This was to be done within 48 hours in a municipal area and within one week in a rural area.
[37] See generally Transvaal Act 8/1909 and ss 1-3 of the Transvaal Industrial Schools Act 7/1910.

Reformatories Act 13/1911.[38] The same was done with industrial schools under the Children's Protection Act 25/1913 (hereafter 'the 1913 Act'). Echoing concerns in contemporary England it was stated in s 33(1) of this Act that the main purposes of these schools were to prevent 'destitute and waif and stray children …falling into crime and for training and educating them'. The Act introduced parallel jurisdiction. Both the supreme court and magistrates' courts could now serve as forums of first instance in care cases.[39] As will be shown below this had some unfortunate consequences.[40]

In the Union period private organisations continued to play a significant role in providing alternative care.[41] Private residential facilities (often maintained by religious organisations) tended to be smaller and more specialized[42] than state ones. Section 2 of the 1913 Act required them henceforth to be licensed as 'certified institutions'. In s 38 it was stated that their primary purposes were 'the reclamation of children of immoral or criminal habits or … the maintenance of poor children'.

Not merely private but also short-term emergency alternative care of children was brought within the ambit of the law in 1913. Section 2 of the 1913 Act included the concept of a 'place of safety' so that courts could authorise temporary care pending the resolution of applications which were to be heard by them. From a modern children's-rights perspective an interesting provision was s 10(2). This stated that a child might of his own volition 'seek refuge in a place of safety'. Unfortunately s 10(3) limited the use of places of safety to children against whom offences had been committed by their parents or guardians -again betraying a fixation on crime.

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[38] *The Union Statutes 1910-1947* (1950) vol 2. Subsequently, detention in a reformatory was provided for under s 350 of the Criminal Procedure and Evidence Act 31/1917.

[39] Section 34(3) clearly indicated that either a supreme court or magistrates' court could be approached to impose alternative care measures in terms of the Act.

[40] See parts 2.3.3 & 2.3.4.

[41] In 1953, out of a total of 225 recorded institutions, 200 were managed by voluntary organisations: see Van Reenen (1953) op cit note 24 at 46-49.

[42] For example, there were facilities which catered mainly for young babies, children with particular disabilities or orphans: see ibid at 313.

Section 34(1) of the 1913 Act provided rudimentary guidance on how care hearings should be conducted. It required proof of a ground that a child was in need of alternative care. The wording of the grounds was mostly drawn from s 2 of the Cape Destitute Children's Relief Act 24/1895 and s 58 of the English Children Act of 1908.[43] If a ground was proved a court could select a placement option in terms of s 34(3). This read in relevant part:

> 'The judge or magistrates' court, if it shall appear to be in the best interest of the child may, instead of ordering the child to be sent to a government industrial school or to a certified institution, make an order removing the child from the custody of his parent or guardian and committing him to the care of a relative or other fit person or may order the child to be apprenticed to some useful calling or occupation until he has obtained the age of 18 years, or may order such child to be boarded out…'.

Alternatively under s 12(1) it could issue an order that would 'commit' a child to the custody of another private person who would then have 'control over the child as if he were his parent'. It can be seen that the 1913 Act greatly increased the powers of courts in care cases and involved them more in long-term placements with private individuals or private institutions.

Whilst the advances in court capabilities in 1913 were considerable, perhaps the most innovative legislative development for the early 20th century came in 1921. Section 11 of the Children's Protection Act Amendment Act 26/1921 empowered courts, after holding a care inquiry, to recommend the payment of a special monthly state grant if they had found that this would enable an impoverished child to remain within her family. The grant was payable to a mother, stepmother or grandmother of a child whose father was 'by reason of ill-health or other reason caused by circumstances beyond his control unable to support such child properly'. It is noteworthy that this provision directed payment to a female caregiver. Grant inquiries soon became a significant part of the work of courts dealing with care cases.[44]

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[43] For a discussion of the 1908 English grounds see Cretney (2003) op cit note 8 at 648-49.

[44] Chisholm (1989) op cit note 16 at 145-46 reviewed case returns and concluded that through the 1920s and into the 1930s these inquiries 'formed an important dimension of the work of children's courts, alongside committals to private institutions and industrial schools'.

The 1920s was also a period when the supreme court exerted an important influence. In 1920 it held in *R v Du Plessis* that, in contrast to reformatories, industrial schools were not intended for children 'who are manifestly criminal'.[45] A fundamental distinction was thus established. Industrial schools were for children who were thought to be less of a threat to society and therefore merited less strict conditions and more in the way of educative resources than were appropriate in reformatories. This appeared to follow the approach in England.[46] However, as will be further discussed in part 2.4.1 below the distinction was to be racially interpreted. It was to have significant consequences for institutional placement practices in lower courts.

In a second important supreme court decision in *R v Smith* in 1922 Wessels JP characterised the 1913 Act benignly as follows:

> 'The principle underlying this Act is that the State should not punish a child of tender years as a criminal and stamp him as such throughout his after-life, but that it should endeavour by taking him out of his surroundings to educate him and uplift him and to make him gradually understand the difference between good conduct and bad conduct.'[47]

This of course supported the practice of removing children and could be seen as a classic enunciation of the child-saving ideology. Following an approach very similar to that in *Smith*, in the 1924 case of *Attorney-General, Transvaal v Additional Magistrate, Johannesburg*[48] Innes CJ stressed that the 1913 Children's Protection Act was predominantly remedial in nature and geared towards the protection, reclamation and welfare of children.[49] In attempting to conform to this dictum and in the aftermath of its clash with the attorney-general, in the mid 1920s the Johannesburg magistracy began to select magistrates for specialisation in care cases.[50]

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[45] 1920 TPD 178.
[46] See part 2.2, above.
[47] *R v Smith* 1922 TPD 199 at 201.
[48] 1924 AD 421.
[49] Ibid at 426.
[50] Chisholm (1989) op cit note 16 at 144 noted that in 1926 the first 'children's court' with its own specialist magistrate was set up at Auckland Park.

The caseloads of the new courts expanded rapidly and by 1926 the Australian terminology 'children's courts' began to be informally applied because they were dealing almost entirely with care matters.[51] The so-called children's courts conducted care-grant and alternative placement inquiries on behalf of children.[52] They were subsequently regarded by the department of justice as a most successful innovation.[53] They became part of the magistrates' courts at most larger urban centres and continued to operate without any enabling legislation for more than a decade.[54]

2.3.3 *The Children's Act 31/1937*

In 1937 following upon recommendations by the Interdepartmental Committee on Destitute, Neglected, Maladjusted and Delinquent Children and Young Persons[55] Parliament replaced the 1913 Act with the Children's Act 31/1937 (hereafter 'the 1937 Act'). In some respects this Act appeared to place South African child care law ahead of that in many other countries at the time. It established basic features and much of the wording of our care legislation which are still applicable today.

Importantly, s 4(1) of the 1937 Act formally constituted a network of what were now officially designated children's courts.[56] It described the function of these as '[t]o hold inquiries in order to determine whether a child is a child in need of care, and to make the

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[51] It is noted, ibid, that the volume and complexity of work expanded so quickly that by 1927 the first 'children's courts' needed the support of four probation officers. Courts termed 'children's courts' were established in Australia from as early as 1905. However, these were more similar to the English juvenile courts than the later South African children's courts because they dealt with both care and criminal cases: see the New South Wales children's court website 'History of the Children's Court' <http://www.lawlink.nsw.gov.au/lawlink/childrens_court/ll_cc.nsf/pages/CC_aboutushistoryofthe childrenscourtchildpage>.

[52] Chisholm (1989) op cit note 16 at 146.

[53] This appears from JH Hofmeyr's introductory speech at the second reading of the Children's Bill on 18th March 1937: *Union of South Africa: House of Assembly Debates* (1937) vol 29, at col 3430.

[54] Ibid.

[55] *The Report of the Interdepartmental Committee on Destitute, Neglected, Maladjusted and Delinquent Children and Young Persons* (Union Government Report 38/1937).

[56] The National Council of Child Welfare (which had been established in 1924) had played a major role in lobbying for this: see T Matthee & L Schreuder 'Submission of the South African National Council of Child and Family Welfare' in *Submissions from the Welfare Sector to the Truth and Reconciliation Commission* (1999) at Section B, Annexure A: p 11.

necessary orders subsequent to such an inquiry'.[57] The status of the children's courts within the South African court hierarchy was not designated. Although adjudicators in them were to receive the distinctive new title of 'commissioner' they were to be selected from the ranks of magistrates and the children's courts were to continue to operate at magistrates' court centres.

Significantly, the children's courts were not accorded criminal jurisdiction. As has been noted contemporary lower courts in England dealt with both juvenile crime and care cases. The decision in South Africa to establish separate courts dealing only with care cases thus represented a break from the hitherto influential English system. It was also an important success for the child-saving over the punitive school of thought because there would be no jurisdiction for children's courts to punish any children who appeared before them. The commitment in 1937 to an entire network of courts intended to deal purely with children's care needs might be perceived as a great South African achievement. However, as will be shown there were to be some major limitations upon their services.

In s 28 of the 1937 Act the criterion of a child 'in need of care' was established as the primary basis for court-ordered state intervention in care cases. This again showed recognition of destitute, abandoned or abused children as requiring nurturing arrangements rather than correction. Subsection 28(1) stated that not merely parents but also any other person having custody of a child could bring a matter to court -and this potentially rendered the children's courts broadly accessible to a wide range of caregivers. Procedural protection for parents was created by s 52(1). This required children's courts to give notice to a parent whenever any other person intended to bring a matter to court 'unless the Commissioner otherwise directs'. The concept of child medical assessments was introduced by s 10(4).[58]

[57] See also s 1 of the 1937 Act.
[58] This stated that a commissioner could at any time direct that a 'protected infant' (meaning a child under ten years of age brought to the attention of the court) be medically examined by the district surgeon or other qualified medical practitioner.

Because of the unique requirements of care adjudication the original 1920s policy of appointing full-time specialist magistrates for children's courts wherever possible was maintained under the 1937 Act.[59] These magistrates were generally successful in facilitating communication by caregivers and even children who as a standard norm appeared directly before them.[60] The hearing of appropriate voices was thus to at least some extent regarded as important in the early children's courts.

Whilst the 1937 Act produced significant advances it was also in some respects retrograde. Court powers to reallocate parental responsibilities were much narrower than under s 34(3) of the Children's Protection Act of 1913. Whereas the latter (as has been noted) had allowed for a transfer of parental powers to any suitable person, s 58 of the 1937 Act only permitted it from a child's separated unfit father to her mother. This was still an important capability, however, because the common-law at this time vested guardianship in the fathers of legitimate children and only custody in their mothers. In a dispute between married parents it was therefore fathers who possessed greater parental power.[61]

The drafters of the 1937 Act did not include the previous express references to the supreme court which had made it clear in the 1913 Act that it had parallel jurisdiction with lower courts as a forum of first instance in care cases. The respective jurisdiction of the new children's courts and the supreme court was thus unclear. A possible interpretation was that the supreme court should no longer be directly approached in care matters. This was to prove unacceptable to judges who wished to preserve an unrestricted domain for the supreme court as upper guardian of all minors.

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[59] Van Reenen (1953) op cit note 24 at 13; Hoexter J *Commission of Inquiry into the Structure and Functioning of the Courts* (Fifth and Final Report RP 78/1983) 493.

[60] According to Van Reenen ibid at 6 they were adept at encouraging discussion by keeping proceedings amicable and informal. See further part 6.2.1, below.

[61] The usefulness to mothers of s 58 of the 1937 Act is illustrated by *Weber v Harvey* 1952 (3) SA 710 (T). In this case after a marriage relationship had deteriorated the husband removed his children to his grandparents' home. This he had every right to do as guardian; but in response the wife and mother opened children's court proceedings on the basis that the children were no longer receiving proper care. She thus attempted to regain custody of her children by instituting a children's court inquiry.

In order to prevent possible encroachments on its powers the supreme court used available opportunities to limit both the status and jurisdiction of children's courts. In 1943 Tindall JA held in *Dhanabakium v Subramanian* that they were courts of inferior standing.[62] In 1952 in *Weber v Harvey* Roper J even suggested that there was a possibility 'that the children's court is not a court of justice, but that it is an administrative body'.[63] In so doing he detracted from the status of these courts in a manner that was quite unwarranted.[64] In 1953 in *R v De Jager* it was held that once the supreme court had set an amount of maintenance payable by a separated father for his children a children's court was not entitled to alter this.[65] The broader message was that, after the supreme court had issued an order, a children's court, as an inferior forum, had no jurisdiction to do anything that would have the effect of altering that order even in the light of new familial circumstances.

The supreme court dicta which confined the jurisdiction of children's courts were unfortunate. Since it was not necessary to hire lawyers to bring matters before the children's courts they had the potential to serve as a less expensive alternative. In particular, their establishment produced a haven for legally-vulnerable mothers involved in child-control disputes with dysfunctional fathers.[66] However, the inadequate guidance on status and jurisdiction in the 1937 Act made it easy for the supreme court to assert wide powers at the expense of those of children's courts.[67] The mid-20th-century judgments in which this was done stand in contrast to the supreme court's earlier, more positive influence. As has been shown above, during the 1920s it had actively encouraged a more supportive environment for children in the lower courts.

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[62] 1943 AD 160 at 165.
[63] *Weber v Harvey* 1952 (3) SA 710 (T) at 715B.
[64] The very usage of the terminology 'children's courts' was against his interpretation. And in s 7(1)(f) of the 1937 Act it was specified that children's courts would issue judgments and that contempt of court penalties would apply when these were not complied with.
[65] *R v De Jager* 1953 (2) SA 197 (T).
[66] See the facts of *Weber's* case in note 61, above.
[67] See also *Lochenbergh v Lochenbergh* 1949 (2) SA 197 (E); and *Forbes v Forbes* 1960 (1) SA 875 (D). The continuance of the problem of uncertainty under the Children's Act 33/1960 is discussed in part 2.3.4.

2.3.4 *The Children's Act 33/1960*

The Children's Act 33/1960 (hereafter 'the 1960 Act') replaced that of 1937. It will be shown in part 2.4.3 below that one of its purposes was a furtherance of apartheid. However, the partly racist motives of the legislature were to some extent disguised by the inclusion of many genuine reforms which resulted in a continuing evolution of child care law. For example, recent understanding of the concept of psychological as opposed to physical abuse of children led to the addition of 'mental neglect' as a new ground for children's courts to order alternative care.[68] Another progressive provision enabled commissioners to order children to be sent to observation centres so that care-needs assessments could take place in an appropriate environment.[69] This showed that the concept of assessments had developed and was now viewed as including more than merely the medical assessments allowed for in the 1937 Act.

Under s 31(2) of the 1960 Act as an alternative to removal from her family a child could remain at home 'on probation or under the supervision of probation officer or child welfare officer or agency'.[70] The Act also advanced our law by introducing enforcement and accountability provisions. Under s 32 a children's court was empowered to order a parent or guardian with whom a child was to live to comply with conditions on pain of committing an offence. This jurisdiction to sentence caregivers showed that the legislature was prepared to go to great lengths to keep children in their families.[71]

Welfare officials also had to comply with children's court orders. In terms of s9(5) if they found that they could not implement a placement in a category of residential facility ordered by a children's court they were obliged to refer the matter back to it. Section 9(5) further required that they must show 'a good reason' for non-implementation.[72] They were

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[68] In s (1)(i).
[69] Section 31(4).
[70] M Uys *The Children's Act 1960 as Amended by Act 50 of 1965* (1978) 5 noted that children's courts had made frequent use of this power.
[71] After it had subsequently fallen away for twenty years a power to enforce compliance by means of criminal sanctions was again introduced in the 2005 Act: see part 8.4.4, below.
[72] From *S v Van Rooi* 1979 (3) SA 899 (NC) at 901H & 904E it appears that a common and acceptable 'good reason' would have been a lack of vacancies in schools of industries. Although not stated in the case this

thus made accountable to the court.[73] Also, pending implementation of any care order they could temporarily keep a child in a place of safety for a maximum of six weeks -any further delay would again have to be defended before a children's court with a good reason. The new powers for children's courts to control implementation of their orders were undoubtedly sound. As will be shown in the next part of this chapter and also in chapter 8[74] the removal of these in the 1983 Act led to delays and even complete failures in putting children's court orders into effect that were seriously disadvantageous to children.

As under the 1937 legislation, the supreme court continued to play an important role in delineating the functions of the children's courts. In *S v Van Rooi* the question of whether a children's court could choose to designate a specific, named institution for a child was considered. Van der Heever J limited the powers of children's courts when he concluded that this would be impracticable because of uncertainties about vacancies. In his interpretation a children's court could direct the category of institution, and welfare officials would then have to attempt to find a vacancy. Having found a specific institution they were however legally obliged to refer the matter back to the children's court. And the court could then decide whether to confirm the placement and name the particular institution in its final order.[75] This approach still afforded greater child protection powers to children's courts than those subsequently available under the 1983 Act.[76]

Another significant development in the 1960 Act was an extension of the scope for children's courts to restrict and reallocate parental powers. Under s 60(1) any or all such powers could now be exclusively allocated by a children's court to either parent. And in terms of s 83 temporary custody of a child (for a period of up to one year) could be awarded either to a parent or a third person.[77] The role of children's courts in what might be called 'private law' reallocations of parental powers as between caregivers was thus

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problem would have been exacerbated by the fact that schools of industries were racially segregated at the time.

[73] The court would then have the power to make an alternative order.

[74] At part 8.4.4, below.

[75] *S v Van Rooi* 1979 (3) SA 899 (NC) at 904E.

[76] See the next part, below.

[77] Uys (1978) op cit note 70 at 9 stated that children's courts frequently used this provision in order to direct which parent a child should live with in situations where a divorce was pending.

greatly increased in the 1960 Children's Act although not to the same extent as had originally been allowed for under the 1913 Act.

In 1964 in *Napolitano v De Wet NO* the important question of appropriate procedures at care hearings was considered.[78] Marais J came to the conclusion that these might sometimes be less formal than in other categories of litigation.[79] He also broke new ground with his recognition that the need to utilise all information which might enable a children's court to establish the best possible outcome for a child might be more important than strict adherence to evidential rules.[80] He showed here a progressive appreciation of the unique nature and purposes of care proceedings.[81] In *Napolitano* Marais J further held that children's courts were proper courts of law, thus providing a much-needed affirmation of their status.[82]

Given the increased powers of children's courts in the 1960 Act it is not surprising that the issue of conflicts in jurisdiction between them and the supreme court remained a live one. In 1963 Banks J took the extreme view that even where a father assaulted his children a children's court could not reduce his parental powers as allocated by the supreme court at a prior divorce hearing.[83] Three years later Vieyra J preferred an opposite view. He held that it was necessary to be cautious before concluding that a subsequent children's court order on the question of custody was necessarily invalid.[84] As he pointed out, a child's situation might have changed for the worse subsequent to a supreme court order being issued.[85]

In *Murphy v Venter* Erasmus J went so far as to concede that a subsequent conflicting children's court order might be valid if the supreme court had not been aware of

[78]1964 (4) SA 337 (T) at 341-44. Confirmed in *Napolitano v Commissioner of Child Welfare, Johannesburg* 1965 (1) SA 742 (A) at 745. See also PQR Boberg *The Law of Persons and the Family* (1977) 435 N86.
[79] *Napolitano* (1964) ibid at 343H-344A.
[80] Ibid at 344A.
[81] For further discussion of the significance of the judgment see parts 6.1 and 6.2, below.
[82] *Napolitano v De Wet NO* 1964 (4) SA 337 (T) at 342F.
[83] *Bergh v Coetzer and the Minister of Social Welfare* 1963 (4) SA 960 (C).
[84] *Raath v Carikas* 1966 (1) SA 756 (T).
[85] Ibid at 761H-762A.

important pre-existing facts concerning a child's situation.[86] However, in a restrictive interpretation in *Van Schoor v Van Schoor*, Muller JA of the Appellate Division held that the parental powers which children's courts were able to restrict under s 60(1) did not include access.[87] He accepted that court intervention might be essential in cases where visitation rights were being used as a pretext to abuse children but concluded that only the supreme court could be approached.[88]

With such mixed signals emanating from the supreme court it is not surprising that confusion about the jurisdictional boundaries of children's courts in allocating parental responsibilities persisted.[89] Despite this, it remains true that under the 1960 Act children's court services became improved in a number of important respects. As will be shown in part 2.4.3 below, these improvements were mainly to benefit white children because children's courts became deeply involved in the implementation of apartheid during the currency of the Act.

2.3.5 *The Child Care Act 74/1983*

The 1960 Children's Act was replaced by the 1983 Act. This is currently, pending full implementation of the 2005 Act, the most important legislation governing children's court services. Aspects of the 1983 Act are considered in subsequent chapters below. In understanding its impact it is important to note at the outset that it is in some fundamental respects a retrograde statute when compared with the 1937 and 1960 Children's Acts.

One giant step backwards was the introduction in s 14 of the 1983 Act of a fault approach to court intervention grounds. The long established concept of the child in need of care was removed. Aside from situations where there was no parent or guardian, it was

[86] 1967 (4) SA 46 (O) at 51F-H.
[87] 1976 (2) SA 600 (AD) -reversing the decision of Melamet J in *Van Schoor v Van Schoor* 1975 (1) SA 383 (T).
[88] *Van Schoor* 1976 ibid at 610. On this case see also part 7.4.2, below.
[89] In *Gold v Commissioner of Child Welfare, Durban* 1978 (2) SA 300 (N) 300 at 305E James JP struck down a children's court order, in part because it 'appears to resolve a dispute between parents in regard to the custody of the child and it is inappropriate for the children's court to resolve such a problem'.

now necessary to prove that a caregiver was 'unfit to have the custody of the child'. And in s 14(4) a highly stigmatising list of categories of unfitness was included. [90] The fault-centered grounds caused proceedings to become more adversarial as caregivers struggled desperately to avoid being branded by children's courts as 'unfit'.[91] Ironically, the ability of these courts to judge parental capabilities was weakened because they had lost their previous power to appoint assessors (incidentally, limiting their cross-cultural capabilities).

In response to the uncertainty about the respective powers of the supreme court and children's courts to allocate parental responsibilities the 1983 Act adopted the simplistic solution of drastically reducing the latter courts' capabilities. They were now permitted to exercise merely a very narrow power to reallocate custody (and not other parental responsibilities) as between separated parents, and only in situations where supervision of the new custodian by a social worker would also be required.[92]

With residential facility placements of children the powers of children's courts were also considerably reduced. It was no longer necessary for welfare to refer cases back for confirmation of the particular facility selected. Children's courts thus lost their review capability.[93] The weakening of the institutional placement powers of children's courts may have encouraged a tendency to disregard their authority. Under s 34(3) welfare representatives were required to seek written approval from a commissioner before amending a children's court order by transferring a child to a reform school. Bosman-Swanepoel and Wessels have noted that this tended to be ignored because s 34(3) was

[90] Section 14(4) of the Child Care A 74/1983 in its original form read as follows:
' At such inquiry the children's court shall determine whether-
(a) the child has no parent or guardian; or
(b) the child has a parent or a guardian or is in the custody of a person who is unable or unfit to have the custody of the child, in that he- (i) is mentally ill to such a degree that he is unable to provide for the physical, mental or social well-being of the child; (ii) has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated; (iii) has caused or conduced to the seduction, abduction or prostitution of the child or the commission by the child of immoral acts; (iv) displays habits and behaviour which may seriously injure the physical, mental or social well-being of the child; (v) fails to maintain the child adequately; (vi) maintains the child in contravention of section 10; (vii) neglects the child or allows him to be neglected; (viii) cannot control the child properly so as to ensure proper behaviour such as regular school attendance; (ix) has abandoned the child; or (x) has no visible means of support.'
[91] Commissioner DS Rothman: personal communication 2 Sept 2002.
[92] Section 15(1)(a) of the Act.
[93] For the previously greater powers of children's courts see the discussion of the 1979 *Van Rooi* case in part 2.3.4, above.

'frequently not applied in practice'.[94] Also, there have often been delays or even complete failures to implement children's court placement orders under the 1983 Act.[95]

The ignoring of the law by welfare may be seen as evidence of poor standards of implementation and a low regard for the rights of children in the late 20th-century.[96] It also reveals a disregard for the status of children's courts. It may be concluded that under the 1983 Act the standing of these courts as protectors of children, and the scope and effectiveness of their work generally, diminished. This will be further substantiated in part 2.4.3, below.

2.4 Implementation of the Law: the Impact of Racism

As mentioned in the introduction to this chapter the factor of racism has been singled out for separate consideration because of its impact upon children in need of alternative care. It will be shown that it illuminates some important aspects of the implementation of the legislation reviewed in part 2.3. It would always have been obvious to those who held political power in South Africa that alternative care placements could result in white children being lost from the minority European group if they died because of inadequate nurturing or were placed with substitute caregivers of colour. Conversely, children of colour might infiltrate the white group if they grew up with white substitute caregivers or in institutions mainly for whites. Because of race purity concerns an approach directly opposite to that for which children's courts were used in contemporary Australia was to be taken.[97] It will be shown that in South Africa for most of the 20th

[94] Bosman-Swanepoel & Wessels (1995) op cit note 24 at 67.
[95] See part 8.4.4, below.
[96] See also the disregard for the requirements of s 12(1) of the 1983 Act as discussed in part 7.2.1.2, below. It will be shown in part 2.4.3 below that a primary focus by government officials during the 1980s was on achieving 'correct' racial classifications and matching in placements.
[97] For most of the 20th century in Australia so-called Aborigines Protection Acts were utilised to remove children of mixed aboriginal and European ancestry for assimilation into the dominant white group: see New South Wales children's court website <http://www.lawlink.nsw.gov.au/lawlink/childrens_court/ll_cc.nsf/pages/CC_aboutushistoryofthe childrenscourtchildpage>. The lighter a child's skin colour, the more likely it was that she would be removed. Australian children's court orders based upon 'proof' that the child was neglected or uncontrollable were

century even partially white children were generally excluded from placement into the European group.

Governmental responses in South Africa to the dilemmas posed by children in need of care in a multiethnic society were complex and often camouflaged. At the time of Union in 1910 some persons of colour still had the vote in the Cape. Also, the liberal and religious sentiments of some white voters favoured protection of all vulnerable children. Therefore, politicians had to treat the wording of care legislation as a sensitive issue. As will be shown, the covert solution adopted until attainment of democracy late in the 20th century was to apply legislation ostensibly promulgated for the purpose of benefiting all children in a biased manner.[98] Primary aims were to continue to ensure that the best alternative care resources were reserved for children regarded as white and to preserve the European group as racially pure. A third aim was to create the impression of a protection system in which there were appropriate remedies for all children in need.

It will be argued that courts served vitally important functions in supporting the covert approach. It will be shown that they helped with the superficial impression of a uniform child protection framework. At the same time, they served as gatekeepers controlling access to resources. It could be ordered, for example, that a child of colour should receive less expensive alternative care benefits than would be designated for a white child in similar circumstances. But courts did much more than merely provide some credibility and access-control to care resources. It will be shown that under the guise of providing care they played a central role in ensuring removals of behaviourally assertive, abandoned and street children of colour from urban areas and other areas reserved for whites. This was done by providing 'care' remedies that were in reality politically

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typically used to justify such removals: see P Parkinson 'The Child Participation Principle in Child Protection Law in New South Wales' (2001) 9 *International Journal of Children's Rights* 259 at 266.

[98] As Matthee and Schreuder (1999) op cit note 56 at 3 have stated the claim that welfare services were for all children in need irrespective of race, class, politics or creed was routinely touted as official policy by welfare officials in South Africa from the early 20th-century onwards -but in practice 'this was done in a segregated and unequal way'.

motivated. As a result, many children of colour were, compared to white children, disadvantaged and sometimes even actively exploited as workers.[99]

2.4.1 *The Pre-apartheid Period*

As has been noted some expressly racist provisions which explicitly confined certain state care services to white children appeared in pre-Union destitute children's legislation.[100] It has also been shown that after Union the Children's Protection Act 25/1913 was of foundational importance in establishing the beginnings of a national child protection system and perpetuating a significant role for courts in care cases.[101] According to Chisholm one of the main concerns which motivated the promulgation of this Act was that some neglected or deserted white children were falling into 'the black underclass'.[102]

The 1913 Act did not expressly provide for preferential care services for white children. However, in practice its care placement provisions (and after 1921 the court power to recommend state-grants) were selectively applied mainly on behalf of them.[103] Welfare societies assiduously followed up reports of white children left in the full-time care of persons of colour and immediately removed them.[104] Most care facilities -and particularly those with better resources- tended to be reserved mainly for white children.[105] Coloured (or so-called 'mixed-race') children in need of care were often seen by courts as

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[99] D DePanfilis 'Intervening with Families When Children Are Neglected' in H Dubowitz *Neglected Children: Research, Practice and Policy* (1999) 211 at 218 similarly noted that in the USA alternative care services were for many years implemented in ways that discriminated against black children.
[100] See part 2.3.1, above.
[101] See part 2.3.2, above.
[102] Chisholm (1989) op cit note 16 at 108.
[103] See HJ Simons *Crime and Punishment with Reference to the Native Population of South Africa* (Unpublished MA thesis, University of South Africa 1931) 142, 147-49 & 155.
[104] See the 1919 annual report of the Johannesburg Children's Aid Society as cited in the submission of the Johannesburg Child Welfare Society *Submissions from the Welfare Sector to the Truth and Reconciliation Commission* (1999) at Annexure E of Section A: page 1, para 1 entitled 'Colonial Roots'.
[105] Chisholm (1989) op cit note 16 at 6-8.

potential sources of labour and thus placed in apprenticeships.[106] With black children, the most common court solution was an order of removal to a supposed tribal area of origin.

By the 1920s there was intense concern about reducing the numbers of urban black children. One way of doing this was to cause as many as possible to appear before juvenile courts. If found either in need of alternative care or guilty of any of a myriad of petty criminal offences they were exiled to a distant locality.[107] If they returned they were likely to be sentenced to be whipped and sent to a reformatory or (for subsequent returns) even prison.[108]

Although covert racial discrimination had been applied under the 1913 Act the 1937 Interdepartmental Committee on Destitute, Neglected, Maladjusted and Delinquent Children and Young Persons which assisted with the drafting of the 1937 Children's Act made an important and liberal recommendation that the unofficial dual system of using juvenile courts mainly for children of colour and children's courts mainly for white children should be terminated.[109] Many members of parliament, however, wanted discrimination increased rather than decreased. During the passage of the 1937 Children's Act there was a fierce and extended debate about whether to include an express prohibition on transracial placements in it.[110] Evincing astute brinkmanship, Prime Minister Hofmeyr claimed that such a clause was not necessary because -revealingly- during his previous four years as minister of interior no children's court had allowed a child to be placed out of the white group.[111] The Act was thus passed without an express prohibition and both liberals and conservatives were to some extent appeased.

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[106] Ibid at 107. See also Simons (1931) op cit note 103 at 147.
[107] As pointed out by Chisholm (1989) op cit note 16 at 142 there were numerous petty offences with which black children could be charged. These included breaches of pass or vagrancy laws, or stealing chickens or fruit from trees.
[108] Ibid; and *Interdepartmental Committee* (1937) op cit note 55 at 53.
[109] It was proposed in its report, ibid, that 'it is a wrong policy to adopt a two-fold standard with regard to the problem of dependency and delinquency, one for Europeans and one for non-Europeans'.
[110] *Union House of Assembly Debates* (1937) vol 29 at cols 5539-5571.
[111] Ibid, col 5541.

When the 1937 Act was implemented the almost complete absence of expressly racial provisions still enabled a continuation of the covert approach. The supreme court assisted in promoting a liberal image of a uniform child protection system by asserting that it was legislation which applied equally to children of all races.[112] In practice, however, racial discrimination was perpetuated in several ways. In rural areas children regarded as 'natives' were unlikely to have care hearings before children's courts. In many rural districts such courts were never established. Section 3(5) of the 1937 Act foresaw this and provided that where there were no children's courts native commissioners (or even merely their assistants) could hear care matters involving black children.

In urban districts black children were equally unlikely to be brought before children's courts. In 1937 the authorities were still concerned that their numbers were rapidly increasing -according to some estimates by as much as 50% per year.[113] Rather than using the children's courts, large numbers of black children in need of alternative care continued to be brought before urban juvenile courts. These courts maintained the practice of issuing orders removing them to distant tribal areas and, if they returned, to the few available badly overcrowded reformatories or prisons for 'natives'.[114] An apologist for this use of juvenile courts could of course point to England where (as noted above) they were still being similarly being used for both care and delinquency cases.

The 1937 Act divested both juvenile and children's courts of the power to designate the duration of institutional care placements. In order to differentiate these from imprisonment it would be social services personnel who would in future decide upon duration -and even changes- in care.[115] This enabled the liberal-minded Alan Paton, at that time director of the Diepkloof reformatory for black boys (and later famous for drawing on

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[112] *R v Komgana* 1939 EDL 246; *R v Ngonyama* 1944 NPD 395; and *R v Makwena* 1947 (1) SA 154 (N).
[113] Chisholm (1989) op cit note 16 at 325.
[114] As noted by A Paton *Report to the Secretary for Education, Union of South Africa, 3 April, 1947* (Document PC 1/8/1/1/1/8: Alan Paton Centre and Struggle Archives, Pietermaritzburg -hereafter cited as 'AP Archives') 3 there was thus a differentiated system in which only some children benefited from the 1937 Children's Act. See also Chisholm (1989) op cit note 16 at 156-58, 326 & 329. A Paton *The Non-European Offender* (1945) 2-3 claimed that the courts often sent black children to distant rural areas where they had no familial connections.
[115] *Union House of Assembly Debates* (1937) vol 29 at cols 3431 & 3433.

this experience in semi-fictional works such as *Cry the Beloved Country*), to challenge the system of punitive and labour-exploitative placements for children of colour. He attracted considerable media attention by removing the sentries and barbed wire fences at Diepkloof and developing an educative system with many innovations (such as cottage groups and freedom passes) there.[116] Although his lead was to some extent briefly followed by managers of other care institutions for children of colour, by the early 1940s cruel punishments, harsh regimes, unhygienic conditions and the poorest of available resources once again generally characterised these facilities.[117]

It must be concluded that despite the fact that there were few express references to race in the 1913 and 1937 Acts their discriminatory implementation meant that the advances in care law during their currency (as noted in part 2.3) mainly benefited white children. Other abused, neglected and destitute children continued to be exploited for their labour, exiled from urban areas to distant rural localities or incarcerated under the guise of court-ordered alternative care placements. The newly developed and specialised children's courts could be pointed to as a unique feature of an evolving South African child protection system; but this progressive achievement is considerably limited by the fact that they were largely gatekeepers for access to resources reserved for children perceived as European. Although the committee which had recommended their formalisation had hoped that official children's courts would bring an end to the discriminatory dual-stream system, this did not occur.

2.4.2 *The Early Apartheid Period*

When the nationalist government came to power in 1948 and began to promote its policy of apartheid the system of unstated racism maintained under the 1937 Children's Act

[116] See A Paton *Freedom as a Reformatory Instrument* (1948) 7; and A Paton 'Flogging -Private Notes Written in 1950' (Document: PC 1/8/1/ 1/1/19: AP Archives) 3. In place of the previous largely-regimented system at black care institutions Paton considered that it was especially important that staff should attempt 'to establish positive personal relationships with individual boys': A Paton 'Diepkloof Reformatory' (Document PC1/8/1/5/6: AP Archives -Unpublished Private Notes, 1 April 1945) 1.
[117] Chisholm (1989) op cit note 16 at 357.

served its purposes for many years. During the first decade of its rule it focused attention on state and private residential care facilities. Firstly, it ensured that these became much more rigorously segregated than previously.[118] Secondly, it promoted the development of more of them for white children whilst not doing so for other children.[119] It also decided there that was a need for more cooperative children's court magistrates.[120] During the 1950s the previous full-time presiding officers were replaced with generalist magistrates who rotated between children's courts and other courts.[121] The practice of appointing dedicated, child-oriented adjudicators which had been regarded as a key strength of the children's courts since their inception in the 1920s was thus terminated.

Under the nationalists' stricter approach to segregation the longstanding method of classifying persons simply by viewing their physical appearance came to be regarded as inadequate -especially in cases viewed as borderline.[122] Since the nationalists wished to classify the entire population racially it was decided to formulate legally-binding criteria that could guide this process in a clear and ethnically scientific manner. As is well-known, classification criteria were formulated and imposed in terms of the Population Registration Act 30/1950.[123]

In order to understand the juridical context within which children's courts now functioned it is necessary to note again the influence of the supreme court. In interpretations of the Population Registration Act it generally supported the nationalist pursuit of white racial purity.[124] It made it clear to lower courts that humanitarian counter-

[118] In a departmental guide it was stated in 1956 that '[v]irtually all institutions grant permission to a specific race only': Professional Division: Department of Social Welfare, Pretoria *Handbook for Children's Institutions* (1956) 9.
[119] See the figures provided by Van Reenen (1953) op cit note 24 at 46 & 48-49.
[120] See Hoexter Commission (1983) op cit note 59 at 493.
[121] Ibid.
[122] *Handbook for Children's Institutions* (1956) op cit note 118 at 9.
[123] They were not based upon ancestry and made limited use of family-affiliations. Instead, they directed attention to the physical appearance of persons, their 'general acceptance' in regard to race, admissions about not being white and their 'habits, education and speech and deportment and their manner in general' as supposedly workable criteria for racial classifications: see, in particular, ss 3, 5, and 19 of the Act.
[124] See Boberg (1977) op cit note 78 at 101. It is noted, ibid, that where only one of a child's parents was classified as white the supreme court tended to support 'downward' classifications of such children as not white.

considerations were of limited relevance.[125] With children whose classifications were difficult to determine, judges even considered questions such as what schools they went to and whether they played with other children of a particular race.[126] Artificial legal barriers were thus created within biological or substitute familial groups where members differed from one another in physical appearance.[127] In many cases these significantly harmed the psychological development of children.[128]

A case which shows how influential racial considerations were by the mid-1950s is *Phillips v Commissioner of Child Welfare, Bellville*.[129] In this matter the supreme court upheld a children's court order for the forcible removal and detention of a white girl named Alice who was found by social workers to be living with a black man. Although 'care' removals of young white females involved in sexual relationships with persons of colour had been a standard part of the work of children's courts since the 1920s[130] this case for the first time tested the practice at the level of the supreme court. Alice (aged 16) had grown up in a black community and was validly married to her partner in accordance with customary law. The couple were well established financially and living in a happy and stable relationship. Nevertheless, Ogilvie Thompson J supported a racially motivated children's court designation of her as 'a child in need of care' simply in order to promote segregation.

It was thus confirmed in *Phillips* that children's courts could order forcible removals to prevent white children from remaining in familial relationships with persons

[125] See *M v Race Classification Board* 1962 (1) 715 (T) at 722F & 722H-723A for acceptance of the view that it might be appropriate to classify siblings differently from each other and to change classifications according to alterations in physical appearance as children grew older.
[126] *Du Preez v Race Classification Appeal Board* 1967 (2) SA 275 (C) at 277G; and *C v Sekretaries Van Binnelandse Sake* 1967 (3) SA (T) 346 at 348H.
[127] See generally Boberg (1977) op cit note 78 at 99-100. In *Pitcher v Secretary of Interior* 1968 (4) SA 258 (C) the children and mother in a family failed in their attempt to be classified the same as the father.
[128] In *T v Secretary for the Interior* 1966 (3) SA 565 (C) at 572A Watermeyer J treated it as appropriate that a son had 'deliberately made a break with his parents' in order to achieve a place in a white ballet group. In *Francisco v Secretary for the Interior* 1967 (2) SA 283 (C) at 289B Tebbutt AJ was of the opinion (*obiter*) that visits by a son to his mother 'once a week and in private' were sufficiently discreet and limited to enable his racial classification not to be changed to that of hers.
[129] 1956 (2) SA 330 (C).
[130] See Chisholm (1989) op cit note 16 at 142.

of colour. And the supreme court Population Registration Act decisions directed conversely that they should not allow any children who might arguably have some coloured ancestry to enter or remain in alternative care situations with whites.

2.4.3 *Established Apartheid in the Late 20th Century*

After a decade it was decided that the classification criteria in the Population Registration Act 30/1950 had proved sufficiently workable to enable the inclusion of express references to race in child care legislation. In 1960 BJ Vorster, who had many years previously opposed Paton's reforms at Diepkloof and was now the minister responsible for social welfare, introduced the Children's Bill of 1960 in parliament.[131] In clause 1(x)(j) he proposed that it should become possible to forcibly and permanently remove any child from his family, not because he was in need of alternative care, but purely because he:

> '... has, in terms of the Population Registration Act (Act No. 50 of 1950), been classified as belonging to a race other than the race of his parents or guardian if there is in the family a child who belongs to the same race as the parents or guardian;'[132]

This would have taken race matching to the extent of enabling removals even from biological parents who had lawful guardianship and were not in any way dysfunctional. Fortunately, in a context where international disopprobrium had already been encouraged by the writings of Alan Paton this extreme provision was ultimately dropped from the Bill.[133]

The removal of clause 1(x)(j) reduced the racial emphasis in Vorster's initiative. It left only a single express provision when the 1960 Children's Act was promulgated.

[131] Other purposes of the 1960 legislation have been discussed in part 2.3.4, above.
[132] Government Gazette No. 6347 [Vol CXCIX] of 8 January 1960.
[133] For a discussion of the Bill, see Zaal (1992) op cit note 4 at 390.

Section 35(2) directed children's courts as follows: '[i]n selecting any person in whose custody a child is to be placed or any children's home…regard shall be had to the religious and cultural background and ethnological grouping of the child… and the relationship between him and such a person'. The rather vague phrase 'regard shall be had' meant that there was still no absolute prohibition on transracial child placements.[134]

However, s 35(2) was nevertheless significant. It indicated that children's courts were no longer to follow the covert practice of mainly hearing cases involving white children and prospective alternative caregivers. They were now to decide care matters involving persons from all groups. Although they would still be expected to preserve the best resources for white children, they would become actively involved in applying all of the classification criteria developed under the Population Registration Act. They would thus train and encourage social workers to give priority to racially matching children to alternative caregivers or residential facilities segregated for the same race group.

In 1965 it was more strongly enjoined that children's courts were to treat racial considerations as overriding. Additional wording was inserted in s 35(2).[135] A new s35(2)(b) now laid down that where an extramarital ('illegitimate') child had the same racial classification as his mother's but not his father's, only her relatives (not the father's) were to be regarded as relatives of the child. This was clearly not in the interests of children. It was designed to prevent relatives of the father from approaching children's courts to have the child placed with them on the basis of consanguinity. Even more subversive of children's best interests was a new s 35(2)(c). This directed that '[a] child may not be placed in the custody of a person whose racial classification differs from his own, unless that person is his parent or guardian'. Here at last was the express prohibition which right-wing members of parliament had originally argued for when the 1937 Act had been debated.[136]

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[134] Some commissioners however interpreted it as absolute: see *Joffin and Another v Commissioner of Child Welfare, Springs* 1964 (2) SA 506 (T) at 507H.
[135] See the Children's Amendment Act 50/1965 at s 4. See also Zaal (1992) op cit note 4 above at 391-92 for a discussion of s 35(2).
[136] See part 2.4.1, above.

With matching now unequivocally required children's court commissioners became extensively involved in placing racial considerations before best interests. In the late 1960s the legislature made it even more difficult to be classified as white.[137] And during this period the supreme court applied a strict approach which made it harder for applicants to succeed with other changes in race classifications.[138] In relation specifically to classification of children as white, in 1971 James JP went so far as to hold in *Barbour v Race Classification Board* that even an appeal court could require the presence of applicants in order to view their physical appearance.[139] The degree of supposed anthropological expertise arrogated to themselves by courts during the high-tide phase of apartheid is graphically illustrated by the impersonal physical assessment of the young child, Steven, after he was forced to stand before the court in *Barbour*:

> 'In my judgment he had a European cast of face and straight hair. He was perhaps somewhat sallow in colour but he had none of the typical facial characteristics usually associated with a person of mixed European and African blood. If I had noticed him at all when walking down a street it might have passed through my mind that he was possibly of Southern European stock, and on further reflection that he might have a small admixture of Asiatic or Arab blood, but if I had seen him making use of exclusively European facilities it would never have occurred to me to doubt his right to do so.' [140]

The message to lower courts was clear. Presiding officers should view themselves as fully capable of determining racial classifications in borderline cases involving young children - but they should be particularly careful and strict in a situation where entry into the privileged white group was at stake.

Unsurprisingly the children's courts as lower forums bound by the supreme court now tended to treat the achievement of 'correct' racial designations as an overridingly important task in care cases.[141] Where siblings differed in physical appearance they frequently imposed different classifications even if this meant that the children would be

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[137] By means of the Population Registration Amendment Acts 64/1967 and 106/1969.

[138] For refusals to change classifications that had created divisions amongst family members see *Parker v Secretary of Interior* 1969 (2) SA 1 (C), *Parker v Secretary for the Interior* 1971 (4) SA 541 (C), *Kolia v Secretary for the Interior* 1969 (1) SA 287 (C) and *Secretary for the Interior v Dalvie* 1972 (2) SA 319 (C). In *Sekretaris van Binnelandse Sake v Jawoodien* 1969 (3) SA 413 (AD) a son succeeded in changing his classification to that of his mother's despite an appeal by the secretary for internal affairs.

[139] *Barbour v Race Classification Board* 1971 (3) SA 534 (N).

[140] Ibid at 539C-D.

[141] Johannesburg Child Welfare Society (1999) op cit note 104 at Section A, Appendix 2 to Annexure E [UP].

parted.[142] And once satisfied that a child had been correctly classified commissioners applied s 35(2)(c) of the 1960 Act strictly. They often refused to place any child with a differently classified person or residential facility even if this was patently in her best interests.[143] One consequence was that many children who could have been placed with extended family members or foster or adoptive parents remained in overcrowded institutions or on the streets.[144] Since all racial groups were supposed to be separated it was no longer (as previously) mainly white children who might be forcibly removed from racially-different substitute parents with whom they had bonded.[145]

As might be expected under the continuance of a nationalist government very similar race-matching provisions were again included when the 1960 Children's Act was replaced by the 1983 Act.[146] A new feature, however, was a carefully-gradated scale of foster care grants ranging from white through coloured and Indian to black-classified children who were to receive the least per month.[147] It has been claimed that many children's courts interpreted this hierarchy of discrimination more broadly as indicating the priority children should receive on their case rolls.[148] Being at the bottom of the scale, black children tended to be worst affected. If commissioners could find a tribal affiliation

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[142] Matthee and Schreuder (1999) op cit note 56 at 6.
[143] Ibid.
[144] Ibid. J Maker 'The Law That Causes Untold Misery' *Sunday Tribune* Jan 31, 1988 at 33 claimed that hospitals and social work agencies received large numbers of applications from couples who were ignorant of the law and willing to adopt children of other groups but had to turn them away.
[145] This led to clandestine lifestyles in which parent figures hid children from the attention of authorities. Pinetown Highway Child and Family Welfare Society Case 18/87 (1987) records the typical situation of a black child growing up with a coloured family after he was abandoned with them in 1981. In order to avoid the danger of removal they did not attempt to register his birth or send him to school. J Maker 'The Women Who Care for the Children of Prostitutes' *Sunday Tribune* 24 April, 1988 at 5 noted that prostitutes, as a group who often had extramarital children who differed from them in appearance, tended to become adept at concealing their existence.
[146] In s 40 of the latter Act were to be found provisions similar to those that had been contained in s35(2) of the 1960 Act. The new Act in s 40 continued to prohibit child placements with persons who had differing race classifications and again directed that 'regard must be had to the religious and cultural background and ethnological grouping… of the child' and any alternative caregiver.
[147] For a discussion and comparison of the amounts see Chatsworth Child and Family Welfare Society *Submissions from the Welfare Sector to the Truth and Reconciliation Commission* (1999) op cit note 56 at Annexure C of Section B, p 9. For a black foster child, a grant would often take years to come through and it would last only until the child was 16 years old (as opposed to 18 for other children): see the submission by the Greater Johannesburg Welfare Social Service and Development Forum ibid at Section A, p 11.
[148] Matthee and Schreuder (1999) op cit note 56 at Section B, Annexure A, p 2 stated that white children's cases were given priority by children's courts whilst children of colour were often left in situations of dire need.

they still tended to transfer them to distant 'homeland' jurisdictions where hardly any care resources were available. In cases where no basis for this could be found some commissioners are alleged to have spent the minimum time in deciding on outcomes for black children. It has been claimed that this sometimes resulted in placements in facilities where mortality rates were known to be high with social workers being refused time to seek suitable extended family carers.[149]

It was of course not only persons of colour who were adversely affected by the intense climate of racism. A case in which Olmesdahl appeared as legal representative for a white single mother in the early 1980s shows how pervasively racial paranoia had come to affect the work of the children's courts by that time. The mother went to work every day leaving her children in the care of a black domestic worker. A children's court held that a care inquiry had been validly instigated purely because the children were spending so much time with the maid that they had developed 'an unnatural liking for blacks'.[150] In another case in 1983 the situation of a black child aged six growing up with white substitute parents was recorded. In order to keep him from being discovered by the authorities and removed they avoided having him classified or sent to school.[151]

An important development was that, in contrast to the earlier period when (as seen in the *Phillips* case) welfare personnel could usually be relied upon to cooperate in the implementation of segregation policies, by the 1980s there was considerable resistance from social workers. Although further research is needed to fully uncover the reasons for this transformation, it is probably at least partly attributable to the appointment of increasing numbers of social workers of colour and growing anti-apartheid activism by the

[149] See the discussion of the scandal arising from the continuation of children's court placements (despite numerous deaths there) at the Van Rhyn Deep Facility from the mid-1970s to the mid-1980s and the alleged comment of the Johannesburg chief commissioner that the babies concerned 'would die anyway' in S Mabusela *Submissions from the Welfare Sector to the Truth and Reconciliation Commission* (Truth and Reconciliation Commission, 1999) at Appendix 1 to Annexure E, p 2.

[150] As it was alleged in court ' *'n onnatuurlike voorliefde vir swartes'*: personal communication -Professor MCJ Olmesdahl, Durban 28 Oct 2002.

[151] Durban African Child and Welfare Society Case 13984/83 (1983). As indicated in note 145 above, by the 1980s it was not only white parents who needed to hide children who looked different from themselves.

late 20th century.[152] A governmental system of different welfare departments for different race groups unintentionally provided infrastructural support for resistance by reducing the degree of white control.

Resistance by welfare professionals was also provoked by the harsh effects of increasingly strenuous attempts to enforce apartheid.[153] Social workers were well placed to impede the implementation of race matching by children's courts. In the 1980s they often did so by providing limited or even false evidence about the background and history of children.[154] The aim was usually to achieve the most favorable possible classification in terms of the governmental racial scale: black-Asian/coloured-white.[155] The physical appearance of many children in relation to these artificial categories was borderline. If a children's court accepted that a child was alone after being abandoned or orphaned it could not demand to see relatives or their classification documents with a view to clarifying racial ancestry. And the classification which it could be persuaded to accept would inevitably have a direct bearing on care resources subsequently made available.

Social workers sometimes gave false evidence that children of indeterminate appearance were of entirely white ancestry.[156] Where this was unlikely to seem convincing they might instead try to prove that a child was 'coloured' or 'Indian' rather than black. Aside from the more general aim of gaining the best possible care resources for a child, selective information about social background and ancestry might also be provided to avoid children being removed from substitute caregivers with whom they had already

[152] For example, in Durban during 1984-1991 a 'Children from Nowhere Association' operated for the specific purpose of developing and sharing tactics intended to promote best-interests rather than racially motivated alternative care placements. Only a minority of the members were white social workers: personal observation -the candidate served as their legal adviser. In other parts of the country there were similar organizations -for example, the Concerned Social Workers' Society in Johannesburg: personal communication Priscilla Mckay MPP 21 April, 2006.
[153] Personal observation; and Mckay ibid.
[154] Whilst this could not safely be recorded in their minutes at the time, the best methods for doing so to assist children individual cases were an important part of the business at meetings of societies such as the Children from Nowhere Association and the Concerned Social Workers' Society: personal observation; and Mckay, ibid.
[155] Ibid.
[156] In Durban Child and Family Welfare Society Case 406/80 (1980-1984) this happened because a light-skinned child had bonded with a white couple. She had been abandoned with them at birth and after four years it was strongly in her best interests that they be permitted to foster or adopt her.

bonded, or siblings being differently classified.[157] A fourth motivation was to manipulate the future classification of a young child so that it would match that of a suitable prospective adoptive or foster parent whom a social work agency had already screened.[158]

As it became recognised that growing numbers of social workers were not cooperating administrative practices were developed to make it more difficult to mislead commissioners. All social workers' reports had to go through a process of what came to be referred to in welfare circles as 'canalisation' before they could be presented at a children's court. This simply meant that the reports were evaluated by government-employed senior social workers who were more likely to assist with the imposition of government racial policies.[159] A second pre-court procedure was that of requiring as yet unclassified children (and any available near-relatives) to be physically viewed by officials employed by the department of home affairs.[160] These officials utilised invasive techniques such as seeing whether fine combs would run through the hair of children and interrogating mothers about their sexual partners.[161]

As tactics and counter-tactics proliferated around questions of race, by the early 1980s some children's courts became ideological battlegrounds. Commissioners responded to activist social workers' classification stratagems by attempting to insure that they were counterproductive. One way to do so was by ordering that a child whose proposed

[157] For example, a social worker might choose not to reveal that children of a single mother had different fathers who differed from each other in racial appearance: personal experience.

[158] A case which illustrates the kinds of dynamics involved is one which was dealt with by the Durban Indian Child and Family Welfare Society in 1985. The Society felt under pressure to ensure that a coloured child was successfully adopted by the Indian husband of his coloured mother. The family was living in an Indian area where the child had not been permitted to go to school for two years because the department of home affairs refused to reclassify him as Indian. The Society therefore launched an adoption application in the Durban children's court without including information about the classifications of the child and mother. The application was successful because the busy commissioner did not wish to spend a lot of time on the case and assumed that the child was Indian. On the basis of the adoption it was subsequently possible to have the child's classification 'corrected' by the department of home affairs to Indian: see Durban Indian Child and Family Welfare Society Case A1732 (1985); and Durban Children's Court Case No. 14/1/2-158/85 (1985: unreported).

[159] On the racist intentions underlying 'canalisation' see Mabusela (1999) op cit note 149 at p 1 of Appendix 1 to Annexure E.

[160] Johannesburg Child Welfare Society (1999) op cit note 104 at p 1 of Appendix 1 to Annexure E.

[161] Personal experience. In Durban Child and Family Welfare Society Case 406/80 (1980-1984) as referred to in note 156 above department of home affairs officials eventually compelled a classification of coloured after checking the hair of the child.

classification appeared suspect should remain for an extended period of time in a place of safety which was not geared for long-term placements. This would be done by applying *M v Race Classification Board*[162] and waiting to see whether the child's physical appearance changed as she grew older.[163] Alternatively, a commissioner could insist that a child must be differently classified from what a social worker proposed even if this meant that extended family members who would otherwise have been available as alternative caregivers were no longer eligible.[164]

It would be wrong to classify all commissioners as heartlessly positivistic appliers of racial law. Particularly by the late 1980s children's courts were sometimes willing to support reclassifications on humanitarian grounds especially where a white child was not involved.[165] However, it was only on 19 June 1991 that the direct prohibition on placements involving persons of differing race classifications was repealed.[166] By that time many children had been had adversely affected by it despite the clandestine struggle which had been waged in the children's courts throughout the previous decade. In its final form as still applicable today s 40 of the 1983 Act continues to direct that 'regard shall be had to the religious and cultural background of the child concerned and of his parents as against that of the person in or to whose custody he is to be placed or transferred'. But this is no longer interpreted by children's courts as standing in the way of transracial placements that are in the best interests of children.[167]

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[162] See note 125 in part 2.4.2, above.

[163] Greater Johannesburg Welfare Social Service and Development Forum (1999) op cit note 147 at Section A, p13 para 7.2. In Case 406/80 as cited in note 156 the child's classification was delayed for two years because 'there is uncertainty regarding the appearance of hair which is not yet grown'.

[164] Mabusela (1999) op cit note 149 at 2.

[165] On 10 Dec 1987 the Durban children's court supported the reclassification of a child from coloured to Indian so that she could live legally with an Indian father figure with whom she had bonded: Durban Indian Child and Family Welfare Society Case A1795 (1987). On 20th April 1988 the Verulam children's court agreed to place an extramarital Indian-classified child with her coloured paternal grandparents and to recommend that they receive a state foster grant. It accepted proof that the Indian mother had died and the child had bonded with the grandparents: Verulam Child and Family Welfare Society Case 4678 (1988).

[166] Under s 14 of the Child Care Amendment Act 86/1991.

[167] There has, however, been some debate about how it should be applied: see generally J Heaton 'The Relevance of Race Classification in Terms of the Population Registration Act 30 of 1950 for Adoption in South Africa' (1989) 106 *SALJ* 713; DJ Joubert 'Interracial Adoptions: Can We Learn from the Americans?' (1993) 110 *SALJ* 726; FN Zaal 'Avoiding the Best Interests of the Child. Race-Matching and the Child Care Act 74 of 1983' (1994) 10 *SAJHR* 372; and TL Mosikatsana 'Transracial Adoptions: Are We Learning the Right Lessons from the Americans and Canadians? A Reply to Professors Joubert and Zaal' (1995) 112 *SALJ* 606.

2.5 More Effective Courts and Legal Representatives

A governmental initiative which originated during the late apartheid period explored the possibility of establishing family courts. Its historical evolution is briefly considered below because it produced some important recommendations concerning the children's courts and is still ongoing at the present time. Also, the concept of a family court structure raises fundamental questions about the possible status and functions of care-proceedings courts.

During the 1970s concern about escalating divorce rates in the white population caused the possibility of establishing family courts in South Africa to be investigated three times but the reports were consistently negative.[168] In the 1980s, however, there were some positive developments which resulted in limited improvements in court services on behalf of at least some children involved in domestic matters. In 1983 the Hoexter Commission published a report in which it recommended the establishment of family courts which should, as part of their jurisdiction, take over the work of children's courts.[169] The Commission further proposed that there be an 'Office of the Children's Friend' to provide specialist assistance for children involved in litigation.[170]

In 1985 the recommendations of the Hoexter Commission appeared to be bearing fruit when a Family Court Bill was published.[171] Although the Bill was ultimately rejected, the Mediation in Certain Divorce Matters Act 28/1987 was promulgated with a view to promoting the Hoexter concept of a Children's Friend. This Act is historically significant

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[168] The internal and unpublished Thompson Report of 21 October 1974; South African Law Commission *Report on the Law of Divorce and Matters Incidental Thereto* (RP 57/1978); and the Galgut Commission *Inquiry into Civil Proceedings in the Supreme Court of South Africa* (1980). For discussion and references to commentaries, see S Burman 'The New Family Court in Action: An Initial Assessment' (2000) 117 *SALJ* 111 at 111-12.

[169] Op cit note 59. Part B is entitled *Commission of Inquiry into the Structure and Functioning of the Courts*. See generally Part VII which is entitled 'The Desirability or Otherwise of the Establishment of a Family Court'. For a recommendation that children's court work be encompassed, see ibid at 525(e).

[170] Ibid at 510.

[171] Bill 62/1985.

because for the first time a network of lawyers who were expected to serve as specialists on behalf of children was set up. These lawyers were titled 'family advocates' (using Canadian terminology) and their services were to be provided at state expense.[172] Unfortunately, the Mediation in Certain Divorce Matters Act confined their work to divorce-related matters, and so the representational needs of children in other courts -such as the children's courts- were not catered for.[173]

As Burman has pointed out, by the mid-1990s strong political pressure to demonstrate a concern for women and families was being felt by the government.[174] In 1997 the Hoexter Commission published another report in which it again recommended the establishment of family courts. It continued to stress the importance of these having a comprehensive jurisdiction to include, inter alia, the work of the children's courts.[175] Even before publication of this report the minister of justice established a family court task team in February 1997. In 1998 this team initiated the setting up of family court centres as pilot projects in a few jurisdictions. These were not actual family courts in the accepted sense of forums with a broad jurisdictional capability in domestic matters. Rather more modestly, they merely situated courts dealing with different kinds of domestic disputes (including children's courts) in close physical proximity to one another.[176] The centres are currently still operative and have slightly reduced duplication of resources and travelling costs for the public but they are only a small step on the road towards creating family courts.

The South African law commission in its draft Children's Bill 2002 recommended the establishment of broadly-empowered 'child and family courts' to replace children's courts and also take over much of the child-related, domestic-case jurisdiction of other

[172] The first family advocates' office was set up in 1990.
[173] A proposal for utilising family advocates in children's court cases is made in part 5.4.2, below.
[174] Burman (2000) op cit note 168 at 113. It is noted ibid that in June 1996 the minister of justice told parliament that he wished to establish a family court as soon as possible.
[175] Report 200/1997 entitled 'Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court'. Part 2 of vol 1 of the Report dealt with 'The Need for the Establishment in South Africa of a Specialist Family Court of Comprehensive Jurisdiction'.
[176] For more information about the pilot projects and the work of the Centres see Burman (2000) op cit note 168 at 113-115. Generally on attempts to establish family courts in South Africa see B Goldblatt 'A Feminist Perspective on the Law Reform Process: An Evaluation of Attempts to Establish a Family Court in South Africa' (1997) 13 *SAJHR* 373.

courts.[177] This proposal was not followed by the legislature and the existing children's court network is perpetuated by the 2005 Act. Nevertheless, the law commission's recommendations in favour of much broader capabilities for courts dealing with children's matters did influence this Act. As will be shown in chapter 8 below[178] it transforms children's courts by greatly increasing the range of remedies they can offer, although their jurisdiction will not extend to juvenile crime cases.[179] As suggested in part 1.1 above, the 2005 Act is well arguably the most important historical development since the legislative recognition of the children's courts in 1937.

In s 55 of the 2005 Act provision has been made for state-funded legal aid board representatives for children in children's courts. Significantly, however, family advocates have not been included and nor has provision been made for state funded representation of other impoverished family members besides children.[180] In s 45(3) of the 2005 Act the legislature has committed itself to the eventual establishment of family courts.[181] It is clear from the wording of the Act, however, that separate children's courts are to remain as an important component of our child protection system for the time being.

South Africa is thus still a long way off from the development of what are known in North America as unified family courts.[182] The focus in subsequent chapters of this thesis, therefore, is on improving our present system of children's courts. It is hoped, however, that the reforms recommended will assist with the strengthening of what may

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[177] Chapter 6, Draft Children's Bill 2002: see South African Law Commission *Report on the Review of the Child Care Act* (RP 17/2003) part 3.
[178] At part 8.3.
[179] In contrast, in Kenya it was decided to establish 'children's courts' which could deal with both civil and criminal matters: s 73 Children Act 8/2001 (Gazette Supplement No 95, 4 January 2002, Nairobi).
[180] Legal representation is further discussed in chapter 5, below.
[181] It opens with the phrase '[p]ending the establishment of family courts by an Act of Parliament'.
[182] In contrast to fragmented systems such as that in South Africa, such courts can efficiently 'bundle' all domestic and even also less serious juvenile delinquency cases involving the same family into a single court matter, often dealt with by a single judge. See, for example A Schepard & JW Bozzomo 'Efficiency, Therapeutic Justice, Mediation and Evaluation: Reflections on a Survey of Unified Family Courts' (2003) 37 *Family LQ* 333 at 338-39; and CD Schwarz 'Unified Family Courts: A Saving Grace for Victims of Domestic Violence Living in Nations with Fragmented Court Systems' (2004) 42 *Family Court Review* 304 at 305-310. That the South African legislature has not begun to contemplate combining delinquency with domestic cases involving the same family is clear from its continued commitment to separate criminal courts for trying children: see generally the Child Justice Bill 49/2002 at <http://www.polity.org.za/pdf/ChildJustB49.pdf>.

eventually become a care and protection component in a future unified South African family court system.

2.6 Conclusion

A complex and in some respects even contradictory set of factors shaped the emergence of modern South African care legislation and the children's courts. The most important external influence came from Britain. The originally prison-like English industrial schools and reformatories and the idea that nonconformist children from the underclasses could be contained and even remoulded in suitable residential facilities have had a considerable impact since they were imported and reinterpreted in South Africa. The allocation of the most important decision-making powers about child placements to South African courts rather than welfare workers can also be attributed to English methods.

However, in the mid-1920s an important break from the English approach occurred with the creation of a unique system of South African children's courts. It is significant that these began as part of a child saving initiative supported by the supreme court and often had dedicated presiding magistrates who specialised in care cases. In world terms they were modern because of an orientation towards keeping children within their families where possible by supporting female caregivers with state grants. Despite some seminal and many subsequent limitations which would seriously affect the work of these courts, their retention primarily as care decision-making forums until the present day represents a remarkable achievement for a developing country.

After their unofficial establishment in the 1920s the formal recognition of children's courts and description of presiding officers as 'commissioners' in the 1937 Children's Act were further important steps forward. This Act continued the modernisation of our law, inter alia, by providing inexpensive accessibility to children's courts for all caregivers, introducing medical assessment procedures, and establishing the no-fault and child focused 'child in need of care' ground. It also helped to redress gender inequality between mothers and fathers. The proven policy of favouring specialist presiding magistrates was retained.

These generally developed sufficient skill to keep proceedings amicable and encourage the hearing of the voices of vulnerable children and caregivers. Despite some supreme court judgments which limited the jurisdiction of the children's courts, the variety and quality of their services were significantly advanced during the currency of the 1937 Act.

Subsequently, the 1960 Children's Act in some respects continued the process of modernising the children's courts. A mental neglect ground and allowance of expert psychiatric evidence based on observation in controlled environments incorporated recent scientific knowledge. Home placements supervised by social workers were introduced as an alternative to removals of children -which of course accords with the primary evaluative criterion of removals as a last resort. Of particular importance was that under the 1960 Act welfare became accountable to children's courts for proper implementation of their orders. Furthermore, children's courts gained a blanket power to impose criminal sanctions on any person impeding such implementation. The Act thus also appears in a positive light when measured against the criterion of courts as an effective monitoring agent able to compel remedies on behalf of children.

The steady improvements in the wording of legislation governing the services of the children's courts must not, however, be viewed in isolation. The most important internal historical influence was undoubtedly political concerns about preserving a pure white population as a separate entity. Alternative care placements were a sensitive issue because they could result in exfiltration of white children and infiltration of children of colour. It has been shown that in response to this concern South Africa has had a long history of racial discrimination in the allocation of alternative care services in general and specifically court services.

As early as the late 19th-century some legislative provisions in destitute children's legislation expressly favoured 'European' children. A need to accommodate various shades of political opinion at the time of Union and an appreciation of the problems resulting from inadequate population-classification criteria caused a more covert approach to discrimination to be adopted in the period 1910-60. Court remedies provided for in care

legislation during this period were not generally expressly racist, and often appeared to be designed for all children.

Despite the apparent neutrality in the wording of much of the legislation, and notwithstanding dicta about applicability equally for all children by some supreme court judges, discrimination against children of colour remained a pervasive feature of court activity in care cases until the last decade of the 20th century. In rural areas black children were consigned to parallel networks of native commissioners' and later homeland courts where presiding officers tended to have little expertise in children's issues and care resources were scarce. In urban areas children of colour were far more likely than white children to be brought before juvenile courts. These courts usually ordered that black children in need of alternative care be forcibly removed to remote tribal areas or the harsh environments of reformatories. Coloured children tended to be exploited by means of court orders placing them in apprenticeships -although institutional placements were also a possibility.

The extensive use of juvenile courts and placements in large, prison-like institutions showed the lingering historical influence of England -for there too, juvenile courts accustomed to criminal cases dispensed care orders, and placements of particularly lower class children in industrial schools and reformatories remained common. Available evidence suggests that in South Africa white children were less likely to be subjected to such placements and that for the first forty years of their existence the specialised children's courts were used mainly for ensuring that the best available care resources were received by them. A covert binary court system based entirely on the physical appearance of children was thus maintained for the first half of the 20th century.

After apartheid became an official policy under the nationalist government in 1948 residential facilities were rigorously segregated and the independent, child-oriented magistrates removed from the children's courts. Expressly-racist provisions reappeared in child care legislation in the 1960s. This was now regarded as feasible because race classification criteria had been developed under the Population Registration Act 50/1950

and refined in supreme court interpretations. The role of children's courts was extended from promoting the best interests of mainly white children. Now staffed by cooperative generalist magistrates, they became centrally involved in racial classification and matching children from all groups to substitute caregivers. Although they continued with their earlier function of preserving the best resources for white children they thus played a key role in segregating all children in need of alternative care.

As had been foreseen by politicians earlier in the century the promulgation in the 1960s of expressly-racial legislative provisions that were obviously applicable to vulnerable children engendered a degree of opposition. During the late apartheid period children's courts became arenas of struggle between activist social workers and pro-government commissioners. Continuing efforts by the latter to preserve the best resources for white children were now impeded by selective and modified evidence put before them. However, their attempts to maintain race matching were supported by legislative amendments, supreme court precedents and administrative requirements rendering it more difficult to alter or ignore race classifications.

It has been shown that the escalating governmental focus on ethnic considerations in the late 20th century harmed children and caregivers. Even the privileged white group suffered -in part because its distracting influence resulted in failures to modernise -and even retrograde measures- in the 1983 Act. As noted in part 2.3.5 these stand in contrast to the overall progress in children's court services (albeit with some setbacks) of previous decades. Since attempts to develop family courts also failed and efforts to improve legal representation for children resulted in only limited advances, these years must with reference to the evaluative criteria applied in this thesis be characterised as a period of stagnation and even deterioration.

Given the effects of the main historical influences it can be understood why in 1995 the democratic government took over outdated and in other respects extremely inadequate care legislation. The extent to which it inherited children's courts where expertise in care matters was lacking because staff had been selected to serve as reliable race classifiers and

guardians of privilege can also be appreciated. The legislature in formulating the 2005 Act was undoubtedly correct in its appreciation that major reforms were urgently needed. How far the Act makes up for lost time by optimising the role of children's courts on behalf of all children is evaluated in the subsequent chapters, below.

CHAPTER 3
ALTERNATIVES TO COURTS

3.1 Introduction

It might be postulated that a logical extension of the anti-legalistic approach referred to in chapter 1 above would be a reduction in the role of courts -or even their complete removal- as decision-making forums in care cases. It is certainly true that in some systems increased use is being made of alternative dispute resolution (hereafter 'ADR') methods rather than relying only upon courts for resolving differences between family members and welfare personnel and for reaching important decisions in these cases. This is supported by the UN Guidelines, 2007.[1] The 2005 Act is the first South African legislation to provide expressly for ADR in care cases.

This chapter considers the extent to which courts should continue to be used for alternative care cases in South Africa or else be replaced or supplemented by ADR processes. The chapter is based on an assumption that this question can best be resolved by considering the main advantages and disadvantages of these processes as compared with those of courts. It will be shown that although South Africa certainly needs to implement less adversarial and more collaborative approaches there are important reasons why our courts must continue to play an authoritative part in the resolution of care cases.

In part 3.2 below five ADR methods with which there has been substantial experience in well-developed systems are briefly described and distinguished. In part 3.3 their main advantages and disadvantages are identified. In part 3.4 some basic strengths and weaknesses of courts are noted and compared with those of the alternative methods. In part 3.5 a motivation for retaining courts and combining them with ADR is put forward. It is recommended that our courts should at the present time continue to bear primary

[1] Article 35(b) refers to the need for states to implement mediation and other conciliation services for assisting children who require alternative care measures.

responsibility for reaching legally-binding decisions about mandatory alternative care measures. It is, however, also suggested that because of its advantages in certain situations as proved in other systems ADR should be promoted in South Africa.

In part 3.6 the framework for combined use of children's courts and ADR in the 2005 Act is critically evaluated. It is shown that although a fundamentally correct approach has been taken in providing children's courts with a managerial function the ADR provisions in the Act are inadequate in a number of respects. Recommendations for addressing these deficiencies are put forward. Finally, in the conclusion to the chapter in part 3.7 the most important findings are summarised and related to some of the evaluative criteria as described in chapter 1.

3.2 Alternative Resolution Methods for Care Cases

The alternative methods selected for evaluation are: negotiated voluntary care agreements, mediation, family group conferences, the Scottish children's hearings panels and pre-court conferences. Although combinations have developed in some systems[2] it is convenient for the purpose of evaluation to consider them individually. As a necessary precursor to an analysis of their effectiveness a brief description of basic distinguishing features of each is provided below.[3]

Negotiated voluntary care agreements may be seen as a natural extension of the kind of interactions which family members would tend to have with investigative social workers in many care cases. The idea behind them is to remove the need for externally directed solutions by allowing caregivers (and sometimes also children) to negotiate with investigative agency personnel and then voluntarily agree upon the implementation of

[2] SM Chandler & M Giovannucci 'Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice' (2004) 42 *Family Court Review* 216 at 217.

[3] As can be seen from the next footnote terminology and utilisation of methods vary slightly in different systems. The purpose in the discussion immediately following is merely to identify the main distinguishing features which tend to characterise the five methods under consideration and give a brief idea of how they have commonly been used.

alternative care measures, including if necessary child-removals.[4] In England opportunities to reach such agreements are sometimes provided at what are referred to as child protection conferences.[5] These have become well established as a standard feature of care cases. They are conducted by investigative agencies and may sometimes avert the need for other forms of ADR or court proceedings.[6]

In some systems voluntary agreement negotiations may be initiated by family members rather than by social workers. For example, in France under the 1984 Children's Act provision was made for either parents or children themselves to approach social services rather than courts with a request for temporary alternative care.[7] In British Columbia s 20(2) of the Child, Family and Community Service Act of 1996 allows for the use of specialist 'coordinators' rather than ordinary investigative social workers to negotiate with families. [8]

Mediation has been defined as a dispute-resolving mechanism for empowering parties to settle problems in a consensual way by means of voluntary direct engagement on an equal footing. It requires the presence of an independent mediator to act as a neutral facilitator.[9] Although it was previously mainly associated with other kinds of disputes mediation has been increasingly utilised in care cases during the last two decades.[10]

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[4] In Canada they have been so used for many years: see SE Palmer 'Mediation in Child Protection Cases: An Alternative to the Adversary System' (1989) 68 *Child Welfare* 21 at 26-27. In some US jurisdictions the resulting agreements with welfare are termed 'entrustment agreements' and can be revoked by parents: see, for example, *In the Interests of La Rue* 366 A.2d 1271 (Pennsylvania 1976) at 1273. In Scotland the family may agree to 'voluntary supervision': see C Hallett & C Murray 'Children's Rights and the Scottish Children's Hearings System' (1999) 7 *International Journal of Children's Rights* 31 at 32.

[5] If parents agree voluntary placements are possible in terms of s 20 of the English Children Act 1989. This is supported by the Children Act Guidance and Regulations 1991 at vol 2, para 2.25. See further G Schofield 'Parental Responsibility and Parenting -the Needs of Accommodated Children in Long-Term Foster-Care' (2000) 12 *Child and Family LQ* 345 at 347.

[6] See the English *Protocol for Judicial Case Management in Public Law Children Act Cases* (June 2003) at para 15.

[7] M Corbillon 'France' in MJ Colton & W Hellinckx (eds) *Child Care in the EC* (1993) 53 at 58.

[8] RSBC 1996: accessed at <http://www.qp. gov.bc.ca/statreg/stat/C/96046_01.htm>.

[9] This definition is adapted from G Davis 'Reflections in the Aftermath of the Family Mediation Pilot' (2001) 13 *Child and Family LQ* 371. See also J Maresca 'Mediating Child Protection Cases' (1995) 74 *Child Welfare* 731 at 733; and GR Savoury, HL Beals & JM Parks 'Mediation in Child Protection: Facilitating the Resolution of Disputes' (1995) 74 *Child Welfare* 743 at 744.

[10] Savoury, Beals & Parks ibid at 744. It is frequently used in the USA for care and other disputes involving children: see AR Imbrogno & S Imbrogno 'Mediation in Court Cases of Domestic Violence' (2000) 81

Because the neutrality and independence of mediators is crucial investigative social workers or even persons associated with their agencies cannot be utilised to undertake mediation with client families. Although care mediation phases and their sequence vary in different systems[11] it has generally been found appropriate to begin with processes in which the mediator interacts separately with individual family members (sometimes only telephonically) before deciding who should be brought together and further involved.[12]

As pointed out by Maynard four main uses of mediation have developed in care cases.[13] Firstly, it is used therapeutically to address problems between family members which cause neglect or abuse of children. The aim here is to avoid drastic measures such as removal.[14] In some matters this may involve mediating between a child and parent.[15] Secondly, it is used to help families accept the need for temporary or permanent removals of their children.[16] Thirdly, it is applied to resolve differences between welfare and members of families where there are care problems.[17]

A fourth use of mediation is to resolve differences between original and alternative caregivers who need to interact during temporary child-placement periods.[18] This is relevant in 'open' placement situations where, for example, the identity of a foster parent is known to birth parents who will continue to have contact with the child and the foster

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Families in Society: The Journal of Contemporary Human Services 392; and AS Schepard & JW Bozzomo 'Efficiency, Therapeutic Justice, Mediation and Evaluation: Reflections on the Survey of United Family Courts' (2003) 37 *Family LQ* 333 at 336. Scotland, with its tradition of using out-of-court settlement processes on behalf of children, has placed a strong emphasis on mediation: see L Parkinson *Family Mediation* (1997) 194; K McK Norrie *The Law Relating to Parent and Child in Scotland* (1999, 2ed) at 296 para 9.48; and N Freymond 'Using Intermediary Structures to Support Families: An International Comparison of Practice in Child Protection' (2001) at 23 (Canadian Partnerships for Children and Families Project Website. Accessed at <http://www.wlu.ca./pcfproject>).

[11] For a list of stages typically followed in the USA see J Lande 'Mediation: Child Protection Mediation' (National Centre for State Courts, 2001) at 3: accessed at < http://www.ncsconline.org/WC/Publications>.

[12] A Henry 'Mediating Child Protection Disputes: a Canadian Perspective. Are We Leaving Room for the Child at the Table?' (Paper: Fourth World Congress on Family Law and Children's Rights, Cape Town 2005) 4. Accessed at < http://www.lawrights.asn.au/>.

[13] J Maynard 'Permanency Mediation: A Path to Adoption for Children in Out-of-Home Care' (2005) LXXXIV *Child Welfare* 507 at 507-08.

[14] Ibid at 509.

[15] Savoury, Beals & Parks (1995) op cit note 9 at 754.

[16] Maynard (2005) op cit note 13 at 507.

[17] Ibid at 508-09.

[18] Ibid at 508.

parent during the time of alternative care.[19] As Palmer has pointed out mediation in such cases usually focuses on issues of access and 'plans toward reuniting the family'.[20]

Instead of relying on the expertise of mediators, an alternative technique known as 'family group conferences' involves utilising a child's wider extended family for deciding on extracurial protection arrangements. These conferences (hereafter, 'FGC's') were originally developed in New Zealand and have since been used there to reduce reliance upon both social workers and courts. They are based on long established indigenous Maori practices of utilising extended families to assist children.[21] They are intended to reduce the decision-making powers of professionals and increase those of families.[22]

FGC's were first given legislative form in the New Zealand Children, Young Persons and Their Families Act 24/1989.[23] In contrast to other processes where efforts are generally made to limit the number of persons present, at FGC's an inclusive approach is taken. This is to encourage groups of family members to attend. Once the wider family have been brought together their most important task is usually to develop a plan of alternative care. This will need to be reduced to writing and signed by those involved.[24] As part of the FGC process a 'private time' phase is often included. During this the facilitator leaves and family members engage in discussion alone.[25]

In any evaluation of alternative methods for dealing with care cases it is essential to have regard to Scotland's unique children's hearing panels system which has been in place since 1971.[26] This may be characterised as an ADR method which seeks to draw upon the

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[19] Ibid.
[20] Palmer (1989) op cit note 4 at 26.
[21] See EM Pasztor & EJ McFadden 'Global Perspectives on Child Welfare' LXXX (2001) *Child Welfare* 487 at 490.
[22] Chandler & Giovannucci (2004) op cit note 2 at 219.
[23] See ss 20-38.
[24] Lande (2001) op cit note 11 at 1.
[25] Chandler & Giovannucci (2004) op cit note 2 at 219-20; S Holland & S O'Neill ' "We Had to Be There to Make Sure It Was What We Wanted" Enabling Children's Participation and Family Decision-making through the Family Group Conference' (2006) 13 *Childhood* 91 at 92.
[26] For a detailed explication of the functioning of the hearing panel system and analysis of relevant law see generally K McK Norrie *Children's Hearings in Scotland* (2005). On origins and early development of the panel system see ibid at 1-2; A Griffiths & RF Kandel 'Hearing Children in Children's Hearings' (2000) 12

local community knowledge of unpaid, ordinary members of a child's neighbourhood who are not highly trained professionals. It could also be defined as a hybrid system (partly alternative and partly court) because it separates key aspects of care proceedings between lay forums (called hearing panels) and the local sheriff's courts. This dual system is used for children up to 16 years of age and is mainly governed by the Children (Scotland) Act 1995.[27]

Professionally-trained officials called reporters evaluate the submissions of investigative social workers and prepare cases for referral to Scottish hearing panels.[28] Before initiating a hearing a reporter must in terms of s 65(1) of the 1995 Act be satisfied firstly that a legal ground for referral exists in respect of the child and secondly that the child is in need of compulsory measures of supervision.[29] Under s 65(5) the selected ground of referral must be put to the parents and also to the child if she is able to understand it. If the child or family do not understand and accept the ground then the case must go to the local sheriff's court. If the ground is proved at court the case goes back to the panel. It will then resume the task of reaching a decision about whether compulsory care measures will be in best interests of the child. Panels can impose a wide range of orders.[30]

In some systems pre-hearing conferences are available as a final process before the onset of full litigation in court. The parties, a representative of the investigative agency and any legal representatives are usually eligible to attend. They are typically facilitated by

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Child and Family LQ 283 at 283-84; and R Mays & D Christie 'The Role of the Child Welfare Hearing in the Resolution of Child-Related Disputes in Scotland' (2001) 13 *Child and Family LQ* 159.

[27] Three volunteer lay persons (in the sense that they are not necessarily qualified professionals) comprise a hearing panel. Besides the 1995 Act, panels must have regard to many other authorities. These include the ECHR, the Children's Hearings (Scotland) Rules (SI 1996/3261), the Convention Rights (Compliance) (Scotland) Act 2001, the Children's Hearings (Legal Representation) (Scotland) Rules 2002, the Antisocial Behaviour etc (Scotland) Act 2004 and the Vulnerable Witnesses (Scotland) Act 2004.

[28] Hallett & Murray (1999) op cit note 4 at 32 point out that the reporter 'usually comes from a legal or social work background'. On reporters see further Norrie (2005) op cit note 26 at 12-13.

[29] Under s 52 there are twelve grounds of referral, including lack of parental care (s 52(2)(c)).

[30] Under s 70 they can place children under supervision at home with or without conditions pertaining to access, medical examination and treatment. In more serious cases they may place children in foster care or institutional care, including preliminary authorisation for possible secure accommodation. Under s 66(4) & (7) they can choose not to disclose where a child is being cared for.

using court staff and premises.[31] Just as with extra-curial ADR, the aim is sometimes to try to avoid the need to proceed to full court litigation.[32] Since pre-hearing conferences are intended to produce benefits similar to other alternatives to adjudicated court proceedings their usefulness for care cases is evaluated in this chapter rather than that dealing with preliminary hearings before court presiding officers.[33] For convenience they are referred to as a form of ADR.

Pre-hearing conferences are typically intended to provide a last opportunity to settle differences amicably or else clarify and narrow down issues in dispute between caregivers and welfare shortly prior to their appearance in court.[34] They have also been utilised to advise parties or their legal representatives about whether they have documentation needed for the pending court proceedings.[35] In addition they have been used to explain to unrepresented parties what legal provisions will be most relevant and how their case will be conducted in court.[36] They have also been used to assist judges by deriving estimates about the amount of court time that will be required to hear a particular case.[37]

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[31] On the English approach see J Hunt, A Macleod & C Thomas *The Last Resort: Child Protection, the Courts and the 1989 Children Act* (1999) at 310-11. In Pennsylvania specially trained persons are used as facilitators: see B T'Shuvah 'Restorative Justice and the Courts' (ND) 4 -accessed at <http://www.nationalservicesresources.org/file manager/download/faith_justice>.

[32] Hunt, Macleod & Thomas ibid at 311.

[33] On the latter see parts 7.2.2, 7.3.1 & 7.4.1, below.

[34] See for example s 65 of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, Australia as discussed by P Parkinson 'The Child Participation Principle in Child Protection Law in New South Wales' (2001) 9 *International Journal of Children's Rights* 259 at 269. Often they are precursors rather than alternatives to courts. Examples of systems which make use of pre-hearing conferences in child protection cases are France, Germany, the Netherlands and Australia: see Parkinson ibid; & R Sheehan *Magistrates' Decision-Making in Child Protection Cases* (2001) at 218. As an example of an American formulation, §4038, s 3A (inserted in 2001) of the Maine Child and Family Services and Child Protection Act states: '[t]he court may convene a prehearing conference to clarify the disputed issues and review the possibility of settlement'. See the Maine Statutes Title 22, Chapter 1071: accessed at < http://www. janus.state.me.us/legis/statutes/22>.

[35] PA Gagel, C Mclean & RS Moss 'Family Court Facilitators in Colorado -Part I' (2002) 31 *The Colorado Lawyer* 61 at 62.

[36] Ibid.

[37] Ibid.

3.3 Strengths and Weaknesses of Alternative Resolution

In the discussion below the main advantages and disadvantages of the alternative methods described above are assessed with reference to care cases. Some general characteristics that may be said to apply to all of them are noted first. Thereafter, the methods are individually considered in the same sequence as followed in part 3.2, above.

3.3.1 Advantages of Alternative Methods

It may be claimed that generally ADR methods are less dependent on authoritarian decision-making and a technically correct application of formal procedures than courts. They less likely to restrict communication or have strict rules about party status which may limit participation.[38] Proponents of ADR contend that this produces three fundamental advantages. Firstly, improved opportunities for uninhibited communication by family members, including children,[39] result in better information-gathering.[40] Secondly, ADR creates a greater sense of family participation in the fashioning of care solutions.[41] And thirdly, agreed-upon solutions are more likely to be supported by family members than ones imposed upon them.[42] The family are therefore more likely to work with welfare towards the return of removed children -which is often an important aim in care cases.[43]

In relation to the specific advantages of the different categories of ADR Bullock has claimed that in England voluntary agreements negotiated directly with investigative agencies have proved successful in less serious care cases. In a significant proportion of

[38] G Firestone & J Weinstein 'In the Best Interests of Children: a Proposal to Transform the Adversarial System' (2004) 42 *Family Court Review* 203 at 209.
[39] For example, in an in-depth study in Wales (albeit with a relatively small sample of 25 children) Holland & O'Neill (2006) op cit note 25 at 103 found that a high proportion of children experienced FGC's as positive forums in which they were readily able to express their views.
[40] Palmer (1989) op cit note 4 at 29-30; Schepard & Bozzomo (2003) op cit note 10 at 347.
[41] Palmer ibid at 29-30.
[42] Schepard & Bozzomo (2003) op cit note 10 at 347; and Chandler & Giovannucci (2004) op cit note 2 at 221. For a South African study in which this view was supported by respondents who had mediated on children's issues in divorce cases: see F Coughlan & D Tatchell 'Perspectives on Inter-professional Collaboration: Mediation' (2001) 37 *Social Work/Maatskaplike Werk* 278 at 282. Palmer (1989) op cit note 4 at 30 argued that it is particularly important that children, as the main affected parties, must feel encouraged to cooperate in care cases.
[43] Palmer ibid.

these parents voluntarily agree to remedies which involved social workers regard as appropriate -including frequently short-term removals of their children. As a result, pressure is taken off court rolls because no care orders are required.[44]

In South Africa although children can voluntarily self-refer to shelters designed for street children in urban areas there is currently no legislative scope for voluntary placements by caregivers or child self-referrals to other categories of care facility.[45] Our system has therefore arguably been unnecessarily overloaded because a children's court inquiry has had to be held in every case where a child needed to be taken into the formal care-protection system. In contrast, in some anti-legalistic[46]continental European systems there has for many years been an extremely strong emphasis on consensual arrangements with children's families that are negotiated outside court wherever possible.[47] A significant advantage of voluntary agreements is that they do not require additional resources beyond those already available at the investigative agency.

In relation to advantages of mediation, it has been claimed that involvement of properly-skilled mediators in care cases often helps to resolve problems amicably and results in better care arrangements for children.[48] For example, Maresca described care mediation in Ontario as highly successful in this regard.[49] Agreement was reached in 85% of the cases in her sample.[50] She found that persons involved almost all felt that agreements reached were fair and had helped to heal relationships within families or with investigative agencies.[51] Although she considered that more research was needed her

[44] See R Bullock 'The United Kingdom' in Colton & Hellinckx (1993) op cit note 7, p212 at 216.
[45] However, voluntary agreement provisions will become applicable when the 2005 Act is fully implemented. For a discussion of these, see part 3.6, below.
[46] For the meaning of this classification as assigned in the thesis see part 1.3.1, above.
[47] See W Hellinckx, B van den Bruel & C vander Borght 'Belgium and Luxembourg' in Colton & W Hellinckx (1993) op cit note 7, p1 especially at 4-5, 17-18 & 20.
[48] For American findings see Lande (2001) op cit note 11 at 2. On England see B Lindley, M Richards & P Freeman 'Advice and Advocacy for Parents in Child Protection Cases -an Exploration of Conceptual and Policy Issues, Ethical Dilemmas and Future Directions' (2001) 13 *Child and Family LQ* 311 at 319 N42. G Cameron & N Freymond 'Canadian Child Welfare: System Design Dimensions and Possibilities for Innovation' (2003) 35 concluded generally that mediation has 'demonstrated its potential' in Canada: accessed at <http:www//.wlu.ca/documents/7180/Canadian_child_welfare_systems_design.pdf>.
[49] Maresca (1995) op cit note 9 at 739-40.
[50] Ibid at 739.
[51] Ibid.

follow-ups indicated a higher rate of compliance with agreements than with solutions imposed by courts.[52]

Where children are able to take part in mediation it has been found that they can sometimes help to correct parental misperceptions about care issues.[53] There have also been claims that mediation may be a less expensive way to achieve placement solutions than court hearings.[54] After conducting empirical research in Massachusetts and taking into account other US research Maynard contended that mediation has proved to be especially useful for resolving issues of access by birth parents to children already in alternative care.[55] She pointed out that open placements typically require ongoing small adjustments to contact arrangements which courts are far too expensive and slow to resolve.[56]

As regards the advantages of FGC's it is noteworthy that they have received considerable acclaim internationally as a valuable child protection intervention mechanism. The original New Zealand model has been adopted for use in many other countries. [57] It would appear that a key advantage which has conduced to their popularity internationally is the manner in which FGC's draw on the nurturing capabilities of extended families. In the formulation of Bell they produce 'meetings where all members of the wider family, including the child, meet together, and propose to the professionals the best ways for them of safeguarding and meeting the child's needs'.[58] There has been some

[52] Ibid at 739-40.
[53] See Parkinson (1997) op cit note 10 at 192-94.
[54] See Maresca (1995) op cit note 9 at 739; and Lande (2001) op cit note 11 at 2.
[55] Maynard (2005) op cit note 13 especially at 520 & 524-25.
[56] Ibid at 519-20.
[57] Pasztor & McFadden (2001) op cit note 21 at 490; and M Connelly with M McKenzie *Effective Participatory Practice: Family Group Conferencing in Child Protection* (1999) 61. For some positive comments about FGC's in English cases see B Lindley & M Richards 'Working Together 2000 -How Will Parents Fare under the New Child Protection Process?' (2000) 12 *Child and Family LQ* 213, at 219 & 221. Schepard & Bozzomo (2003) op cit note 10 at 346 noted that in the USA FGC's are 'being used ever more extensively in child protection cases with great success in more and more states and family courts'.
[58] M Bell 'Case Conferences in Child Protection' in K Wilson & A James (eds) *The Child Protection Handbook* (2002) 288 at 301.

evidence that in the group situations they entail children feel less exposed to perpetrators of neglect or abuse.[59]

The fact that it is families who do the proposing in FGC's results in what Lindley, Richards and Freeman have described as a shift in the balance of power from investigative professionals to the child's family.[60] This counters feelings of inadequacy in families by enabling children's relatives rather than the state to take responsibility for alternative care decision-making.[61] It has been claimed by Chandler and Giovannucci that whereas other approaches may 'disempower and disenfranchise' participants FGC's 'strengthen and sustain the family'.[62]

In South Africa FGC's are of special interest because of possible analogies in the use of extended-family child-support systems in indigenous-African and Maori-New Zealand cultures.[63] As was noted in the previous chapter[64] our indigenous approach has been sidelined by legislative developments over the years -and FGC's appear to have some potential to help revive it.[65] Experience in the USA indicates that they have the advantage of enabling families to utilise their own home-language and traditional norms as they design solutions which are culturally-appropriate.[66]

Some overseas findings indicate tentatively that FGC's have reduced the need for removals of children,[67] saved on court time and reduced state expenditures on child

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[59] See the reference to a Washington study in Chandler & Giovannucci (2004) op cit note 2 at 226.
[60] Lindley, Richards & Freeman (2001) op cit note 48 at 320.
[61] Ibid.
[62] Chandler & Giovannucci (2004) op cit note 2 at 220.
[63] J Worrall 'Kinship Care of the Abused Child: the New Zealand Experience' (2001) LXXX *Child Welfare* 497 at 500 suggests that one reason why FGC's have been utilised in so many countries is because they have proved capable of being adapted to suit other cultures.
[64] At parts 2.2 & 2.3.
[65] They are already being unofficially used by some social workers serving rural Zulu communities: Nontando Mathe, (social worker, department of social development, based in the rural jurisdiction of Mapumulo, KwaZulu-Natal) comment at a Masters seminar on Child Care and Protection, University of Durban-Westville, 4 Sept 2002.
[66] See Chandler & Giovannucci (2004) op cit note 2 at 218 & 220. At 219 ibid they state '[c]onferencing is designed to draw on and be shaped by the cultural patterns and resources of the family'.
[67] See the US study results cited ibid at 226. Chandler and Giovannucci note, however, (ibid, at 226-27) that more empirical research is needed on outcome issues such as post-conference safety of children. This is

protection.[68] A majority of studies conducted in numerous other countries support the view that they reduce the proportion of cases in which children are removed into the care of non-family members.[69] The use of FGC's in South Africa would therefore accord with the evaluative criterion of maximum systemic support for family care.

Like the New Zealand FGC's, Scottish hearing panels have attracted a considerable degree of interest and acclaim[70] although they have not been emulated to the same extent. Some commentators have characterised these panels as having proved effective in their articulation with courts over a period of many years. Griffiths and Kandel have stated that they have 'been hailed as "unique", "an exciting innovation," and as "a vastly superior way of dealing with children and their problems than ever the old courts were" '.[71]

It would appear that a basic strength of the panels is their facility for drawing upon local community expertise. They avoid both the stultification of unduly formal processes and the alienation of caregivers that may result from making grounds-determinations. Dale-Risk and Cleland describe them as able to 'combine informality of proceedings with a humane, community-based decision-making process'.[72] What renders them community-based is the use of local, lay panel members who are usually in a good position to appreciate the neighbourhood conditions under which children who appear before them are growing up. It could be contended that if similar panels were to be introduced in South Africa the skills of local elders or community leaders might be used to help revive traditional African approaches.

Hallett and Murray have pointed out that a fundamental aim at Scottish panel hearings is to produce 'a non-adversarial and relatively informal setting' so that children

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further discussed in the next part, below. Findings which suggest that FGC's may be expensive because of their resource intensiveness are noted in the next part, below.

[68] Ibid at 222; Holland & O'Neill (2006) op cit note 25 at 92.

[69] See the review of research in Holland & O'Neill ibid at 92-93.

[70] K Dale-Risk & A Cleland 'Can Scotland's Children's Hearing System Survive ECHR?' UP (Paper: 11th World Conference of the International Society of Family Law, 7 Aug 2002): accessed at <http://www.jus.uio.no/ifp/isfl>.

[71] Griffiths & Kandel (2000) op cit note 26 at 284.

[72] K Dale-Risk & A Cleland (2002) op cit note 70 UP.

and their families will feel free to participate in discussion.[73] A key aspect is that direct child participation is given considerable legislative prominence. Section 45(1)(a) of the 1995 Children (Scotland) Act makes it clear that a child has a right to attend at all stages of a panel hearing.[74] Under s 16(2) children must be given the opportunity to express views and have them taken into account when sufficiently mature.[75] There is a general presumption that children aged at least twelve have that maturity.[76]

In relation to pre-hearing conferences, their main advantages have to some extent proved to be the same in care cases as in other types of matter. They have generally been found to be effective for clarifying and narrowing disputed issues in care matters.[77] Where appropriately conducted they may not only save on court time but also promote more amicable relationships between families and representatives of welfare services.[78] In Australia they have been found to be effective as a means of encouraging child participation.[79] They have proved to be so successful in England that in 1994 the Children Act Advisory Committee recommended that they should always be utilised once it became obvious that a care matter would need to proceed to court.[80]

In Pennsylvania the success of an initial pre-hearing conference pilot project in 1997 was such that they quickly became the norm for care cases throughout this state.[81] In Colorado an initial pilot with specially appointed court facilitators who conducted pre-

[73] Hallett & Murray (1999) op cit note 4 at 33.
[74] Under s 45(2)(a)-(b) of the 1995 Act a panel, however, may dispense with the child's presence if it would not be in the best interests of the child or is not needed 'for the just hearing of the case'. For a detailed analysis of s 45 see K McK Norrie *Children (Scotland) Act 1995* (2004) 85-88.
[75] On s 16(2) see ibid at 51. Rule 15(4) of the 1996 Children's Hearing (Scotland) Rules allows for a variety of ways in which children may participate. Children may express their views in writing, by audio or videotape, through a safeguarder or simply by speaking directly to the panel. Under r 11 any suitable person can accompany the child to a hearing to assist with her participation. Under s 46(1) of the Children (Scotland) Act 1995 other persons may be excluded from the hearing where this is regarded as necessary to enable a child to speak freely. On legislative support for participation see further Hallett and Murray (1999) op cit note 4 at 44; and Norrie (2005) op cit note 26 at 64 & 122.
[76] Rule 15(5), 1996 Children's Hearing (Scotland) Rules. See further Norrie (2005) ibid at 122.
[77] Hunt, Macleod & Thomas (1999) op cit note 31 at 311; and Sheehan (2001) op cit note 34 at 218. Parkinson (2001) op cit note 34 at 269 stated that in New South Wales they have often proved to be '[a]n important step in care proceedings'.
[78] Sheehan ibid.
[79] Parkinson (2001) op cite note 34 at 269.
[80] Hunt, Macleod & Thomas (1999) op cit note 31 at 275 N22.
[81] T'Shuvah (ND) op cit note 31 at 3-4.

hearing conferences in care and delinquency cases was so successful that by 2002 they had been appointed throughout the state.[82] Generally in termination of parental rights cases in the USA pre-hearing conferences have been found to be useful. They have been recommended by the National Council of Juvenile and Family Court Judges as a standard measure which should be attempted before full litigation.[83] It may be concluded that there is certainly evidence which indicates that where other ADR methods are not appropriate or have failed a bargaining in the shadow of the court may produce significant benefits.

3.3.2 Disadvantages of Alternative Methods

A disadvantage of all five alternative methods considered in this chapter is that they require involvement of highly skilled personnel who may be in short supply. Another general criticism is that ADR emphasises participation and partnership to an extent that may prejudice protection of children. As attempts to obtain informed consent and then work successfully with caregivers continue children may remain at risk in inappropriate situations.[84] In some cases parents who are not dysfunctional feel pressured to remain with partners who are dangerously abusive whilst ADR continues.[85]

Further difficulties arise where consent is apparent rather than real. With the exception of the Scottish panels ADR tends to be utilised as a voluntary process. It therefore requires free and informed consent from participants. However, poverty, mental

[82] Gagel, McLean & Moss (2002) op cit note 35 at 61-62.
[83] Maynard (2005) op cit note 13 at 509.
[84] For some English experiences of this problem see Hunt, Macleod & Thomas (1999) op cit note 31 at 38-39. For two Australian studies showing the danger of abusive parents continuing to have contact see E Mullinar 'Problem with Family Courts' (2004) 2: accessed at <http://www.asca.org.au/pdf_public>.
[85] CD Schwarz 'Unified Family Courts: a Saving Grace for Victims of Domestic Violence Living in Nations with Fragmented Court Systems' (2004) 42 *Family Court Review* 304 at 308. E McInnes 'The Best Interests of the Child? The Interaction of Public and Private Law in Australia' (2001) 16-17 points out that even where the 'good' parent has removed the children the collaborative approach upon which alternative methods typically depend facilitates continued contact with the separated abusive parent: accessed at < http://www.aph.gov.au/Senate/committee>.

illness, drug or alcohol abuse, or simply a fear of having children removed may induce consent which is more apparent than real.[86]

Given the vulnerability of many family members involved in care cases the use of even subtle and indirect pressures to induce participation or settlements is surely unacceptable, but may be difficult to avoid.[87] There are findings which suggest that the problem of coercion can sometimes be overcome by facilitators remaining sensitive to the capabilities and genuine wishes of family members[88] but it is a serious concern. Therefore, the availability of courts as alternatives would appear to be indicated for a significant proportion of cases where sufficiently full and free consent and participation of families cannot be obtained.

Another general problem is that in alternative processes it may be difficult to guard against inappropriate interactions amongst attendees. Sensitive issues may need to be discussed whilst dysfunctional and vulnerable family members are together in close physical proximity. This may render the question of who to invite problematic. In particular the question of whether to include the child may be a difficult one. With little by way of research findings to guide them facilitators must weigh up positive and negative factors in each case and then make an educated guess about the likely levels of stress and whether the child (or other vulnerable family member) would benefit from attendance despite these.[89] Although informality of proceedings often encourages family participation there are clearly cases where the more segregated and structured environment

[86] Savoury, Beals & Parks (1995) op cit note 9 at 751; Maynard (2005) op cit note 13 at 521-22; and J Brophy *Research Review: Child Care Proceedings under the Children Act 1989* (2006) 54-55: accessed at <http://www.dca.gov.uk/research/2006/05_2006.pdf>.

[87] M Hester 'One Step Forward and Three Steps Back? Children, Abuse and Parental Contact in Denmark' (2002) 14 *Child and Family LQ* 267 at 277-78 conducted research which drew attention to the falsely 'voluntary' nature of mediation produced by para 27a of the 1985 Danish *Myndighedslov* (Custody Law). She found that although this Act was designed for voluntary state-funded mediation many parents attended it only because failure to do so 'could be damaging in any consequent court case regarding custody'.

[88] Maresca (1995) op cit note 9 at 735-36.

[89] Even with the longest established method of mediation there are few research-based findings about when to involve children directly: see Parkinson (1997) op cit note 10 at 192-94. Child participation is discussed further in part 3.6, below.

of a court (with, for example, the presence of orderlies) would better promote both safety and appropriate contributions.[90]

Turning to specific alternative methods, negotiated voluntary care agreements have been found to be problematic in certain respects. Although they appear to have the great advantage of families and investigative social workers producing their own mutually-agreed-upon solutions, in practice:

> 'under the guise of partnership and agreement, the degree of informal coercion exercised in these circumstances can be quite considerable. Indeed, the familiar practice of persuading parents to agree to the child being accommodated, with the threat of a compulsory order being applied for if they do not comply, has been documented.'[91]

A variation on this noted by Hunt, Macleod and Thomas was threats by investigative social work agencies of court action without revealing that they in fact had too little evidence to successfully go to court.[92] From an American perspective Imbrogno and Imbrogno have also been sharply critical of social workers inappropriately using their influence to pressure family members to make concessions that will enable cases not to be taken to court. [93] There is clearly a general danger that if they have been closely involved in a case members of the investigative agency may lack the neutrality needed to permit family members to produce a genuinely voluntary agreement.

A further problem with some voluntary agreements noted by Hunt, Macleod and Thomas was a lack of specificity in final settlement clauses when reduced to writing. They found that the recorded terms negotiated between families and social workers were sometimes so vague that they jeopardised children's welfare and even their safety.[94] Also, where welfare were overly committed to attempting to reach voluntary agreements with

[90] Palmer (1989) op cit note 4 at 22.
[91] Lindley & Richards (2000) op cit note 57 at 224. On coercion see also Hunt, Macleod & Thomas (1999) op cit note 31 at 36 & 115; and Bropy (2006) op cit note 86 at 54-55.
[92] Hunt, Macleod & Thomas ibid at 37.
[93] Imbrogno & Imbrogno (2000) op cit note 10 at 392.
[94] Hunt, Macleod & Thomas (1999) op cit note 31 at 115.

parents this might result in long delays as negotiations continued whilst children remained in inappropriate and sometimes dangerous situations.[95]

Although facilitated by an independent mediator, mediation has also proved to be problematic in some respects. Because it typically requires small numbers of parties to interact intensively upon a basis of equality mediation may be inappropriate where there are significant power differences. Children in care cases will almost always be vulnerable and thus lack power. One or both parents will frequently have a poor self image or other problems which could weaken their standing if expected to mediate with an investigative social worker.[96] There is also the possible problem of power differences between joint caregivers such as parents.[97]

Of particular concern are the extreme power differences which tend to exist in the abusive relationships that are common in families involved in care cases. Feminist and other commentators have criticised the use of mediation where a party has been physically, sexually or emotionally abused and will be expected to interact with the abuser.[98] It is not only the danger of secondary abuse that arises in these cases. Hester found that in mediation between parents in abusive relationships there was a tendency for mediators to be misled. The abused parent would often remain silent and the more responsive abuser would therefore sometimes incorrectly 'end up being viewed more positively' by mediators.[99] Hester thus concluded that mediation could have the unfortunate effect of extending the power and control of abusive parents.[100]

Whilst conceding that an abuse victim should never be pressured to participate Schwarz has argued that mediators can sometimes do a great deal to counter power-

[95] Ibid. As has been noted above this is a general problem with alternative methods; but with voluntary negotiations since there is no independent facilitator the likelihood of long delays may be greater.
[96] See Imbrogno and Imbrogno (2000) op cit note 10 at 396 for the example of mothers who will readily make concessions because they are fearful of losing custody of their children.
[97] It is noted ibid that mothers who are not breadwinners may be economically disempowered.
[98] Savoury, Beals & Parks (1995) op cit note 9 at 745-46.
[99] Hester (2002) op cit note 87 at 278.
[100] Ibid. Hester's finding that mediation is sometimes inappropriate for vulnerable parties is supported by Davis. Davis (2001) op cit note 9 at 381 concluded that some English research showed that there are situations in which lawyers provide better support for such parties than mediators.

imbalances. For example, they can exert control over the stronger party and allow the weaker party a support-person.[101] She has even claimed that mediation may sometimes be the best process for abuse cases because 'studies have shown that abusers, due to the private, confidential nature of mediation, tend to take more responsibility for their actions as opposed to traditional adversarial ways of handling these proceedings'.[102] This may speed the resolution of cases, help the victim to heal and improve the prognosis for therapy.[103]

Not all commentators share this view. Davis has argued that there is a central inconsistency in expecting mediators to remain neutral and yet also redress power imbalances.[104] Lindley, Richards and Freeman have a related concern that if care case mediators cease to be neutral there is 'potential for the mediator to become manipulative, controlling and oppressive if he is too persuasive within the mediation process'.[105] Schepard and Bozzomo point out that the danger of mediators applying subtle forms of direction is a real one because they often feel tempted to speed up completion of cases.[106]

It must be concluded that where there are significant power differences vulnerable parties may experience mediation as highly stressful and any agreements reached are unlikely to be genuine or equitable. [107] Furthermore, some studies show that mediation is not necessarily much less expensive than utilising courts.[108] In light of the difficulties it is understandable that the question of whether mediation should replace courts, or even be used to assist with litigation, has been viewed as controversial by some commentators.[109]

As regards weaknesses of FGC's, it has gradually become clear that there are some serious difficulties which impede their usefulness. One problem is the resources required.

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[101] Schwarz (2004) op cit note 85 at 308.
[102] Ibid.
[103] Ibid.
[104] Davis (2001) op cit note 9 at 378. She evaluated English research on mediation conducted by the Legal Services Commission.
[105] Lindley, Richards & Freeman (2001) op cit note 48 at 324 N57.
[106] Schepard & Bozzomo (2003) op cit note 10 at 352.
[107] Savoury, Beals & Parks (1995) op cit op cit note 9 at 746.
[108] Imbrogno & Imbrogno (2000) op cit note 10 at 395-96; and Davis (2001) op cit note 9 at 372.
[109] See Davis ibid at 377.

Sieppert, Hudson and Unrau concluded that they are 'inherently a resource-intensive process' with exacting labour and skill requirements.[110] They found that even just the preliminary preparations required a considerable effort from coordinators -these were involved in making an average of forty-one attempts to contact family members before each conference. [111]

Working with extended rather than merely nuclear families means that facilitators of FGC's often have to cope with complex sets of factors.[112] And the claims about cost savings noted in the previous part may be incorrect. Financial expenses such as those arising from travel and accommodation of distant family members tend to be high.[113] Even after FGC's have been successfully held, following up to see that plans developed by families are actually implemented requires yet more time and effort.[114] It has also been contended by some commentators that FGC's do not necessarily deliver on their central purpose of encouraging extensive family participation. It has been found that it is often easy for more powerful family members to take control and silence the dissent and alternative views that weaker members (including children) might like to express.[115] And further, in some cases family members collude in efforts to silence the voices of children.[116]

A serious criticism of FGC's is that after they have been held children are sometimes subjected to further harm or neglect because extended families fail to

[110] JD Sieppert, J Hudson & Y Unrau 'Family Group Conferencing and Child Welfare: Lessons from a Demonstration Project' (2000) 81 *Families in Society: The Journal of Contemporary Human Services* 382 at 389. In New Zealand it has been found necessary to set up a network of specialised staff to convene FGC's: see S Fraser & J Norton 'Family Group Conferencing in New Zealand Child Protection Work' in J Hudson, A Morris, G Maxwell & B Galloway (eds) *Family Group Conferences: Perspectives on Policy & Practice* (1996) 37 at 38-47.
[111] Sieppert, Hudson & Unrau ibid at 389-90.
[112] Worrall (2001) op cit note 63 at 502.
[113] Connelly & McKenzie (1999) op cit note 57 at 70. E Pruett & C Savage 'Statewide Initiatives to Encourage Alternative Dispute Resolution and Enhance Collaborative Approaches to Resolving Family Issues' (2004) 42 *Family Court Review* 232 at 241 noted that in Colorado provision of FGC's had to be reduced because of the costs.
[114] Sieppert, Hudson & Unrau (2000) op cit note 110 at 390.
[115] Connelly & McKenzie (1999) op cit note 57 at 66.
[116] Ibid at 70. See also Parkinson (2001) op cit note 34 at 269.

intervene.[117] Worrall noted that the emphasis on families taking more responsibility tended to result less monitoring of children by social workers.[118] He concluded that this may be especially disadvantageous for children with serious psychological difficulties placed with family members who do not know how to address these.[119] It has even been claimed that in New Zealand the Children, Young Persons and Their Families Act 24/1989 created 'a confused patchwork of duties, discretions and principles' as FGC facilitators, social workers and judges struggled to balance the conflicting demands of respect for extended families and their culture on the one hand, and the best interests of vulnerable children on the other.[120] It has also been stated that the introduction of FGC's failed to significantly reduce the number of care cases reaching courts in New Zealand.[121]

In relation to the Scottish hearings panels, some difficulties have resulted because panel members are not professionally qualified or extensively trained for their work.[122] Panel reporters often need to provide them with neutral legal advice. However, reporters are not in an entirely neutral position because they have brought the proceedings on the basis of a decision that there are valid grounds for intervention.[123] The dangers of utilising persons lacking sufficient expertise for working with highly vulnerable children in stressful situations have been exposed in some cases.[124] Of particular concern has been an apparently widespread inability by panel members to enable children to contribute

[117] As an example of the dangers of the strong New Zealand emphasis on keeping vulnerable children within their families Atkin cited the case of the child James Whakaruru. He had been victimised by an abuser known to welfare. He was nevertheless left at home where the abuser continued to have contact and eventually killed him: see B Atkin 'New Zealand: a Year of Reports' in A Bainham (ed) *The International Survey of Family Law 2002 Edition* (2002) 305 at 306-07.
[118] Worrall (2001) op cit note 63 at 502.
[119] Ibid at 505.
[120] B Atkin & G McLay 'Suing Child Welfare Agencies -a Comparative View from New Zealand' (2001) 13 *Child and Family LQ* 287 at 297-299. See also Connelly & McKenzie (1999) op cit note 57 at 67-68.
[121] Connelly & McKenzie ibid at 66.
[122] See generally C Creegan, G Henderson & C King *Getting It Right for Every Child: Children and Young People's Experiences of Advocacy Support and Participation in the Children's Hearing System. Big Words and Big Tables* (2006) at paras 4.13-4.38: accessed at <http://www.scotland.gov.uk/Resource/Doc/113343/027458.pdf>. Panel members do, however, receive some part-time training: see Freymond (2001) op cit note 10 at 11; and Norrie (2005) op cit note 26 at p10 N11.
[123] EE Sutherland 'Scotland: Justice for the Child Offender in Scotland?' in Bainham (2002) op cit note 117 p357, at 375. At 378 ibid she suggests that the solution is for children's hearings to have legally qualified chairpersons.
[124] Griffiths & Kandel (2000) op cit note 26 at 296. For case examples of extremely poor empathy which was harmful to children see ibid at 293-94.

meaningfully and provide them with a sense of sharing in decision-making.[125] Griffiths and Kandel noted that some panel members tended to 'diagnose' comments of children inappropriately 'in a quasi-parental way tinged with tones of therapy and social morality' whilst others displayed class prejudices that 'estranged children further, making them clam up or feel invisible'.[126]

Another factor which hampers child participation is the use of confusing technical jargon by adults at panel hearings.[127] A further problem is that some children feel that panel members so readily and obviously accept welfare's versions of the facts that there is no point in attempting to provide a different view.[128] Inadequate skills in at least some panel members therefore appear to have made it difficult to achieve a central purpose of the Scottish legislation, namely, the promotion of child participation.[129]

In relation to the use of pre-hearing conferences in care cases it would not appear that there are many inherent disadvantages. It has, however, been suggested that where children have already been directly involved in other alternative methods it is inappropriate to also subject them to pre-hearing conferences if it is now clear that full court litigation will be required.[130] It has also been claimed that pre-hearing conferences are unsuitable where only one parent is abusive. By dragging out the time during which a collaborative approach is required they prevent the other parent from protecting the child.[131]

Generally, the unselective use of pre-hearing conferences has been strongly criticised for delaying cases which urgently need to go to court. Where other methods have already been unsuccessfully attempted their advantages in clarifying issues may be

[125] Creegan, Henderson & King (2006) op cit note 122 at paras 4.16 & 4.34-4.36. See also Dale-Risk & Cleland (2002) op cit note 70 UP; and Griffiths & Kandel (2000) op cit note 26 at 288 N43.
[126] Griffiths & Kandel ibid at 296.
[127] Creegan, Henderson & King (2006) op cit note 122 at para 4.38.
[128] Griffiths & Kandel (2000) op cit note 26 at 290-91.
[129] Creegan, Henderson & King (2006) op cit note 122 at para 6.4.
[130] This is because children may find multiple exposures difficult to deal with: see McInnes (2001) op cit note 85 at 16-17.
[131] Ibid at 17. In the absence of a court order the abusive parent will still have access to the child: see Mullinar (2004) op cit note 84 at 2.

more than counterbalanced by the extension of time during which a child remains in a situation of abuse or neglect.[132] It may also be suggested that the use in some systems of judges who will later hear the proceedings proper[133] blurs the difference between pre- and preliminary hearings.[134] It may reduce informality, confuse families about the onset of court processes and discourage parties from making admissions and concessions which they believe might influence the judge later on.[135]

3.4 Strengths and Weaknesses of Courts

Having reviewed the advantages and deficiencies of commonly used alternative methods for settling issues in care cases it is necessary to set against these the primary strengths and weaknesses of courts. Although detailed aspects of the work of courts are considered in the remaining chapters some fundamental capabilities and limitations are briefly evaluated, respectively, in the next two sub-parts, below.

3.4.1 Advantages of Courts

As noted in chapter 1 in many developed systems there was a shift towards greater reliance on courts for the resolution of care cases in the last two decades of the 20th century.[136] Part of the reason for this was because courts possess some inherent capabilities that can be of great value. For example, the training and experience of judicial officers in weighing up evidence objectively can be most advantageous particularly where there are irreconcilable differences about the need for alternative care or problems caused by collusion of family members. Another basic strength of courts is their potential for incrementally refining child protection through the precedent system.

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[132] Ibid.
[133] See Hunt, Macleod & Thomas (1999) op cit note 31 at 275 N22.
[134] Only the latter should involve courts in full session. For a detailed discussion of preliminary hearings see chapter 7 especially at parts 7.3.1 & 7.4.1, below
[135] Thus the practice in some Australian children's courts is for registrars rather than magistrates to chair preliminary conferences: see 'Practice Note 4 of 2002: Preliminary Conferences-Listing and Cancellation Procedures for Country Courts' in Children's Court of New South Wales *Case Law News* (July 2002) vol 2(5) 21. See also Parkinson (2001) op cit note 34 at 269.
[136] See part 1.3.1.

Unlike other forums, courts can exert a high degree of authority. English care practitioners reported that in many cases once proceedings have begun parents soon recognise the power judges are capable of exercising. This sometimes galvanises them to improve care arrangements and end deadlocks with social services even before court proceedings have gone far.[137]

In the case of dysfunctional parents who are entirely resistant to voluntary modifications in care arrangements the power of courts to impose compulsory measures may become crucially important.[138] In these cases courts are likely to be the only forum with sufficient authority to issue orders that will protect vulnerable children from further harm.[139] Furthermore, '[w]hen a child has been seriously neglected or abused, it is important to have court evidence of the situation for the child's future protection; otherwise, parents might successfully argue the child's return without much change in the family environment'.[140]

The fact that courts have permanent establishments which do not have to be specially set up for particular cases means that they can quickly provide urgently-needed short-term rulings in emergency cases where the imminent risk to a child is high. To rely upon alternative methods in these cases may be to waste precious time.[141]

In contrast to ADR, courts appear to be ideal where there are extreme power differences amongst parties. Findings by Hunt, Macleod and Thomas indicated that they are the best fora for such cases. Their sample of respondents included English lawyers experienced in representing parents in care cases. This group characterised court adjudicators as generally better at countering power-imbalances amongst parties than

[137] Savoury, Beals & Parks (1995) op cit note 19 at 745; and Hunt, Macleod & Thomas (1999) op cit note 31 at 115.
[138] Firestone & Weinstein (2004) op cit note 38 at 209 N18.
[139] See G Firestone 'Models of Collaboration in Family Law' (2004) 42 *Family Court Review* 200. Schepard & Bozzomo (2003) op cit note 10 at 348 noted the protective capabilities of courts in relation to vulnerable family members generally.
[140] Palmer (1989) op cit note 4 at 21.
[141] See Lindley, Richards & Freeman (2001) op cit note 48 at 319.

facilitators of other forums.[142] Palmer has argued similarly that courts are necessary where vulnerable parties cannot sufficiently express views directly even with the help of an alternative method facilitator.[143]

When operating under appropriate rules and the guidance of properly trained judicial officers courts can arguably provide a greater degree of procedural fairness than any other category of forum or process.[144] Even where appropriate procedural rules also apply to ADR, facilitators may fail to follow them properly because of an absence or insufficiency of legal training.[145] The evaluative criterion of a system able to provide care hearings which are substantively fair therefore indicates a continuance of courts.

A crucial function which courts can best perform is the interpretation and affirmation of legal rights.[146] Even strong protagonists of greater reliance on ADR in care cases have conceded that courts must remain for providing 'rights-based dispute resolution backups'.[147] As has been shown in chapter 1 above[148] South Africa is still at an early stage in interpreting the fundamental rights of children included in international instruments and our Constitution. In the US context Schepard and Bozzomo have characterised the parent-child relationship as a precious 'constitutionally recognised value'. They argue that where other processes 'cannot facilitate agreement on a plan for family reorganisation' courts should step in to do so.[149] This argument is equally true for South Africa. It is important, for example, that there be sufficient access to our courts for interpreting the extent of children's constitutional right to family, parental or alternative care as created in s 28(1)(b).

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[142] Hunt, Macleod & Thomas (1999) op cit note 31 at 115. See also Firestone (2004) op cit note 138 at 200.
[143] Palmer (1989) op cit note 4 at 21.
[144] See Schepard & Bozzomo (2003) op cit note 10 at 342.
[145] See Hallett & Murray (1999) op cit note 4 at 39-41 for procedural failures by Scottish hearing panels.
[146] BG Fines, RE Oliphant & N Ver Steegh 'Termination of Parental Rights: Case Law Development' (2006) 1 discuss two American examples. They point out, ibid, that in *In re O.S.* Ill. App. Lexis 333 (April 17, 2006) the Illinois Court of Appeals performed valuable corrective action by asserting the rights of a mother where a social work agency had forced her to pretend to her child that she was not his mother and provided insufficient contact and reunification services during a period of foster care. They also refer to *Matter of Guardianship of NS* 122 Nev. Adv. Rep. 27, 2006 Nev. Lexis 31 (March 16, 2006) where a Nevada court asserted the kinship rights of a grandmother to offer family care to her grandchild (removed from an abusing mother) in preference to a stranger. Accessed at
<http//www.law professors.typepad.com/family_law/termination_of_parental_rights/index>.
[147] Firestone & Weinstein (2004) op cit note 38 at 208.
[148] At part 1.2.
[149] Schepard & Bozzomo (2003) op cit note 10 at 342.

Not only children, but also parents and other family members who require binding legal determinations about their child-nurturing responsibilities will often be better-served by a court than any alternative forum or process.

It is useful to keep in mind the contention of Edwards that:

> 'By diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavoured areas of law... The wholesale diversion of cases involving the legal rights of the poor may result in the definition of these rights by the powerful in society rather than by the application of fundamental societal values reflected in the rule of law.' [150]

This is a danger which cannot be afforded in South Africa at a critical time when we have begun to build a democracy based upon constitutional rights. The danger of the poor being disadvantaged looms particularly large in care cases.[151] The development of South African child care law is already to some degree stifled because of a paucity of legal representation and reported cases.[152] If all matters were to be entirely consigned to ADR development might be halted almost completely.

From a South African perspective it also needs to be kept in mind that the ACC is more strongly worded in favour of the use of courts for care inquiries than the CRC. As noted in part 1.3.2, above art 19(1) of the ACC prohibits the separation of a child from parents unless 'a *judicial* authority determines in accordance with the appropriate law that such separation is in the best interests of the child ' [emphasis added].[153] It is thus clear that in South Africa the ACC could easily be used to challenge the validity of any extra-curial mechanism that might be introduced in our law unless it was subject to review and ratification by a court.

Another significant contribution which courts can make is that of monitoring the work of investigative welfare personnel. As noted in chapter 1 even in first-world countries with relatively well-developed welfare systems social workers sometimes show poor

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[150] H Edwards 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 *Harvard LR* 668 at 679.
[151] As will be remembered, in part 1.2 above it was noted that it is predominantly poor and disadvantaged families who tend to be involved.
[152] In relation to the latter problem, see ibid. On our low rates of legal representation see part 5.2, below.
[153] The analogous art 9(1) in the CRC allocates the duty to determine whether a separation is in the best interests of the child to 'competent authorities subject to judicial review'.

judgment.[154] In the most serious cases their failures to act timeously lead to the deaths of children who should have been provided with alternative care.[155] And even where social workers take all possible care they may be misled into trusting plausible and manipulative perpetrators of child abuse.[156] In other cases they are overzealous in seeking to remove children unnecessarily.[157] The evaluative criteria of removal as a last resort and keeping a proper balance between family care and protection therefore both indicate utilisation of courts because of their monitoring capabilities. This is particularly relevant in South Africa where mistakes are more likely to happen because welfare services are overburdened.[158]

It is not only welfare who may need to be subjected to court monitoring. It can be argued that a greater commitment to alternative methods creates a whole new function for courts -that of overseeing these also. Schepard and Bozzomo have suggested specifically that courts can play a valuable role in directing ADR facilitators. They state that courts are the best placed to ensure 'that these nonjudicial professionals are qualified and accountable, do not coerce families into uninformed, involuntary agreements, or supplant the role of the judge in making ultimate determinations that affect the parent-child relationship'. [159]

Courts are also ideally positioned to ensure that ADR does not drag out care cases unnecessarily with the child being left 'in limbo'.[160] Not only are judicial officers well-

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[154] See parts 1.1 & 1.3.1, above.
[155] See the editorial introduction of Wilson & James (2002) op cit note 58 above,1 at 3; and M Lane & T Walsh 'Court Proceedings and Court Craft' in Wilson & James ibid, 342. See also the previous footnote and experience in Canada as referred to in part 7.3.1, below.
[156] On the subtlety of strategies sometimes used by abusive caregivers to mislead social workers and gain their trust see M Hayes '*Re O and N; Re B* -Uncertain Evidence and Risk-Taking in Child Protection Cases' (2004) 16 *Child and Family LQ* 63 at 63-64. See also the findings of Hester as discussed in part 3.3.2, above.
[157] See R J Gelles 'Policy Issues in Child Neglect' in H Dubowitz *Neglected Children: Research, Practice and Policy* (1999) 278 at 291. Examples of unnecessary removals by welfare are noted by H O'Donnell 'What's Wrong with the Picture: the Other Side of Representing Parents in Child Protection Cases' (2005) 4 *Appalachian Journal of Law* 73 at 76. See also the Cleveland affair as referred to in part 1.3.1, above.
[158] As noted by V Sewpaul 'The African Union Plan of Action on the Family in Africa' (2006) 49 *International Social Work* 129 at 134 intensive recruitment of South African social workers particularly by the United Kingdom 'has created visible and felt cracks in services especially in child welfare where statutory services have suffered some of the worst consequences, so much so that the national Department of Social Development in South Africa has declared social work a scarce skill'.
[159] Schepard & Bozzomo (2003) op cit note 10 at 343.
[160] Ibid at 348.

placed to monitor the effectiveness of alternative processes but their legal training renders them ideal for checking the fairness of agreements reached before giving them legal force through ratification.[161] It must be concluded that courts can provide a range of unique and potentially important advantages in care cases. Given their inherent capabilities it is not surprising that, despite perhaps more experience of ADR than in any other country, they continue to be utilised as the predominant forum for care cases in the USA.[162]

3.4.2 Disadvantages of Courts

It has been contended generally that 'formal, court-based systems… do not promote children's welfare and rehabilitation'.[163] It has been argued that one reason for this is that courts produce a climate of 'excessive legalism' which is not suitable.[164] It has also been claimed that they are fundamentally geared to enforcement whereas what most families involved in care cases require is assistance.[165]

Many of the more specific criticisms directed at courts are based on a view that their approach in care cases is too narrow. It has been suggested, for example, that they focus unduly on what has happened in the past when what is most important is what needs to happen to a child in the future.[166] It has also been argued that, in a process of defining child protection issues as legal problems, courts frequently fail to take full account of complex psychological and social problems.[167] It has been claimed that court adjudicators and lawyers usually do not have the degree of cross-disciplinary expertise about the needs of children and family dynamics required for care cases.[168] Mathe has stated that inadequate training in the staff of many South African children's courts has encouraged some social workers to avoid them in favour of ADR. [169]

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[161] See further Firestone & Weinstein (2004) op cit note 38 at 209.
[162] See ibid at 208.
[163] Dale-Risk & Cleland (2002) op cit note 70 UP.
[164] Palmer (1989) op cit note 4 at 30.
[165] See ibid at 23.
[166] Firestone & Weinstein (2004) op cit note 38 at 205.
[167] Ibid at 203.
[168] Ibid at 206.
[169] Mathe (2002) supra note 65.

Courts have also been criticised for confining themselves to information which is too limited. Rather than being permitted a sense of collaboration and allowed to tell their stories fully parties are forced to fit their accounts 'into the categorized requirements of the law'.[170] In particular, it has been suggested that courts are inherently poorly-geared for child participation. Children frequently do not appear at all -and their views may then remain unconsidered or at best be received in a filtered form when conveyed by a legal representative or other professional such as a social worker.[171] Even where children do appear, judges are often not specially trained to appreciate the significance of what they say.

Another criticism is that the resources expended on courts are disproportionate to the results achieved.[172] It has been claimed that court processes are extremely expensive for states and thus drain off governmental resources which should be used for other forms of service delivery to families.[173] Care litigation is also expensive for parties if they need to employ private lawyers.[174] Costs in time may be high. Courts frequently take long periods to resolve care cases and this may be harmful to children left in uncertain situations and unable to understand adult timeframes.[175] Costs in both time and money are likely to be at their highest where there are multiple parties with their own lawyers.[176]

It has been suggested that courts often have a negative impact even before proceedings commence. Freymond has claimed that judges expect involved persons to

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[170] Firestone & Weinstein op cit note 38 at 204.
[171] Ibid at 206-07. Child participation is considered in more detail in part 4.2, below.
[172] Maresca (1995) op cit note 9 at 733 noted that '[t]he litigation of a case requires the expenditure of resources: money, court time, staff services, and all of the myriad elements that support the court structure. Perhaps the greatest costs of all are the psychological and emotional costs borne by the parties, and particularly the children'.
[173] Firestone & Weinstein (2004) op cit note 38 at 205.
[174] Ibid.
[175] Maresca (1995) op cit note 9 at 732-33. On delays see also Freymond (2001) op cit note 10 at 15 and the South African findings of Denge noted in part 6.2.3, below.
[176] Palmer (1989) op cit note 4 at 29. The problem of expense of care litigation has been a concern in the Yukon: see Yukon Children's Act Revision Project 'Policy Forum Discussion Paper -Alternatives to the Court Process' (2004) 2: accessed at <http://www.yukonchildrensact.ca> and hereafter cited as 'Yukon Revision Project'. The problem of multiple parties is considered in more detail in part 4.3.2, below.

undertake excessive amounts of preliminary preparation.[177] Maresca argued that a negative consequence of this is the drawing off of 'significant amounts of time and energy in preparation of the cases… that could otherwise be spent in dealing with the problems that confront the family'.[178]

A further criticism is that once court processes are interposed interactions between investigative social workers and families are inevitably changed in a negative manner. As Maresca has put it '[t]he social worker who begins work with the family in the capacity of a helping professional is thrust into the position of building a case against the family, and bearing witness against his or her client'.[179] In response, the family begin to view the social worker as an opposing side that must be beaten rather than as someone supportive.[180] Not only social workers but other expert witnesses may become polarised into supporting one side's position.[181]

As soon as it is clear that a court will be involved communication between participants tends to be inhibited. Where lawyers are appointed they often warn family members not to communicate with welfare and intimidate social workers from having further contact with families.[182] Frequently, they block communication channels or modify information. Even where lawyers are not involved concerns about preserving information for evidence, avoiding making damaging admissions or breaching rules of confidentiality all have the result that communication between families and social workers 'may become distorted or shut down completely, thus closing down the possibility of therapeutic intervention'.[183] As Freymond has argued 'the legal strategies involved in winning a case, by their very nature, create an institutionalised antagonism that decreases dialogue and tempers helping relationships'.[184]

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[177] Freymond (2001) op cit note 10 at 15.
[178] Maresca (1995) op cit note 9 at 733. See also the similar view of Cameron & Freymond (2003) and King (1997) as cited in the discussion of legalistic systems in part 1.3.1, above.
[179] Ibid at 732.
[180] Ibid; and Palmer (1989) op cit note 4 at 23.
[181] Firestone & Weinstein (2004) op cit note 38 at 205.
[182] Palmer (1989) op cit note 4 at 23.
[183] Maresca (1995) op cit note 9 at 732. See also Firestone & Weinstein (2004) op cit note 38 at 205.
[184] Freymond (2001) op cit note 10 at 14 cites several studies in support and claims that it was this problem which led to the introduction of mediation for child welfare in Ontario, Canada in 1989. She cites the *Report*

Some of the strongest criticisms directed at courts relate to their use (in some systems) of an adversarial approach. It has been argued that in care cases the adversarial approach 'typically fails to serve the interests of children and families and may be more harmful than beneficial to children relative to other possible methods of dispute resolution'.[185] It has been said that its use at court destroys opportunities for collaborative problem-solving.[186] Generally it has been claimed that where parental neglect or abuse is alleged it tends to produce bitter litigation which has a 'toxic effect on children caught in the middle'.[187]

In particular, the adversarial system has been condemned for promoting intrusive questioning that may traumatise vulnerable children and intimidate or provoke hostility in parents.[188] As will be shown below this has been particularly true of South African children's court proceedings.[189] Participants at these frequently experience questioning as so stressful that they cannot communicate properly.[190] A further criticism is that the adversary system presupposes an equal contest of opposed interests but in care matters contests between caregivers and investigative agencies are often far from equal.[191] Also, in the complex triangular relationship of welfare services, children and caregivers, interests are not necessarily always diametrically opposed.

Another criticism of courts is that they rely upon interactions between social workers and lawyers despite the fact that the orientation of these professionals tends to be

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of the Panel of Experts on Child Protection: Protecting Vulnerable Children in Ontario, Canada (1998) 16 as describing child protection proceedings as 'adversarial, complex, costly, and time-consuming'.

[185] Firestone & Weinstein (2004) op cit note 38 at 203.

[186] Ibid at 206.

[187] Ibid at 204.

[188] The latter is a serious consideration because it may make it more difficult to gain the cooperation of parents needed for post-court rehabilitation and reunification work. On the adversarial approach as inappropriate for care cases see further Yukon Revision Project (2004) op cit note 176 at 2.

[189] See part 6.2.3.

[190] Ibid. Palmer (1989) op cit note 4 at 29 contrasts courts generally with the less threatening environment at alternative processes such as mediation.

[191] The fact that parents involved in care cases are often from disadvantaged backgrounds has already been noted. On the other hand, investigative agency members are likely to be professionally qualified and used to appearing in court. On the resultant imbalance see further the comments of Wessels and Wriggins in part 6.3.1, below.

very different.[192] Whereas social workers are geared towards healing rifts between family members lawyers are expected by courts to provide vigorous representation which often entails taking 'extreme and unnecessarily divisive positions'.[193] It has been claimed that the requirement of zealous advocacy inevitably produces behaviour by lawyers which is inimical to the best interests of children and escalates tensions and conflict between parties.[194] A lawyer may be so articulate in presenting an unrealistically favorable impression of a caregiver that a court may leave a child in what is, in reality, a dangerous situation.[195] And even where children are removed the destruction of family relationships produced by the hostile advocacy of lawyers using the adversarial approach may produce long-lasting effects which prevent their return.[196]

A further group of criticisms of courts is based on alleged inadequacies in the alternative care solutions they provide. It has been claimed that courts are not geared for the provision of 'customised solutions' according to the particular needs of individual families because they only 'have a limited repertoire of remedies and typically do not have the time or resources to create individualised parenting plans for families'.[197] As will be shown below it is certainly true that under the 1983 Act South African children's courts have provided an extremely limited range of care solutions.[198] Mathe has claimed that the narrow scope of these often encourages social workers to choose ADR.[199] Another criticism is that court solutions are imposed from a position of authority. In the view of Maresca this has the result that:

> 'Decisions made by courts and imposed upon parties are often resented by the families they are intended to benefit. Parents and sometimes children may sabotage the interventions and/or placements ordered, especially when they have opposed them at trial. The lack of active input into the formulation of solutions to family problems reduces the incentive to ensure that the interventions ordered actually work.'[200]

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[192] On the functions of lawyers see chapter 5 below, especially at part 5.3.
[193] Palmer (1989) op cit note 4 at 24.
[194] Firestone & Weinstein (2004) op cit note 38 at 204.
[195] Palmer (1989) op cit note 4 at 24-5.
[196] Firestone & Weinstein (2004) op cit note 38 at 204. On negative consequences sometimes produced by lawyers see also part 5.2, below.
[197] Firestone & Weinstein ibid at 209.
[198] See the discussion of s 15 of this Act at part 8.3.1, below.
[199] Mathe (2002) supra note 65.
[200] Maresca (1995) op cit note 9 at 733. See also Palmer (1989) op cit note 4 at 29.

Finally, it has been suggested that the negative consequences of court involvement may endure long after proceedings are over. Parents who have been formally found to be dysfunctional typically feel stigmatised, dehumanized and disempowered. Palmer has noted that there are studies which show that where they believe that they have 'lost' a court battle to retain their children they 'often withdraw from their children's lives, in pain and despair'.[201] This may render it impossible for welfare to engage in family rehabilitation work where this would otherwise have been feasible.[202] Post-hearing fallout may therefore in some cases be extremely detrimental.

3.5 Combining Courts and ADR Processes in South Africa

The review of strengths and weaknesses of ADR methods and courts leads to a conclusion that courts should continue to play an important role in South Africa at the present time. Many of the so-called disadvantages of courts discussed in part 3.4.2 are methodological rather than inherent weaknesses. They represent the historical legacy of traditional processes developed over centuries and not specifically for care cases. It may be suggested, for example, that criticisms which relate to the adversarial method can to a large degree be met simply by reducing reliance upon it in care cases. This can be achieved by making suitable modifications in procedural and evidential rules.

Suitable legislative modifications and new approaches to the training and responsibilities of court staff and lawyers could be used generally to reduce the stresses imposed upon persons involved in care proceedings, improve opportunities for effective participation and information-gathering, and reduce the extent to which adjudicators are required to rely upon a predominantly authoritarian approach. Specific suggestions in relation to what changes in court functioning are required will be provided in the remaining chapters of this thesis. The criticism that courts tend to provide too narrow a range of solutions will to a large extent cease to be valid when the 2005 Children's Act is

[201] Palmer ibid at 22.
[202] Ibid.

fully implemented. As will be shown in part 8.3 below a far wider range of outcomes will then be provided for.

The case for a continuance of a significant role for courts rests also on the unique and in some situations crucial contribution they can make as discussed in part 3.4.1, above. Criticisms that courts are too authoritarian cannot be sustained where authoritative decision-making is essential to protect children from harm. It is also important given the still limited development of child care law in South Africa that courts be retained for determining the nature and extent of any legal rights which may be placed in issue in a particular case. Local circumstances provide further strong grounds for retaining courts as external monitoring forums. They are needed to ensure that welfare and other professionals involved in our overburdened system perform their functions appropriately. This accords with the criterion of a system which ensures that proposed alternative care measures are subject to scrutiny and open to real challenge.

Although it is put forward as a basic proposition that courts must continue to play a significant role in South African care cases it is not suggested that this should happen to the exclusion of alternative methods. The strengths-analysis investigation of foreign approaches above shows that the likelihood of achieving the best possible outcome for a child may sometimes be increased by relying at least partly on ADR. The enhanced capabilities for uninhibited communication which exist within alternative processes are a positive indicator for their use in terms of another evaluative criterion -that of effective methods for hearing the voices of children and caregivers. It is also noteworthy that as will be remembered Mathe has indicated that in some South African care cases the advantages of relying on ADR are so significant that social workers occasionally already make unofficial use of even resource-intensive forms such as FGC's.[203]

The disadvantages of ADR that have been identified in part 3.3.2 above are to a large extent linked to its use in inappropriate situations. They could usually be avoided or minimised if appropriate ADR selection criteria were formulated for use in our system and

[203] Mathe (2002) as cited in part 3.3.1, above.

post-ADR monitoring could be imposed in relevant cases. A second basic proposition, therefore, is that our care law can be greatly improved by implementing appropriate legislation providing for ADR. As Schepard and Bozzomo have rightly argued the key question is no longer alternative methods versus litigation but how they can work together.[204] In answering this question it is necessary to consider when ADR should be utilised in our law and how it should relate to court processes. These and related issues which concern implementation of ADR will be addressed as part of an evaluation of relevant provisions of the 2005 Act, below.

3.6 An Evaluation of the Children's Act 38/2005

The 2005 Act is the first South African statute to provide direction on the use of ADR in children's cases -including care cases. In the discussion which follows specific sections of it are discussed and then some general comments are offered. The relevant provisions, ss 49, 69-72 and 75(1)(d)-(f), are all to be found in chapter 4, entitled 'Children's Courts'. The impression thus conveyed that ADR is to occur under the direction of children's courts is confirmed (as will be shown below) by a reading of these sections.

It should be noted at the outset that the 2005 Act provides merely a starting point. A power for the minister for justice and constitutional development to provide further coverage on certain additional aspects of alternative methods is included in s 75(1)*(d)-(f)*. This allows for regulations on:

> '(d) the holding of pre-hearing conferences in terms of section 69, procedures regulating such conferences and information that must be submitted to a children's court;
> (e) the holding and monitoring of family group conferences or other lay-forums in terms of sections 70 and 71, procedures regulating such conferences and other lay-forums and information that must be submitted to a children's court;
> (f) the qualifications and experience of persons facilitating family group conferences, including special requirements that apply to persons facilitating in matters involving the alleged abuse of children;'

What will need to be dealt with in regulations is considered below.

[204] Schepard & Bozzomo (2003) op cit note 10 at 348-49 -referring particularly to FGC's and mediation.

The model relied on in the Act is clearly one which is intended to be court driven. Court control will appropriately align our system with the predominant trend in countries where there has been extensive experience of ADR in care cases.[205] For example, a court power to instigate ADR as proposed in the Act is supported by findings elsewhere which indicate that investigative agencies tend to avoid doing so their own accord[206] or else choose methods where they retain the most power.[207]

Section 49 of the Act is entitled 'Lay-Forum hearings'. Sub-section 49(1) reads as follows:

> 'A children's court may, before it decides a matter or an issue in a matter, order a lay forum hearing in an attempt to settle the matter or issue out of court, which may include-
> (a) mediation by a family advocate, social worker, social service professional or other suitably qualified person;
> (b) a family group conference contemplated in section 70; or
> (c) mediation contemplated in section 71.'

The wording 'before it decides a matter or an issue in a matter' implies that a children's court could instigate ADR either as a preliminary process or in parallel with its own proceedings.[208] Procedural rules as envisaged in s 75(1)*(e)* will certainly be needed if s49 is to be successfully implemented. These should require investigative agencies to provide an opinion on whether ADR is indicated and, if so, in what form. They should include this as a standard part of their pre-hearing investigative reports to court. Also, as is further motivated in part 7.4.1 below, where courts contemplate instigating ADR they should be

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[205] A different model in which courts lack a dominant status and are merely one of a variety of service providers from which participants can choose has been proposed by some commentators: see Firestone & Weinstein (2004) op cit note 38 at 207-12. Nevertheless, in developed systems courts have generally remained the most authoritative forum involved in care cases -and in fact the introduction of ADR has extended their powers as they are expected to manage and monitor it: see Schepard & JW Bozzomo (2003) op cit note 10 at 341.

[206] Freymond (2001) op cit note 10 at 16; Bell (2002) op cit note 58 at 301.

[207] Atkin & McLay (2001) op cit note 120 at 298 N58. See also Connelly & McKenzie (1999) op cit note 57 at 63; and Brophy (2006) op cit note 86 at 54 N117.

[208] This wording may be contrasted with Canadian provisions that provide clearer guidance. In British Columbia s 23(1) of the Child, Family and Community Service Act [RSBC1996] supra note 8 expressly states that courts may at any stage adjourn care cases for up to three months for the purpose of enabling 'a family conference, mediation or other alternative dispute resolution mechanism' to proceed. In Nova Scotia s 21(2) of the Children and Family Services Act 1990 provides that '… the court, on the application of the parties, may grant a stay of the proceedings for a period not exceeding three months': accessed at <http://www.gov.ns.ca/legislature/legc/statutes/childfam.htm>.

required to instigate a preliminary hearing to further consider its appropriateness and form.[209]

Future regulations should also expressly provide that children's courts can utilise the option of parallel ADR if positive indicators emerge after the proceedings proper have commenced in court. It has been found in some systems that ADR can be most effective when conducted simultaneously with court litigation.[210] Parallel ADR is sometimes more successful than pre-litigation ADR because as court hearings progress parties gain new insights and may become more open to suitable voluntary solutions. [211] When this occurs it will often be appropriate for the court to adjourn and then later consider whether to ratify partial or complete resolutions achieved during parallel ADR.

The phrase 'order a lay forum hearing' in s 49(1) is of some concern. It has been suggested above that ADR should not be forced upon unwilling participants and this position has been supported by commentators in other jurisdictions.[212] For more suitable wording one may note s 21(1) of the Nova Scotia Children and Family Services Act 1990. This states in relevant part that mediation in child protection cases can only be permitted where '[a]n agency and a parent or guardian of a child… agree to the appointment of a mediator to attempt to resolve matters relating to the child who is or may become a child in need of protective services'.[213] The possibility of forced ADR under s 49(1) of our 2005 Act is unfortunate and it is to be hoped that a suitable clarification will be developed.

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[209] This would be in line with the approach in many US jurisdictions: see Chandler & Giovannucci (2004) op cit note 2 at 217.

[210] See Sheehan (2001) op cit note 34 at 218. In a study of mediation by Savoury, Beals & Parks (1995) op cit note 9 at 754 it was found that in as many as a third of child protection cases the appropriate opportunity for ADR came only after court proceedings had commenced.

[211] Sheehan, ibid; and Yukon Revision Project (2004) op cit note 176 at 5.

[212] See Savoury, Beals & Parks ibid at 751. Schwarz (2004) op cit note 85 at 307-08 has also argued that alternative methods should not be imposed -rather, the role of a court should merely be to decide whether ADR is appropriate and, if so, help parties decide whether they wish to utilise it. Firestone & Weinstein (2004) op cit note 38 at 210 propose that families should be given some degree of choice also about which form of ADR is to be selected.

[213] Savoury, Beals & Parks ibid at 753 have pointed out that this provision has been interpreted to mean that court adjudicators may suggest mediation during the course of care proceedings but must never force it upon an unwilling person.

Section 49(2) of the 2005 Act lists criteria which children's courts must take into account before instigating ADR. It states:

> 'Before ordering a lay forum hearing, the court must take into account all relevant factors, including-
> (a) the vulnerability of the child;
> (b) the ability of the child to participate in the proceedings;
> (c) the power relationships within the family; and
> (d) the nature of any allegations made by parties in the matter.'

Again, a regulation will be required which indicates that investigative agencies must provide recommendations based on these factors in their pre-hearing reports.[214] And at the ADR preliminary hearings which have been proposed above children's courts should be required to hear and if necessary derive any further evidence that may be needed. If courts are to be placed in a situation where they can 'take into account all relevant factors' before deciding on the appropriateness and form of ADR they will need sufficient means to obtain pertinent information.

It is appropriate that s 49(2)(b) requires a children's court to consider whether the child involved should participate in ADR. As has been noted above the less formal procedures which characterise ADR may sometimes favour child participation. Canadian care mediator Henry has warned that older children who feel shut out of ADR processes sometimes 'vote or decide with their feet' and disappear before a care solution can be established.[215] She has proposed that guidelines to assist with decisions about child participation can be formulated. In her view children will frequently be too young, traumatised or psychologically vulnerable to take part. Where they are not, however, three further important negative indicators for their involvement are:

- Negative information concerning parents that they did not previously know about will need to be discussed during ADR -for example, criminal behaviour or drug addiction.

[214] See ibid at 744 where it is suggested that there should be a requirement that investigative social workers take a position in their reports on whether the risk of harm to a child in her current situation is so high or unpredictable that the delays attendant upon instigating ADR would be too dangerous.
[215] Henry (2005) op cit note 12 at 7. On the need to involve mature children where possible see also Palmer (1989) op cit note 4 at 27.

- The danger that a child may be placed under pressure to make inappropriate choices which may lead to a conflict of loyalty.
- Cases that have reached a stage where a disputed permanent removal appears likely.[216]

She has further suggested that four key positive indicators for child involvement are:

- More mature children.
- Cases where a significant part of the problem is that parents or social workers are not listening to children.
- Cases where parental guilt issues can be constructively resolved by assisting them to make admissions to children who are able to understand.
- Where children show a strong need to express themselves.[217]

It may be suggested that, rather than leaving our children's courts without any direction in relation to child-participation in ADR, criteria such as these should be made available to them in the form of published guidelines.

In many care cases a discretionary use of the proposed guidelines might lead children's courts to a conclusion that it is not appropriate to involve children directly because of their vulnerability. The guidelines should therefore further direct that if the magistrate decides that ADR without direct child participation should be undertaken the ADR facilitator must be required to establish whether the child is sufficiently mature to express views separately. If so, the facilitator must discuss beforehand with the child the nature of the care plan that should be negotiated by the adults involved in the ADR.[218] By so doing the facilitator can take the child's views to the alternative process and provide her with feedback afterwards. In this way some children can participate indirectly.

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[216] Henry ibid 7-8; and personal communication at the Conference.
[217] Ibid at 8-9; and personal communication at the Conference.
[218] Section 21(3) of the British Columbia Child, Family and Community Service Act 1996 supra note 8 requires that with sufficiently mature children ADR facilitators cannot agree to any such plan without first explaining it to the child and taking the child's views into account. There is a rebuttable presumption that a child of at least 12 years of age is sufficiently mature to be consulted.

In relation to specific ADR methods the 2005 Act is broad enough to allow for all of the five basic forms already discussed in this chapter.[219] For example, in s 72 the possibility of negotiated voluntary agreements has been provided for. In terms of this, any agreement reached would have to be 'accepted by all parties involved in the matter' (including presumably the child if sufficiently mature) and then submitted to a children's court for possible ratification.[220] Because of the potential drawbacks of voluntary agreements as discussed in part 3.3.2 above it will obviously be important for children's courts to weigh carefully the four basic criteria in s 49(2) before sanctioning an attempt to utilise this process.

Procedural rules should be created to indicate that at a court preliminary hearing held to discuss ADR magistrates must consider whether there are deep-rooted disputes or extreme power-differences between family members and investigative social workers that are likely to negate the benefits of a negotiated voluntary agreement. A deficiency in the wording of s 72 is that an all-or-nothing approach has been taken. Courts must either ratify or reject final agreements *in toto*. The possibility of a partial ratification of only those clauses in voluntary agreements which courts find to be appropriate should also have been allowed for.

Section 70 of the Act is entitled 'Family group conferences' and provides some specific provisions on their use. A criticism of s 70(1) is that it somewhat ambiguously designates those who may attend FGC's as 'parties involved in a matter… including any other family members of the child'.[221] The whole point of FGC's is that the wider family, including persons who may not be parties in the legal sense, may be needed as attendees - and this should have been made absolutely clear. Furthermore, the limitation to family members is inappropriate because, as Holland and O'Neill have pointed out, FGC's

[219] It could even as discussed later in this part allow for lay community panels somewhat similar to the Scottish ones.
[220] In terms of s 72(2)(b) courts can refer agreements back for reconsideration by the parties.
[221] The words 'including' and 'other' indicate contrary interpretations on who may attend.

sometimes need to involve 'significant non-family members such as godparents and neighbours'.[222]

It is not suggested that all the FGC provisions in the Act have been inadequately worded. Section 70(2)(a) appropriately requires that a children's court must appoint 'a suitably qualified person or organisation to facilitate' if it decides that an FGC is indicated.[223] And s 70(2)(c) usefully requires the provision of a post-FGC report (presumably by the facilitator) which a children's court may consider before issuing an order. As appears from the quotation above s 75(1)(e)-(f) helpfully provides wide scope for future regulations covering the use of FGC's.

As appears from the wording quoted above aside from voluntary agreements and FGC's, the Act allows very broadly for what are termed 'other lay-forums'. Section 71(1) states that a children's court 'may, where circumstances permit, refer a matter brought or referred to a children's court to any appropriate lay-forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court'. The discretionary wording 'may, where circumstances permit' appears useful in enabling children's courts to refrain from instigating ADR where the necessary resources are not locally available. However, the inclusion of the word 'mediation' is unfortunate because it implies the use of a particular form of ADR in what is obviously meant to be a general enabling provision allowing for various categories.

The reference in s 71(1) to 'a traditional authority' clearly allows for tribal chiefs, headmen and elders to be instructed by children's courts to undertake ADR -for example, by chairing community panels. It may be suggested that the difficulties encountered with lay hearing panels in even such a relatively well-resourced system as Scotland reveal the dangers of utilizing part-time non-professionals. It has been shown in part 3.3.2 above that child participation in particular is likely to suffer if such persons are placed in positions of considerable authority. Connelly and McKenzie have noted that, while child participation

[222] Holland & O'Neill (2006) op cit note 25 at 92. See also Firestone & Weinstein (2004) op cit note 38 at 205 & 209.
[223] The question of how this could be achieved is discussed later in this part, below.

is potentially extremely valuable in child protection decision-making, a practical problem is that in many traditional indigenous cultures 'children's opinions are not privileged, and disagreement with adults and elders is not necessarily sanctioned'.[224] The latter observation would appear to be relevant when considering indigenous cultures in South Africa.[225] It may therefore be suggested that despite the possible benefits which may arise from culturally-based models the decision to involve traditional leaders in care case resolution was an unfortunate one.

The 2005 Act expressly provides in s 69 for pre-hearing conferences in any contested matter which is to be brought before a children's court. Section 69(1) states that these can be used to mediate or settle disputes 'to the extent possible' and 'define the issues to be heard by the court'. As noted in part 3.3.1 these have been found to be appropriate purposes in other systems. What is missing from s 69, however, is an indication of what should distinguish pre-hearing conferences from the other alternative methods provided for in ss 70-72 of the Act. As has been shown in foreign systems these conferences tend to be reserved as a final resort prior to the onset of full litigation. However, there is unfortunately no indication in the Act about how pre-hearing conferences should articulate with other alternative methods.

A further difficulty with s 69 is that important questions relating to who should facilitate, who should attend and what procedure should be followed at pre-hearing conferences are insufficiently addressed. It is simply stated in s 69(4)(a) that '[t]he court may- prescribe how and by whom the conference should be set up, conducted and by whom it should be attended'. Children's courts will need better guidance than this on instigation of pre-hearing conferences. It should have been laid down, for example, that

[224] Connelly & McKenzie (1999) op cit note 57 at 69.

[225] Findings by FN Zaal 'Hearing the Voices of Children in Court: A Field Study and Evaluation' in S Burman (ed) *The Fate of the Child. Legal Decisions on Children in the New South Africa* (2003) 158 at 163 indicated that black South African children who have had a traditional upbringing sometimes have difficulty in refuting the testimony of adults because they have been taught not to contradict statements made by older persons. See also DM Chirwa 'Participation Rights: Challenging African Legislation' (2002) 6 *Children First* 32. This could also pose a barrier to child participation in other forms of ADR such as FGC's. However, as appears from part 3.3.1 above the international experience seems to indicate that children feel less intimidated when involved in these than when appearing before community panels.

magistrates must not preside.[226] Yet another shortcoming is that, just as with lay hearings,[227] courts are not directed to consider the views of any party who may be against the utilization of a preliminary conference.[228]

In the spirit of a conference that is indeed 'pre-hearing' and with reference to other systems where pre-hearing conferences have been successfully implemented it should have been indicated in s 69 that court premises and court support staff must be utilised. In relation to the latter it could have been proposed that children's court assistants as provided for in the 1983 Act should facilitate.[229] Unfortunately, however, references to this officer do not appear in the 2005 Act. It would appear that the intention is to do away with children's court assistants completely and it may be commented that children's courts are unlikely to be able to take on the task of managing a variety of forms of ADR as envisaged under the Act if they are in future to be staffed only by clerks and magistrates.

Section 69(2) of the 2005 Act prohibits the holding of pre-hearing conferences in any case 'involving the alleged abuse or sexual abuse of a child'.[230] Since abuse is at least a potential factor in a high proportion of care cases this blanket restriction is likely to severely limit the number of matters in which pre-hearing conferences may be utilized. It should not have been included in this form[231] given the potential usefulness of such conferences and possibilities for using court support staff to produce a safe and structured environment where only the appropriate participants are present. For example, a perpetrator might be willing to admit abuse at a pre-hearing conference and thus enable a children's court to save time and concentrate on finding an appropriate care solution for the child at the subsequent court hearing.

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[226] For the reasons mentioned in part 3.3.2, above.

[227] See the discussion of s 49(1) earlier in this part.

[228] Compare s 2-12(1) of the Juvenile Court Act 1987 as amended, from Illinois. In terms of this, although a court can order a preliminary conference, the child's view must be taken into account. She has the right to move her case directly to a full court hearing without one: see chapter 705 of the Illinois Compiled Statutes: accessed at <http://www.ilga.gov/legislation/ilcs/ilcs 4.asp>.

[229] Section 7(2) of this Act allows for the appointment of these officers to 'generally assist' in the performance of the functions of children's courts.

[230] This clumsy wording appears to exclude actual abuse of a nonsexual kind, although that could hardly have been the intention.

[231] It is conceded that, as has been noted earlier, abuse of a child may be a possible indicator for avoiding a pre-hearing conference; but the bar should not be an absolute one.

Aside from the need for some amendments relating to core aspects of the Act, a detailed set of practice rules on preliminary conferences must be developed.[232] As will be remembered the Act facilitates the development of such rules because s 75(1)*(d)* expressly provides for the publication of regulations covering pre-hearing conferences.

Aside from difficulties which pertain only to specific methods there are some general problems relevant to all of the forms of ADR envisaged in ss 49, 69-72 and 75(1) of the Act. Although the foundational s 49 provides children's courts with four basic criteria to use when considering whether to instigate ADR at all, the Act does not provide guidance on their selection of particular forms. Given that presiding magistrates will mainly be trained in law rather than ADR these will urgently be needed. Although considerations of space preclude a detailed discussion of selection criteria it may be suggested that the analysis of characteristic strengths and weaknesses in part 3.3 above shows that a list of positive and negative indicators for the selection of particular types of ADR could be developed. Whilst children's courts should obviously be left with a realm of discretion such indicators are essential.

In addition to the need for selection guidelines, another area where the Act will leave children's courts and participants somewhat in the dark unless suitable regulations are developed concerns the degree to which communications made during ADR should remain confidential.[233] This is an important issue because the basic scheme in the Act is that after any form of court-instigated ADR is complete a facilitator's report and written record of any issues agreed between the parties must be submitted to the court to assist it at a subsequent care hearing.[234]

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[232] A useful example of one appears in the New South Wales 'Practice Note 4 of 2002' op cit note 135 at 21.

[233] As can be seen from the quotation above s 75(1)*(d)* & *(e)* expressly provide for regulations on 'information that must be submitted to a children's court'.

[234] See ss 69(4)(b)-(c), 70(2)(b)-(c), 71(3)(a)-(b), & 72(2)(a)-(c). The latter indicates that it is only with negotiated voluntary agreements that a children's court has the option of making a settlement reached by the parties an order of court without holding any subsequent hearing at all.

The approach taken in the Act is that no uniform standards governing what information should be treated as privileged are required. In relation to different forms of ADR, ss 69(4)(b), 70(2)(b) and 71(3)(a) all contain very similar wording. They direct children's courts to decide on a case-by-case basis 'the manner in which' a record is to be kept during ADR of any agreement or settlement reached or of any fact that emerges 'which ought to be brought to the notice of the court'. The latter phrase begs the question and therefore better direction will be needed.

As pointed out by Savoury, Beals and Parks, either open or closed models can be utilised in legislation dealing with communications-privileges during ADR processes in care cases. [235] In the former, all records of processes and information which comes to light during ADR can freely be made known to persons who were not present. In the latter, this cannot be done because confidentiality is preserved.[236] A compromise model developed for child protection mediation after considerable experience in Ontario works as follows:

> 'Before the commencement of mediation, the parties are asked to agree in writing that they will not ask the mediator to testify or provide a report. This is done to ensure that the mediator is not used by any party to advance that party's case. The parties, however, are free to use any information from the mediation process in any subsequent litigation. It should be noted that this does not relieve the mediator from the responsibility to report information that suggests child abuse…' [237]

Maresca has claimed that this allows parties to negotiate freely and openly without fear of prejudicing their case, yet still meets child protection concerns.[238]

A more closed model which places restrictions on the parties as well as the facilitator has been established in s 24(1) of the British Columbia Child, Family and Community Service Act, 1996. This states:

> 'A person must not disclose, or be compelled to disclose, information obtained in a family conference, mediation or other alternative dispute resolution mechanism, except
> (a) with the consent of everyone who participated in the family conference or mediation,
> (b) to the extent necessary to make or implement an agreement about the child,
> (c) if the information is disclosed in an agreement filed [at court] under section 23, or
> (d) if the disclosure is necessary for a child's safety or for the safety of a person other than a child…'. (Insertion added)

[235] Savoury, Beals & Parks (1995) op cit note 9 at 760.
[236] Ibid.
[237] Maresca (1995) op cit note 9 at 735.
[238] Ibid.

An advantage of a relatively closed system such as this is that participants are more likely to speak freely, make admissions and offer concessions.[239] This is obviously most important because facilitation of uninhibited communication is one of the core reasons for utilising ADR. Lande has pointed out that many US states have promulgated very closed wording. They extensively protect disclosures made during ADR as privileged, except where they reveal child abuse or neglect.[240] Since child protection ADR typically deals with these problems even that exception has frequently been narrowly interpreted to apply only to 'previously unreported allegations of child abuse or neglect'.[241]

In South Africa the 2005 Act certainly needs to be supplemented with some s75(1) regulations providing direction on which statements made during ADR should be treated as privileged. The general position ought to be that communications are confidential. The exceptions should be those listed in paragraphs (a)-(d) of the British Columbia provisions quoted above, with the rider that only previously unreported allegations of neglect, abuse or danger are not confidential (similarly to the US approach). This would entail that our children's courts are only entitled to utilise three categories of information: firstly, proposed solutions which ADR participants have agreed upon (and related implementation information), secondly, any other information which participants have all agreed can be released, and thirdly anything that the facilitator believes to be new information about serious dangers to children or other persons. This approach could also be used to provide guidance concerning what information anyone else (besides a children's court) could utilise as unprivileged.

A set of South African ADR rules would additionally need to cover training[242] and qualifications for eligibility as a court-appointed ADR facilitator.[243] As will be remembered from the quotation above s 75(1) rather strangely provides only for

[239] Yukon Revision Project (2004) op cit note 176 at 3.
[240] Lande (2001) op cit note 11 at 4 referring particularly to mediation.
[241] Ibid.
[242] For some examples of systems of licensing and training see Chandler & Giovannucci (2004) op cit note 2 at 228. In relation to scope of training see Maresca (1995) op cit note 9 at 747-50. On training see also Palmer (1989) op cit note 4 at 28-29.
[243] In Nova Scotia and British Columbia there are rosters of approved mediators for care cases: Savoury, Beals & Parks op cit note 9 at 753; Henry (2005) supra note 12 at 6.

regulations on the 'qualifications and experience of persons facilitating family group conferences'.[244] Obviously, these are needed for facilitators of all alternative methods and not merely FGC's.

Facilitators also need a rules framework covering the processes they should follow during ADR.[245] Here, s 75(1) has been more appropriately worded because s 75(1)(e) provides broadly for regulations on procedures at all forms of 'lay forums'. When these are developed they should, inter alia, direct that a facilitator may not continue with ADR where a party whose participation the court regarded as essential (at its proposed ADR preliminary hearing) proves to be unable to provide informed consent. The same should apply if it emerges that such a party cannot sufficiently communicate her position and interests. Facilitators must be expressly required to immediately refer a matter back to the court in these situations.[246]

A potential concern is that the introduction of ADR in the 2005 Act should not be used to reduce children's courts to merely rubber-stamping agreements reached during alternative processes. And this may be a serious danger if, as has been surmised above, there is no intention to develop stronger staff complements. A final point is that the American experience indicates the need for a standing body of specialists (including some court adjudicators) to oversee the operation of alternative methods.[247] It may be suggested that it will be essential to set up one in South Africa to oversee training and licensing, and also for formulating proposals for ongoing development of ADR regulations and guidelines.

3.7 Conclusion

The investigation of extra-curial methods for the resolution of care cases in this chapter indicates that there are five basic forms of these currently used in well-developed

[244] At s 75(1)(f).
[245] For a detailed description of steps found to be effective in Ontario see Maresca (1995) op cit note 9 at 737.
[246] See ibid at 735.
[247] Lande (2001) op cit note 11 at 4.

systems. It further reveals that four of these -voluntary negotiations between families and welfare, mediation, FGC's and pre-hearing conferences- appear to have considerable potential for implementation in South Africa. Their capacity for encouraging communication accords with the evaluative criterion of a system which facilitates the hearing of appropriate voices. And their potential for healing differences amicably and sometimes therapeutically aligns them with the criterion of a system which promotes successful care by parents and other family members rather than removals of children.

The fifth ADR form considered in this chapter is one which empowers selected lay community volunteers to attempt to settle issues. This currently appears to be problematic from a South African perspective because of the difficulties faced by untrained persons in attempting to work constructively with the highly vulnerable children and family members typically involved. This last conclusion must be seen as tentative, however, because it is based only on extrapolation from the Scottish hearings panels in a very different environment and some limited local research on attitudes towards children's views in indigenous cultures.

It is noteworthy that the predominant approach in developed systems is that in care cases courts must not be entirely replaced by ADR. As has been shown in part 3.4.1 courts have unique qualities which potentially enable them to play a valuable role. These include their capacity for authoritative decision-making, evaluating evidence objectively, development of a children's rights culture, and monitoring of the work of child protection personnel. It has been contended that all of these capabilities are especially relevant in South Africa at the present time.

A continuation of the use of courts in our system is particularly indicated by the primary evaluative criteria requiring fair hearings and a systemic capacity for rigorous scrutiny and real challenge for the purpose of testing mandatory care intervention proposals by welfare. It is clear that our courts, and especially the children's courts, must continue to play a predominant role in care cases.

Although the continued involvement of South African children's courts is essential it must be conceded that significant changes in the nature of their functioning are required. It has been suggested (and will be further substantiated in part 6.2.3, below) that reliance on the adversarial method must be reduced. And clearly, in view of the advantages to be gained it will be appropriate to supplement court involvement with ADR processes.

On the crucial question of how ADR and court processes should be combined it emerges from the comparative research in this chapter that the ideal model is one which places courts in control. As shown in part 3.6 a court-managed system is precisely what has been established in the 2005 Act. Appropriately, children's courts will decide in each case whether ADR should be utilized, and if so, in what form. The correctness of another basic feature of the Act -that any agreements reached during alternative processes must be submitted to the instigating court for possible ratification- is also supported by experience in developed systems.

Although the 2005 Act is fundamentally correct in its approach to combining courts and ADR there are some serious deficiencies in its wording which may undermine its effectiveness. The allowance of both the possibility of forced ADR against the will of participants and reliance upon untrained traditional leaders are not appropriate. The decision to leave children's courts to deal on an *ad hoc* basis with questions of confidentiality is another failing. Because a confidence to speak freely is crucial to the success of all ADR methods a closed model providing only for certain crucial categories of information to be released (as discussed in part 3.6) should have been established in the Act.

Fortunately, many of the other less serious shortcomings in the 2005 Act could be addressed simply by issuing regulations as provided for in s 75(1). In relation to what is required in these it is essential to indicate how children's courts should obtain relevant information on the appropriateness and timing of ADR in any particular case. A first step would be to direct that investigative social workers' pre-hearing reports must include motivated recommendations. In addition, it should be rendered mandatory for children's

courts to hold preliminary hearings before ordering ADR. This would be for deriving any further necessary information, establishing what ADR resources are locally available and ascertaining the wishes and capabilities of the parties and others involved.

Although s 49(2) of the 2005 Act contains some broad criteria to guide children's courts on whether to instigate ADR in a particular case they have not been provided with further indicators to assist in deciding what form it should take. It has been shown that it is essential to provide these and that appropriate wording could easily be formulated. To create uniform national standards they should be published as a set of official guidelines.

With reference to the criterion of hearing appropriate voices the 2005 Act quite correctly requires children's courts to consider whether the child who is the subject of a case should take part in ADR. It has been shown that experience in developed systems indicates that suitable criteria can and should be formulated and published to assist in decisions about either direct or indirect child-participation. It has been recommended that it needs to be made clear that the children's courts must never force an unwilling child or any other person to undergo ADR. A clarification to s 49 in this regard is urgently needed.

There are further important aspects which the regulations need to cover. These include requirements for ADR facilitators. Standards governing their training and qualifications for eligibility as court appointees must be formulated. The regulations must also show in broad outline what steps facilitators must follow with any particular form of ADR and in what sequence. It has been recommended that it is especially important to include a direction that a facilitator must immediately refer a matter back to court for further instruction if emerges that a party whose involvement is crucial is not able to participate constructively.

Although the provisions in the 2005 Act which establish ADR under the auspices of children's courts are to be applauded the legislature does not appear to have gauged the resources required. Experience in other systems indicates that where courts are expected to manage ADR processes this greatly increases the range of their responsibilities. It is of

concern that a middle-ranking staff member in the form of a children's court assistant (as provided for under the 1983 Act) appears to have been jettisoned in the 2005 Act. As has been shown, valuable ADR-related processes such as facilitation of pre-hearing conferences could have been carried out by these officers.

Removal of the concept of children's court assistant will mean that children's courts are to be expected to undertake a considerably wider array of functions with little in the way of staff resources. Although this is certainly not the intention in the Act there is a real danger that many children's courts may therefore be reduced to merely rubber-stamping written ADR agreements rather than providing the degree of critical monitoring and rigorous scrutiny that will be needed. It is to be hoped that the new legislation will not be implemented with an expectation that children's courts must do considerably more with considerably less.

A final point which emerges from the analysis in this chapter concerns magistrates. Quite clearly they will only be able to instigate and manage ADR processes effectively if they are provided with appropriate interdisciplinary training. In particular, they will need to be familiarized with the positive indicators for, strengths and limitations of the different forms of ADR. And once they become familiar with the unique form of skilled work now required it will be crucial to provide financial incentives and the degree of professional status which their new ADR functions surely deserve.[248]

[248] In the USA has been found that failure to do this discourages court adjudicators from remaining with care work and developing the degree of ADR-related specialisation which is crucial: see Schepard & Bozzomo (2003) op cit note 10 at 343-44.

CHAPTER 4
PARTY-STATUS AND DIRECT PARTICIPATION AT CHILDREN'S COURT PROCEEDINGS

4.1 Introduction

As noted in the previous chapter although there will be new scope for ADR under the 2005 Act children's courts will continue to be the primary forums for deciding care cases. They will thus still issue orders imposing mandatory alternative care measures.[1] In contrast to the extra-curial methods considered in chapter 3, this chapter begins a discussion of means for optimising communication by children and other persons at children's court proceedings themselves. The focus is on the basic aspects of party status and direct participation. [2]

Party status at care proceedings is clearly important because it confers significant participatory advantages.[3] These include being able to obtain legal representation, call witnesses or challenge decisions in higher courts.[4] Direct participation where persons speak for themselves at court avoids difficulties associated with hearsay. But as will be shown it is problematic in several respects. Reference to the criterion of optimum means for hearing appropriate voices indicates that a critical evaluation of our law on party status and direct participation is essential. The evaluation is divided into two main parts. In these,

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[1] In s 45(1)(h) of the 2005 Act it is expressly stated that matters involving 'alternative care of a child' fall under the jurisdiction of children's courts.

[2] Chapters 5 and 6 follow through with a discussion of how lawyers and presiding officers, respectively, can assist communication.

[3] As noted in part 1.3.2 above art 9(2) of the 1989 CRC specifically recognises the importance of participation by interested parties in care proceedings.

[4] B Van Heerden 'Judicial Interference with the Parental Power: The Protection of Children' in B Van Heerden, A Cockrell & R Keightly *et al*, *Boberg's Law of Persons and the Family* (1999) 497 at 622. In more detail, GC Bohr 'Children's Access to Justice' (2001) 28 *William Mitchell LR* 229 at 235 described the essential rights of parties in care cases as those to notice, to have legal representation, to be present at all hearings, to conduct discovery, to bring motions before the court, and to participate in all parts of the action including settlement agreements. See also M Sobie 'The Child Client: Representing Children in Child Protective Proceedings' (2006) 22 *Touro LR* 745. As Sobie states ibid at 765 '[a]n essential feature of party status is the automatic applicability of a large "bundle" of procedural and substantive rights'.

aspects relating to children who are the subject of care proceedings and other persons are separately considered.

Part 4.2 deals with whether children should be involved at court. This has been treated as a primary aspect which requires detailed analysis. The presence or absence of the child who is the subject of a care case is clearly a significant contextual factor. Accordingly, it should influence how court hearings are conducted. For example, if verbal participation or even just physical presence of children at court is to be promoted this will have implications for procedures that need to be employed.

Research findings and arguments for and against children being at court are noted in parts 4.2.1 and 4.2.2. In part 4.2.3 degrees and kinds of child-involvement are considered and then in part 4.2.4 a position is taken on child participation. Party status for children and an approach which facilitates direct involvement in accordance with their capabilities and interests are proposed. In part 4.2.5 our present law is critically evaluated with reference to this recommendation.

The second fundamental question addressed in this chapter is which persons besides the child who is the subject of proceedings should have party-status or be otherwise entitled to participate directly at court. Prior to the 2005 Act our law did not allocate party status to welfare despite the fact that social workers instigated nearly all care litigation and presented evidence for the state. With the 2005 Act having now designated investigative agencies as parties[5] the question of whether this is appropriate is considered in part 4.3.1. It is concluded that, despite some foreseeable difficulties, it will enable agencies to provide better services.

In part 4.3.2 the issue of which private individuals should receive party status is discussed. In subpart 4.3.2.1 the preliminary question of whether to limit the numbers of

[5] Section 1 provides automatic party status to 'the department or the designated child protection organisation managing the case of the child'.

private parties is considered. It is contended that a child-participatory model as recommended in part 4.2 and the need to facilitate communication by primary caregivers entail that a selective rather than accommodating approach must be taken. In light of this, in subpart 4.3.2.2 private-party eligibility criteria are discussed. Particular attention is given to unmarried fathers and prospective caregivers. It is concluded that provisions in the 2005 Act providing them with automatic party status are overly broad.

In subpart 4.3.2.3 the 2005 Act's introduction of a merely 'participant' as opposed to full party status for certain persons is analysed. It is suggested that this facilitates a child participatory model and assists existing primary caregivers. It is shown that it is a potentially useful mechanism for presiding officers. It could enable them to reduce the number of lay adults and legal representatives who are able to maintain an adversarial presence throughout proceedings. Participant status is thus supported in this chapter as capable of rendering children's courts more child- and caregiver-friendly by reducing overcrowding and intimidation. However, it is contended that the Act provides inadequate wording because it does not distinguish clearly enough between participants and full parties. Recommendations for a better differentiation are put forward.

4.2 Party-participation by Children Who Are the Subject of Care Proceedings

The appropriate extent and nature of direct involvement of children at court requires careful consideration. From a child empowerment perspective it may be argued that it is important to hear them at first hand because crucial decisions about their futures are to be made. However, from a child protection perspective concerns about secondary, systemic abuse of children arise. Can they really be expected to participate in hearings where adults dispute sensitive issues? Given these seemingly contradictory considerations it is not surprising that different solutions to the dilemma of child involvement have been adopted in developed systems. In legalistic systems[6] responses range between

[6] On the concept of legalistic systems as utilised in this thesis see part 1.3.1, above.

discouraging[7] and (less frequently) actively supporting[8] such involvement, with shades in between.[9] In anti-legalistic systems[10] child involvement is more likely to be encouraged.[11]

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[7] There have been criticisms that many legalistic systems have failed to accommodate direct child participation: see J Cashmore 'Children's Participation in Family Law Matters' in C Hallett & A Prout *Hearing the Voices of Children: Social Policy for a New Century* (2003) 158. In England and Wales representation by adults tends to be regarded as a preferable substitute. This is facilitated by s 95 of the Children Act 1989 which provides courts with a discretion to decide whether the child should attend. Family Proceedings Rules 1991 (SI 1991/1247) r 4.16 indicates that proceedings can take place in the absence of a child if the court considers this to be in her best interests. Under r 4.11(4)(b) a court may receive information about the child's wishes in regard to attending. These provisions tend to be implemented in a way which avoids the presence of children: J Hunt, A Macleod & C Thomas *The Last Resort. Child Protection, the Courts and the 1989 Children Act* (1999) 170 noted that the few children who seek direct involvement in proceedings are sometimes 'dissuaded or denied attendance'. See also J Masson 'Representation of Children in England: Protecting Children in Child Protection Proceedings' (2000) 34 *Family LQ* 467 at 469 & 491; B Mitchels & H James *Child Care Protection Law and Practice* (2001) 63; and J Brophy *Research Review: Child Care Proceedings Under the Children Act 1989* (2006) at 69. In some parts of Australia there has also been little facilitation of child participation: L Akenson & L Buchanan *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* (1999) at 24; P Parkinson 'The Child Participation Principle in Child Protection Law in New South Wales' (2001) 9 *International Journal of Children's Rights* 259; and R Sheehan 'The Marginalisation of Children by the Legal Process' (2003) 56 *Australian Social Work* 28 at 29.

[8] New South Wales appears not to follow the trend in other Australian jurisdictions because child participation has been strongly encouraged there: see note 65, below. Scotland also places strong emphasis upon hearing children through direct engagement. This is not merely as noted in part 3.3.1 above at lay hearings panels; as can be seen from K McK Norrie *Children's Hearings in Scotland* (2005) 98-100 it also applies when care matters go to court. See also R Sheehan *Magistrate's Decision-making in Child Protection Cases* (2001) at 211.

[9] In the USA only limited involvement by the child is usually possible: see note 14 and the accompanying text, below.

[10] In relation to the meaning applied to these see part 1.3.1, above.

[11] As appears from A Moylan 'Children's Participation in Proceedings -the View from Europe' in Thorpe LJ & J Cadbury (eds) *Hearing the Children* (2004) 171 at 172 in anti-legalistic systems in continental Europe there is much more emphasis on judges seeing children if they have significant interests at stake. This is to directly ascertain their wishes and feelings. For the example of France see Sheehan (2001) op cit note 5 above at 214; and M-C Celeyron-Bouillot 'The Voice of the Child in Hague Proceedings: a French Perspective' (Autumn 2003) VI *The Judges' Newsletter/La letter des juges* 18. On Germany see H-C Prestien J 'The German Child Law Reform of 1998 As Seen by a Practitioner: Does It Go Far Enough in Making the Child's Voice Heard?' (Autumn 2003) VI *The Judges' Newsletter/La letter des juges* 44; and M Stötzel & JM Fegert 'The Representation of the Legal Interests of Children and Adolescents in Germany: A Study of the Children's Guardian from a Child's Perspective' (2006) 20 *International Journal of Law, Policy and the Family* 201 at 206-07. Hearing children has been encouraged by art 6b. of the European Convention on the Exercise of Children's Rights 1996 which came into force in July 2000: accessed at <http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm>. It places an onus on every court adjudicator in proceedings affecting a child to 'consult the child in person in appropriate cases, if necessary privately' either directly or through other persons or bodies 'in a manner appropriate to the child's understanding, unless this would be manifestly contrary to the best interests of the child'. In *Kutzner v Germany* (Application No 46544/99, 26 Feb 2002) <http://cmiskap.echr.coe.int/tkp197/portal.asp?sessionId=8553112&skin=hudoc-en> the chamber court of the European court of human rights reviewed a removal of two sisters into alternative care. One of its concerns which led to a finding of unlawfulness was that they had at no stage been heard by a court adjudicator: see ibid at p15 para 77. On the approach in anti-legal systems see also part 1.3.1, above.

The question of attendance of children at care proceedings is multidimensional.[12] Aside from possible different forms of participation, other important variables are different purposes (for example, the child observing, being seen and/or being heard), differences in children,[13] and voluntary or compelled participation. In considering the best approach for South Africa it is necessary to keep these variables in mind. They allow for a more nuanced appreciation of the arguments for and against child-involvement. These arguments, an appropriate model for accommodating different degrees of involvement, and our current law, are considered in the next four sub-parts below.

As a preliminary consideration it may be asserted that the position taken on involvement of children must depend on whether it is concluded that care proceedings must inevitably represent a travail or whether it is regarded as possible to develop procedures that will produce a positive, self-affirming experience for a significant proportion of children. Although negative considerations will be noted first it will be shown that there are research findings which indicate that involvement at court can serve at least some children's needs and be experienced by them as constructive.

4.2.1 Arguments against Involvement of Children

A technical argument which can be raised against significant participatory rights for children is that care cases arise because of disputes between the state and a child's caregivers and not between the state and the child. Under this characterisation the child can be left, in terms of her involvement, on the sidelines. This sidelining approach has been applied to deny or limit participatory rights for children in many US jurisdictions.[14]

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[12] Brophy (2006) op cit note 7 at 69.

[13] Ibid at 69-70. In relation to differences in children, under s 64(3) of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, Australia, notification of proceedings 'is to be made in language and in a manner that the child or young person can understand having regard to his or her development and the circumstances' -accessed at <http://www.austlii.edu.au/au/legis/nsw>.

[14] Bohr (2001) op cit note 4 especially at 236-38. At 232 ibid she cites the Minnesota Juvenile Protection Rules 2000 r 58.01 as an extreme example of this approach because it removed party status for children. Sobie (2006) op cit note 4 at 769 points out that only a minority of US states have explicitly given party status. As she comments, ibid, in most states the child is merely a virtual party with limited participation rights which 'vary from state to state'. See also S Gerwig-Moore & LS Schrope 'Hush, Little Baby, Don't Say a Word: How Seeking the Best Interests of the Child Fostered a Lack of Accountability in Georgia's Juvenile

The main substantive argument against child participation in care proceedings is protectionist and can be simply stated. It is based upon the contention that there is a significant likelihood that children will be confused and severely stressed by such proceedings.[15] In appreciating this assertion fully it must be accepted that a high proportion of children who need to be the subject of care hearings are psychologically fragile because they have inadequate parents and dysfunctional families.[16] It has been claimed, for example, that negative effects of involving such children in court proceedings have been revealed in England. A pre-1989 English practice of requiring children over five years of age to attend care proceedings at magistrates' courts was, in the words of Masson 'severely criticised because of its damaging and disruptive effect on children who were brought from distant placements to courts which completely lacked facilities for them'.[17] It was found to be particularly oppressive and harmful where children did not want to attend.[18]

A related argument against direct participation of children is that it may place them under pressure to make inappropriate choices about forms of care or caregivers.[19] A fourth argument is that the presence of children may lengthen proceedings and make other participants uncomfortable about speaking freely.[20] It is unnecessary and a waste of court time because adults can more efficiently present their views and protect their interests at

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Courts' (2007) 58 *Mercer LR* 531 at 540-41. There are, however, a few states in which party status has been accorded to the child by legislation or authoritative case precedent. For example: Indiana Code Annotated §3103409-7; *In re Nikolas E* 720 A. 3d 562 (supreme judicial court of Maine, 1998); and *In re Adoption/Guardianship No. T97036005* 746A. 2d 379 Md. 1 (court of appeals, Maryland, 2000).

[15] Parkinson (2001) op cit note 7 at 259 noted that in many systems concerns about promoting the safety of children have traditionally prevailed over considerations relating to their autonomy and participation. He also stated ibid '[t]his has been buttressed by the idea that what will happen to them in alternative care is outside their experience and thus they cannot be expected to make a meaningful contribution'. See generally also L Davis 'Children in Court -a Postcript' (2007) 37 *Family Law* 454.

[16] J Masson (2000) op cit note 7 at 467-68 noted English statistics showing that approximately half of all care proceedings are provoked by a serious crisis such as a physical injury to the child.

[17] Ibid at 489.

[18] J Masson & MW Oakley *Out Of Hearing: Representing Children in Care Proceedings* (1999) 145.

[19] As noted by Davis (2007) op cit note 15 at 435 this may have the effect of the 'drawing the child into direct conflict with close family members'.

[20] M Ells, RB O'Neill, V Weise et al 'Unravelling the Labyrinth: a Proposed Revision of the Nebraska Juvenile Code' (2004) 82 *Nebraska LR* 1126 at 1161.

court.[21] In support of the substitute-adult representation approach it has been suggested that where a child's views are presented for her by other persons she is spared the trauma of appearing in court but nevertheless can participate in the sense of 'knowing that one's actions are taken note of and may be acted upon'.[22]

It is also arguable that ADR removes or at least reduces the need for children to appear at court. As noted in the previous chapter s 4(2) of our 2005 Act requires consideration to be given to the child's capabilities for participation in ADR. It could be suggested that there is no longer a need for children to come to court since they can if capable participate at less stressful forums. Where this has already occurred it can be argued further that they have had an opportunity to communicate directly and might now find it unduly stressful to have to hear and recount similar information again in a more formal environment at court.

4.2.2 Arguments in Favour of Involvement of Children

The technical argument that care proceedings arise purely between the state and caregivers discounts the reality that it is the child who has the greatest stake in the outcome.[23] Bohr has contended that its application in the USA has produced 'significant barriers' to just outcomes in care cases.[24] Against this sidelining approach is a growing body of international literature, partly analytical and partly based on research findings,

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[21] On the substitute adult approach see note 7, above. As an example of legislative facilitation of this approach s 328 of the Welfare and Institutions Code, California requires expressly that in a care investigation '[t]he social worker shall interview any child four years of age or older who is a subject of an investigation… to ascertain the child's view of the home environment…'. The social worker must include 'the substance of the interview' in her investigatory report for court: accessed at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=wic &group=00001-01000 &file=>.

[22] J Boyden & J Ennew *Children in Focus-a Manual for Participatory Research with Children* (1997) 33.

[23] Bohr (2001) op cit note 4 at 236. As has been noted in part 1.3.2 above the most drastic outcomes in care cases tend to be forms of institutional confinement which restrict a child's liberty. In South Africa s 35(2)(d) of the Constitution creates a right for any person who has been detained 'to challenge the lawfulness of the detention *in person before a court* and, if the detention is unlawful, to be released' [emphasis added]. It can be argued that this strengthens the right of a sufficiently mature child to participate directly. PJ Schwikkard 'Arrested, Detained and Accused Persons' in I Currie & J De Waal et al *Bill of Rights Handbook* (2005) 733, at 741-42 refers to Canadian approaches and supports a broad interpretation of detention in s 35(2)(d).

[24] Bohr ibid at 239. In criticising the failure to allocate party status to the child in many US jurisdictions Sobie (2006) op cit note 4 at 769-770 stated 'recognition of the child as a formal party in child protective cases would resolve many of the problems and dilemmas which continue to plague the field'.

which asserts the case for court adjudicators paying more attention to children's views about domestic problems generally and involving them in consequential decisions that affect them.[25] Three important arguments which emerge from the literature can be briefly stated. Firstly, participation means that children are more likely to comply with decisions.[26] Secondly, participation can enable some children to better understand their present circumstances and result in more appropriate decision-making about their futures.[27] Thirdly, it supports a modern view of children as individuals who deserve respect and are capable of exercising rights for themselves.[28]

The counterargument that children's views can be adequately presented in their absence by other persons has been weakened by research findings. These suggest that even expert witnesses sometimes make inappropriate recommendations because they fail to identify children's deepest concerns.[29] They have also been found to differ widely on such basic issues as whether children should be removed from parents.[30] Clearly, children's views will often be more easily and accurately communicated to the judge if they are in the courtroom.[31]

The approach in some legalistic systems of relying mainly on adults as substitutes to present the views of children at court has understandably therefore been criticised both for denying children a voice[32] and for being inefficient.[33] It is not surprising that in 1997

[25] See Cashmore (2003) op cit note 7 at 159-60.
[26] Ibid 159. As has been noted in relation to ADR in part 3.6 above, children who are not involved may 'vote with their feet'.
[27] Ibid.
[28] Ibid. See also J McCausland & A Bourton *Guarding Children's Interests: The Contribution of Guardians Ad Litem in Court Proceedings* (2000) 9. G Van Bueren 'The United Nations Convention on the Rights of the Child: An Evolutionary Revolution' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 202 at 205 has argued that the CRC has promoted a 'new culture of listening' which requires recognition of children 'as evolving autonomous individuals'.
[29] See V Morrow ' "We are people too": Children's and Young People's Perspectives on Children's Rights and Decision-Making in England' (1999) 7 *International Journal of Children's Rights* 149 at 151; and Masson & Oakley (1999) op cit note 18 at 12.
[30] See N Thomas & C O'Kane 'When Children's Wishes and Feelings Clash with Their "Best Interests" ' (1998) 6 *International Journal of Children's Rights* 137 at 138.
[31] Ells, O'Neill & Weise et al (2004) op cit note 20 at 1161.
[32] See Masson (2000) op cit note 7 at 490. See also note 7, above.
[33] J Fortin *Children's Rights and the Developing Law* (2003) 211 described it as a 'fragmented and arbitrary' method for conveying children's wishes to courts. See also Masson & Oakley (1999) op cit note 18 at 15.

the English Magistrates' Association supported a view that attendance at cases could be in the interests of children -and particularly more mature children.[34] And even the English court of appeals has recently slightly softened its position against attendance.[35]

A number of specific advantages may be said to result from child-participation at care hearings. If the child is permitted to give testimony and her input is given serious consideration this will maximise her chances of influencing the proceedings. This is particularly important in care cases because of the grave significance for the child of the decisions that will have to be made.[36] Where a child wishes to participate at court closing her out may reduce her future cooperation by causing her to disengage from what is seen as an alien manipulation of her life.[37]

It is particularly where the child's wishes differ from those of persons who purport to represent her that her views are unlikely to be sufficiently heard by a court if she is not permitted to speak directly. And where an adult (such as a lawyer) is genuinely attempting to represent the child's views he will be able to consult with a child who is present if new evidence comes to light during the hearing. Where a child of sufficient understanding remains present she may not only gain a useful understanding of the social dynamics affecting her case but may also be able to counter incorrect evidence.[38] This she may do either by passing on instructions to her legal representative (if any) as the evidence unfolds or by directly correcting impressions herself.[39]

A further argument in favour of involvement of the child at court is that seeing and interacting with her will make her 'real' for the presiding officer.[40] This will enable the establishment of a relationship that may be important in soliciting information from the

[34] Masson (2000) op cit note 7 at 490 N131.
[35] See the judgments discussed by Davis (2007) op cit note 15 at 434-36.
[36] See note 23, above. As Gallinetti has put it 'the more serious the consequences of the decision are, the more the child's opinion needs to be considered': see J Gallinetti 'Child Participation in South African Family Law and Child Welfare Proceedings' (UP, Paper: 11th World Conference of the International Society of Family Law: Copenhagen and Oslo 2-7 August, 2002: <http://www.jus.uio.no/ifp/isfl>).
[37] On the problem of disengagement see further Masson & Oakley (1999) op cit note 18 at 116.
[38] This point was made many years ago by Tredgold CJ in the Rhodesian care case *In re R* 1951 (2) SA 18 (R).
[39] Sheehan (2003) op cit note 7 at 37 after observing children's court cases in Melbourne concluded that these two important capabilities could be impeded if children were seated too near opposing adult parties.
[40] Ells, O'Neill & Weise *et al* (2004) op cit note 20 at 1137.

child and affirming her self-worth. Also, actual contact encourages adjudicators to work more rapidly towards suitable solutions.[41] If the child is present at the end of the proceedings the presiding officer will have the opportunity to explain the effect of the court order and the reasons for it. This may be better than the child having to rely on other persons to inform her at second-hand.

Perhaps the most important argument supporting a system designed to encourage children to appear at care proceedings is that it may represent a positive and useful experience.[42] Some findings indicate that it may empower them by providing greater 'feelings of self-efficacy or perceived control' at a stressful time in their lives.[43] There is also research which suggests that the problem of other parties' evidence being stressful for children to hear is less serious than previously thought.[44]

On the views of children themselves about whether they should be at court, Clark and Sinclair found that those who participated directly at care proceedings particularly appreciated being listened to and given a part in decision-making.[45] In two larger and more general studies involving, respectively, 73 and 184 children Morrow established as a significant finding that a high proportion of children wish to be involved in decision-making processes where outcomes are likely to affect them.[46] Recent surveys of children

[41] Ibid and at 1161.

[42] G Schofield 'The Voice of the Child in Public Law Proceedings: a Developmental Model' in Thorpe & Cadbury (2004) op cit note 11, 33 at 34 concluded that current knowledge on care cases shows '[i]f it is appropriately and sensitively handled, enabling the child to participate in the process of decision-making can also be developmentally beneficial'.

[43] Ells, O'Neill & Weise *et al* (2004) op cit note 20 at 1158; BA Green & AR Appell 'Representing Children in Families -Foreword' (2006) 6 *Nevada LJ* 571 at 579.

[44] Brophy (2006) op cit note 7 at 71 notes that courts sometimes direct that children should not attend 'on the expectation of intense adversarialism which does not actually materialise particularly by the later stages. The feared scenario of highly distressed parents rehearsing horrendous verbal evidence in court' has been found not to happen in most cases and thus is overrated as a negative consideration.

[45] McCausland & Bourton (2000) op cit note 28 at 8.

[46] Morrow (1999) op cit note 29 at 166. See also Masson (2000) op cit note 7 at 490; and S Walker 'Consulting with Children and Young People' (2001) 9 *International Journal of Children's Rights* 45 especially at 47 & 54.

in alternative care in the US have shown that the majority of them wish that they had been allowed to participate directly at care proceedings.[47]

In rejecting the commonly-held belief that appearances in court are always experienced as negative by children Lipovsky cited a 1992 American study of 218 children who gave evidence in sexual abuse cases.[48] A significant proportion of them found the experience to be positive.[49] Lipovsky and Stern have suggested that '[c]hildren can and do testify without suffering significant emotional trauma'.[50] Even relatively young children have gone to great lengths to assert their right to be heard in care proceedings.[51]

In challenging the core argument that testifying is too stressful for most children one may also note the findings of Grover.[52] After reviewing recent research in several countries she concluded that it shows that many at-risk children (including those in need of alternative care)[53] tend to have strong and resilient rather than diminished self advocacy skills.[54] They develop these as a survival mechanism.[55] She contends that it is therefore gravely unfair, disempowering and can even be dangerous (because important evidence may be missed) to deny such children the opportunity to participate directly where important decisions about their futures are to be made.[56]

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[47] Ells, O'Neill & Weise *et al* (2004) op cit note 20 at 1158; BA Green & AR Appell 'Representing Children in Families -Foreword' (2006) 6 *Nevada LJ* 571 at 579.
[48] JA Lipovsky 'The Impact of Court on Children: Research Findings and Practical Recommendations' (1994) 9 *Journal of Interpersonal Violence* 238, at 241-42 & 254.
[49] Ibid at 241-42 citing research by GS Goodman, EP Taub and EP Jones *et al*.
[50] J Lipovsky & P Stern 'Preparing Children for Court: An Interdisciplinary View' (1997) 2 *Child Maltreatment* 150 at 161.
[51] An American example is 10-year-old Samantha Frazer in *In the Matter of the Petition of Samantha Nicole Frazer*, 721A. 2d 920 (Del. 1998). For a discussion of this case see TM Culley 'What Does It Mean to Represent Delaware's Abused, Neglected and Dependent Children?' (2001) 4 *Delaware LR* 77 at 80-81.
[52] S Grover 'Advocacy by Children as a Causal Factor in Promoting Resilience' (2005) 12 *Childhood: a Global Journal of Child Research* 527.
[53] Ibid at 536.
[54] Ibid at 531-32 & 536.
[55] Ibid at 531. In an analysis of current child developmental research findings Schofield (2004) op cit note 42 at 38 explained that this occurs because some children with inadequate parents learn to 'use displays of feelings to gain the attention of and control unpredictably available caregivers'. She further points out at 40 ibid that '[f]or children whose early caregiving experiences are characterised by insensitive, neglectful or abusive care' one response is a 'striving for personal power and efficacy'. She also concludes, however, that the current knowledge indicates a second group of more closed, uncommunicative children who also commonly become involved in care proceedings: see ibid at 38.
[56] Grover (2005) ibid at 531 & 536.

It may be concluded that although there are arguments both for and against direct child involvement many of the latter predate more recent findings about the needs and resilience of children. And they would lose much of their force if appropriate changes in court environments could be produced. In the next part below the additional factor of different forms of child involvement is considered and a proposed model for the South African children's courts is then put forward.

4.2.3 Different Forms of Participation

Before reaching a conclusion on the position which ought to be taken in South Africa it is necessary to focus more closely on what permutations in direct child participation are possible. In a purely technical sense it could be asserted that any child who is the subject of proceedings becomes a participant in law merely by being granted party status. It will be recalled that it has been argued above that allocation of such status is certainly an important threshold requirement for effective participation.[57] However, English researchers Masson and Oakley found that the mere designation of party status for children in care cases did not necessarily result in opportunities equal to those of other parties -and in particular it often did not produce scope for children to participate at court.[58] They concluded that it did not even guarantee that courts would focus sufficiently on children's concerns rather than those of the adults involved.[59]

In terms of involvement going beyond mere receipt of party status it would appear that it is necessary to distinguish between at least five possibilities along a spectrum of a child's engagement. Firstly, a child might have her views conveyed without being

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[57] In further support Bohr (2001) op cit note 4 at 236 contends that US experience shows that failure to provide party status weakens children's rights to be heard, to present evidence, and to cross-examine witnesses. They and their legal representatives are also sometimes denied access to crucial documents. In England, the National Association of Guardians ad Litem and Reporting Officers *Support Services in Family Proceedings -Future Organisation of Court Welfare Services* ND <http://www.nagalro.com/docs/documents_page.htm> chapter 4, para 2 has argued that a full and entirely separate party status for children is essential because they have so much at stake.

[58] Masson & Oakley (1999) op cit note 18 at 144-45.

[59] Ibid at 145.

physically present at court or directly involved in hearings at all. This could be done for her by representatives. Secondly, a child might be physically present but merely appear at court for a short period of time so that the adjudicator could have sight of her and perhaps converse with her at the start of proceedings.[60] Thirdly, a child might remain present during all or part of the proceedings -but just as a silent observer.[61] One variation here would be to have the child present only when the presiding officer is ready to give judgment.

A fourth possibility would entail a child becoming more actively involved in proceedings but taking only an indirect role. She could give evidence, but only from a sheltered situation where she is protected from direct confrontations with other parties.[62] Simple methods for providing shelter could involve a child being placed behind a screen or having questions directed through the medium of the presiding officer.[63] Other methods could involve a child giving evidence via a prerecorded statement, remote television linkage and/or trained intermediary who rephrases information in child-appropriate language (hereafter, these are collectively referred to as 'sheltered' participation methods). A fifth approach would be to provide for full involvement of the child in giving *viva voce* evidence directly in the presence of the other parties -and this might even include conducting and being subjected to cross-examination. Under this last approach, the child

[60] A variation is for the adjudicator to see the child in chambers rather than in court. Under title 13, § 724(a) of the Delaware Code Annotated <http://www.delcode.state.de.us/title 13/> appear detailed provisions allowing for a presiding officer to interview a child in chambers to ascertain her wishes. There is a discretion to permit counsel to be present. It is further provided that '[t]he court shall, at the request of a party, cause a record of the interview with the child to be made part of the record in the case'. This provision is worded as applying to custody cases. However, it is also used for termination of parental rights cases: see Culley (2001) op cit note 51 at 91. Fortin (2003) op cit note 33 at 240-41 contends that where chambers contact is employed confidentiality rules must be developed and it must be kept in mind that if other parties are not present they will not have had the opportunity to test evidence privately presented by the child. JEB Myers 'Session 3: Children's Rights in the Context of Welfare, Dependency and the Juvenile Court' (2004) 8 *U.C. Davis Journal of Juvenile Law and Policy* 267 at 285-86 suggested that confidential chambers meetings should be an option not merely with children but also other vulnerable family members.

[61] Under title 22, § 4005-D of the Maine Child and Family Services and Child Protection Act (2001 Amendment) <http://janus.state.me.us/legis/statutes/22/title_22_sec_4005-D._html> at subpart 3 there is express provision for a court to grant observation status to a person. It is further stated that '[t]he opportunity to attend court proceedings does not include the right to be heard or the right to present or cross-examine witnesses, present evidence or have access to pleadings or records'.

[62] Research in the US has shown that what tends to cause most stress for child-witnesses is 'face-to-face contact' with an opposing party: Lipovsky (1994) op cit note 48 at 255.

[63] The latter has been provided for in domestic violence cases under s 7(3) of the South African Domestic Violence Act 116/1998.

might, or might not, also remain present during the rest of the proceedings when she is not participating.

4.2.4 An Appropriate Model

A properly-developed system of care law must take a clear position and provide sufficient guidance for presiding officers on degrees and forms of participation by children who are the subject of proceedings.[64] To protect their rights such children should certainly as a threshold requirement automatically receive full party status. However, as noted above research findings indicate that more will be required to ensure meaningful involvement. The proposed guidance should therefore deal distinctly with the two alternatives of child-participation sought by the child herself or by other persons. More detailed recommendations are made below.

Direct involvement desired by the child is supported by both the analysis above and the criterion of optimum capacity for hearing the voices of vulnerable participants. A child participatory model is the ideal because courts should be accessible and supportive where children wish to communicate directly.[65] A response to the counterargument that this is too

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[64] TG Kleinman 'Strategies and Pretrial Hearings for Child Protection' 2004 (1) *Journal of Child Custody* <http://www.leadershipcouncil.org/doc/kleinman-strategies-2004.pdf> 105 at 110 states that in some US jurisdictions special hearings (referred to as competency hearings) may be held by courts to determine whether the child ought to give testimony. If it is found that the child should, a second question is whether this should be in open court or by means of one of the sheltered participation methods. Very similarly, under r 69.07 (7) of the Civil Procedure Rules -Nova Scotia: Proceedings under the Children and Family Services Act courts are directed 'as soon as is practicable in the circumstances' to hold 'interim protection hearings'. At these they are required, inter alia, to 'make such directions respecting the child's party status, representation, presence at hearings, participation, disclosure to the child, and service of documents upon the child as are just and necessary in the circumstances, having regard to the child's best interests'. On special hearings for establishing party and participation status see further part 7.3.1, below.

[65] This view is gaining acceptance in the US and a few states have begun to promulgate legislation encouraging direct participation: see Ells, O'Neill & Weise *et al* (2004) op cit note 20 at 1158. On growing support in the US for the presence of children at care proceedings see also Green & Appell (2006) op cit note 43 at 588. An Australian example is s 10 of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales. This not only establishes the child's right to express herself freely but also requires that she should receive any support necessary to do so in children's court proceedings. Parkinson (2001) op cit note 7 at 260 asserted that a strong point of the 1998 legislation is its support for child participation in care matters. He states ibid '[t]his principle runs like a golden thread throughout the Act'.

stressful is that at care hearings there is not generally a punitive purpose.[66] Therefore, pressures on children need not be as intense as at criminal trials. In answer to the related counterargument that children from dysfunctional families are too vulnerable to go to court it is necessary to bear in mind the research cited above which shows that upsetting revelations by other parties are not pervasive and that children from difficult circumstances often have well-developed self advocacy skills. It is thus recommended that the child should have a right to apply to give relevant evidence if she wishes and is able to.[67] As suggested by Ells, O'Neill & Weise *et al* suitable criteria for adjudicators are the child's level of development, the potential for trauma to the child, and how essential the child's direct participation is 'to a just and fair outcome'.[68]

It must be conceded that psychological fragility may be a reason to limit the degree of involvement by some children; but it should not be a consideration which results in court inaccessibility becoming a standard norm. None of the reasons against participation that have been considered in part 4.2.1 above justifies a general ban on child participation in the South African children's courts. What these reasons admittedly do indicate, however, is that because children generally are vulnerable procedural methods and rules of evidence will need to be carefully fashioned and implemented to provide sufficient shielding and encouragement.[69]

On the alternative right of children to remain present as merely silent observers it may be concluded that the basic approach should again be that this is a standard but not absolute entitlement. Whenever other participants are inhibited from communicating freely or a child may find their testimony too upsetting courts must have a discretion to order her temporary removal.[70] But this should not be overutilised. As a means to promote involvement of children it should be stated in future regulations that failure to facilitate the

[66] However, in part 8.4.4 below it is suggested that courts dealing with care cases occasionally need to enforce compliance with their orders by imposing criminal sentences.
[67] The question of the extent of active participation -and specifically the issue of cross-examination- is further considered in the next part, below.
[68] (2004) op cit note 20 at 1157.
[69] For some specific proposals see part 6.3.2, below.
[70] Ells, O'Neill & Weise et al (2004) op cit note 20 at 1160.

continued presence of the child during phases of proceedings where she wishes to remain constitutes a reviewable irregularity unless a children's court has noted reasons against.

Turning to the second fundamental question of child-involvement desired not by the child but by other persons, in view of the problem of child-vulnerability only very limited scope should be allowed.[71] Only court adjudicators acting in terms of circumscribed powers should be able to compel the presence and especially actual participation of a child. As will be further motivated below they should have a right to see and/or question the child concerned at any stage of care proceedings if this reasonably appears to be necessary in the interests of the child.

Future South African procedural rules should provide that the presiding magistrate will normally have contact with the child at least once and as soon as possible in the course of proceedings. This should apply unless there is a reason (such as infancy or ill-health) which renders it inappropriate. A motivation for this is that it will often be easier to decide on the best care outcome if the magistrate has seen the child. If it is necessary to decide whether she has been physically or psychologically harmed, seeing her will often be useful.[72] Ells, O'Neill and Weise *et al* have noted that in systems where judges regularly see children this provides indirect protection. The likelihood of such monitoring 'galvanizes' welfare to take better care of children in their charge.[73]

Contact between presiding officers and children would not only help make children 'real' for adjudicators as noted above; it would also create opportunities for older children to decide whether they would like to communicate directly. They might discover a

[71] As will be remembered from the discussion in part 4.2.1 Masson & Oakley (1999) concluded that pre-1989 English practice revealed that forcing children to attend is inappropriate in many cases.
[72] This is proposed as a supplement to the possibility of expert evidence. The 1983 Act at s 54(1) currently enables a commissioner to estimate the age of a person when necessary 'by his or her appearance or and from any information which is available'. The latter will usually include a report from a district surgeon.
[73] Ells, O'Neill & Weise *et al* (2004) op cit note 20 at 1161.

supportive adjudicator and then wish to give evidence.[74] Future South African rules of court should require presiding magistrates to be encouraging in this regard.[75]

Whether presiding officers should have a right to question as opposed to merely see the child may be seen as more controversial. It raises the extent of a child's right not to participate. From a children's rights perspective it might be asserted that a child should never be subjected to questioning if she is unwilling. What, however, of a case where the child's evidence is essential and her reasons for refusing to testify are suspect? For example, an immature child might refuse because an unfit parent has bribed her by promising her a computer game if she avoids court.[76]

It might be contended that the answer to the problem of children manipulated into silence is alternative evidence from other sources such as investigative social workers. This avoids the hard truth that cases occur where a court needs to make a direct assessment of the child's version of important events.[77] For example, what if welfare can convey only hearsay that a child has been abused and the alleged perpetrator insists that social workers were influenced by someone whom he proves has a grudge against him? By seeing and questioning the child the court may be able to establish the truth.

Yet another reason for courts being able to see or question children is that this will help counter child-grant fraud. A problem in South Africa is that of non-existent 'ghost-children' against whose names alternative care cases are brought to court.[78] This is done so that fraudulent persons can receive foster care or institutional care grants from the state.[79]

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[74] Brophy (2006) op cit note 7 at 71 cited English research showing that in some care cases children wanted to speak directly to the judge to ensure that their views were understood.

[75] Grover (2005) op cit note 52 at 531 reported positively on findings which she concluded show that professionals can provide the support necessary 'to foster self-advocacy efforts' even by highly marginalised children.

[76] Children being manipulated by parents has been recognised in England as a danger that courts must remain alert for: see D Burrows 'A Child's Understanding' (October 1994) *Family Law* 579 at 579-80; and Fortin (2003) op cit note 33 at 260-61. See also part 6.3.2.4, below.

[77] This is clearly proved by recent case examples in England: for a discussion see Davis (2007) op cit note 15 at 434-36.

[78] The terminology 'ghost-children' in this context is that of commissioner DS Rothman: personal communication 2 Sept 2002.

[79] Ibid; and commissioner P Booysen: personal communication 12 Sept 2006.

Another form of fraudulent court case is one in which it is pretended that parents have died so that other relatives can claim foster care grants.[80] In these situations ordering the presence of the child and then questioning any child who is presented should uncover the deception.[81]

It must be concluded that cases do occur where it will be necessary for a presiding officer -and obviously within bounds appropriate to the child's capabilities- to question the child even where she has not agreed to this. If it is accepted that children's courts should have a right to seek evidence from children, they will need procedural guidance. Procedural rules should require magistrates to weigh the extent to which the child's best interests will be served by her being encouraged to participate. They should also be required take into account any possible adverse effect upon any other party if the child does not provide testimony.

Against these factors must be balanced possible psychological damage resulting from the child being pressured to give evidence.[82] Specifically, where the child is apparently unwilling (as opposed to incapable) the court should be required to determine whether there is reason to believe that her evidence will be essential.[83] In so doing adjudicators must be empowered to at least see and may sometimes also decide to question the child.[84]

Although a child participatory model is proposed for our children's courts there should be some limitations. In many cases it will clearly not be in the best interests of, for example, a very young, ill or traumatised child to even appear at court. Generally on good

[80] On the problem of fictional care cases see further FN Zaal 'When Should Children Be Legally Represented in Care Proceedings? An Application of Section 28(1)(h) of the 1996 Constitution' (1997) 114 *SALJ* 334 at 342.
[81] Because children tend to be more honest than adults, this has often proven to be a successful means for discovering dishonest applications in the children's courts: Rothman (2002) supra note 78.
[82] A test recently developed in England is whether the child will find it 'oppressive' as opposed to merely unpleasant or difficult if compelled: Davis (2007) op cit note 15 at 436.
[83] This is the key test in the recent English approach: ibid at 435-36.
[84] This is supported by a finding of Walker (2001) op cit note 46 at 46. He argued that international research increasingly 'demonstrates the value of consulting children and seeing how much they can achieve with a little help which is appropriate and acceptable'.

cause shown a court should dispense with having sight of the child at some or all stages of proceedings. And where courts order an attendance or participation which the child does not desire they should be required to limit its extent to the minimum necessary for an appropriate outcome in the case.[85]

Regardless of whether participation is initiated by the child herself or another person, sheltered means for testifying must be considered. Magistrates must be required to make an informed choice from amongst all of the degrees and methods of child-involvement discussed earlier. They must also be directed to keep in mind the distinction between the child providing factual evidence, generally expressing feelings, or expressing specific preferences between caregivers or forms of care.[86] The latter should be discouraged unless the child is exceptionally mature and resilient. This is both because a commitment to choices may be harmful for a child[87] and it is the adjudicator's responsibility to decide upon outcomes.

It is obviously particularly where a child feels seriously intimidated that she ought not to be present -and especially in open court. It should be the duty of a child's legal representative, if any, and welfare to indicate in pre-hearing reports how well the child would be likely to manage in giving evidence or merely observing. If the prognosis is that the child can testify the prehearing advice should indicate whether she should be a sheltered-method participant. Sometimes it will only be apparent that the child cannot cope when she appears at court. This may be because of causes not foreseen by the persons who prepared her. An example might be an unexpected reaction in the presence of an adult whom the child is afraid of.

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[85] Brophy (2006) op cit note 7 at 70 suggests that it is important to protect children from 'long and acrimonious hearings'. She also noted findings which indicate that adversarialism diminishes as care cases proceed towards the outcomes decision-making stage; so appropriate attendance of the child 'can be a question of timing'.

[86] On the importance of these distinctions for appropriate child participation in domestic litigation generally see Cashmore (2003) op cit note 7 at 159.

[87] On the dangers of children taking on the burden of inappropriate choices see RE Emory 'Hearing Children's Voices: Listening and Deciding is an Adult Responsibility' (2003) 45 *Arizona LR* 621 at 622. See also Davis (2007) as cited in part 4.2.1, above.

Future South African rules for children's courts should require presiding officers to give attention to the degree of fear encountered or likely to be encountered [88] by any child party or witness. They should do so after reading pre-hearing documentation and then continuously, on a monitoring basis, if the child is present at proceedings. Should the magistrate observe that the child is becoming seriously stressed or is for any other reason unable to cope the cause should be dealt with. The proposed rules should indicate that this can be done by removing a person who is the source of the child's discomfort, by ordering sheltered participation or by removal of the child from the proceedings.

The proposed discretionary power to remove the child where it appears that this is in her best interests means that presiding officers will sometimes have to make on-the-spot rulings about child-protection versus a child's right to understanding about her circumstances.[89] As noted earlier a witness may intend to reveal sensitive information that could upset the child. An example might be that a man whom a child always thought was his father is not in fact his father, or that the child's mother is a prostitute.[90] Rules of court should therefore indicate that presiding officers, legal representatives, welfare and other expert witnesses are all obliged to give consideration to whether the child will be harmed by information that is likely to be revealed in testimony.

In light of the proposals for a best practice model for child participation as put forward above relevant aspects of our current law can now be critically evaluated. This will be done, below.

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[88] CD Schwarz 'Unified Family Courts: A Saving Grace for Victims of Domestic Violence Living in Nations with Fragmented Court Systems' (2004) 42 *Family Court Review* 304 at 307 has argued that generally children should not be present in court 'when domestic violence is involved'.

[89] Brophy (2006) op cit note 7 at 73 notes English data suggesting that courts need to respond flexibly according to the participation requirements of individual children.

[90] See further A Griffiths and RF Kandel 'Hearing Children in Children's Hearings' (2000) 12 *Child and Family LQ* 283 at 293.

4.2.5 An Evaluation of Our Current Law

Limited available data suggests that under the 1983 Act children have tended not to be encouraged to participate in care proceedings.[91] In a study by the Community Law Centre of the University of the Western Cape in 2001 a group of child-respondents who had appeared in both children's courts and juvenile courts indicated that they preferred the latter because 'although the criminal courts were impersonal, a child could at least express his or her opinion in the criminal court as opposed to the children's court'.[92] In the same year non-participation by children in children's courts was noted by the South African law commission as a matter for concern and it recommended legislative amendments.[93]

Although child participation in children's courts is currently governed by the 1983 Act more detailed provisions have been promulgated in the 2005 Act. In the discussion below attention is devoted mainly to the wording of the new legislation. General orientation on child participation, party status, court accessibility, attendance at court, voluntary and involuntary participation, and protective limitations are in turn considered.

At the foundational level of general precepts, the 2005 Act strongly asserts a child participatory approach. Section 10 is entitled '[c]hild participation' and it states '[e]very child that is of such an age, maturity and stage of development as to be able to participate

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[91] Interviews with commissioners at 43 children's courts indicated that children were less likely to be encouraged to participate in rural jurisdictions. Findings in the same study showed that in at least 19% of all jurisdictions commissioners routinely conducted care cases without the child coming to court at any stage: see C Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* (1997) 48-49. Attorney V Groenewald 'Representing Children in the Children's Courts' (Unpublished Paper: Law Teacher's Conference, Durban, 6 July 2000) found in her practice that Cape province commissioners frequently excluded children from proceedings. In her view many of them did not regard it as important to hear the child. B Khumalo (children's court commissioner at Pietermaritzburg) stated that low levels of child participation were prevalent in KwaZulu-Natal (personal communication 24 Oct 2002). A similar view was expressed about Mpumalanga province by a legal aid board attorney specialising in children's court work in rural jurisdictions near Middleburg (personal communication: R Govender, 1 June 2005). See also the findings of Bacharam noted in part 6.2.3, below.

[92] Community Law Centre *Report on Children's Rights "They should listen to our side of the story"* (2001) 13.

[93] *Review of the Child Care Act* (Discussion Paper 103: Project 110, December 2001) vol 5, at 1141. It was therefore proposed by the commission (ibid, at 1176) 'that it be expressly stated, as part of the procedures… that a child-party has the right to be present and to participate at a court hearing (or to convey her views in chambers to the adjudicating officer), if she so wishes and is able'.

in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration'. This wording appears as part of a listing of general principles in chapter 2 of the Act. Although it is therefore not confined only to children's court proceedings it is certainly applicable to them. As will be seen more specific provisions which pertain only to children's courts have also been included.

Section 1 of the 2005 Act includes 'a child involved in the matter' in a list of persons who have automatic party status in children's court cases. As has been noted this is certainly an important threshold requirement. The express affirmation of it in s 1 compares favourably to the 1983 Act.[94] It triggers further core rights to adduce evidence,[95] have legal representation and appeal.[96]

Section 14 of the 2005 Act provides a second important threshold right for children -that of access. It is entitled '[a]ccess to court'. It establishes that '[e]very child has the right to bring, and to be assisted in bringing, a matter to court, provided that matter falls within the jurisdiction of that court'.[97] This is reinforced by s 53. The latter includes '[a] child who is affected by or involved in the matter' amongst persons who may bring relevant cases to children's courts for placement on their rolls. This again compares favourably with the 1983 Act. Under the latter a child in need of alternative care is entirely reliant upon welfare to initiate proceedings on her behalf. [98]

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[94] The 1983 Act unfortunately does not expressly state that the child who is the subject of care proceedings is a party. However reg 4(1) subsequently published in terms of this Act stated that the child 'shall have the same rights and powers as a party to a civil action in a magistrates' court in respect of examining witnesses, adducing evidence and addressing the court'. This regulation was inserted by Government Notice R416 in *Government Gazette* 18770 of 31 March 1998.

[95] As will be further discussed below, the 2005 Act at s 58 expressly states that the child has a right to adduce evidence. In s 59(1) the child is given the right to require a children's court clerk to summons a person to appear as a witness or produce other forms of evidence.

[96] Section 51 provides all parties with the right to appeal and ss 54 and 55, respectively, allow child parties to have private legal representation or be considered for state-funded representation.

[97] On the importance of children being able to instigate care cases themselves see P Day 'Should Children Be Able to Divorce their Parents?' (2000) 11 *Journal of Contemporary Legal Issues* 652 at 653.

[98] J Sloth-Nielsen 'Children's Rights and the South African Courts: an Overview since Ratification of the UN Convention on the Rights of the Child' (2002) 10 *International Journal of Children's Rights* 137 at 149-50 argued that there is generally a need for mechanisms to enable South African children to bring court actions on their own behalf.

The analysis earlier in this chapter indicates that a fundamentally correct approach has been taken in grounding the 2005 Act generally on child participation principles. In regard specifically to proceedings in the children's courts its attention to the threshold requirements of party status and access to court is also appropriate.

On a physical presence at children's court hearings s 56(b) of the 2005 Act creates a basic right for 'the child involved in the matter before the court' to attend. As regards mandatory attendance s 57(1) states that children's court clerks may 'request' any party to attend -and this would obviously include the child. Whilst the word 'request' suggests a right to refuse, s 57 is entitled '[c]ompulsory attendance of persons involved in proceedings'. The tension in meaning thus created is to some extent clarified by s 57(2). This states that '[t]he person in whose physical control the child is must ensure that the child attends those proceedings except if the clerk of the children's court or the court directs otherwise'. It would thus appear that the Act creates both a right and duty of attendance for child-parties.

Although the 2005 Act appears to provide magistrates with a right to compel children's attendance it does not indicate how they should implement this. For example, they are not informed whether they must normally at least have sight of the child. Here the 2005 Act compares unfavourably with the 1983 Act.[99] As has been argued, a standard attendance requirement is essential.

Active participation as opposed to mere attendance by child-parties is covered in ss 58, 60 and 61 of the 2005 Act. Some boundaries for voluntary participation are set out in these provisions. The former accords a child 'the right to adduce evidence… and, with the permission of the presiding officer of the children's court, to question or cross-examine a witness or to address the court in argument'. This needs to be read with s 60(1)(c). The latter empowers the presiding officer to allow any person 'to be questioned or cross-

[99] Section 13 of the latter is entitled 'Bringing Children before Children's Court'. It provides that in cases of emergency removals or referrals from other courts the child must be seen (s 13(1)). In other care cases the children's court assistant must decide whether the child ought to be seen (s 13(2)). For further discussion see HM Bosman-Swanepoel & PJ Wessels *A Practical Approach to the Child Care Act* (1995) 35.

examined' by the child 'to the extent necessary to resolve any factual dispute which is directly relevant'.

By way of commentary on these provisions, the basic right in s 58 to provide evidence is clearly a *sine qua non* for meaningful child involvement. Appropriately, this is subject only to the threshold requirements in s 10. As will be remembered these merely compel sufficient maturity and an appropriate method for participation. However, the s 58 requirement for children to seek permission from adjudicators before addressing them 'in argument' appears unduly restrictive and adversarial. Subject to some reservations noted in the next paragraph below, the need to obtain similar permission before a child may question other participants does appear to be appropriate because it could be used to protect children from stressful verbal confrontations.

> Section 61 of the Act is entitled '[p]articipation of children'. It begins as follows:
>
> '61. (1) The presiding officer in a matter before a children's court must-
> (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so;
> (b) record the reasons if the court finds that the child is unable to participate in the proceedings or is unwilling to express a view or preference in the matter;…'

It is noteworthy that a different form of children's voluntary evidence -that of expressing a view and preference- is designated here. Given the dangers of allowing children to make inappropriate choices as referred to above the restrictive criteria in s 61(1)(a) based on maturity and special needs are entirely appropriate. What is inappropriate, however, is that they are to be applied merely to discern whether the child generally 'is able to participate in the proceedings'. They should have been made more specifically applicable to whether the child is sufficiently mature and psychologically resilient to express preferences about caregivers or care -and it should further have been made clear that the expression of such preferences should be facilitated in only the most exceptional cases. Another comment about the maturity and special needs criteria in s 61(1)(a) is that they should also have been made applicable to decisions by magistrates about a child's right to question other witnesses as referred to in the previous paragraph.

In relation to mandatory as opposed to voluntary participation by child-parties a foundational provision is s 60(1) of the Act. This opens with an affirmation that presiding officers control proceedings. It further provides them with a range of capabilities in this regard. These include calling 'any person' -which must presumably include the child- and subjecting him or her to 'questioning or cross-examination'.[100] Presiding officers may also require persons so called to be subjected to questioning or cross-examination by other participants or their legal representatives 'to the extent necessary to resolve any factual dispute which is directly relevant'.[101] Whilst s 60(1) thus provides very wide powers for magistrates to compel children to submit to even intensively adversarial forms of participation, it needs to be read with other provisions in the Act.

In relation to controls upon the power of adjudicators to compel children to participate inappropriately a question which arises is whether the maturity and special needs limitations in s 61(1)(a) as discussed above in relation to voluntary participation can be interpreted as also curbing the broad compulsion powers of presiding officers. Against this view is the fact that the limitations do seem to be worded as applicable only where a child is the instigator of participation -she is being 'allowed' rather than called upon by the presiding officer. Also, as noted above s 61(1)(a) refers to a child expressing 'a view or preference' rather than being 'questioned or cross-examined' as contemplated in s 60(1). It would therefore seem that unfortunately a child's immaturity or special needs as referred to in s 61(1)(a) have not been expressly set as limiting the extremely wide compulsion powers available to magistrates in terms of s 60(1).

There are, however, other limitations in the 2005 Act which are clearly intended to protect children in both situations of voluntary and court instigated participation. For example, s 60(2) states '[i]f a child is present at the proceedings, the court may order any person present in the room where the proceedings take place to leave the room if such order would be in the best interests of that child'. An obverse provision, s 61(3), states that a children's court:

[100] Section 60(1)(b).
[101] Section 60(1)(c). As has been noted above this provision is also relevant when children seek to participate voluntarily.

'(a) may, at the outset or at any time during the proceedings, order that the matter, or any issue in the matter, be disposed of separately and in the absence of the child, if it is in the best interests of the child; and
(b) must record the reasons for any order in terms of paragraph (a).'[102]

Under s 48(1)(e) it is further indicated that the reasons for removing any person must be recorded on the court roll prior to the removal actually taking place. That there is indeed a need for a removal power has been shown in the discussion of an ideal model, above. That it is particularly appropriate for South Africa appears from findings which indicate that commissioners sometimes keep children present whilst disturbing evidence is presented.[103] However, the best interest criterion is rather broad as a ground and Masson and Oakley have rightly suggested that more specific guidelines such as the maturity of the child and whether testimony will be lengthy can be utilized.[104]

Section 58 of the 2005 Act usefully accords considerable protective powers to presiding magistrates by enabling them to decide whether to allow any participant to question a particular witness. Unfortunately, however, it does not give them the same power where a participant wishes to question a party. Nevertheless s 61(1)(c) provides some protection by compelling presiding officers to 'intervene in the questioning or cross-examination of the child if the court finds that this would be in the best interests of the child'.

On sheltered methods, s 61(2) allows for a child who is a party or witness to 'be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act No 51 of 1977) if the court finds that this would be in the best interests of the child'. The ground of 'undue mental stress or suffering' is included in

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[102] This wording is very similar to clause 84(3)(a) of the South African law commission's 2002 Draft Children's Bill. In this it was recommended that a court 'may, at the outset or it any time during the proceedings, order that the matter, or any issue in the matter, be disposed of separately and in the absence of the child, if it is in the best interest of the child'. In clause 84(3)(b) of the Bill it was further recommended that the court 'must record the reasons for any order' directing a removal. Under s 19(2)(b) of the Children and Young Persons Act 56/1989 <http//www.austlii.edu.au/au/legis/vic> as currently in force in Victoria, Australia, a court can of its own accord or 'on the application of a party or of any other person who has a direct interest… order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding'. It is further provided usefully in s 19(3) that either a party or any other interested person has standing to support or oppose such an application. Similar wording should be included in our law.

[103] Matthias (1997) op cit note 91 at 49. Govender (2005) supra note 91 described the practice as widespread in rural children's court jurisdictions.

[104] Masson & Oakley (1999) op cit note 18 at 116.

s170A as the requirement for its use on behalf of child witnesses in criminal cases.[105] This seems unduly restrictive for care cases. An accommodating approach in which an intermediary could be considered in any matter where this would help the child participate effectively would have been more appropriate.[106] In criminal cases it is prosecutors who must make an application for the child to interact with an intermediary (trained to convert communications into child-appropriate language) at a location viewable from the courtroom.[107] However, it is to be hoped that s 61(1)(c) will be interpreted as enabling magistrates to require intermediaries *mero motu*. It is most unfortunate that the 2005 Act does not additionally make specific reference to other sheltered participation methods.

It may be concluded that a fundamentally correct approach has been taken in establishing a child participatory model as a basis for the Act. The concept of providing some detailed guidance in relation to how that participation should occur is also sound[108] but there are some weaknesses in its enunciation. As has been shown these include failures to indicate that magistrates should only in exceptional cases allow children to make critical choices or compel them to participate. The wording on access to sheltered methods is too limited. These shortcomings do not appear to be fatal deficiencies, however, since they could easily be corrected by the publication of additional regulations. In this regard, s52(2) of the Act expressly allows for the publication of rules governing appropriate questioning techniques for children.

Just as with the ADR requirements,[109] so too with the child participation provisions in the 2005 Act presiding magistrates will need to acquire important new skills. They will have to be able to make correct decisions, sometimes during the course of proceedings, about whether to allow, order, alter or terminate a child's involvement at court. They will

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[105] For a discussion of its applicability in such cases see J Le Roux & J Engelbrecht 'The Sexually Abused Child as a Witness' in Davel (2000) op cit note 28, 343 at 347-50.
[106] In s 10(1)(c) of the New South Wales Children and Young Persons (Care and Protection) Act 1998 supra note 13, for example, a there is a general duty to provide 'any assistance that is necessary for the child or young person' to participate.
[107] See further Le Roux & J Engelbrecht (2000) op cit note 105 at 348.
[108] Parkinson (2001) op cit note 7 at 260 mentioned that experience in Australia shows that obligations to ensure child participation in care cases need to be legislatively 'spelt out in great detail'.
[109] See part 3.7, above.

need to become knowledgeable about a variety of participation methods for children including not only sheltered methods but also the distinctions between recounting factual evidence, conveying feelings and 'expressing a view or preference'.

4.3 Party-Participation by Persons Who Are Not the Subject of Proceedings

In the discussion which follows party-status and participatory rights for persons other than the child who is the subject of care proceedings are considered. In part 4.3.1 the introduction of party status for investigative welfare agencies in children's court cases in terms of s 1 of the 2005 Act is critically evaluated. Arguments for and against this significant change are weighed up. It is suggested that on balance it represents an important advance in the development of our care law.

Just as in the case of children, so too with other private persons, children's court magistrates need to judge capabilities and interact appropriately if effective participation is to be achieved.[110] In part 4.3.2 the question of appropriate criteria for allocating party status to private individuals is considered. It is contended that an effective child participatory model entails a selective approach to applications by adults for private party status. It is further proposed that achieving a balance between hearing the voices of caregivers who have substantial nurturing links and avoiding intimidation which may result from the presence of too many persons is feasible. It is argued that this can be facilitated with restrictive grounds for full party status combined with an alternative status which permits less participation. It is shown that the 2005 Act achieves the compromise required, but unfortunately confuses between full parties and mere participants because of inappropriate wording.

[110] In a review of research Brophy (2006) op cit note 7 at 62-63 noted English findings that a critical factor for encouraging effective parental participation was presiding officers 'showing some patience, sympathy, respect and warmth and addressing parents directly'. Parents felt discouraged from participating where adjudicators did not welcome and acknowledge them in court or showed little understanding of their cultural backgrounds.

4.3.1 *Party Status for the Investigative Agency*

In some developed systems investigative social workers are parties in care proceedings, but only on behalf of the state in a representative capacity.[111] This has not been the approach in South Africa. In 1970 under the Children's Act 33/1960 De Vos Hugo JP held in the high court decision of *Ex parte Kommissaris van Kindersorg: In re Steyn Kinders* that probation officers could not acquire party status in care proceedings heard by children's courts.[112] In line with this when social workers took over the care functions of probation officers they were not provided with party status. Under the 1983 Act this position continues.

It could be argued that it is anomalous that welfare have been denied party status given the crucial role they play. They conduct pre-hearing investigations into the domestic circumstances of all children who require alternative care and then prepare evidence. A social worker must present a written investigative report to the children's court in every case.[113] She must subsequently be available to give *viva voce* evidence if the contents of the report are challenged or the court requires clarification.[114] The fact that she may merely be questioned at proceedings as an expert witness and has no right in turn to question other participants or address the court are serious limitations.

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[111] For example, under s 39(1)(b) of the Child, Family and Community Service Act (RSBC 1996) of British Columbia, Canada, and s 98(1)(b)-(c) of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, Australia, party status is allocated to the ministry of welfare. Investigative social workers appear merely as representatives.

[112] 1970 (2) SA 27 (NC) at 33B-D. He interpreted unclear wording in reg 8(2) published in terms of the 1960 Act. At 33A ibid he stated *'Volgens reg 8(2) kan enigiemand wat die voorsittende Komissaris by 'n ondersoek oortuig dat hy 'n wesenlike belang, direk of indirek, by die verrigtinge van die ondersoek het van die Kommissaris verlof kry om tussenbei te tree en so iemand word dan beskou as 'n party by die verrigtinge…'*.

[113] In terms of s 14(2) of the 1983 Act '[t]he commissioner presiding over a children's court holding such inquiry *shall during that inquiry* request any social worker to furnish a report on the circumstances of the child concerned and his or her parent or guardian or the person having custody of the child' [emphasis added]. It can be seen from this wording that the commissioner has no choice and must receive a report in order to complete a care inquiry. Under ss 62, 63 and 155(2) & (9) of the 2005 Act these responsibilities will continue.

[114] Regulation 5(3) under the 1983 Act. In s 63(3)(b) of the 2005 Act the liability to defend the report has been continued.

In a 2001 report it was proposed somewhat ambiguously by the department of social development that '[i]nvestigating social workers could be treated as witnesses or could become a party to the matter. It depends on the case and the functions of the social worker'.[115] Rather than allowing an election, in s 1 of the 2005 Act a simpler solution was adopted. In a significant change to our law automatic and mandatory party status has been accorded to 'the department or the designated child protection organisation managing the case of the child'.[116] The department here referred to is the department of social development. This either utilises its own social workers or delegates care cases to non-governmental child protection agencies.[117] Once s 1 comes into force both government and delegated social workers will appear as parties.

An important question is whether the new status is appropriate. In some respects the department of social development and nongovernmental agencies may find that it is disadvantageous. As parties they may incur forms of liability -for example, for the payment of damages or legal costs- that did not apply when they were merely expert witnesses.[118] It could also be asserted that party status entails that the relationship of investigative social workers with family members and other professionals will change in ways that are negative.[119] Because there is more scope for welfare incurring legal liability and also a need to ensure that they are a successful party at court they may become reticent about providing information to other participants before and during proceedings.

It can certainly be predicted that once it is clear that a matter will go to court an investigative agency is likely to be concerned about making statements that may prejudice their case. This could result in investigative social workers becoming extremely inhibited in their interactions with other parties and anyone who might potentially appear in court as

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[115] Department of Social Development *Comment on Critical Issues to Enable the Law Commission to Finalise its Investigation Into the Review of the Child Care Act* (2002) 3.
[116] See the definition of 'party' at (e).
[117] See the definition of 'Department' in s 1 of the 2005 Act.
[118] In relation to damages, in s 45(1)(f) of the 2005 Act children's courts receive a new power to adjudicate any claim arising from abuse or neglect of a child other than a criminal charge. With costs, in s 48(1)(d) of the 2005 Act it is expressly stated that children's courts may make costs orders. For a discussion of these provisions see part 8.4.4, below
[119] On the danger of negative role changes affecting social work services see also part 3.4.2, above.

an opposing witness or opposing legal representative. This in turn could reduce chances for extracurial resolution of issues and thus run counter to the effort to encourage ADR which (as seen in the previous chapter) is an important feature of the 2005 Act.

It could be argued that a further negative consequence of party status for welfare is that dependence on lawyers (who would now be more frequently needed both to advise and act in children's courts as their representatives) is likely to increase. This raises two concerns. For South African investigative agencies -and particularly nongovernmental ones which tend to be cash-strapped- this could result in precious financial resources being drawn off to pay the bills of law firms. Also, since lawyers are trained to work in an adversarial manner their inclusion as representatives could by association generate a less positive image of social workers. Resulting alienation of caregivers might reduce their willingness to cooperate in family reunification work during the post-court phase.[120]

Closer interaction with their own lawyers may encourage agencies to work in a more legalistic manner. Greater formality and an emphasis on technically correct procedures may subvert immediate and unconstrained help for families. And as has been noted in chapter 1 above, factors which encourage a predominantly legalistic approach in work with families with care problems have been viewed as problematic in some systems.[121] It could also be suggested that it is something of a fiction to characterise welfare as merely one of the parties. In practice their reports tend to carry considerable weight; and this has been increasingly recognised in our legislation to an extent which could be seen as giving them an unfair advantage if they are also to receive party capabilities.[122]

As against the negative arguments, some important counterarguments in favour of the new status can be put forward. It has already been suggested that the extensive

[120] See ibid.
[121] See part 1.3.1.
[122] Under reg 5(1) of the 1983 Act 'the mere submission' of the investigative agency's report constitutes 'prima facie proof of the facts stated in that report'. Following a recommendation in clause 86(2) of the South African law commission's 2002 Draft Children's Bill, in s 63(1) of the 2005 Act submission constitutes 'evidence' which is no longer merely prima facie. It should be noted, however, that the same is true of reports submitted by other experts.

responsibilities of investigative agencies require that they should have greater powers. In relation specifically to legal representation Loffell, having had many years of experience in children's court work as a social worker in South Africa, has argued that the right to have a lawyer would be a positive rather than negative consequence.[123] She pointed out that social workers are sometimes prevented from presenting evidence effectively because of high levels of intimidation by opposing lawyers. This is especially likely where lawyers represent parents who wish to retain custody of children at any cost.[124] She considers that the solution is for the social worker to have her own lawyer to shield her against such intimidation and assist her in conveying evidence. [125]

As Loffell has also suggested a further significant advantage which flows from party status is that if an incorrect decision is reached by a children's court the investigative agency can take the matter to higher courts on appeal or review. She cited personal experience under the present dispensation of being powerless to challenge occasional children's court rulings which resulted in children being left with dangerously-abusive caregivers.[126] It is quite true that if welfare is not permitted to challenge such decisions there may be no one else with the motivation and resources to do so.

A practical problem is that taking a matter on appeal or review raises the stakes considerably in terms of legal costs. One solution would be to create procedures for state representational entities such as the legal aid board or family advocate to serve as lawyers for investigative agencies at state expense. This could be done with regulations published in terms of the 2005 Act. A significant side benefit might be more opportunities for higher courts to assist in the development of South African care law. As has been noted the inability of nearly all current parties to afford appeals or reviews has resulted in very few reported cases and a consequent stultification in this field in recent decades.[127]

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[123] Dr J Loffell (social worker, Johannesburg Child and Family Welfare Society) personal communication 12 Aug 2001.
[124] Ibid. On intimidation and other inappropriate behavior by lawyers see also parts 3.4.2, above & 5.2, below.
[125] Loffell ibid.
[126] Ibid.
[127] See parts 1.2 & 2.3, above.

It may be concluded that the advantages of party status for welfare are so important that they outweigh the disadvantages. In view of the importance of their functions it is surely essential that investigative social workers no longer be confined to a role in which they can merely be questioned at hearings. Also, a right to take matters to higher courts will not only improve the quality of services which agencies can provide but may also improve the services of children's courts as they recognise that monitoring of their decisions by higher forums is a more likely possibility. The problem of legal fees can to some extent be addressed as has been suggested in the previous paragraph. The greater exposure of nongovernmental agencies and the department of social development to legal liability will serve usefully as an ongoing pressure to improve standards of care services. In relation to nongovernmental agencies, s 1 of the 2005 Act should, however, be amended to enable party functions to be exercised in a purely representative capacity on behalf of the state.[128] The state would then incur liability and could use its agency-licensing powers to indirectly maintain standards.

It must be conceded that the likelihood of inhibited communication and a more legalistic approach by agencies is a matter for concern. This could best be countered by developing regulations covering appropriate communication between agencies and families. In these it should be indicated that pending or current court proceedings cannot be used as a reason to reduce normal levels of care services to and communication with client families. Overall, the decision to allocate mandatory party status in the 2005 Act was a fundamentally correct one which will conduce to better development of our law and provide direct advantages to children and families.

4.3.2 Party Status for Private Individuals

The question of which private individuals besides the child should receive party status in care proceedings is clearly an important one. In part 4.3.2.1 below the preliminary

[128] See note 111, above.

aspect of whether applications for such status should be facilitated regardless of numbers or else restricted is considered. It is concluded that children's courts in South Africa should be supplied with criteria that will enable them to control numbers. In light of this it is further explored in part 4.3.2.2 what these should be. Finally, in part 4.3.2.3 the concept of an alternative to private party status is examined with particular reference to the 2005 Act. It is suggested that this concept is fundamentally in harmony with a child participatory model, but that the wording of the Act requires refinement.

4.3.2.1 Accommodating and Restrictive Approaches

In an effective system at least some legislative direction is required on criteria for eligibility as a private party. If care- or kinship-related links to the child were applied as such criteria possible candidates for party status might include the following:

- Biological parents, with possible extensions to other actual or potential caregivers closely related to the child who is the subject of care proceedings.
- Distant relatives, with a possible limitation to those who are current or potential caregivers.
- Current or previous *de facto* caregivers with service as substitute parents, although they are unrelated to the child biologically.
- Potential future caregivers who are unrelated -such as prospective foster or adoptive parents.

It can be seen that even where care- or kinship-related links are required the pool of persons who might merit consideration remains potentially large.

A fundamental distinction is between what has been called in England the 'open-door'[129] or else what might perhaps be termed the 'controlled gate-keeping' approaches. Under the former, in care proceedings courts will generally accommodate persons in the

[129] See Hunt, Macleod & Thomas (1999) op cit note 7 at 167.

categories listed above[130] and there may even be no limit on who else may apply.[131] In contrast, where courts are expected to act as gatekeepers their own discretion or legislative criteria are restrictively applied to ensure that the number of parties is kept to a minimum.[132] South African commissioner Rothman, having had personal experience of both large and small numbers of parties, has expressed a view that the latter is generally preferable.[133]

Rothman bases his support for a gatekeeping approach on two arguments. Firstly, everyone with a right to party-status must be given reasonable notice of proceedings. Where there are many such persons long delays occur while the notices are served. Furthermore, children's court decisions become vulnerable to being unseated by subsequent reviews. The larger the number of notices required, the easier it will be to raise a technical argument that there is not sufficient proof on record that they were all properly served.

Rothman's second argument is that it will not be to the advantage of the child concerned to crowd children's court hearings with numerous private parties who may be vociferously in opposition to each other. This may be intimidating if she is present and will mean that many persons will be able to cross-examine her if she chooses or is required to give evidence.[134] Furthermore, anyone who has party status will be entitled to bring a

[130] Ibid. In England, courts even have a discretion to grant a request for party status without a hearing: see C Lyon *Child Abuse* (2003) 293 para 7.28. Under the Delaware Code Annotated title 13, § 1104 a wide range of persons have *locus standi* to bring termination of parental rights cases to court. These include parents, a presumed father, any blood relative of the child, the department of welfare or any licensed agency.

[131] In England under the Family Proceedings Courts (Children Act 1989) Rules 1991 (SI 1991/1395) r 7(2) any person can file a request to be joined as a party or to have another person joined.

[132] For example, under s 98(1) of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, automatic party status is restricted to the child, other private persons with legally allocated parental responsibilites, and investigative agency personnel as 'agents' of the state. Even more restrictive is s39(1) of the Child, Family and Community Service Act (RSBC 1996) of British Columbia, Canada. Under this automatic party status is limited to parents of the child, the investigative agency (in a representative capacity on behalf of the state) and certain persons who have been granted interim custody of the child by a court. However, in each of these three cases automatic party status is lost upon failure to appear 'at the commencement of the protection hearing'.

[133] Rothman (2002) supra note 78.

[134] Rothman's view that large numbers of contesting private parties produce a difficult children's court environment has been supported by other experienced commissioners: see Zaal (1997) op cit note 80 at 341.

lawyer. And large numbers of lawyers with different agendas tend to produce a more formal and adversarial children's court environment.[135]

In contrast to the approach supported by Rothman, in England under the 1989 Children Act utilisation of the 'open door' approach to persons who wish to be private parties in care proceedings has been described by some commentators as successful in encouraging potential alternative caregivers to come forward and offer placements for children.[136] An accommodating approach has also been favoured by the South African law commission.[137] However, a sample of care cases drawn by English researchers Hunt, Macleod and Thomas in 1999 uncovered unwieldy matters where there were as many as nine and even fifteen different parties.[138] Since (as has been shown above) in England the participation of children at court is rare, intimidation of them by large numbers of adult parties is hardly an issue. From a South African perspective, however, a very different model which emphasises facilitation of child-participation has been proposed above. Accordingly, it is recommended that in South Africa there should be a court capacity to control the number of parties rather than an open door approach.[139]

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[135] Rothman 2002 supra note 78. On the influence of lawyers see also part 5.2, below.

[136] Hunt, Macleod & Thomas (1999) op cit note 7 at 167 found that an open-door policy led to nonparent adults becoming involved in 45% of cases. They concluded '[p]ractitioner reports that this has encouraged wider participation are confirmed by our sample cases'.

[137] In 2001 the commission was concerned that, generally in matters involving children, accessibility to the courts is 'a major failing at the moment': see *Review of the Child Care of Act* op cit note 93 at vol 5, 1185. It therefore recommended that legislation replacing the 1983 Act should contain provisions for discouraging courts from 'adopting a technically-restrictive procedural approach in order to deny someone who has a substantial interest in the proceedings from presenting his or her case and, where appropriate, from being regarded as a party' -ibid, at 1184. In clause 81(e) of the commission's Draft Children's Bill of 2002 it recommended broadly that automatic party-status be granted to any 'person whose rights may be affected by an order that may be made by the court in those proceedings'.

[138] Hunt, Macleod & Thomas (1999) op cit note 7 at 167-68.

[139] In the New South Wales case *In the Matter of 'Pamela'* as reported in *Children's Law News* March 2003 <http://www.lawlink.nsw.gov.au/lawlink/children's_court/II_cc.nsf> 1 the issue of a court's discretion to add a fifth party where are there were already four arose. Schurr CM of the Campbelltown children's court found it appropriate to hear argument against such addition from the prior parties. It was contended (at 6 ibid) on behalf of the department of community services that 'a multiplicity of parties would impede the court in its duty to deal with cases with informality and expedition'. Schurr CM (at 9, ibid) conceded: 'It is likely, with so many parties, that elements of adversarial approaches, legal technicalities and lack of expedition will threaten the timely disposition of the case'. After observing 92 children's court cases in Melbourne, Australia, Sheehan (2003) op cit note 7 at 32 noted that the presence of large numbers of persons adversely affected children's capacity to participate. Children tended to feel confused and alienated.

If control over the number of private parties is appropriate the question which arises is how this should be achieved. Holding special hearings to decide whether to grant party status to all private individuals who seek this could be time-consuming. A compromise approach which has much to recommend it, therefore, distinguishes between persons who have automatic party status and those who must obtain court permission.[140] The question of what criteria should be employed to distinguish between the two groups is pursued below.

4.3.2.2 Criteria for Eligibility

Section 1 of the 2005 Act includes a definition as follows:

' **"party",** in relation to a matter before a children's court, means-
(a) a child involved in the matter;
(b) a parent;
(c) a person who has parental responsibilities and rights in respect of the child;
(d) a prospective adoptive or foster parent of the child;
(e) the Department or the designated child protection organisation managing the case of the child; or
(f) any other person admitted or recognised by the court as a party;'. [Emphasis in the original.]

Similarly to the list of possible private parties in part 4.3.2.1 above this provision utilizes biological parenthood, prior legally-allocated parental responsibilities and a willingness to adopt or foster as criteria for automatic private-party status. But additionally under s 1(f) a broad and entirely unguided discretion to apply either open door or gatekeeping approaches in respect of any other private party applicants is accorded.

In relation to the automatic status criterion in s 1(b) mere biological parenthood is questionable.[141] A much more restrictive approach providing automatic party-participation

[140] Under s 98(3) of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, besides persons who have automatic party status, 'any other person who, in the opinion of the Children's Court, has a genuine concern for the safety, welfare and well-being of the child or young person may, by leave of the Children's Court' obtain exactly the same rights as a private person who has automatic party status by virtue of exercising legally allocated parental responsibilities.

[141] In interpretations of the rights to family life and nondiscrimination in arts 8 and 14, respectively, of the ECHR the European court of human rights has tended to protect the interest of all parents to participate effectively in judicial processes involving their children: see Moylan (2004) op cit note 11 at 180. However, it also held in *B v UK* ECRH [2000] 1 FLR 1 (14 Sep 1999) that there are objective and reasonable justifications for treating married and unmarried fathers and caring and uncaring parents differently. On the approach of the court see further G Douglas 'Case Reports: Human Rights' 2000 (30) *Family Law* 88 at 88-

rights only to parents with custody or guardianship over legitimate children became established in our law many years ago under the Children's Act 33/1960.[142] This Act did not, however, extend automatic party-status to either of the parents of extramarital children.[143] Under the 1983 Act until the late 1990s the practice was to grant automatic party status only to custodian parents of such children.[144] This favoured mothers because they and not fathers automatically received custody in terms of our common law.[145] Unmarried fathers were therefore required to approach children's courts and make out a case for receiving party status.[146]

The practice of denying automatic party status to non-custodian fathers of extramarital children ended in the late 1990s. In 1997 the constitutional court decided *Fraser v Children's Court, Pretoria North and Others*.[147] In this matter an unmarried father successfully asserted his right to be heard in children's court proceedings prior to the adoption of his child. It was held that s 18(4)(d) of the 1983 Act was inconsistent with the interim constitution[148] to the extent that it denied an unmarried father a right to consent to the adoption of his child 'in all circumstances'.[149]

At the time *Fraser* was heard the wording of s 18(4)(d) prevented all unmarried fathers from resisting adoption of their children by other persons. Just as with care cases, they were not even entitled to notice of pending adoption proceedings. The constitutional

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89; and S Bellamy QC 'Fathers: Who They Are -Their Parental Responsibility and Rights in Public Law Proceedings' (2004) <http://www.nagalro.com/docks/Stephen%20 Bellamy> at 6.

[142] In *Snyder en Andere v Steenkamp en Andere* 1974 (4) SA 82(N) at 87H-88B it was held that that even a divorced, non-custodian guardian who had taken little interest in his child had the right to have his reasons for not testifying recorded like any other person with automatic party-status: see also ibid at 83E-G. G Van Wyk 'Kinderhofondersoeke: Partye tot die Ondersoek' (1988) 23 *Die Magistraat/The Magistrate* 168 supported the view that a noncustodial divorced parent should have automatic party-status. See also *Weepner v Warren en Van Niekerk* 1948 (1) SA 898 (C).

[143] It referred at s 1 to 'parents' as including a father or mother of a child born out of or legitimated by a lawful marriage. For an interpretation of this section, see the *Snyder* case ibid at 88A.

[144] See Bosman-Swanepoel & Wessels (1995) op cit note 99 at 24. This was encouraged by wording in s13(5)(a) which created a right to notice of care proceedings only for custodian parents.

[145] See further B Van Heerden 'How the Parental Power Is Acquired and Lost' in Van Heerden (1999) op cit note 2, 313, at 405 (hereafter referred to as Van Heerden (1999A)); and T Davel 'The Status of Children in South African Law' in Davel (2000) op cit note 28, 1 at 35.

[146] See Bosman-Swanepoel & Wessels (1995) op cit note 99 at 24.

[147] 1997 (2) BCLR 153 (CC).

[148] As contained in Act 200/1993.

[149] Op cit note 147 at 173J-174A.

court held in *Fraser* that s 18(4)(d) was unconstitutional because it discriminated unfairly against unmarried fathers on the basis of their gender and marital status.[150] The court gave parliament two years to amend the 1983 Act. This was done with the Adoption Matters Amendment Act 56 of 1998 which altered s 18(4)(d) so as to require the consent of unmarried fathers to adoptions in certain situations.

Not only the 1983 Act but also its regulations were amended as part of the post-*Fraser* response in 1998. A new reg 4(1) conferred 'the same rights and powers as a party to a civil action in a magistrate's court in respect of examining witnesses, and adducing evidence and addressing the court' on the 'parent or parents' of any child subject to a children's court care inquiry.[151] A new reg 9(3) compelled commissioners to ensure that notice of any pending inquiry was sent to 'a parent or guardian of a child or to the person in whose custody the child is'.[152] These regulations have been interpreted as requiring that all parents and not merely custodian parents have a right to party status in care cases.[153] As noted above the requirement that biological parents must receive automatic party status is set to continue when s 1 of the 2005 Act is implemented.[154]

It may be suggested that it is not in fact appropriate for all non-custodian parents of extramarital children to receive automatic party status.[155] For some parents party status is only of importance for opportunities it provides to be obstructive by delaying

[150] Mohammed DP J, expressing the unanimous judgement of the constitutional court, found that s18(4)(d) of the 1983 Act was contrary to the right not to be unfairly discriminated against in s 8(2) of the interim constitution as contained in Act 200/1993. See the judgment ibid at 162 D-E.
[151] 1986 Regulations of the 1983 Act as amended by Government Notice R416, *Government Gazette* 18770 of 31 March 1998.
[152] Ibid.
[153] Van Heerden (1999) op cit note 4 at 617 noted that the new wording was interpreted as creating not merely a right but also a duty for parents to attend. Commissioner Booysen (2006) supra note 79 stated that the regulations brought about a new procedure. In terms of this commissioners can only commence care proceedings without an unmarried father if it is confirmed on affidavit that his identity or present whereabouts remain unknown. And this must be despite reasonable search efforts by welfare.
[154] See, however, the limited exceptions referred to in note 164, below.
[155] In the English case of *Re X* [1996] FLR 186 it was decided that notice about pending care proceedings need not be served on a putative father who had not exercised any parental responsibility. However, in *Re AB (Care Proceedings: Service on Husband Ignorant of Child's Existence)* [2004] 1 FLR 527 a mother's application to prevent the father receiving notice failed. The court held that all categories of fathers were entitled to notice except in extreme circumstances. On English law see further note 159, below.

proceedings[156] or to continue abusive contact with the child or other parent.[157] Rothman has expressed the view that the difficulties encountered in post-1998 children's court practice reveal a need for reinstituting the previous onus on unmarried fathers to apply for permission to be joined as parties rather than granting them automatic status.[158]

A modification of Rothman's proposal would be to distinguish between categories of fathers of extramarital children. This is not without precedent elsewhere.[159] In terms of our own post-*Fraser* law, under s 19A(2)[160] of the 1983 Act in order to have a right to withhold consent to the adoption of his child an extramarital father must have acknowledged his paternity in writing and made his identity and whereabouts known.[161] And even where he has done so he loses this right under certain circumstances specified in s 19 of the Act. These include his having abused the mother or child, or failed to discharge parental duties without good cause.[162]

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[156] Rothman (2002) supra note 78; Booysen (2006) supra note 79. Despite the open door approach in England, in *Re P (Care Proceedings: Father's Application to be Joined as Party)* [2001] 1 FLR 781 Connell J upheld a lower court's rejection of party status for a father who had on several occasions delayed care proceedings. Generally, however, English courts have been reluctant to deny party status to unmarried, noncustodial fathers purely on the ground that it would delay completion of cases: see Lyon (2003) op cit note 121 at 294-95 para 7.32.

[157] Instructive in this regard is the Australian case *In the Matter of 'Trent'* (Children's Court of New South Wales at St James, Case 36/2004, 30 Jan 2004) reported in *Children's Law News* March 2004 <http://www.lawlink.nsw.gov.au/lawlink/children'scourt/IIcc.nsf> at 23. Mulroney CM (at 26 ibid) found it regrettable that, in terms of the mandatory party entitlement in s 64 of the Children and Young Persons (Care and Protection) Act 1998, he was compelled to allow the presence of a father who had an extensive history of criminal violence. He was satisfied on the evidence that the father's presence would jeopardise the safety of the mother and possibly also the child. But he was forced to dismiss an application to prevent attendance by the father. In his judgment, ibid, he noted that 'circumstances where a parent has no genuine interest in the welfare of the child and where that parent may take advantage of the opportunity to attend court to do something that would harm the best interests of the child' were not unusual in care cases. He compared the New South Wales provision unfavourably with the discretion available to courts in England. Sheehan (2003) op cit note 7 at 34 observed several cases of abusive parents who posed a danger to other participants at the Melbourne children's court in Australia.

[158] Rothman (2002) supra note 78.

[159] Bellamy (2004) op cit note 141 at 6-7 pointed out that in English care proceedings it is only fathers with legally allocated parental responsibilities who automatically receive party status. Other fathers must submit a motivated application to court.

[160] Inserted by the Adoption Matters Amendment Act 56/1998.

[161] For further discussion see Davel (2000) op cit note 145 at 35.

[162] See s 19(b)(vii)-(x).

Appropriately, the limitation on automatic participation rights of abusive or uncaring fathers which developed in our pre-existing law has been carried over into the 2005 Act for adoption matters.[163] However, it is anomalous that there is only a slight extension of it to care proceedings.[164] The drafters of the Act need surely not have feared constitutional challenge. A body of constitutional jurisprudence indicating that not all forms of discrimination are unfair has begun to develop.[165] There are even authoritative precedents which indicate that fathers not exercising parental responsibilities may in some situations be lawfully discriminated against if important societal goals, such as protecting the interests of vulnerable single mothers or children, will be advanced.[166] Under the 2005 Act there is greatly increased scope for caring extramarital fathers to gain parental responsibilities[167] -and so it would mainly be those who have shown little interest in their children who would be denied automatic party status with the approach proposed.

It is recommended that the blanket allocation of automatic party status to nearly all parents in the 2005 Act needs to be modified. It should be limited in care cases only to

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[163] See ss 233(1)-(2) & 236(1) of the 2005 Act.

[164] In care proceedings (as in other children's court matters) a father who conceived the child through rape or incest will be denied party status: see ibid at s 1: definition of 'party' read with that of 'parent'. Also, in terms of the definition of 'parent' in s 1 of the Act 'a parent whose parental responsibilities and rights in respect of the child have been terminated' loses a right to automatic party status.

[165] See Currie & De Waal (2005) op cit note 23 at 245-46.

[166] In *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC) at 173A-B Mohammed DP J accepted the validity of a distinction between caring and uncaring fathers. In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) Goldstone J, expressing the view of the majority of the constitutional court, found that a decision by President Mandela to release female but not male prisoners with children younger than 12 was not unconstitutional: see especially at paras 37, 39 & 40. In a separate concurring judgment in *Hugo* O 'Regan J expressed the view that the disproportionately heavy child-rearing burden carried by many women justified some discrimination against fathers at the present stage of development of South African society: see ibid at para 113. *S*ee also *Harksen v Lane NO* 1998 (1) SA 300 (CC) at paras 52-53. In *Jooste v Botha* 2000 (2) SA 199 (T) it was held that it was not unconstitutional for unmarried noncustodial fathers to have fewer parental responsibilities than other fathers. E Bonthuys (revising author) 'Children' in Currie & De Waal (2005) op cit note 23, 599 at 607-08 has commented that awarding unmarried fathers equal parenting rights may theoretically advance gender equality but without children necessarily benefiting from additional care. In practice, it may even produce disadvantages resulting from increased opportunities for interference by such fathers.

[167] For example, under s 21 fathers who have on a long-term basis lived with the mother, attempted to provide maintenance or agreed to have their paternity legally recorded automatically acquire parental responsibilities. Under s 22 they may acquire responsibilities by entering an agreement with a person who already has them. Under ss 30 & 33 they may become co-holders of parental responsibilities in terms of an agreed parenting plan.

parents who currently have lawful custody[168] or contact[169] entitlements and have not been found by a court to have abused the child or other parent. It should be noted that these criteria are gender neutral and that other parents would still have a right to apply to court for party status. On procedures required, a first step would be to differentiate between rights to notice of proceedings and party status as in English law. A second step would be to follow our adoption law[170] in placing an onus on parents to see that they identify themselves on their children's birth registers.

In England, fathers without parental responsibilities have a right to notice if they can be identified and traced; but then they have to apply to court for permission to receive party status.[171] A similar approach should be adopted for parents of either gender in South Africa. This would reduce the problem of delays resulting from requirements to provide notice to unknown parents. As long as courts take reasonable steps to try to trace all parents there should be no danger of a court decision being overturned because of an absence of notice.

The detailed wording of §11,007A in title 13 of the Delaware Code Annotated provides an example of the kinds of notice procedures that could be utilised in South Africa. Courts in Delaware are required to establish whether a child's father has received notice of pending care proceedings.[172] If not, they are obliged to pursue an inquiry. The purpose of this is to attempt to identify the father and his whereabouts. Privacy rights of the mother are respected to the extent that she cannot be forced to give evidence on these aspects.[173] And if welfare services and the court are also not able to establish the latter independently, notice may be sent to the last known address or, failing any such, published

[168] In a listing of parental responsibilities in s 18(2) the 2005 Act appears to substitute the term 'care' for 'custody'. The latter has become well-established in our common law and is used in its traditional sense in this chapter to prevent confusion with notions of alternative care.
[169] The term 'contact' has clearly been substituted ibid for our common law term 'access'.
[170] See s 19A(2)(a) of the 1983 Act as discussed in the main text above; and also ss 236(3)(a) & 236(4) of the 2005 Act.
[171] For a detailed discussion see Lyon (2003) op cit note 130 at 293-96.
[172] § 1107A(c).
[173] § 1107A(e) read with §1105(5)a.

for three weeks in a local newspaper.[174] Hearings may then validly commence immediately.[175] In South Africa a similarly manageable tracing rules would be very useful.

In 2001 it was recommended by the South African law commission that a legislative provision was required to enable children's courts (or their future equivalent) to conduct a different form of separate hearing -one not for tracing but for dealing with applications to receive discretionary party-status.[176] Such a provision is certainly still needed. It could be utilised, inter alia, to consider applications by known parents without responsibilities if the 2005 Act were to be amended as proposed above.[177]

Even if the Act is not amended, a party status application procedure as suggested by the law commission will still be needed for persons who are not automatic parties in terms of the current wording. As will be remembered, the final category referred to in the definition of a party in s 1 is very broadly 'any other person admitted or recognised by the court as a party'. The law commission recommended a capability for party status hearings in cases either 'pending or currently underway'[178] and it is indeed essential that express jurisdiction to hear both new or late applications after proceedings have already begun be created for the children's courts.[179] This could perhaps now best be achieved with a suitable regulation published in terms of the 2005 Act.

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[174] §1107A(f). If there is evidence of a presence in a different locality notice in the press may also be ordered there.

[175] §1107A(i).

[176] The commission proposed '[a] provision needs to be enacted in the proposed new children's legislation which is to the effect that any person who wishes to assert the right to be a party in a case pending or currently underway in the Child and Family Court should be permitted to appear and/or place documentation before the Child and Family Protector of the Court in order to try to make out a case that she or he has an interest in the proceedings sufficiently substantial that she [*sic*] should receive the status of being a party. Should the person establish a *prima facie* case, the Child and Family Protector should immediately refer the matter to the Court for a decision which might involve a special hearing': see *Review of the Child Care Act* (2001) op cit note 93 at vol 5 p1184.

[177] It could take the form of a rule of court which states that unless the court directs otherwise a party status hearing may be *ex parte*. On the use of preliminary hearings for establishing party status see further part 7.4.1, below.

[178] See *Review of the Child Care Act* (2001) as quoted in note 176, above.

[179] Although no South African statistics are available researchers Hunt, Macleod and Thomas (1999) op cit note 7 at 239 found that in a significant proportion of English care cases (35 out of a sample of 83) applications for late party status needed to be considered. A South African example is the unreported Durban high court case of *Womack v Womack and Four Others* (Case No 1766/2000, of 5 June 2000). In this matter two applicants for late party status in children's court care proceedings were denied that status despite the fact

Aside from the fact that s 1 of the 2005 Act is problematic because it provides automatic party status indiscriminately for nearly all parents, regardless of their links with children, it is also unfortunate that it does so for 'a prospective adoptive or foster parent of the child'. 'Prospective' is not defined in the Act and so any claim of willingness to foster or adopt could become a ticket for automatic party status. It is hard to see why this approach was adopted. Prospective adoptive or foster parents who wish to participate as full parties would usually be seeking to gain custody of the child.[180] Their main motive will therefore often be the negative one of discrediting current or potential rival caregivers.

By providing 'prospective adoptive and foster parents' with automatic and extensive participatory powers as parties (including, for example, the right to utilise lawyers) the drafters of the Act have greatly increased the scope for adversarial interactions that will not favour child participation, poor unrepresented biological parents or even the achievement of the best possible outcomes.[181] Prospective caregivers, like parents without lawful custody or contact entitlements, should surely have been required to make out a case for a grant of party status.

Aside from being too accommodating on private persons entitled to automatic party status the 2005 Act also does not indicate what criteria children's courts should apply when exercising a discretion to grant party status to other private persons.[182] English courts have been provided with the broad legislative criterion of 'the applicant's connection with the

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that they were closely related to a bereaved child and she was more strongly bonded to them than anyone else. Although children's court proceedings by other family members who wished to gain care of the child had been started without their knowledge they could not be granted late party status because there was no provision for this in the 1983 Act. In his judgment in the high court Moerane AJ described this as rendering the Act 'fatally-flawed': see the judgment ibid, at p 5, lines 12-13. On late party status hearings see further part 7.4.2, below.

[180] Prospective adoptive parents will also be seeking guardianship.

[181] In *Re G* [1993] 2 FLR 839 the English court of appeal decided that in the absence of special circumstances foster parents should not normally receive party status. See also Lyon (2003) op cit note 121 at 297 para 7.35.

[182] There is very little South African case precedent. In *Ex parte Kommissaris van Kindersorg: In re Steyn Kinders* 1970 (2) SA 27 (NC) at 33 B-D, in an interpretation of reg 8(2) the Children's Act 33/1960, it was held that a priest's interest in a child as merely a member of his congregation was insufficient to justify party-status.

child'.[183] Thus any previous ties with the child can be utilised in support of a claim for discretionary party status.[184] Under a more restrictive gatekeeping approach which is needed in our system the primary criterion which ought to be applied is whether an applicant has at any stage made reasonable efforts to provide significant care (including indirectly in the form of maintenance) for the child.[185]

The proposed discretionary party status criterion of efforts to feature significantly in the child's life as a parent figure has the advantage of being grounded in facts that can be proved. For example, where it can be shown that a separated father or mother has maintained a positive relationship with a child for a significant period of time this should count in favour of an application. In contrast, a parent who has ignored a child until the time of the proceedings should not be allocated party-status.[186] In relation specifically to unmarried fathers a substantial care criterion for allocating rights would certainly not be out of line with our existing law.[187] Even a substitute-parent figure not related to the child might be able to meet the significant care test. It is thus realistically based on who has actually nurtured and bonded with the child.[188] Also in favour of the actual service ground is that it is gender-neutral.[189]

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[183] Children Act 1989 s 10(9)(b).

[184] See further Lyon (2003) op cit note 130 at 296 para 7.34.

[185] In the New South Wales children's court case *In the Matter of 'Pamela'* (2003) op cit note 139 at 5 it was found that foster parents had correctly been granted party status because they had previously through their care demonstrated 'a genuine concern for the safety, welfare and well-being of the child'.

[186] After observing at children's courts in Melbourne Sheehan (2003) op cit note 7 at 34 recommended legislation to keep away parents who had played little part in their children's lives yet attended at court to interfere vexatiously with proceedings or behave abusively.

[187] In *T v C* 2003 (2) SA 298 (W), also reported as *Talbot v Cleverly* [2003] 1 All SA 640 (W), at para 19 the fact that an unmarried father had had little contact since birth counted against his application to challenge the adoption of his child by another person. Under s 21(1)(b)(ii) of the 2005 Act contributing or attempting to contribute in good faith 'to the child's upbringing for a reasonable period' is enough to automatically confer full parental responsibilities and rights on a biological father. As mentioned by Bonthuys (2005) op cit note 166 at 607 N35 with reference to the previous Natural Fathers of Children Born out of Wedlock Act 86/1997 an important consideration with unmarried fathers should be whether they have developed a bond with their children.

[188] In *C v Commissioner of Child Welfare, Durban* 1978 (2) SA 300 (N) at 304 James JP found that the person who most deserved party status in children's court care proceedings was an unrelated friend of the child's mother.

[189] Bonthuys (2005) op cit note 166 at 608 has suggested that prior 'actual child care work' with a child may be a suitably gender neutral criterion for the allocation of parental responsibilities.

In further support of a significant care criterion for discretionary party status it may be noted that under the Maine Child and Family Services and Child Protection Act the ground for a person to be added to care proceedings is 'having a substantial relationship with the child or a substantial interest in the child's well-being, based on the time, strength and duration of the relationship or interest'.[190] Under a somewhat similar approach in Victoria, Australia, s 3 of the Children and Young Persons Act 56/1989 was amended to enable a same-sex partner with whom a parent or current custodian 'is living as a couple on a genuine domestic basis (irrespective of gender)' to obtain party-status in the children's courts.[191] The concept of 'genuine domestic' links with the child, and even genuine efforts to provide substantial indirect care over time by way of contact or maintenance, are surely better indicators of a would-be applicant having the best interests of a child at heart sufficiently to utilise party status appropriately than the mere happenstance of biological parenthood.

Even where the proposed requirement of sustained efforts to provide significant previous care is successfully established by an applicant for discretionary party status our children's courts should be obliged to consider two further exclusionary criteria. Firstly, it should still be necessary to assess whether a grant of party status is reasonably likely to result in harm to the child or another vulnerable person who already has party status -this would apply where there is evidence that the applicant's previous behaviour suggests that he will use opportunities at court to behave in an abusive or seriously intimidating manner.[192] This exclusion should only apply where inappropriate behaviour is anticipated

[190] Title 22 § 4005-D at subparts 1C & E of the Maine Child and Family Services and Child Protection Act supra note 61.

[191] The amendment was in terms of the Children and Young Persons Amendment Act 72/2001. In South Africa, in *Du Toit v Minister of Welfare and Population Development* 2001 (12) BCLR 1225 the constitutional court held that a partner in an established same-sex relationship could be a party in a children's court adoption application. It is likely that by analogy the same approach would be taken in care proceedings, but the criterion proposed in the main text would only permit party status for partners who had built up a prior relationship with the child by providing substantial care. Generally on increasing support for the parenting role of same-sex couples in our law see A Pantazis & T Mosikatsana 'Children's Rights' in M Chaskalson, M Kentridge & J Klaren *et al* (eds) *Constitutional Law of South Africa* (2005) 33-i at 33-14.

[192] As has been mentioned, at the Melbourne children's court Sheehan (2003) op cit note 7 at 34 noted instances where vexatious and angry parents were a danger to children and other participants. Without legislation enabling them to control participation rights of parents there was 'little the court could do' to ensure sufficient control inside and personal safety outside the courtroom during proceedings.

to an extent that available sheltered participation methods cannot sufficiently prevent.[193] It should thus generally be limited to extreme cases. There should even be a power for children's courts to apply the criterion of abusive or intimidating behaviour to remove party status from someone who already has it.[194]

The second exclusionary criterion required entails a power to deny an applicant who will be taking substantially the same position and thus mainly duplicating views that will be put forward by an existing party. As has been established in some other systems, accommodating such a later applicant would encourage repetitive evidence and thus lengthen proceedings unnecessarily.[195]

In answer to a possible criticism that a significant care criterion with the two further limitations proposed would unduly restrict discretionary party status applications it can be asserted that effective gatekeeping powers for children's courts to control the numbers of private parties are essential. Children and vulnerable custodian parents such as single mothers should not have to appear amongst crowds of satellite role players.[196] The proposed approach accords with the criterion of hearing the most appropriate voices. Also, as will be shown below an alternative status for less centrally involved participants has been created under the 2005 Act -and this greatly reduces the need for children's courts to be accommodating in respect of all party status applications.

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[193] There is a similar approach in England. Under s 10(9) of the English Children Act 1989 courts must consider whether an applicant for discretionary party status will disrupt the child's life to an extent which is harmful. For an illustration of the serious difficulties which can result where the risk criterion is not available, see note 157, above.

[194] In the English case *Re W (Discharge of Party to Proceedings)* [1997] 1 FLR 128 a court removed the party status of a natural father who had had very little contact with his children and had been convicted of murdering their half-sister. As commented by J Black, J Bridge & T Bond *A Practical Approach to Family Law* (2000) at 498 although it is a serious matter to remove existing party status it is occasionally justifiable in care proceedings.

[195] In the English case *Re M (Minors) (Sexual Abuse: Evidence)* [1993] 1 FLR 822 grandparents were denied party status where they were taking precisely the same position as the mother of the child. For a discussion of the application of the principle in English law see Lyon (2003) op cit note 130 at 296-97 para 7.35. In New South Wales children's courts apply a similar rule that if a later applicant's interests and aims are identical or nearly in accordance with those of someone who already has party status this weighs against the application: see *In the Matter of 'Pamela'* (2003) op cit note 139 at 8.

[196] Sheehan (2003) op cit note 7 above at 32 noted from her observation in the Melbourne children's court that allowing large numbers of persons to be present not only intimidated children but also custodian parents.

4.3.2.3 An Alternative to Party Status

It appears from the wording of s 58 of the 2005 Act that another way to gain participatory rights besides the receipt of party status has been created. This provision reads:

> '**Rights of persons to adduce evidence, question witnesses and produce argument**
> The following persons have the right to adduce evidence in a matter before a children's court and, with the permission of the presiding officer of the children's court, to question or cross-examine a witness or to address the court in argument:
> (a) A child involved in the matter;
> (b) a parent of the child;
> (c) a person who has parental responsibilities and rights in respect of the child;
> (d) a care-giver of the child;
> (e) a person whose rights may be affected by an order that may be made by the court in those proceedings; and
> (f) a person who the court decides has a sufficient interest in the matter.'

A comparison between the persons listed here and those included in the definition of a party in s 1 reveals some significant differences. Of particular note is that categories (e) and (f) in s 58 are not listed in s 1 as either automatic or discretionary parties. Category (d) in s 58 must be read with the definition of 'care-giver' included in s 1.[197] Such reading indicates that only one of the listed kinds of caregiver -a foster parent- would receive automatic party status. The inescapable conclusion is that the intention with s 58 was to create a much wider set of persons to whom children's courts can provide lesser participatory rights than those which go with full party status.

The creation of two categories of what may conveniently perhaps be referred to respectively as full parties and participants in the 2005 Act is not without precedent elsewhere.[198] Whilst it might be criticised as bringing complexity to the legislation[199] it

[197] The definition includes foster parents, persons who care for a child with permission from a parent or guardian or who do so in their capacity as a care worker or head of a child-headed household.

[198] Section 87(1) of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales supra note 13 reads as follows:

supports a child participatory model. In cases where so many private persons wish to be involved that the child and/or existing caregiver involved would be overwhelmed and intimidated it potentially increases the powers of a court to limit the extent of participation.

The aim of enabling children's court magistrates to modulate the degree of participation by private persons has not been perfectly realised in s 58. The new category of persons to be allocated lesser participation rights should not have been confusingly overlapped with parties as defined in s 1.[200] This is a recipe for confusion. However, unlike the 1983 Act where the only choice is between the opposite extremes of either party or merely witness status, s 58 creates a via media which allows for an in-between category who may provide evidence, seek permission to question other persons and address the court. It could be used to allow persons such as extended family members something more than a purely passive involvement. It could also limit them to brief appearances and thus reduce overcrowding.

Precisely how the rights of mere participants are reduced as compared to those of parties in the 2005 Act will need to be delineated further in regulations. Under r58.02 subdivision 1 of the Minnesota Juvenile Protection Rules 2000 the rights of participants are merely to receive notice, attend hearings, and offer information at the discretion of the court.[201] Under title 22, § 4005-D of the Maine Child and Family Services and Child

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'The Children's Court must not make an order that has a significant impact on a person who is not a party to proceedings before the Children's Court unless the person has been given an opportunity to be heard on the matter of significant impact.
(2) If the impact of the order is on a group of persons, such as a family, not all members of the group are to be given an opportunity to be heard but only a representative of the group approved by the Children's Court.
(3) The opportunity to be heard afforded by the section does not give the person who is heard the status or rights of a party to the proceedings'.
Sub-rules 58.01-02 of the Minnesota Juvenile Protection Rules 2000 very similarly created a new class of persons who were mere participants as opposed to full parties in care cases. Bohr (2001) op cit note 4 at 236 described the rationale for the rules as follows: '[t]here may be many individuals concerned about the best interests of a child who do not have the immediate connection to the child that justifies treating them as parties'.

[199] Bohr ibid at 238 has argued that in US care cases distinguishing between full parties and mere participants has sometimes resulted 'in a wasting of court time which should be spent developing an alternative care plan as applicants and their lawyers argue about whether a person is entitled to full party status'.

[200] The overlapped categories are: the child who is the subject of the proceedings, a parent, and a person who has legally-allocated parental responsibilities.

[201] This clearly goes only slightly beyond the rights of witnesses. For a discussion and comparison of participant and full party rights under these rules see Bohr (2001) op cit note 4 at 235.

Protection Act as amended in 2001 it is expressly indicated in subpart 4 that a person who merely has participant status 'has the right to be heard in any court proceeding under this chapter. The right to be heard does not include the right to present or cross-examine witnesses, present evidence or have access to pleadings or records'. In subpart 5 it is stated that none of these exclusions applies to persons with full party status.[202]

In the South African 2005 Act s 58 ought to have distinguished between the rights of full parties and mere participants. The point of the distinction is surely that participants should be expressly shown to have lesser rights so that children's courts can use participant status to reduce overcrowding and adversarialism in ways that will encourage communication by vulnerable core role players and smooth the path to an amicable outcome. It could usefully have been stated, for example, that participants may not bring legal representatives and can remain for only limited parts of the proceedings specified by the court. To distinguish them more from mere witnesses they should not have needed a children's court's permission to address it in argument.

Aside from inadequate wording on the communication rights of participants s 58 is also vague on the criteria for granting persons participant status. The designation in para (f) of 'a person who the court decides has a sufficient interest in the matter' is so broad as to provide no real guidance. In para (e) 'a person whose rights may be affected by an order that may be made by the court in those proceedings' is also open-ended. In England a person who needs to defend himself against allegations that he maltreated the child may intervene in care proceedings without receiving full party status.[203] However, this has been circumscribed to include only cases where clarification about the truth of the allegations will assist in deciding whether the child is in need of alternative care or what form that care should take.[204] This is appropriate since it should not be possible for persons who have links to the proceedings to use them for their own ends and thus draw courts away from the primary task of deciding on the best care outcome for the child.

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[202] In subpart 7 it is usefully indicated that participants are subject to confidentiality and disclosure limitations. Such a rule should be applied to participants in our law.
[203] *Re S (Care: Residence: Intervener)* [1997] 1 FLR 497.
[204] *Re H (Care Proceedings: Intervener)* [2000] 1 FLR 775. For a general discussion see Lyon (2003) op cit note 130 at 297-98 para 7.36.

By indicating that the only automatic right for participants is that of presenting their personal evidence s 58 of the 2005 Act confuses between the concepts of witness and participant. The primary and automatic right of a participant ought instead to be that of addressing the court -further attendance and evidence related rights should be subject to court permission on a monitoring basis. If this approach were taken, children's courts would be better able to distinguish between mere witnesses and participants. The latter should be designated as persons who can make out a prima facie case that if they were permitted to do more than merely present their own personal evidence the relevant interests of the child in the case would be served.

Discretionary party status and participant status are inherently useful concepts. The extensive powers that go with automatic party status mark it as a blunt instrument of traditional adversarial litigation. In an era when alternatives such as ADR are becoming increasingly available and adversarialism needs to be controlled it will often be appropriate only for core attendees at care proceedings. It should of course be indicated in regulations that persons who lack automatic party status may apply for discretionary party status or, in the alternative, mere participant status.

4.4 Conclusion

It emerges in this chapter that it is crucially important for the children's courts to facilitate the presence of children who are able to directly participate meaningfully. The current widespread disregard of the importance of direct involvement and denial of sufficient access indicated by local data are a matter for concern. The children's courts fail significantly when measured against the criterion of hearing of the voices of children. As has been shown, the traditional protectionist argument against children's involvement at court does not take sufficient account of international research findings on the needs and capabilities of even vulnerable children.

South Africa's international convention responsibilities to hear children properly when significant decisions are to be made and include them fully in a rights culture also strengthen the case for a child participatory model as the ideal for our children's courts. Advances in technology which have increased the scope for sheltered participation methods have further eroded the protectionist position. Thus the assertion and strengthening of children's participatory rights in the 2005 Act is entirely appropriate.

Concerning how children should participate it has been shown that the 2005 Act takes our law forward in regard to the threshold aspects of instigating proceedings, party status and the right to attend at court. However, on substantive aspects which require detailed explication the Act emerges as less well formulated. The requirement in s 58 that children must seek permission from adjudicators before addressing them 'in argument' is an unnecessary technicality which clumsily inserts adversarial elements into what should be an entirely supportive relationship between adjudicators and children.

On children's interactions with other parties at hearings it has been shown that ss58, 60(2) and 61(1) of the 2005 Act all offer some protection by providing magistrates with wide powers to control questioning and remove persons from proceedings. However, the specified criteria of maturity and special needs are unfortunately not linked to one particularly sensitive form of evidence - that of expressing a preference about a future caregiver or form of care. The criterion of a child's willingness in s 61(1)(b) is inappropriate for this because of the general undesirability of children giving such evidence.

A serious weakness in the 2005 Act is insufficient reference to sheltered participation methods. Unfortunately, it refers expressly only to the use of intermediaries. Even here, the Act is too narrow because it provides merely a cross-reference to a criminal law provision designed to deal with very different situations. Appropriate grounds and a power for magistrates to order intermediary use *mero motu* have not been included. Given the vulnerability of many family members involved in care proceedings the sparse provision for sheltered methods is a major shortcoming.

On the difficult question of compelled as opposed to voluntary involvement of children it has been shown that mandatory attendance at court is occasionally necessary for care cases. Although an unfortunate inclusion of the word 'request' in s 57(1) of the 2005 Act causes some confusion a power for a magistrate to call and/or subject to cross-examination 'any person' in s 60(1) seems to include the child. This being so, it is unfortunate that although the factors of immaturity or special needs of children have appropriately been included as criteria for limiting voluntary participation, magistrates are not obliged to take them into account when deciding on the extent of compulsory participation.

It is apposite that s 10 of the 2005 Act expresses as a general principle that children in all situations affecting them have 'the right to participate in an appropriate way'. However, the failure in the more specific provisions which relate to children's court hearings to guard against the danger of children expressing outcomes preferences (and thus taking on a heavy responsibility), the inadequate attention to sheltered participation methods and the insufficiency of criteria for controlling the compulsion powers of adjudicators cumulatively raise a concern that children may in practice and despite s 10 be expected to participate inappropriately. This danger is likely to be great where specialist and well-trained presiding officers are not available.

Aside from the new provisions on child participation a second important change brought about by the 2005 Act is the creation of automatic party status in children's court cases for investigative welfare agencies. This is likely to result in greater liability for legal costs and damages. Reference to experience in other systems suggests that there may be a consequential shift towards a more constrained, legalistic approach in agency work. It has been suggested, however, that this problem is not insurmountable. Non-governmental agencies could be given an amended party status so that they appear merely as representatives of the state. Regulations are required both to counter legalistic reductions in services where children's court proceedings are in train and to ensure that state entities provide agencies with free legal representation. If these solutions are adopted party status

for welfare should enable it to be much more effective. Also, it might be possible to generate more higher court oversight because welfare would have not just the theoretical entitlement but also the actual resources to take matters on appeal or review. As has been suggested the advent of even limited higher court monitoring could be of great value in improving the quality of children's court work generally.

The proposal in this chapter that a child-participatory model is the ideal has important implications for rules governing allocation of party status to other private individuals. It is essential that a selective approach to some categories of applications by the latter be established. This would help to avoid overcrowded care hearings in which children feel intimidated and the concerns of adults at the periphery receive undue attention. The extreme vulnerability of many caregivers also indicates a need to limit involvement of satellite role-players. The criteria of effectively hearing of the voices of children and supporting caregivers thus indicate a gatekeeping approach. On the basis of this conclusion it has been argued that the 2005 Act is too accommodating of nonessential parties.

In relation to biological parents it has been shown with reference to approaches in other systems and our own constitutional jurisprudence that it is practicable to distinguish between different categories. It has been suggested that parents not currently entitled to either custody or contact should have to apply for party status. The same has been recommended for prospective foster or adoptive parents -and it has further been suggested that this category should be approached with caution since their motivation will often simply be to discredit rival caregivers.

A gap which currently exists in the 2005 Act is an absence of grounds for discretionary as opposed to automatic private party status. With reference to approaches in other systems it has been recommended that the primary ground should be substantial previous care for the child. This ought to be coupled with two further potentially exclusionary, secondary criteria. These should be a likelihood that abusive tendencies in

the applicant will not be shielded by available shelter participation resources or that the applicant will duplicate the position of a pre-existing party.

In the final part of this chapter the viability of distinguishing between full party and a lesser 'participant' status has been investigated. It has been noted that these categories are utilised in some foreign systems. It has been proposed that the distinction is potentially very useful. In care proceedings it allows for a compromise status between the extremes of full party and mere witness. It is therefore a valuable concept which can allow, for example, extended family members or prospective substitute carers to have a brief say in court rather than an ongoing presence that may crowd the proceedings.

Although the concept of participant has been included in s 58 of the 2005 Act, there are two deficiencies in its formulation. The core distinguishing right should not have been that of adducing evidence because this confuses with mere witnesses. Instead, it should have been that of addressing the court. Secondly, it is most unfortunate that in the Act there is a confusing overlap between parties and participants. Amendments to improve the blurred wording are thus urgently required.

It emerges from this chapter as a whole that the attempt in the 2005 Act to broaden and create different forms of direct participation will make significant new demands on children's court magistrates. And these demands are increased by the inadequacy of many of the relevant provisions. As has been shown some of the shortcomings require actual amendments rather than merely supplementary regulations. And just as noted with ADR in the previous chapter, for effectively managing communication at court magistrates will need appropriate training and the opportunity to specialise.[205] In the next chapter one possible means for their assistance -that of effective representation for parties- is considered.

[205] On the complexity of decision-making about participation in children's cases and knowledge consequently required of decision-makers see further Thomas & O' Kane (1998) op cit note 30 at 150; and Schofield (2004) op cit note 42 at 34.

CHAPTER 5
LEGAL REPRESENTATION: TOWARDS A RESOLUTION OF TWO FUNDAMENTAL PROBLEMS

5.1 Introduction

In chapters 3 and 4 the role of legal representatives in care proceedings has been briefly referred to.[1] These references suggest that involvement of lawyers may be either disadvantageous or beneficial, depending on the nature of their functioning[2] and this is supported by some local findings and observations.[3] The challenge, then, is how to ensure that the positive potential of lawyers is maximised so that they effectively assist parties, help to transmit knowledge of care law and in other ways contribute positively to a better functioning of our under-resourced system.

In this chapter an attempt is made to resolve two core problems which relate to effective utilisation of legal representatives in children's court care cases in South Africa. The first of these is the extent to which they should focus upon an assertion their clients' views and wishes or, alternatively, be able to disregard these in directly assisting courts to establish what is in the best interests of children who are the subject of proceedings. The second problem is how to make optimal use of state-appointed legal representatives.

These are clearly important issues in a system where available skills and finances are by no means abundant. In part 5.2 below our relevant law and also the limited South African data on the impact of lawyers are briefly considered. This discussion provides a context for the analysis which follows in parts 5.3 and 5.4. This analysis concerns, respectively, what should be the primary role of legal representatives and when and how they should be appointed at state cost.

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[1] See parts 3.4.2 & 4.3.1.
[2] See also R Sheehan *Magistrates' Decisionmaking in Child Protection Cases* (2001) at 189-90.
[3] For examples of valuable contributions made by lawyers in children's court cases see FN Zaal *Do Children Need Lawyers in the Children's Courts?* (1996) 47 & 53-57; and C Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* (1997) 54-55. For lawyers having a negative effect see part 5.2, below.

In part 5.3 it will be argued that in our system a mainly client-directed model is needed for lawyers. Their primary function should be to assist with communication in court. It will be contended that this is compatible with an overall paramountcy of the best interests of children. It is further proposed that it is only where a lawyer appears on behalf of a child who is not able to communicate relevant evidence that he should work in accordance with his own informed views concerning the best interests of the child. It will be suggested that the functions of legal representatives should be set out in a practice code for lawyers who appear in children's courts.

In part 5.4 a process for appointing legal representatives at state expense for indigent parties is proposed. It is recommended that discretionary guidelines rather than absolutely binding legislative grounds are required. It will be shown that an appropriate list of such guidelines can be formulated by drawing upon previous South African attempts and available local and international literature.

It will further be proposed that not only children but also other parties should be eligible to receive state funded legal representation in certain care cases. It will be suggested that in the absence of specialist screening officers at children's courts our family advocates are currently the best placed for making final decisions on who should receive subsidised representation. It will be shown that procedural mechanisms for this process need to be created.

5.2 An Overview of South African Law and Practice

The South African children's courts have for much of their existence been subject to the procedural rules of ordinary civil magistrates' courts on the appearance of lawyers although with an unspecified degree of discretion to make changes.[4] In the absence of

[4] Section 52(1) of the 2005 Act states in relevant part '[e]xcept as is otherwise provided in this Act, the provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and of the rules made in terms thereof as well as the rules made under the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), apply, with the necessary changes required by the context, to the children's court in so far as these provisions relate to-… (b) the appearance in court of advocates and attorneys'. Section 9(1)(a) of the Children's Act 33/1960

specific legislation or reported higher court precedent to the contrary, lawyers appearing in these courts have often been permitted to function in an unconstrained adversarial manner just as they would in other courts.[5] Local empirical findings and anecdotal evidence from practitioners suggests that the absence of guidance on how their role should be adapted has reduced the effectiveness of lawyers in the children's courts. They frequently confuse participants and waste time by attempting to import terminology and procedures that are relevant to other litigation with which they are more familiar.[6]

There is even evidence to suggest that, just as in other systems,[7] South African lawyers occasionally add to secondary, systemic abuse of children.[8] By overly aggressive behaviour and intrusive questioning they traumatise participants[9] and inflict damage on fragile family relationships.[10] They sometimes also make it more difficult for children's courts to discover the best alternative care solutions.[11] The lack of authoritative directions concerning functions of lawyers and more generally an absence of procedural guidelines indicating operational differences between children's courts and ordinary civil magistrates' courts have made it difficult for adjudicators to ensure that lawyers have a constructive

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and s 9(1) of the Child Care Act 74/1983 similarly applied the rules of civil magistrates courts, including those relating to lawyers, to children's courts.

[5] T-LD Wessels 'Representing Children at Court: a Lawyer's Perspective' (Visiting lecture, University of Durban-Westville, 20 Aug 2003). This was also the experience of attorney M Essack as he developed a specialist children's practice in KwaZulu-Natal: personal communication 6 Sept 2002.

[6] Earlier findings by Zaal (1996) op cit note 3 at 41 and Matthias (1997) op cit note 3 at 54 about the inappropriate work methods of some South African lawyers were corroborated by V Groenewald 'Representing Children in the Children's Courts' (Unpublished paper, Law Teacher' s Conference, Durban, 6 July 2000); and J Gallinetti 'Child Participation in South African Family Law and Child Welfare Proceedings' (Unpublished paper, 11th World Conference of the International Society of Family Law: Copenhagen and Oslo 2-7 August, 2002)UP accessed at <http://www.jus.uio.no/ifp/isfl>.

[7] See part 3.4.2, above.

[8] Zaal (1996) op cit note 3 at 41 and Matthias (1997) op cit note 3 at 54; Groenewald (2000) supra note 6; Gallinetti (2002) supra note 6.

[9] See Loffell as cited in part 4.3.1, above.

[10] As noted by BA Green & AR Appell 'Representing Children in Families -Foreword' (2006) 6 *Nevada LJ* 571 at 582 it is essential that lawyers appreciate the need for children to maintain connections with their families and work to strengthen rather than weaken these.

[11] Zaal (1996) op cit note 3 at 45-46; Matthias (1997) op cit note 3 at 54. DS Rothman 'The Need for Legal Representation for Children in Children's Court Proceedings -Fact or Phobia?' (2001) 4 *The Judicial Officer* 4 at 8 has gone so far as to state that it 'has been the personal experience of many commissioners' that where lawyers appear in children's court proceedings they sometimes 'impact negatively on the interests of the child concerned'.

influence.[12] And instances even appear to have occurred where lawyers encouraged adjudicators to make inappropriate procedural rulings.[13]

The ineffectiveness of some commissioners in interacting with lawyers -and particularly in failing to curb extreme manifestations of win-at-all-costs tactics- may also in part be due to unfamiliarity. Having a lawyer appear in a children's court case is something of a rarity in South Africa. Although only limited data is available, there are findings which suggest that relatively few litigants have had legal representation at children's court hearings[14] -and this is of course consistent with worldwide trends indicating that most families involved in care cases are too impoverished to afford lawyers.[15]

For child parties specifically, prior to the promulgation of the final Constitution in Act 108 of 1996 there was no provision for state funding of the costs of lawyers.[16] However, in s 28(1)(h) of the Constitution it is stated that every child has the right 'to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result'.[17] This is clearly wide enough to include children's court proceedings and it rendered South African

[12] Matthias ibid cited social worker-respondents who observed commissioners allowing lawyers to behave inappropriately at children's court hearings. See also the findings of Zaal ibid at 46.
[13] Dr J Loffell (of the Johannesburg Child Welfare Society) stated that she had on many occasions served as the investigative social worker in cases where commissioners deferred unduly to aggressive lawyers: personal communication, 1 Aug 2002. L Dhabicharan (assistant-director of Childline, Durban) described involvement in a case where, at the insistence of a lawyer who complained about overcrowding, the commissioner ordered the departure of an experienced investigative agency social worker, leaving only her colleague who was doing her first case in court: personal communication 20 Sept 2002.
[14] Zaal (1996) op cit note 3 at 37-38 found that lawyers only appeared in approximately 0.4% of all cases in rural jurisdictions and in about 5% of cases in urban jurisdictions. Findings by Matthias (1997) op cit note 3 at 53 also indicated that lawyers rarely appeared in children's courts, especially where black families were involved. In 2003 a legal aid justice centre director noted that hardly any lawyers were appearing in the Verulam, Phoenix, Kwa-mashu and Ndwedwe jurisdictions in KwaZulu-Natal: F Bacus, personal communication 4 April 2003. Legal aid justice centre attorney R Govender, based on her experience in 13 rural children's court jurisdictions in Mpumalanga province, stated that legal representatives almost never appear in these: personal communication 1 Jun 2005.
[15] On poverty see part 1.2, above.
[16] General legal aid provisions were contained the Legal Aid Act 22/1969, but they afforded no particular priority to children or children's court matters.
[17] For a general analysis of the wording of s 28(1)(h) with reference to all types of civil proceedings and in the light of international instruments to which South Africa is a signatory see J Sloth-Nielsen 'Children' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2005) 507 at 535.

research data suggesting that children were rarely represented in these a matter for concern amongst the legislature. An amendment of the 1983 Act was promulgated in 1996. A new s 8A was worded to provide expressly for the possibility of either private or state-appointed legal representatives appearing on behalf of children in children's court hearings.[18] Relevant aspects of this provision will be discussed below.

In relation to private legal representatives paid for by parents, s 8A(3) allowed rather broadly for a children's court to approve the appointment of a child's legal representative by a parent 'should the children's court consider it to be in the best interests of such child'. Van Heerden noted that '[t]his provision flies in the face of expressed concerns about the potential for a conflict of interest, where parents (who may be in a position akin to that of defendants in a removal inquiry) are empowered to appoint a legal representative for the child'.[19]

The wording on appointment of lawyers for children by the state was equally unsatisfactory.[20] Section 8A(4) determined that '[a] children's court may, at the commencement of a proceeding or at any stage of a proceeding, order that legal representation be provided for a child at the expense of the state, should the children's court consider it to be in the best interest of such child'. It was subsequently recognised that the best interest criterion was too vague. Section 8A(4) was supplemented in 1998 by a much more detailed set of sub-grounds. These were provided in a new reg 4A(1) published in terms of the 1983 Act.[21] It reads as follows:

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[18] Section 8A was inserted by s 2 of the Child Care Amendment Act 96/1996.

[19] B Van Heerden 'Judicial Interference with the Parental Power: The Protection of Children' in B Van Heerden, A Cockrell & R Keightly et al *Boberg's Law of Persons and the Family* (1999) 497 at 619 N408. Groenewald (2000) supra note 6 cited an unreported case where a lawyer appointed to represent a child by his father advised the child not to speak to the investigative social worker and encouraged the child to say at court that he wanted to remain with his father when in fact he was uncertain about this.

[20] For criticisms of s 8A see further J Sloth-Nielsen & B Van Heerden 'The Child Care Amendment Act 1996: Does It Improve Children's Rights in South Africa?' (1996) 12 *SAJHR* 649 at 650; FN Zaal 'When Should Children Be Legally Represented in Care Proceedings? An Application of Section 28(1)(h) of the 1996 Constitution' (1997) 114 *SALJ* 334 at 335-36; and the South African Law Commission *Review of the Child Care Act* (Discussion Paper 103, Project 110, 2001) vol 1, pp 96-98.

[21] Child Care Act 74/1983 Amended Regulations (Government Notice R 416, *Government Gazette* 18,770 of 31 March 1998).

'Legal representation

(1) Legal representation at the expense of the state shall be provided for a child who is involved in any proceedings under the Act, in terms of section 8A(5) of the Act, in the following circumstances:

(a) Where it is requested by the child who is capable of understanding;

(b) where it is recommended in a report by a social worker or an accredited social worker;

(c) where any other party besides the child will be legally represented in the proceedings;

(d) where it appears or is alleged that the child has been physically, emotionally or sexually assaulted, ill treated or abused;

(e) where the child, a parent or guardian, a person in whose custody the child was immediately before the commencement of the proceedings, a foster parent or proposed foster parent, or an adoptive or proposed adoptive parent contests the placement recommendation of a social worker or of an accredited social worker who has furnished a report contemplated in section 14(2) of the Act or regulation 8(2), as the case may be;

(f) where two or more persons are each contesting in separate proceedings for the placement of the child in their custody;

(g)where the child is capable of understanding the nature and content of the proceedings, but differences in language used by the court and the child prevent direct communication between the court and the child, a legal representative who speaks both the languages must, subject to paragraph (h), be provided;

(h) where a legal representative contemplated in paragraph (g) can not be provided, an alternative arrangement should be made, including the provision of an interpreter for the child;

(i) where there is reason to believe that any party to the proceedings or any witness intends to give false evidence or to withhold the truth from the court; and

(j) in any other situation where it appears that the child will benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcome for the child.'

As can be seen reg 4A(1) provides a relatively detailed set of grounds. It is clearly based on a view that legal representation should be available at state expense in a wide variety of children's court proceedings. However, its breadth and mandatory wording raised concerns that it might prove to be costly to implement.[22] Rothman criticised the degree of detail as 'draconian' and as indicative of 'an unrealistic and almost phobic approach'.[23]

However, other commentators expressed the contrary view that the regulations should be broadened further to assist as many children as possible.[24] In line with this, clause 78(5) of the South African law commission's 2002 draft Children's Bill proposed that the grounds be widened to allow any child to obtain legal representation simply by making a request for this. A power for a court to terminate the services of a child's

[22] Rothman (2001) op cit note 11 at 4 & 8 argued that if the grounds contained in s 8A and reg 4A(1) were implemented this would lead to lawyers being employed in cases where they were not needed.

[23] Ibid at 4.

[24] J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 *SAJHR* 401 at 410-11; Van Heerden (1999) op cit note 19 at 618.

privately appointed legal representative who 'does not serve the interests of the child in the matter or serves the interests of any other party' was recommended in clause 78(2)(b).[25]

Additional proposals were contained in clause 77 of the 2002 draft Bill. This recommended that not merely a child but any impoverished party should be entitled to apply for state funded legal representation.[26] And with a view to ensuring representation of sufficient quality it was suggested that it should be provided either by a family advocate or a lawyer drawn from a select list of names on a 'Family Law Roster'.[27]

In a climate of financial restraint and conflicting opinions by commentators it is perhaps not surprising that neither s 8A nor reg 4A were ever implemented. Legal aid justice centres nevertheless began to provide free legal representation for children in some children's court care cases. A survey by Gallinetti revealed that, since there were no rules to guide their services, they achieved only a 'disjointed and inconsistent application' of their child representation goals.[28] According to Rothman the lack of guidance has also caused commissioners to refer cases for state representation haphazardly. They have used such criteria as whether court time might be saved and to obtain the benefit of legal argument.[29]

Since justice centres employ their own full-time lawyers these have often been used to replace the private lawyers who were previously occasionally appointed for legal aid cases. The quality of services provided for children by justice centre lawyers has sometimes been less than ideal.[30] It appears that one reason for this is that many centres undertake mainly criminal law work.[31] Many of their lawyers therefore remain

[25] A state funded lawyer would then have to be appointed as a substitute -see clause 78(5)(g).
[26] Clause 77(2).
[27] Subclauses 77(2)(a)-(b).
[28] Gallinetti (2002) supra note 6. Similar observations were made by Groenewald (2000) supra note 6, Bacus (2003) supra note 14; and Govender (2005) supra note 14.
[29] Rothman (2001) op cit note 11 at 7-8.
[30] This view as expressed by Wessels (2003) supra note 5 was unanimously endorsed by a group of eight practitioners who attended her seminar. These included an attorney, two children's court commissioners, two prosecutors and three social workers who all had experience in the children's courts.
[31] Gallinetti (2002) supra note 6; and K Mehta (director of the Pinetown justice centre) -personal communication 7 Aug 2003.

inexperienced in children's court representation.[32] It has been alleged that in some cases this is exacerbated because centres change representatives partway through cases.[33] It has even been have claimed that the standard of services provided by some justice centres has been so poor that children's court commissioners who previously referred matters for legal aid ceased to do so.[34]

Despite the ongoing need for direction, in the 2005 Act there is little reference to legal representation. The use of ordinary civil magistrates' court rules as a primary guide for children's court appearances has been continued in s 52(1)(b).[35] In s 54 appears a simple restatement of the common law as follows: '[a] person who is a party in a matter before a children's court is entitled to appoint a legal practitioner of his or her own choice at his or her own expense'. This is supplemented by s 55 which reads as follows:

> '(1) Where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board referred to in s 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969).
> (2)The Board must deal with a matter referred to in subsection (1) in accordance with section 3B of that Act, read with the changes required by the context.'

Although this wording expressly allows for legal aid lawyers to appear on behalf of children, just as in s 8A of the 1983 Act insufficient guidance is provided on when this should occur. This is because of the utilization, once again, of the vague best interests ground.[36] As can be seen, despite the proposal in clause 22 of the law commission Bill there is also no provision for parties who are not children to receive representation.

It is clear that the 2005 Act will need supplementing. Firstly, given the rather mixed track record of the few lawyers who have appeared in recent years, s 52 requires additional wording indicative of the main orientation and functions of legal representatives in the children's courts. And in relation to ss 54-55 more clarity is needed on when children

[32] Wessels (2003) supra note 5.
[33] Ibid.
[34] Commissioner A Vermooten: personal communication 20 Aug 2003.
[35] See note 4, above.
[36] As will be remembered it was noted in part 1.3.2 above that where the best interests ground stands alone it may invite dangerously simplistic interpretations.

have a right to representation at state expense. Because of the vulnerability of many caregivers it is also essential that criteria be created to enable other parties besides children to receive such representation. The absence of any reference in the 2005 Act to selection, training and accreditation of South African lawyers for children's court work leaves further gaps.

As a first step towards developing the more detailed guidance which is needed it is necessary to ascertain what kind of assistance lawyers ought to provide. This requires an analysis of what their primary roles should be. Such an analysis is provided, below.

5.3 A Determination of the Primary Functions of Legal Representatives

In relation to lawyers appointed to represent children who are involved in domestic litigation generally, a fundamental question which has been debated in the last decade -and particularly in North American systems- is whether they should assert what is in the best interests of their clients or else only what their clients want conveyed.[37] This distinction is of importance in care cases.[38] What a lawyer comes to believe is in the best interests of a child-client who is under consideration for alternative care may be very different from what that child wishes to have communicated or even achieved in the court proceedings. A key question in this situation is whether the lawyer should assert best interests according to her own subjectively informed views, or else remain within a client-directed brief.

One solution to this dilemma is a combined approach with children's lawyers expected both to see that their clients' voices are properly heard and that what is in their

[37] BJ Berenberg 'Attorneys for Children in Abuse and Neglect Proceedings: Implications for Professional Ethics and Pending Cases' (2006) 36 *New Mexico LR* 533; M Sobie 'The Child Client: Representing Children in Child Protective Proceedings' (2006) 22 *Touro LR* 745. For a review of the literature up to 2005 see BA Atwood 'Representing Children: the Ongoing Search for Clear and Workable Standards' (2005) 19 *Journal of the American Academy of Matrimonial Lawyers* 183, at 184 N2-N3. Some subsequent commentaries are included in (2006) 6 *Nevada LJ* -'Special Issue on Legal Representation of Children'. This contains contributions and conclusions from an important conference of academics and practitioners on representation of children. It was held in January 2006 at the University of Nevada and is hereafter referred to as the 'Nevada Conference'.

[38] See generally DN Duquette 'Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required' (2000) 34 *Family LQ* 441.

best interests is fully asserted in court.[39] As Atwood has noted, however, experience has begun to indicate that this hybrid approach is impracticable because it requires lawyers to undertake what are often contradictory functions.[40]

In South Africa the significance of the distinction between the best interests and client-directed approaches to representation and the potential for conflict between these appears to have been recognised by only a few practitioners.[41] This is understandable given that legal representatives appear on behalf of children so rarely. In divorce cases, the high court has in some instances concluded that a child may need a separate lawyer to help her express her views even when there is a lawyer available to assist in establishing what is in the best interests of the child.[42] Although it is to be hoped that the children's courts will also benefit from direction from the high court, this would not obviate the need for comprehensive practice regulations.[43]

A strong case can be made for the proposed regulations to direct that lawyers must primarily assert the wishes of young clients who are able to express these. Since s 28(2) of our Constitution states that the best interests of children must be paramount in any situation affecting them, conveying a child's position and version of events should be seen as her own lawyer's contribution to what is in her best interests. By doing this, such a lawyer certainly contributes to the child's sense of empowerment as a human being with

[39] For further explication see Atwood (2005) op cit note 37 at 205, 207 & 214-15.
[40] Ibid, at 221-22.
[41] An exception is the University of Cape Town legal aid clinic. Lawyers in this clinic who specialised in children's court work experimented with both best interests and client directed approaches in the late 1990s. They concluded that the latter was better for children who could communicate because of the importance of ensuring that the voices of even the very young were properly heard in court: Groenewald (2000) supra note 6. In its review of the 1983 Act the South African law commission similarly concluded that lawyers who represent children should 'come to court prepared and able to present the hopes and wishes of the child-client (genuine child advocacy) as opposed to merely conveying… what certain adult persons feel is best for the child': see *Review of the Child Care Act* (2001) op cit note 20 at vol 5, p1196.
[42] *Soller NO v G and Another* 2003 (5) SA 430 (W); *Van Niekerk v Van Niekerk* Case No 20880/2002, 22 June 2004 (TPD, unreported); and *Reardon v M* Case No 5493/02, 27 February 2004 (DCLD, unreported).
[43] It has been recognised in the USA that lawyers need more than ad hoc court guidance on their functions. A number of professional bodies have produced draft versions of practice codes which differ somewhat and are being debated in the USA. For evaluations of these see Duquette (2000) op cit note 38 at 450-51; and Atwood (2005) op cit note 37 at 209-19.

important participatory rights.[44] He also helps to ensure that the court has sufficiently complete information.

Blinn, in arguing strongly that an especially important function of children's lawyers is 'giving their stories a voice in proceedings,'[45] has given examples of cases in which gravely wrong solutions were adopted simply because the child's version of events was not strongly enough asserted.[46] She argues that it is now obvious that in many cases 'the child's own perspective' must be effectively conveyed to courts and that in some instances children need their own personal legal representatives to assist with this.[47]

There is merit in the argument that lawyers generally do not have the capability to independently assess a child's welfare needs sufficiently to assert her best interests accurately and without any subjective bias.[48] Conveying the evidence and views of their clients is far more in accordance with their training. Where courts are clearly aware that this is their function there will surely be little danger of adjudicators being misled rather than assisted by child advocates.[49]

The task of providing an objective assertion of what is in the best interests of the child should be that of welfare. With the 2005 Act having now provided party status to agencies they will have the power to appoint their own lawyer if one is needed to assist them in doing so.[50] The constitutional court has recognised that best interests representatives can play an important role. In *Du Toit and Another v Minister of Welfare and Population Development and Others* in the context of adoption and with reference to s28(1)(h) of the Constitution Skweyiya AJ stated *obiter* '[i]n matters where the interests of

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[44] KH Federle 'The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client' (1996) 64 *Fordham LR* 1655 at 1695-96.
[45] BA Blinn 'Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights' (2004) 61 *Washington and Lee LR* 789 at 794.
[46] Ibid at 790-94.
[47] Ibid at 822.
[48] Duquette (2000) op cit note 38 at 458 warned that lawyers may simply substitute their own personal prejudices as a criterion of what is in the best interests of the child. See further Atwood (2005) op cit note 37 at 209.
[49] On this danger otherwise see the problem of commissioners being misled noted in part 5.2, above. See also part 3.4.2, above.
[50] See part 4.3.1, above.

children are at stake, it is important that their interests are fully aired before the court so as to avoid substantial injustice to them and possibly others'.[51] Also, as will be further discussed in the next chapter,[52] if the role of children's court adjudicators is defined as inquisitorial rather than accusatorial they themselves will be able to elicit evidence to establish what is in the child's best interests.[53]

In accordance with the criterion of hearing the voices of children it may be recommended that a South African practice code is required. It should direct that, if a child is willing and mature enough, facilitating her communication of relevant information is the task of any lawyer appointed to represent her.[54] In support of this it may be noted that the majority view at the Nevada Conference was that children's lawyers should wherever possible be client- rather than best interests-directed.[55]

It has been noted in the previous chapter that one of the most important reasons for facilitating children's participation is to provide them with a sense of empowerment.[56] Another finding at the Nevada Conference was that when children's lawyers function appropriately they can contribute to this.[57] In line with the conclusions reached at the Conference it would be useful to indicate in the proposed code that support by their lawyers for children's participation should not only be through the three traditional means of leading evidence, challenging opposing versions of other parties and advocacy. It should

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[51] 2003 (2) SA 198 (CC) at 201 paras F-G.
[52] See generally part 6.3.
[53] P Parkinson 'The Child Participation Principle in Child Protection Law in New South Wales' (2001) 9 *International Journal of Children's Rights* 259 at 268 argued that the best approach is one in which welfare supplemented by 'the independent scrutiny of the Court' establish what is in the child's best interests.
[54] See r 1.14(a) of the American Bar Association (hereafter, 'ABA') *Model Rules of Professional Conduct* (2006 ed) <http:// www. abanet.org/ cpr/ mrpc/rule_1_14.html>. See also the ABA comment 1 to this rule at <http://www.abanet.org/cpr/mrpc/rule_1_14_comm.html>; and standard B-4 of the ABA *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996) <http://www.abanet.org/child/repstandwhole.pdf>.
[55] Green & Appell (2006) op cit note 10 at 583-84.
[56] See part 4.2.2, above.
[57] Green & Appell (2006) op cit note 10 at 578 recorded that '[c]hildren need lawyers not simply to promote fair processes and outcomes, but to promote children's autonomy -their right and need to have a say in what happens to them and in legal proceedings'.

be stressed that a crucial function is first to establish whether the child wishes to participate.[58]

Discovering a child's participation needs requires a relationship of trust.[59] Except in emergencies where there is no time a child's lawyer should be expressly directed to establish such a relationship prior to proceedings.[60] During this pre-hearing stage the lawyer must ascertain whether the child would prefer not to attend court at all or needs to use a specific sheltered participation method at proceedings. It would be useful for drafters of the proposed code to consult the ABA's detailed recommendations on how precisely legal representatives should strike a balance between advising and listening to child clients when preparing for court. [61]

However, there should be two ethical limitations on the principle of client direction. Firstly, despite being open to the child's expression of views and fully available to assist in her provision of evidence, her representative must be careful not to pressure her into feeling that she must take responsibility for making choices about the outcome. As noted in the previous chapter this will often be inappropriate in care cases[62] -and the lawyer must therefore consistently remind the child that it is the burden of the court to decide. Secondly, if during consultations the child discloses new information indicating a substantial danger of injury or death to herself or another person, her representative should be immediately obliged to disclose such confidences to the court.[63] The proposed code should state that a child's representative must endeavour to explain this exception to attorney-client confidence at the first pre-hearing interview with her.

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[58] Ibid.
[59] Groenewald (2000) supra note 6.
[60] It has been alleged that legal aid lawyers in South Africa sometimes meet child-clients for the first time at court on the day that proceedings commence: Wessels (2003) supra note 5; and Vermooten (2003) supra note 34. On the importance of the lawyer engaging with the child beforehand see Green & Appell (2006) op cit note 10 at 581.
[61] See the ABA provisions cited in note 54 above. As just one example of wording which could be considered, the ABA comment to standard B-4 in its *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996) loc cit, at p4 includes the following useful suggestion: '[t]he lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings'.
[62] See part 4.2.4, above.
[63] See Atwood (2005) op cit note 37 at 217.

Although a client-directed model has been recommended for children who can communicate it is not suggested that their lawyers should never assert best interests because the two positions sometimes converge.[64] In other cases where a child's lawyer reaches a conclusion that she is not able to give instructions or convey evidence this must be conveyed to the court at the outset of proceedings. In such a case legal representation can only be on the basis of assisting the court to establish what is in the best interests of the child.[65] In view of the dangers of subjectivity and limitations of lawyers' training as referred to earlier, in these matters a lawyer will need the assistance of a welfare expert such as a social worker.[66]

Turning to legal representation of adult family members, it is of concern that, as noted in part 5.2, even less attention has been devoted to this in South Africa than to representation of children. In considering whether directions covering adult clients should be included in the proposed code the vulnerability of many caregivers and the criterion requiring that their voices be properly heard need to be kept in mind. It is arguable that just as with children there is a need to indicate expressly that an entirely client directed approach must be followed if an adult client has sufficient ability to communicate.

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[64] As noted by N Thomas & C O'Kane 'When Children's Wishes and Feelings Clash with Their "Best Interests" ' (1998) 6 *International Journal of Children's Rights* 137 at 151 this occurs where it is possible to contend that what a child wants is in her best interests. They refer to an example of a girl with terminal cancer. As they point out, her wish to spend her last few months with a mother who suffered from agoraphobia was arguably more in her best interests than immediately being removed to a distant institution as proposed by welfare.

[65] South African wording could be along similar lines to s 99 of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, Australia. Subsection 99(2) of this Act describes the role of a child's lawyer at court as follows:
'(a) ensuring that the views of the child or young person are placed before the Children's Court, and
(b) ensuring that all relevant evidence is adduced and, where necessary, tested, and
(c) acting on the instructions of the child or young person or, if the child or young person is incapable of giving instructions:
(i) acting as a separate representative for the child or young person, or
(ii) acting on the instructions of the guardian ad litem.'
Subsection 99(3) establishes a rebuttable presumption that any child of at least ten years old 'is capable of giving proper instructions to his or her legal representative. This presumption is not rebutted only because a child or young person has a disability' -accessed at <http://www.austlii.edu.au/au/legis/nsw>.

[66] Since the investigating agency will be an opposing party such social worker could not be one employed by it. On the importance of children's lawyers knowing when to collaborate with professionals from other disciplines see Green & Appell (2006) op cit note 10 at 581.

Where factors such as stress induced by spousal abuse, a fear of losing one's child, low intellectual capability or dependence upon drugs or alcohol are present in adult clients, the temptation to substitute what the lawyer sees as best may be just as strong as where children are represented. [67] Therefore, role-directions along similar lines to those proposed above for child-clients would be valuable in guiding lawyers.[68] Generally the approach in South Africa should be that the factor of client vulnerability ought to be treated as a possibility, regardless of whether adult or younger private parties are to be represented in children's court care proceedings. Even a duty to disclose a substantial danger of injury or death to any person as proposed above for children's representatives seems appropriate for lawyers representing adult clients in care cases.[69]

A final point regarding the proposed code concerns scope of work. As has been noted in chapter 3,[70] under the 2005 Act there will be substantial reliance upon ADR in many care cases. Experience in other systems indicates that this requires the role of lawyers to be extended.[71] In many cases supporting clients during ADR becomes just as important as assisting them at court.[72] This will tend not to involve a lawyer appearing directly at ADR processes -but rather preparing clients before, and advising them afterwards on whether to sign agreements reached. As in other countries where ADR has become prominent, South African lawyers will need to develop what are commonly termed 'collaborative and cooperative law practices' geared to supporting clients involved

[67] Blinn (2004) op cit note 45 at 832 has pointed out that in care cases the client-competency issues which lawyers must take into account are not substantially different between older children and the adult parties typically involved.

[68] It was found necessary in the ABA *Model Rules of Professional Conduct* (2006 ed) supra note 54 to direct expressly in r 1.14 (a) that where clients have diminished responsibility or capacity lawyers should in all types of cases 'as far as reasonably possible, maintain a normal client-lawyer relationship with the client.' Again, in terms of possible wording for a South African code, valuable guidance on how lawyers should interact with and represent vulnerable adult clients can be drawn from the ABA commentary to this rule: see supra note 54.

[69] R Lindley, M Richards & P Freeman 'Advice and Advocacy for Parents in Child Protection Cases-What Is Happening in Current Practice?' (2001) 13 *Child and Family LQ* 167 at 189 proposed that represention of adult clients must be subject to not increasing dangers for children. Atwood (2005) op cit note 37 at 207 suggests more broadly that lawyers ought to disclose a substantial likelihood of harm to the client or anyone else.

[70] See part 3.6.

[71] See G Firestone & J Weinstein 'In the Best Interests of Children: a Proposal to Transform the Adversarial System' (2004) 42 *Family Court Review* 203 at 213.

[72] Based on research in Australia Sheehan (2001) op cit note 2 at 189-90 found that in some cases appropriate legal representation could significantly improve the chances of achieving a successful ADR outcome.

in ADR rather than merely encouraging adversarial confrontations in court.[73] As part of guidance on their functions some direction on the ADR support to be provided by lawyers should therefore be included in the proposed practice code.

5.4 Criteria and a Process for the Allocation of State-Appointed Representatives

Even in developed systems with substantial resources there is no absolute rule that the state must provide legal representation for all indigent parties in care cases. In Canada, for example, poor parents have sometimes been denied legal aid.[74] This also happens in the US.[75] There the supreme court has expressly held that there is no absolute right for parents to be funded[76] and children are often unrepresented.[77] In England in *In re G., S. and M. (Wasted Costs)* it was held that the seriousness of the risk of losing their children entails that parents ought to be provided with proper representation by the state[78] but for children, although a guardian ad litem will be appointed, it is usually considered that a legal representative is not also required.[79] The tandem system of guardians ad litem who can be supplemented by state appointed lawyers is used in some developed systems. It is not recommended as a standard approach for South Africa, however, because paying for both a guardian and also a lawyer would be prohibitively expensive.[80]

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[73] Firestone & Weinstein (2004) op cit note 71 at 213.

[74] This was noted with disapproval by Claire L' Heureux-Dube`J in *New Brunswick (Minister of Health and Community Services) v G.J.* (1999), 177 D.L.R. (4th) 124, at 169. Subsequently, rates of representation were somewhat increased: see N Bala and R Jaremko 'Canada: Non-marital Unions, Finality of Separation Agreements and Children's Issues' in A Bainham (ed) *The International Survey of Family Law* (2002) 109 at 129.

[75] H O'Donnell 'What's Wrong with the Picture: the Other Side of Representing Parents in Child Protection Cases' (2005) 4 *Appalachian Journal of Law* 73 at 87.

[76] *Lassiter v Department of Social Services of Durham County, N.C.* 452 U.S. 18 (1981) at 33; *Santosky v Kramer* 455 U.S. 745 (1982) at 753.

[77] According to TB Harding 'Involuntary Termination of Parental Rights: Reform Is Needed' (2000-2001) 39 *Brandeis LJ* 895 at 907 the US supreme court has avoided opportunities to rule on whether children should be entitled to representation. Duquette (2000) op cit note 38 at 441 pointed out that some US states fund the costs of children's representatives where abuse or neglect is alleged. However, Blinn (2004) op cit note 45 at 829 mentioned that the overall situation is one in which US states rarely provide counsel for children in proceedings to terminate parental rights.

[78] [2000] 1 FLR 52 at 60.

[79] CM Lyon 'Child Protection in the Civil Law' in K Wilson & A James (eds) *The Child Protection Handbook* (2002) 191 at 225.

[80] Even in Germany and England with their far greater resources there have been difficulties because of the expensiveness of the tandem system: see M Stötzel & JM Fegert 'The Representation of the Legal Interests of Children and Adolescents in Germany: A Study of the Children's Guardian from a Child's Perspective' (2006)

In South Africa since the numbers of appropriately skilled legal representatives and available state funds are likely to remain limited for the foreseeable future criteria and procedures for the appointment of lawyers at government expense must also not produce an uncontrollable explosion of large numbers of applications. In the next two subparts below proposals for a cost-effective system are made. Firstly, guidelines for deciding applications are considered. Secondly, procedures for appointing suitable representatives are recommended.

5.4.1 Allocation Guidelines

The high stakes for private parties in care cases are sometimes put forward as a ground for subsidised representation.[81] There have also been suggestions that certain types of case can be singled out as particularly serious.[82] However, such delineation is problematic because it is well arguable that all care cases have serious consequences.[83] State subsidisation for legal representation in care cases is inherently expensive,

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20 *International Journal of Law, Policy and the Family* 201 especially at 221-222; and C Blacklaws & S Dowding 'The Representation of Children: From Aspiration to Extinction?' (2006) 36 *Family Law* 777 at 778-79. It may not be a particularly effective system either. O'Donnell (2005) op cit note 75 at 82 claims on the basis of US experience that guardians ad litem have proved relatively ineffective.

[81] BG Fines, RE Oliphant & N Ver Steegh 'Termination of Parental Rights: Case Law Development' (2006) <http//www.lawprofessors.typepad.com/family_law/termination_of_parental_rights/index.> discuss the case of *Walker v Walker* 2006 Del. Lexis 81 (Feb 9, 2006). In this case the supreme court of Delaware held that indigent parents have a right to apply for state-financed legal representation in termination of parental rights cases because of the degree of jeopardy to them. For a similar approach in England see the text accompanying note 78, above. Gallinetti (2002) supra note 6 proposed that in South Africa children should be considered for free legal representation where removal from their families is a likely outcome. Sloth Nielsen (2005) op cit note 17 at 535 suggested more generally that in our system 'the likely impact of any decision on the day-to-day life of the child –such as… the placing of a child in residential care (for example, in an industrial school)– should play a weighty role in any decision as to whether legal representation is required'.

[82] M Ells, RB O'Neill & V Weise *et al* 'Unravelling the Labyrinth: A Proposed Revision of the Nebraska Juvenile Code' (2004) 82 *Nebraska LR* 1126 at 1157 suggested that where applications are made to have children locked up in secure care representation for them is essential. For a similar view see E Pitchal 'Children's Constitutional Right to Counsel in Dependency Cases' (2006) 15 *Temple Political and Civil Rights LR* 663 at 670-71. As noted in part 1.3.2 above, it is recommended in art 48 of the UN Guidelines, 2007 that parents be provided with legal representation where they do not agree to removal of their children.

[83] As stated by MJ Mossman '*New Brunswick (Minister of Health and Community Services) v. G.J.*: Constitutional Requirements for Legal Representation in Child Protection Matters' (2000) 112 *Canadian Journal of Women and Law* 490 at 503 the interests at stake in child protection proceedings are always significant.

particularly if lawyers are to be reasonably compensated.[84] Since it is therefore not possible to afford subsidised representation in all or even a high proportion of cases in South Africa it is impracticable to propose seriousness as a legal ground.

As has been illustrated by the non implementation of reg 4A of the 1983 Act having any grounds at all may be too expensive.[85] Grounds are potentially costly, simply because they are binding. As soon as a first wave of applications is granted these establish precedents strengthening the claims of later parties for state-financed representation. The result is a snowball effect in which the numbers of claims which cannot be denied increases over time. It therefore appears that non-binding guidelines rather than actual grounds are required.

In the *Grootboom* case the constitutional court made it clear that, despite the paramountcy of the best interests principle, the claims of vulnerable persons (including children) may be interpreted with reference to resource constraints that require the state to follow an ordered plan for gradual upliftment of the population.[86] In line with this approach, practicable guidelines for the children's courts should permit control over the numbers of cases in which subsidised representation is provided.

To facilitate cost effectiveness the proposed guidelines must deliver competent representation and only for the worst affected persons. They must target impoverished parties whom lawyers can assist to make a significant participatory contribution. They must be parties who are constrained from doing so by themselves because of an impediment beyond their control. This group can be further narrowed to parties whose contributions would relate to the existence of grounds for mandatory alternative care

[84] Experience in some systems has shown that inadequate rates of pay reduce the quality of legal representation both directly and by preventing appeals. See O'Donnell (2005) op cit note 75 at 86; and Blacklaws & Dowding (2006) op cit note 80 especially at 778-79.
[85] See part 5.2, above. Since its publication in 1996 it has never been implemented due to cost concerns. According to commissioner P Booysen there has been a long-standing disagreement between the department of justice and constitutional development and the department of social development about who would have to budget for legal representation in terms of it**:** personal communication 12 Sept 2006.
[86] 2000 (11) BCLR 1169 (CC) at 1203D-F, 1205A&G-H. On *Grootboom* see also part 1.2, above.

measures and/or what these should be.[87] The impediment must be one which cannot reasonably be overcome by measures other than representation -such as the use of sheltered participation methods or the magistrate assisting with questioning.[88] Suitable guidelines would thus facilitate participation by a select group of severely disadvantaged parties where other means will not suffice.

Unless such guidelines are provided, when the 2005 Act is fully implemented the current unsatisfactory situation will simply continue. The only available direction will be the best interests ground in s 55 of the Act and the equally broad substantial injustice ground in s 28(1)(h) of the Constitution. As noted in part 1.3.2 above the best interests criterion is inherently vague. If not clarified it may therefore conduce to wastage of our scarce representation resources.[89] What is meant by substantial injustice specifically in care cases is also unclear because it has not yet been authoritatively decided in South Africa -something which in any event would be difficult to do comprehensively. Rothman has argued that it should be interpreted to mean only a significant degree of unfairness likely to be experienced by a child during children's court proceedings.[90] However, it would be unfortunate if such a narrow interpretation were to be adopted. Substantial injustice in relation to the outcome should not be excluded.

On the right to have a state-financed legal representative in a criminal matter it was held in *Legal Aid Board v Msila* that whether a person has the ability to represent himself and the potential outcome of the case were both relevant considerations.[91] It may be suggested that in care cases a party's ability to express himself in relation, inter alia, to a proposed outcome should be relevant. Sloth-Nielsen has commented that, whilst it is commendable that the courts have begun to grapple with the application of s 28(1)(h), in

[87] Thus, for example, a parent's wish to resist potentially damaging children's court findings because these might open the way for a subsequent prosecution of him for child abuse should not count.

[88] Sloth-Nielsen (2005) op cit note 17 at 535 has rightly stated with reference to the substantial injustice test that an important factor should be whether views can be adequately ascertained other than by the expensive means of legal representation.

[89] For example, Rothman (2001) op cit note 11 at 8 has cited uncontested cases involving abandoned infants in which lawyers would have nothing to do at court.

[90] Ibid at 11.

[91] 1997 (2) BCLR 229 (SE) at 243D.

the absence of legislation clarifying what constitutes substantial injustice this is occurring in a highly undesirable ad hoc manner.[92] This prevents the development of a coherent and uniform set of criteria.[93] In addition, whether or not the child's right to legal representation is raised at all in court often depends on the inclination of individual judges.[94]

Even if some direction is forthcoming from higher courts, the vague best interests and substantial injustice grounds will continue to compel decisionmakers to make uncertain predictions about future events which may be impossible to forecast. Without sufficient amplification these grounds will remain difficult to implement in a coherent and logical manner. Furthermore, as has been noted they apply only to representation for children and not other vulnerable parties faced with significant communication barriers. It will be shown below that by considering experience locally and elsewhere it is possible to formulate a list of much more specific guidelines for deciding whether to allocate a state funded legal representative to any party. In creating such guidelines a factor to be kept in mind is that applicant parties may need to be considered separately[95] or have their ability to communicate considered relative to that of other parties.

A comparison of capabilities may lead to a conclusion that a legal representative is necessary as an equaliser where a party's voice is in danger of being silenced by the contentions of a much more powerful and assertive opposing party or parties.[96] South African commentators Sloth-Nielsen and Van Heerden have rightly argued that particularly children in danger of intimidation by opposing parents should have a strong right to be considered for representational support.[97] Based on her experience in children's courts in the Cape Groenewald proposed that special consideration be given to providing

[92] Sloth-Nielsen (2005) op cit note 17 at 538.
[93] Ibid.
[94] Ibid.
[95] D Telfer '*In Re T.M.*: Who Protects the Indigent Parents?' (2004) 6 *Journal of Law and Family Studies* 161 at 161-162 makes the point that there may be a conflict of interests between parents in care cases. This should therefore always be investigated when deciding whether they can share state appointed counsel.
[96] Scottish researchers A Griffiths and RF Kandel 'Hearing Children in Children's Hearings' (2000) 12 *Child and Family LQ* 283 at 298 found that children's advocates can play a useful role in helping children put their views across where extreme power imbalances present a barrier.
[97] J Sloth-Nielsen & B Van Heerden 'Putting Humpty Dumpty Back Together Again: Towards Restructuring Families' and Children's Lives in South Africa' (1998) 150 *SALJ* 156 at 159.

lawyers to children who wish to speak out but are going to be overawed in multiparty cases.[98]

What is sometimes referred to in England as 'equality of arms' should be extended to any vulnerable party of any age whose voice is being or is reasonably likely to be drowned out.[99] As will be recalled it was noted in the previous chapter that where an opposing party has sufficiently powerful legal representation even welfare may need its own lawyer if it is to put forward its case effectively.[100] A substantial disparity in communication abilities should thus be one guideline for possible appointment of a state funded legal representative.

In a demographically mixed society such as South Africa a second guideline should be whether a language or cultural barrier significantly disadvantages a party in her attempts to communicate.[101] In support of this is *Centre for Child Law and Another v Minister of Home Affairs and Others.*[102] In this case De Vos J of the Transvaal provincial division held that unaccompanied refugee children involved in children's court care proceedings, as an especially vulnerable group who are often unable to communicate, must be assessed for possible state representation.[103]

It will be recalled that reg 4A(1)(g) of the 1983 Act provides innovatively that where a language barrier prevents direct communication by a child a lawyer speaking the same language as the child should if possible be provided to represent her.[104] Rothman criticised this on the ground that it could lead to bilingual lawyers taking over the functions

[98] Groenewald (2000) supra note 6. Although criteria for a allocating some persons a lesser participant rather than full party status have been proposed in part 4.3.2 above, her concern will clearly remain valid for some cases where crowding is an issue.
[99] CJ Ross 'The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings' (2004) 11 *Virginia Journal of Social Policy and the Law* 176 at 202 noted cases where the assertive powers of an investigative agency are strengthened to such an extent by their legal representative that a vulnerable opposing parent becomes 'intimidated, inarticulate or confused' and needs a legal representative of her own. O'Donnell (2005) op cit note 75 at 78 & 85 similarly draws attention to the need for representation for parents who are completely 'outgunned' in some cases.
[100] See part 4.3.1.
[101] As noted in part 1.3.2 above the factor of language differences is important in South Africa.
[102] 2005 (6) SA 50 (T).
[103] Ibid at paras 29 and 31.
[104] See the quotation in part 5.2, above.

of interpreters in the children's courts.[105] The law commission likewise rejected the provision as 'unworkable in practice'.[106] These criticisms do not, however, take account of the fact that interpreters and lawyers perform very different functions.[107] Nor do they sufficiently appreciate the considerable advantages which clients may derive from having direct communication with a lawyer even outside the courtroom.[108] Moreover, South African research findings indicate that children can be severely disadvantaged when compelled to rely only upon interpreters without any direct communication with their legal representatives.[109]

Also, children who have appropriate language familiarity but have had a strongly traditional upbringing may be unable to counter completely false suggestions made in court because they have been taught not to disagree with adults.[110] Where linguistic or cultural barriers are not sufficiently compensated for children sometimes withdraw psychologically in court and provide such minimal information that it becomes difficult for the adjudicator to make an appropriate decision.[111]

It is true that cultural or linguistic differences are common in South Africa and an interpreter will often suffice to overcome them. However, where this is insufficient and they seriously impede parties consideration should be given to the appointment of a lawyer. And although it will not always be feasible wherever possible this should be a

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[105] Rothman (2001) op cit note 11 at 10.

[106] *Review of the Child Care Act* (2001) op cit note 20 vol 1, p100.

[107] And para (g) does not state that interpreters should be displaced where bilingual lawyers represent children. Moreover, confusion with the role of a court interpreter is completely irrelevant where a client is too vulnerable to appear at all and wishes to be represented in her absence.

[108] For example, prehearing consultations with a lawyer regarding what and how a child will communicate at court may be crucial. Experiential and not merely linguistic factors may be relevant. S Walker 'Consulting with Children and Young People' (2001) 9 *International Journal of Children's Rights* 45 at 54 pointed out that child participation research in some countries is beginning to show that many children can participate more effectively when interviewed by someone from their own ethnic group -or at least by someone who has shared similar experiences and been similarly 'conditioned by racism and other social disadvantages'.

[109] See the analysis of research in CR Matthias & FN Zaal 'Hearing Only a Faint Echo? Interpreters and Children in Court' (2002) 18 *SAJHR* 350 especially at 354-64 & 368. See also FN Zaal 'Hearing the Voices of Children in Court: a Field Study and Evaluation' in S Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 158 at 164-66.

[110] Zaal (2003) ibid at 163; DM Chirwa 'Participation Rights: Challenging African Legislation' (2002) 6 *Children First* 32.

[111] See Matthias & Zaal (2002) op cit note 109 at 355; and Zaal (2003) ibid at 183.

lawyer familiar with the language and/or culture of the party concerned.[112] The cost of providing such a lawyer would often be the same as that for a lawyer unfamiliar with the child's mother tongue and culture. It could even be less, since an interpreter or cultural expert will not be needed to assist with client-consultations.

Despite the criticisms of Rothman and the law commission it would not be unworkable to show consideration to children who require more than just an interpreter to overcome a significant language or cultural barrier. As some commentators have warned, where racial or cultural differences obtrude between families on the one side and investigative agencies or courts on the other, completely incorrect decisions about mandatory care measures may be reached.[113] In line with the contention in this chapter that all private parties and not only children should be viewed as potentially vulnerable the guideline of cultural or language disadvantage severe enough to substantially silence a person who wishes to communicate should be applied also in favour of adult applicants for subsidised representation.

Disability which significantly reduces a party's ability to understand or participate in the proceedings[114] should be a third guideline.[115] Again, the eligible group should be persons who wish and are able with assistance to participate and have a position to convey to the court. An example might be parents anxious to prove that their parenting is adequate, but faced with communication difficulties in court because of causes such as

[112] There are no reported South African authorities directly in point. But in the divorce matter *Soller NO v G and Another* 2003 (5) SA 430 (W) Satchwell J replaced a child's lawyer with one from the same cultural background: see the judgment at 436H. As noted by Green & Appell (2006) op cit note 10 at 581 a viable alternative may sometimes be a lawyer who has relevant cross-cultural knowledge and competence.

[113] Ross (2004) op cit note 99 at 190-91; WJ Sammon *Advocacy in Child Welfare Cases: A Practitioner's Guide* (1985) 80. MCJ Olmesdahl reported instances of this in the children's courts: personal communication 28 Oct, 2002. On linguistic and cultural barriers in South Africa see also CR Matthias 'Shadows of Apartheid Lingering? Cross-cultural Work with Children in Need of Care' in S Burman (ed) (2003) op cit note 109, p32 especially at 40-42.

[114] Care should be taken in reaching this conclusion. As noted in ABA comment 1 to rule 1.14 (a) of the Model Rules of Professional Conduct (2006 ed) supra note 54 a client with diminished capabilities may still retain an ability 'to understand, deliberate upon, and reach conclusions about matters'.

[115] See generally C Watkins 'Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded' (1995) 83 *California LR* 1415.

mental retardation[116] or a speech defect.[117] The effects of physical injuries or illnesses on communication capabilities should also be a relevant factor.[118]

Another special needs group who surely merit consideration is parties whose communication skills have been severely limited as a result of psychological trauma.[119] This category may include abused persons like children and their 'co-victim' caregivers. The latter are often battered mothers experiencing ongoing abuse from fathers who have also harmed children who are the subject of proceedings.[120] US findings have shown that children are sometimes inappropriately removed from co-victim caregivers by courts which unfairly blame them for permitting the actions of the abusive caregiver.[121] In Miami Dade County, Florida, was found that families often benefit when legal representatives who can correct misperceptions by courts are provided for co-victim mothers.[122]

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[116] On the vulnerability of parents with intellectual disabilities see further part 7.3.2, below.

[117] D McConnell & G Llewellyn 'Disability and Discrimination in Statutory Child Protection Proceedings' (2000) 15 *Disability and Society* 883 at 891-92 concluded that welfare and courts are frequently biased against parents with disabilities. They further conclude, ibid at 892, that this vulnerable group will sometimes need additional support during care proceedings to avoid children being inappropriately removed. See also AC Collentine 'Respecting Intellectually Disabled Parents: a Call for Change in State Termination of Parental Rights Statutes' (2005) 34 *Hofstra LR* 535 at 536. American judge RS Sackett 'Terminating Parental Rights of the Handicapped' (1991) 25 *Family LQ* 253 at 295-96 contended that it is particularly where parenting abilities are at issue that a legal representative may be able to provide valuable assistance. This can sometimes be done by showing that the disability can be sufficiently overcome to provide adequate parenting. The lawyer may need to make a case for family support services. This is relevant in South Africa since, as will be further discussed in part 8.3.2 below, under the 2005 Act our children's courts will be able to order such services.

[118] This is especially important at the height of an AIDS pandemic. As a foreign example, in West Virginia in *In the Interest of Betty J.W.*, 371 S.E.2d 326 (W.Va. 1988) it was held by Miller J that a lawyer should have been appointed for a father who was unable to attend because he was in hospital. For similar cases a rule is required in South Africa which allows seriously ill persons to provide evidence to a children's court via telephonic link -and this will sometimes obviate the need for legal representation. On the representation needs of mentally ill parents see N Wasow 'Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities' (2006) 31 *New York University Review of Law and Social Change* 183 at 222.

[119] The incidence of this problem in the South African children's courts has been noted in part 3.4.2, above.

[120] AJ Jackson '*Nicholson v. Scoppetta*: Providing a Conceptual Framework for Non Criminalisation of Battered Mothers and Alternatives to Removal of Their Children from the Home' (2005) 33 *Capital University LR* 821 at 861.

[121] TD Lyon 'Are Battered Women Bad Mothers? Rethinking the Termination of Abused Women's Parental Rights for Failure to Protect' in H Dubowitz (ed) *Neglected Children: Research, Practice, and Policy* (1999) 237; CA O'Riley, & CS Lederman J 'Co-Occurring Child Maltreatment and Domestic Violence' (2001) 10 *The Florida Bar Journal* 40; and Ross (2004) op cit note 99 at 188-189. Blinn (2004) op cit note 45 at 821-22 argues that the danger of courts overreacting to an abusive parent by removing a child from a co-victim who is a relatively good parent justifies legal representation in these matters.

[122] A successful strategy involving specially trained legal representatives for parallel domestic violence and care cases was developed there: see O'Riley & Lederman ibid.

Trauma may be caused or exacerbated during court proceedings themselves. Parties may become overwhelmed and frozen in court -for example, because they are terrified about being separated from loved ones.[123] As Masson has pointed out, support from a legal representative can enable some of these parties to maintain sufficient self-control to respond to allegations and assert their views effectively, despite the emotional stress they experience at hearings.[124] This group should therefore also be eligible for consideration for subsidised representation. As noted in part 4.2.4 above it may in some cases be appropriate for a presiding officer order the removal of a vulnerable party from court so that she does not hear upsetting evidence. Where there is to be substantial reliance on evidence which a vulnerable party will not be able to challenge in person because of a courtroom removal this may strengthen the case for appointment of a legal representative to such party. It would minimise prejudice to her and thus accord with the right to a fair court hearing in s 34 the Constitution.

A fifth factor which has sometimes been proposed as an indicator of whether representation ought to be provided at state expense is the complexity of a case.[125] However, to limit the number of applications it may be suggested that complexity should only apply if it substantially compromises the participatory contribution of a party. Where for example a novel or convoluted point of law renders the adjudicator's decision in a case complex but there is no impact upon the ability of parties to deliver their evidence effectively, this should not count.[126] Complexity should thus be evaluated in conjunction with the capacity of applicants for self-representation. As it was put by Lamer CJ in the Canadian case of *New Brunswick (Minister of Health and Community Services) v G.J.* '[w]hether it is necessary for the parent to be represented by counsel is directly

[123] See O'Donnell (2005) op cit note 75 at 76.
[124] J Masson 'Representation of Children in England: Protecting Children in Child Protection Proceedings' (2000) 34 *Family LQ* 467 at 469.
[125] Sloth-Nielsen (2005) op cit note 17 at 535. For data indicating that some South African children's court commissioners favour appointments of legal representatives in complex cases see Zaal (1996) op cit note 3 at 56. The South African law commission (2001) op cit note 20, vol 5 at 1195-96 recommended that state funded representation only be available in complex cases.
[126] However, as noted by JA Dunlap 'Sometimes I Feel like a Motherless Child: the Error of Pursuing Battered Mothers for Failure to Protect' (2004) 50 *Loyola LR* 565 at 611 some care cases are both 'factually and legally complex'.

proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent'.[127]

The recommended scheme of two resource-related threshold criteria and five applicant-focused secondary guidelines may need to be refined or expanded as experience with screening applications builds up over time. However, improved and financially practicable guidance is clearly feasible. A question which remains is what procedures should be used to implement the proposed guideline-driven decision-making. This will be discussed next.

5.4.2 The Appointment Process

In relation to cost-effective utilisation of precious state funding two important considerations are how applications for representation should be decided and who should provide such representation. [128] Each of these issues will be considered in turn. On how applications should be decided it will be remembered that although it was never implemented s 8A(4) of the 1983 Act provided that presiding officers could simply order that a legal aid representative be appointed if they considered this to be in the best interests of a child.[129] Under s 55(1) of the 2005 Act they will merely refer children to the local legal aid board office which will then make a final decision.[130] This raises the question of whether it is better for court adjudicators to make a final ruling or else refer cases for consideration by another decisionmaker.

The secondary guidelines recommended in part 5.3 above would tend to manifest in ways that children's court magistrates would recognise. They should usually be able to observe that a party is substantially unsuccessful in her efforts to participate at court. And they will even in many cases be able to discern causes such as language or speech barriers,

[127] (1999) 177 D.L.R. (4th) 124 at 155.
[128] Although only children's court care cases will be considered below, there is a general need in our law for appointment mechanisms for all cases which arise in terms of s 28(1)(h) of the Constitution: see further Sloth-Nielsen (2005) op cit note 17 at 538.
[129] See part 5.2, above.
[130] Ibid.

fearfulness, damaging revelations in pre-court documentation, intimidation, low intellectual functioning or being significantly outmatched by an assertive opposing party. They will therefore frequently discern at an early stage that a party appears to need representational assistance although in some cases this will admittedly only become obvious later on.[131] Although it is true that adjudicators will often be in a good position to make an initial assessment it may be suggested that they should then make a referral for further investigation rather than take the final decision themselves. One reason for this is that a merely prima facie determination by adjudicators would be fairer to applicants whose capabilities they may later be judging.[132] Also, as will be further argued the proposed threshold criteria would best be established outside the courtroom.

Discovering whether an applicant satisfies a means test and whether sufficient state funds and a suitably skilled legal representative are available would require a partly administrative investigation and processing of applications that should not be part of a court hearing. Moreover, if there is a need for representation, a children's court magistrate should not be deciding which particular lawyer should appear before him.[133] Thus before referring an applicant a magistrate should merely decide whether there is a prima facie case for representation. Another advantage to having an extra-curial decision-maker is that parties could then also make applications directly for themselves prior to proceedings which could save court time.

This leads to the question of who would conduct the proposed further investigation and then make a final determination. Our existing law in the form of both s 8A(4) of the 1983 Act and s 55(1) of the 2005 Act would require referrals to legal aid justice centres. Whilst they are certainly familiar with applying financial means tests, legal aid board

[131] For example, after available sheltered participation methods have proved insufficient.
[132] In *New Brunswick (Minister of Health and Community Services) v G. (J.)* (1999) 177 D.L.R. (4th) 124, at 168-69 L'Heureux-Dube`J of the supreme court of Canada warned that final decisions on legal aid criteria were problematic for adjudicators because this compelled them to prejudge persons whose care capabilities they would subsequently assess.
[133] American researchers RF Kelly & SH Ramsay 'Legal Representation for Parents and Children in Child Protection Proceedings: Two Empirical Models of Acquisitorial Processes and a Proposal for Reform' (1985) 89 *Dickinson LR* 605 at 609 found that where lawyers are dependent on court adjudicators for possible future briefs their independence -and thus the vigour with which they assist clients- may be compromised.

representatives are not generally specialists in domestic cases involving children.[134] This combined with the lack of uniformity and other shortcomings in their services noted earlier raises doubts about whether they should carry final responsibility for deciding applications.[135] Children's court assistants based at children's courts might usefully have been trained as specialist application assessors but, as has already been noted, this officer will unfortunately cease to exist once the 2005 Act is implemented.[136]

In the absence of in-house capacity being created at children's courts themselves, the best option currently available would be to utilise our national network of family advocates for making final decisions on whether state subsidised legal representation should be provided in children's court care matters.[137] Family advocates should also further decide in particular cases whether they themselves or other lawyers should represent parties. What befits them for these tasks is that they already specialise in child related aspects of some domestic matters such as divorce and international parental child abduction.[138] An important additional advantage is that they routinely work jointly with social workers termed family counsellors.[139] Not only does this mean that family advocates tend to understand factors which affect the welfare of children, but the family

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[134] See part 5.2, above.

[135] Parkinson (2001) op cit note 53 at 268 noted that in Australia generalist legal aid lawyers have proved to have a limited capacity for care case screening. See also Howe as quoted in note 138, below.

[136] In proposals for upgrading children's courts the South African law commission (2001) op cit note 20 at part 2 p303 & p310; and also in its draft Children's Bill (2002) at clause 94 rightly emphasised the importance of a screening component staffed by well-trained middle-ranking officers. In the USA, court screening sections are frequently utilized: see, for example, the reference 'court-appointed lawyers' in MR Forte 'Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings' (2003) 28 *Novo LR* 193 at 202-03.

[137] As noted in part 2.5, above family advocates are appointed in accordance with the Mediation in Certain Divorce Matters Act 24/1987. In terms of s 2(2) of that Act it is only persons who have had sufficient 'involvement in or experience of the adjudication or settlement of family matters' who can be appointed.

[138] The system proposed is similar to the 'Office of the Child Advocate' in Delaware. As noted by TM Culley 'What Does It Mean to Represent Delaware' s Abused, Neglected and Dependent Children?' (2001) 4 *Delaware LR* 77 at 85 it manages 'a programme to provide *pro bono* or contractual attorneys to represent… Delaware's abused, neglected and dependent children… in all relevant proceedings'. Using family advocates is also supported by developments in Canada. Representation in child protection cases has been successfully managed there by specialist child advocates since the late 1990s: see RB Howe 'Implementing Children's Rights in a Federal State: The Case of Canada's Child Protection System' (2002) 9 *International Journal of Children's Rights* 361. He notes at 368 ibid that part of the motivation was that generalist lawyers 'often were not well trained to interact with children and represent children'.

[139] Assistance by family counsellors is provided for in s 3(1) of the Mediation in Certain Divorce Matters Act 24/1987.

counsellors could play a valuable part in helping to assess the applicability of secondary guidelines such as those recommended in this chapter because of their social work training.

If an application for representation at state expense is successful the final question is who should provide it. Since the aim must be to enable representation in all jurisdictions it would not be wise to confine eligibility only to family advocates -and particularly since they already have other responsibilities. Also, research at Australian children's courts has indicated that overall quality of representation is maximised if private lawyers are amongst those who provide subsidised representation in children's cases.[140] It has been noted above that the law commission proposed in 2002 that state-funded representatives should be drawn from a family law roster containing the names of lawyers with expertise in domestic matters.[141] Rosters of lawyers with an interest in family litigation have been successfully established in a number of jurisdictions.[142] They typically volunteer for special training and then choose the numbers of domestic-dispute cases and the jurisdictions in which they will appear (sometimes *pro bono*).[143]

The unique nature of representation in care cases and the importance of lawyers who have specialist expertise has been appreciated in some systems even to the extent of recognising a right to competent representation.[144] Failure by states to provide competent subsidised lawyers may lead to court decisions being challenged as invalid.[145] In South Africa the need for competent representation will be even greater when the 2005 Act is

[140] McConnell & Llewellyn (2000) op cit note 117 at 883.
[141] See part 5.2.
[142] Blinn (2004) op cit note 45 at 836 notes the examples of New Jersey, New York and Ontario.
[143] Ibid.
[144] In *L.W. v Department of Children and Families* 812 So. 2d (2002) 551 at 554 Florida's first district court of appeal held that there was a right to competent representation. It cited recognition of this in an 'overwhelming' number of US jurisdictions. On the right to competent counsel in the US see also MD Bustamante J 'Incorporating the Law of Criminal Procedure in Termination of Parental Rights Cases: Giving Children a Voice through *Matthews v Eldridge*' (2002) 32 *New Mexico LR* 143 at 164-65; Telfer (2004) op cit note 95 at 164; and Green & Appell (2006) op cit note 10 at 587. In Australia Sheehan (2001) op cit note 2 at 189-90 concluded that quality of legal representation often made a crucial difference in achieving constructive outcomes. English researchers Lindley, Richards & Freeman (2001) op cit note 69 at 325 concluded (although not only in relation to lawyers) that 'an advocate working in child protection needs to have specialist knowledge and experience of the law and practice in this field'.
[145] Telfer ibid; Forte (2003) op cit note 136 at 202-05.

fully implemented.[146] Waldfogel has commented that in systems where legislation requires courts to customise social services for particular families the work of lawyers becomes even more specialised.[147] As will be shown in part 8.3.2 below it is precisely such solutions that will be required under the 2005 Act.

A simple and workable system would be to allow any lawyers to become eligible to act as state representatives by attending a short course covering relevant aspects of ADR, child welfare methodologies and locally available care services.[148] Upon completion of the course they should also have to observe a set number of hours of children's court hearings. Once sufficient lawyers had become qualified new lawyers could be required to observe cases in which experienced lawyers are involved. Gradually, eligibility requirements could be improved in the longer term.

If initial requirements are kept manageable, all family advocates and a significant proportion of legal aid justice centre and private lawyers should hopefully find it practicable to qualify. If support can be obtained from community-minded members of the profession through bodies such as the Bar Council and Law Societies[149] and a practice code for lawyers is developed as proposed in part 5.3 it should become possible to overcome the problem of ineffective lawyers and improve the current rates of representation in the children's courts. It might even prove feasible to encourage some private lawyers to fulfil roster requirements as a form of community service *pro bono* or for a reduced fee.

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[146] There is currently no reported South African precedent which specifically supports a need for competent representation in care cases. However, in the divorce matter of *Soller* op cit note 112 at 438B-D Satchwell J found it necessary to arrange for a child to have a highly competent lawyer.

[147] J Waldfogel 'Protecting Children in the 21st Century' (2000) 34 *Family LQ* 311 at 323.

[148] Special training on child welfare is a requirement for state-appointed lawyers who represent children in care cases in Delaware: see Culley (2001) op cit note 138 at 85. On the need for this see also Lindley, Richards & Freeman (2001) op cit note 69 at 326-27.

[149] Masson (2000) op cit note 124 at 479 noted that in England it was the Law Society which responded to a shortage of lawyers with sufficient experience in representing children at care proceedings. In 1984 it set up training courses and arranged a 'Children's Panel' so that only lawyers who had been specially trained, tested and selected could henceforth represent children in such proceedings. The Bar Council and Law Societies in South Africa are in principle willing to increase levels of *pro bono* representation of vulnerable children: see E Bertelsmann J *Report on the National Initiative on the Reduction of Overcrowding in Detention Centres Activities for the Year 2007* (2007) p2.

The problem of privately appointed legal representatives who appear only notionally for children because they are paid for by parents[150] requires special consideration. Waiting to see how a lawyer behaves and then possibly terminating his services as recommended in clause 78(2)(b) of the 2002 draft Children's Bill is not an ideal solution. It is contrary to the approach long established for civil magistrates' courts.[151] In cases of seriously inappropriate behaviour by any lawyer civil court magistrates are expected to inform the Bar Council or Law Society.[152] This would be sufficient for children's courts if lawyers will in future need to retain their places on a roster. Applying the drastic alternative of termination partway through proceedings as proposed by the law commission might disrupt working relationships which children have formed with persons whom they trust and delay proceedings. It might also deter some lawyers from acting with maximum vigour and independence because of fears of dismissal.[153]

In cases where a lawyer's fees are to be paid for by a different party from the client, the paying party should not have the right to choose the lawyer.[154] Instead, the money should be paid to a fund kept at the local family advocates' office, which would then select a roster representative. This process could also be followed in referrals by magistrates or direct applications for subsidisation where the ordinary legal aid means test indicates that a guardian or spouse of an impoverished applicant is sufficiently wealthy to pay for representation.

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[150] See part 5.2, above.

[151] In a commentary on s 20 of the Magistrates' Court Act 32/1944 HJ Erasmus & DE Van Loggerenberg *Jones and Buckle: the Civil Practice of the Magistrates' Courts in South Africa* (2004) vol 1 p29 concluded that this provision provides parties with a right to have their legal representative 'carry to completion' any legal proceedings.

[152] Under s 23 of the Magistrates' Court Act which is entitled 'Misconduct of practitioners'.

[153] This has been found to be a negative consequence in some US jurisdictions where adjudicators have extensive powers to control which lawyers may appear before them in care cases: see Kelly & Ramsey (1985) op cit note 133 at 609.

[154] Article 9 of the European Convention on the Exercise of Children's Rights 1996 provides for a separate process for appointing a representative to a child in any situation where holders of parental responsibilities have a conflict of interest.

5.5 Conclusion

Whilst legal representation is potentially a valuable resource for supporting the participatory capacity of parties and more generally improving children's court services the review of South African law and practice in this chapter reveals grounds for concern. Available data indicates that lawyers currently appear in very few children's court cases. When they do, they are often ineffective and occasionally even obstructive in the achievement of an appropriate outcome. The poor performance of many South African lawyers can be attributed to a system which provides insufficient guidance on their functions.

It has been shown that what is needed to improve lawyers' performance is proper direction that takes account of the specialised nature of care matters. In broad terms, a primarily client-directed model is what is required. Thus the legal representatives of sufficiently capable children or other private parties should be confined to putting forward, defending and advocating their clients' wishes and versions of evidence, subject to a duty to reveal new information which indicates a danger of serious harm to the child or any other person.

A client-directed model is not contradictory to the paramountcy of the best interests of the child as established in s 28(2) of the Constitution. In seeing that the voices of vulnerable parties with communication difficulties are properly heard lawyers would help to place our children's courts in possession of full and accurate versions of the evidence - and this will assist them in making decisions that are genuinely in the best interests of children. Lawyers undertaking the task of conveying the evidence of private parties should not be simultaneously expected to put forward what is in the best interests of the child from a neutral position. Imposing such a contradictory and dual role will simply continue the existing problem of ineffective representation.

Where a lawyer is needed to assert a child's best interests from a neutral position the ideal solution is for such lawyer to appear as a representative of welfare. In a model

where the investigative agency, a possible legal representative for the agency and a children's court presiding officer applying inquisitorial powers can all seek to establish the best interests of the child a quite sufficient proportion of resources will have been allocated directly to this function.

The differentiation in their primary orientation according to which clients are represented as proposed in this chapter could provide a practicable framework for a lawyers' code of practice which is urgently needed. Such a code would help to create uniform standards and improve overall quality of representation. However, the second problem of how to increase the proportion of cases in which lawyers appear would still remain. The pervasive poverty which affects families involved in care matters means that the only solution is an effective mechanism for state-subsidised representation. Section 28(1)(h) of the Constitution, in requiring such representation for children in any civil case where substantial injustice would otherwise result, is so broadly worded that it needs to be supplemented with more detailed criteria. As regards the form of these, it has been shown that our recent legislative history indicates that binding grounds which confer an absolute right to representation regardless of available state resources need to be avoided.

An effective system for state-financed representation must include discretionary guidelines rather than grounds if it is to be sustainable in the long-term. It is essential that local availability of both the necessary funds and sufficiently skilled lawyers be established as threshold criteria. Since only a few parties can be provided with lawyers at state expense it is also essential that additional secondary guidelines be formulated to further narrow down the number of persons represented. This must be done so as to direct representation resources to applicants who can benefit most from these. However, the criterion of hearing the voices of all core persons involved indicates that the guidelines must not be age-limited.

It has been shown in this chapter that by drawing on local and foreign experience it is possible to formulate a test mechanism for selecting suitable secondary guidelines. These must identify persons who need to communicate relevant information at court but

are substantially disadvantaged by communication barriers too serious to overcome by other available means. A corollary is that representation must be reasonably likely to be successful in overcoming those barriers. Applying this test it has been recommended that five suitable secondary guidelines are: extreme inequality between parties in advocacy capabilities, serious linguistic or cultural barriers; and disability, psychological trauma or exceptional case complexity which inhibit participation.

Significant communication barriers resulting from these causes will generally be discernible before or early in court proceedings. Children's court magistrates are well placed to recognise possible candidates for subsidised representation. However, they should only make a prima facie determination. It is family advocates who should make final decisions -and these should be on direct applications as well as referrals from magistrates. Family advocates are appropriate both because of their own potential to develop specialist expertise and the assistance readily available to them from family counsellors.

Although family advocates should also be empowered to actually undertake representation of clients they select, they must also be able to utilise legal aid justice centres or private lawyers. This is in order to have sufficient lawyers available and because experience in developed systems shows that a wider choice assists the quality of subsidised representation. Both experience in such systems and local difficulties in our own children's courts reveal that competence is a crucial issue. It is therefore essential that only lawyers with at least some specialist training be eligible for state appointments.

In order to encourage some private lawyers to become appropriately qualified state fees should be realistic and support from their professional associations should be sought. Training requirements for all lawyers should initially be modest, but could be developed as the numbers of specialist representatives are increased over time. In conclusion, it is clear that feasible means can be developed for addressing the two fundamental problems of quality and sufficiency of legal representation in children's court care proceedings. In the

next chapter, attention is turned to how a different group of professionals -presiding officers themselves- also need their role to be clarified and developed.

CHAPTER 6
THE ROLE OF ADJUDICATORS: PUTTING THE CASE FOR A NEW APPROACH IN THE CHILDREN'S COURTS

6.1 Introduction

Because of the resource constraints in South Africa even if the proposals in the previous chapter are implemented many parties will continue to be unrepresented in children's court care cases. For them the only person available to support and guide their testimony may be the presiding officer. In this chapter the role of adjudicators in ensuring that appropriate voices are heard is explored. It will be suggested that although presiding officers could potentially do a great deal to assist with communication our law requires major development. The chapter is divided into two main parts. Part 6.2 provides a critical evaluation of current South African law governing the functions of children's court presiding officers in care cases. Part 6.3 contains some proposals on how it should be substantially reformed and extended.

In part 6.2.1 it is shown that a basic shortcoming which has for many decades impeded the work of children's court magistrates is inadequate guidance on the procedures to be followed at hearings. In part 6.2.2 it is demonstrated more specifically that despite the unique nature of the work involved our law provides little coverage on magistrates' functions in care cases. In part 6.2.3 local empirical data and accounts of practitioners are analysed to discover the consequences. Particular attention is paid to the effects of a vague and limited legislative framework on attempts by persons appearing in the children's courts to communicate. It is concluded that there is now a strong case for enabling presiding officers to specialise and furnishing them with rules that will provide better guidance on their duties in court. In part 6.2.4 the capacity of the 2005 Act to address the main problems with the role of adjudicators is evaluated. It is shown that the wording of the Act is inadequate and that therefore amendments and also more detailed supplementary provisions are needed.

The nature of the reforms required is considered in part 6.3. Reference is made to both the South African situation and, by means of some comparative and cross-disciplinary analysis, to what has been found to be effective in developed systems elsewhere. Particular attention is paid to Australia where challenges for adjudicators in children's courts are similar to our own, and generally to systems confronted with analogous transformation requirements because of historically-similar court traditions to South Africa.

It is shown in part 6.3.1 that there are strong arguments in favour of requiring children's court adjudicators to become much more active in managing care proceedings. It is specifically argued that they must be directed to adopt a primarily inquisitorial function. It is further proposed that this core directive must be amplified by more detailed legislative guidance indicating how the inquisitorial role should be implemented in specific situations. The nature of this guidance is discussed in part 6.3.2.

6.2 Role-Confusion: An Overview of Its Origins and Consequences

Magistrates serving as commissioners of child welfare in the South African children's courts currently operate with little guidance about how they should function during hearings. As will be shown in the next part below uncertainty about their role is just one aspect of a broader lack of clarity about children's court procedures generally. Children's courts function as part of magistrates' court centres with little separate identity. Commissioners work without their own dedicated set of procedural rules. They are expected to use their discretion in drawing upon the rules of ordinary civil magistrates' courts. As will be seen this has led to confusion.

It will further be shown that although only limited data is available there is sufficient information to prove that the confusion about procedures generally and adjudicative role functions in particular has been prejudicial to many persons involved in care proceedings. It has resulted in serious barriers to effective participation by children and other family members. This assertion will be substantiated with local research

findings and anecdotal accounts of South African practitioners with substantial children's court experience.

6.2.1 Inadequate Development of Procedural Law

To appreciate the difficulties concerning the role of commissioners in care cases it is necessary to understand how procedural law has developed in the children's courts. When they were formally established in terms of the Children's Act 31/1937 they were provided with only a limited list of some briefly-worded procedural and evidential rules.[1] These enabled them to hold care hearings concerning children (referred to as 'enquiries') at which parties would have 'the same rights and powers as a party to a civil action in a magistrate's court in respect of the examination of witnesses, the production of evidence and of address to the court'.[2] Although civil magistrates' court practice was thus imported, the rules did create two special capabilities for presiding magistrates. They were expressly empowered to call or recall witnesses *mero motu* and accept uncontested written reports as documentary evidence.[3] It was thus recognised that the nature of children's court work required a modified approach to information gathering.

Under the 1937 Act, except for the two variations mentioned above, formal rules of procedure and accusatorial functions for magistrates identical to those in the contemporary civil magistrates' courts applied in the children's courts. And children's courts remained accommodated at and were part of magistrates' court centres. Until the early 1950s there was a degree of separate identity, however. As has been noted, this was because individually selected magistrates were encouraged to specialise in children's court work.[4] It was generally agreed within the department of justice that the children's courts functioned well under these dedicated, often full-time adjudicators.[5] Van Reenen indicated that during this period children did appear in court.[6] He noted that when they did so the

[1] Rules 8-11 of the Rules of Court and Regulations promulgated under s 86 of the Children's Act 31/1937.
[2] Ibid, r 8.
[3] Ibid, r 10 & r 11, respectively.
[4] See part 2.3.3, above.
[5] Hoexter J *Commission of Inquiry into the Structure and Functioning of the Courts* (RP 78/1983) 493.
[6] TH Van Reenen *Handbook on the Children's Act* (1953) 6.

specialist magistrates tended to be successful in balancing the required formality with 'a simplified procedure, which a child can readily understand, and with a more friendly atmosphere… in the nature of a discussion in the child's interests, rather than a trial'.[7]

It will be remembered, however, that the nationalist government ended full-time presiding officers and began rotating magistrates between the children's and other courts.[8] The absence of a comprehensive set of dedicated procedural rules was now felt as ordinary magistrates' court procedures began to predominate and many children's courts functioned less effectively.[9] However, as noted in chapter 2, the nationalist government was primarily concerned about using the children's courts to assist with racial segregation.[10] It is thus not surprising that attention was not devoted to fashioning a separate procedural dispensation to provide comprehensive guidance for the often less experienced magistrates now working in these courts.

When the 1937 Children's Act was repealed the brief list of summary procedural and evidential rules provided under it was re-enacted almost verbatim as an adjunct to the Children's Act 33/1960.[11] In 1964, in considering the position under the 1960 Act it was decided by Marais J in the supreme court case of *Napolitano v De Wet, N. O. And Others* in relation specifically to children's court care hearings that a rather different approach from the friendly discussions noted by Van Rensburg was required. He stated that:

> 'At an enquiry the issue is whether the circumstances of the child in question are such as to justify interference by the State. It may be entirely *ex parte*, as in the case of a deserted child; normally it would be a dispute between the custodian of the child and the State, and evidence would be adduced by the custodian against the allegations of the State, and on behalf of the State by the children's court assistant.'[12]

This indicated that contested proceedings should be adversarial and that children's court assistants (as officers who provided general support at these courts) were required to lead

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[7] Ibid.
[8] See part 2.4.2, above.
[9] Hoexter Commission (1983) op cit note 5 at 493.
[10] See parts 2.4.2-3, above.
[11] See r 8 of the 'Children's Courts' Rules and Regulations' in Government Notice No. R.523 of 30 March, 1961 as contained in *Government Gazette Extraordinary* No. 6659 (*Regulation Gazette* No. 93) of 30 March, 1961.
[12] *Napolitano v De Wet, N.O. and Others* 1964 (4) SA 337 (T) at 344D.

evidence on behalf of the state. The implication was that presiding magistrates should generally apply an accusatorial function because they would not need to derive evidence directly for themselves during hearings.

As will be remembered from the reference to this judgment earlier[13] Marais J in *Napolitano* also held that children's courts were 'bound in the main to observe all the rules of … procedure commonly observed by other courts of law'.[14] And he expressly rejected the idea 'that they might pardonably function less formally than any other court of law'.[15] As has been pointed out, he concluded that children's courts must proceed in the same manner as other courts to the extent that '[w]hat would, generally speaking, constitute a reviewable irregularity in the latter would have the same consequences in the case of proceedings of a children's court'.[16] From a procedural perspective, the conclusions of Marais J clearly did not support a relaxed and interventionist approach for adjudicators in children's court care proceedings.

The judgment of Marais J was confirmed on appeal in *Napolitano* v *Commissioner of Child Welfare, Johannesburg*.[17] But in this decision Holmes JA unfortunately provided rather a mixed signal. On the one hand, he held that an inquiry under s 30 to determine whether a child was a child in need of care 'is a much more informal proceeding' than an adoption application in a children's court.[18] However, he also expressly confirmed that children's courts must be subject to review for any procedural irregularities.[19] It was this second message that was most strongly received by other supreme court judges considering appeals, and the *Napolitano* judgments were subsequently taken by them as requiring substantial conformity wherever possible with civil magistrates' court procedures.[20]

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[13] In part 2.3.4, above.
[14] *Napolitano* op cit note 12 at 342F.
[15] Ibid.
[16] Ibid at 344A.
[17] 1965 (1) SA 742 (A).
[18] Ibid at 745G.
[19] Ibid at 745F.
[20] In *Snyder en Andere v Steenkamp en Andere* 1974 (4) SA 82 (N) at 87 D-G, and *J and Another v Commissioner of Child Welfare, Durban* 1979 (1) SA 219 (N) at 222E.

When the Children's Act 33/1960 was replaced by the 1983 Act the list of children's court rules was not re-enacted a third time.[21] The idea of a separate body of rules governing procedures in these courts therefore fell away completely. However, as will be further discussed below, some new procedural rules were included amongst the substantive provisions in the 1983 Act. Some features of previous law, such as the description of care hearings as 'inquiries'[22] and the expectation that children's courts should mainly borrow from the procedures of ordinary civil magistrates' courts, were preserved in the Act.

Section 13(3) of the 1983 Act refers to the holding of a care inquiry 'in the prescribed manner'. However, the Act does not 'prescribe' in the sense of including any detailed instructions on the conduct of proceedings.[23] What it does do is lay down a general rule in s 9(1) that '[s]ave as is otherwise provided in this Act or in any other law' the provisions of the Magistrates' Courts Act 32/1944 and the rules made under it 'shall apply *mutatis mutandis*' to children's court proceedings, in so far as those provisions relate to:

> '(i) the appointment and functions of officers;
> (ii) the issue and service of process;
> (iii) the appearance in Court of advocates and attorneys;
> (iv) the conduct of proceedings;
> (v) the execution of judgments; and
> (vi)the imposition of penalties for non-compliance with orders of Court, for obstruction of execution of judgments and for contempt of court… '

The effect of this is to continue the importation to children's courts of the processes used in ordinary civil magistrates' courts.

The Magistrates' Courts Act and the rules published under it provide a substantial body of procedural directions which have developed over many decades. However, the inclusion of the words '*mutatis mutandis*' in s 9(1) of the 1983 Act showed some recognition of the different nature of children's court work. It left the precise extent of the

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[21] The 1961 'Children's Courts' Rules and Regulations' had been published as part of the regulations to the Children's Act 33/1960 as provided for under s 92 of that Act. Since they were not re-enacted they ceased to have effect when the Children's Act was repealed.

[22] See ss 13-15. The 1937 Act had used the spelling 'enquiries'.

[23] Section 8 of the Act is entitled 'Procedure in Children's Courts'. However, it does not deal with the conduct of proceedings in court. It refers to extraneous aspects such as where children's courts shall sit, persons who may attend, the service of subpoenas and witness fees.

applicability of the Magistrates' Courts Act uncertain. *Mutatis mutandis* has unfortunately not been judicially considered specifically in relation to s 9(1). Its internationally well known meaning denoting a broad discretion to make alterations as required by changed circumstances[24] has, however, been approved by our courts in a variety of other contexts.[25]

What has remained entirely uncertain under s 9(1) of the 1983 Act is the scope of commissioners' discretion to alter procedures created by the *mutatis mutandis* proviso. And unfortunately no contemporary direction on this question has ever been obtained from higher courts. In the absence of such, the *Napolitano* judgments have continued to be cited by some commissioners as the leading precedents on procedure in the children's courts.[26] Being an interpretation of the wording of a repealed Act they are, strictly speaking, no longer binding. However, in some important respects the 1983 legislation is exactly the same. As noted above it continues to refer to care proceedings as inquiries and perpetuates ordinary civil magistrates' court processes as a primary point of reference for children's courts. In an interpretation vacuum and with a continuance of relatively similar legislation it is not surprising that *Napolitano* gained an extended life as an aid to applying s 9(1) for some commissioners. [27]

A major difficulty which arose from continuing to apply *Napolitano* to care proceedings was the mixed nature of its messages. Not surprisingly, children's court

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[24] *Mutatis mutandis* is in use in various contexts in many legal systems and tends to mean 'the necessary changes having been made': see BA Garner *A Dictionary of Modern Legal Usage* (1987) at 368.

[25] In *South African Fabrics Ltd v Millman* 1972 (4) SA 592 (A) at 600C it was held that '[t]he words *mutatis mutandis* mean subject to the necessary alterations'. The meaning of *mutatis mutandis* in s 25 of Prevention and Treatment of Drug Dependency Act 20/1992 was considered in *In re Afrikaner* [1996] 2 All SA 298 (C). In *Waymark and Others v Meeg Bank Ltd* [2003] 1 All SA 518 (Tk) the meaning '[s]ubject to the necessary alterations in the changed circumstances' was applied. For earlier cases, see RD Claassen *Dictionary of Legal Words and Phrases* (1997) vol 3 at p M-74.

[26] De VM Horak 'The Abused Child as a Child in Need of Care: the Role of the Children's Court' in RR Graser & WS Winship (eds) *Child Abuse -a Southern African Problem* (1984) 109 at 113; MM Eckard *Geldigheidsvereistes in Kinderhofondersoeke by Versorgingsverrigtinge Ingevolge Artikel 13 en Aannemingsaansoeke Ingevolge Artikel 18 Van Die Wet Op Kindersorg, 74 Van 1983* (1988) 63; B Van Heerden 'Judicial Interference with the Parental Power: The Protection of Children' in B Van Heerden, A Cockrell & R Keightly *et al, Boberg's Law of Persons and the Family* (1999) 497 at 621.

[27] As pointed out by MW McConnell 'Active Liberty: A Progressive Alternative to Textualism and Originalism?' (2006) 119 *Harvard LR* 2387 at 2389-90, 2400 & 2414-15 where there are intransigent interpretative difficulties a typical reaction by some presiding officers is to become originalist in the sense of looking backwards in historical time for precedents which others might regard as outdated.

commissioners became divided into two camps utilising very different approaches.[28] On the one hand there were those who felt that they had a broad license to deviate from civil magistrates' court procedures. They drew support from the fact that 'enquiry' had been interpreted in the *Napolitano* appeal as permitting informal care proceedings and from the broad meaning of '*mutatis mutandis*' in s 9(1).[29] On the other hand, there were many commissioners who gave more weight to the *Napolitano* dicta which required conformity with civil magistrates' court processes on pain of being negatively reviewed by a higher court.[30] This was of course also a convenient solution since it required little adaptation of their methods as they rotated between courts. As noted by senior magistrate Horak in 1984 commissioners in this conformist group insisted that proceedings must remain formal and predominantly adversarial.[31] They thus attempted as far as possible to ensure that children's court care hearings indeed proceeded as if they were trials in the civil magistrates' courts.[32]

The divergence in approaches by the two groups of commissioners had some unfortunate consequences. In 1983 it was asserted before the Hoexter Commission that '[t]he complete lack of any kind of uniformity in approaches of the commissioners leads to confusion and real distress on the part of children and families, and indeed, on occasions can lead to a very serious adverse effect on the child or others involved in a children's court enquiry'.[33]

This situation still exists. Research by Matthias indicated that in the late 1990s there was a considerable lack of uniformity in different jurisdictions, and sometimes amongst different commissioners in the same jurisdiction.[34] She even found instances of

[28] See Hoexter Commission (1983) op cit note 5 at 480-81.
[29] For the establishment of this approach see Van Heerden (1999) op cit note 26 at 621.
[30] Horak (1984) op cit note 26 at 113.
[31] Ibid.
[32] Ibid.
[33] Hoexter Commission (1983) cit note 5 at 481.
[34] C Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* (1997) 46-48 provided examples of different procedures followed.

individual commissioners changing their processes from case to case.[35] In corroboration of the Hoexter commission submission more than ten years earlier she found that unpredictability about how hearings would be conducted continued to cause difficulties for investigative social workers and other persons who appeared at care inquiries.[36] As further evidence that confusion reigned during this period, in 1998 the then department of welfare found itself constrained to note in a practice guide for social workers that only a tentative outline of children's court procedures could be provided because individual commissioners decided on their own approaches.[37]

Anecdotal accounts by practitioners with substantial children's court experience are consistent in indicating that the absence of uniformity in procedures has continued in the new millennium. Attorney Essack, for example, observed a continuation of the divergence between the two groups of commissioners who preferred, respectively, formal, predominantly adversarial proceedings based on the magistrates' courts, and informal proceedings where commissioners could impose individually-tailored procedures.[38]

Not all commissioners are comfortable with their freedom to conform to civil magistrates' courts or else craft solutions of their own on the basis of *mutatis mutandis*. In 2005 Rothman, in conducting training sessions for commissioners based throughout the country, noted a widespread feeling amongst them that they had been procedurally 'left in the dark'.[39] In view of the importance of the functions carried out by children's courts the ongoing situation of unclarity about procedures generally is clearly a matter for concern.

6.2.2 Confusing Direction on the Role of Adjudicators

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[35] One respondent interviewed by Matthias complained that even where the same commissioner presided 'the commissioner changes the rules from one case to the next which makes it very difficult for the social worker'. See ibid at 47-48.

[36] Ibid at 47.

[37] Department of Welfare *Information Guide for Social Workers on the Practical Application of the Child Care Act 74 of 1983, As Amended and Regulations* (1998) 49.

[38] M Essack 'The Role of the Lawyer in Children's Court Proceedings' (Unpublished Masters seminar paper, University of Durban-Westville 4 Sept 2002) 2. See further the observations of practitioners see part 6.2.2, below.

[39] DS Rothman 'The Functioning of Children's Courts' (Visiting lecture: University of KwaZulu-Natal 8 Sept 2005).

On the question specifically of how commissioners should function during children's court hearings the 1983 Act and regulations published under it unfortunately provided signals that were at least as mixed as those which flowed from *Napolitano*. The statement in s 9(1) of this Act that the Magistrates' Courts Act 32/1944 is to apply '*mutatis mutandis*' to the 'functions of officers' and 'the conduct of proceedings' arguably indicates an accusatorial function and limited management of adversarial proceedings since this is the approach the latter Act establishes for ordinary civil magistrates' courts.

Regulations 5(3)-(4) and 10(1)(b) published in terms of the 1983 Act[40] expressly support a passive-accusatorial function because they direct commissioners to accept evidence which is not challenged in cross-examination as valid.[41] The requirement that vulnerable parties (including presumably children) who typically appear at care hearings must challenge assertions they disagree with and that commissioners should draw an adverse inference against them if they do not is patently unrealistic. The sheer powerlessness and vulnerability of most children and parents involved in care proceedings would in many cases render it absurd for a commissioner to draw such a conclusion unless, of course, the party concerned was legally-represented.

It is one thing to accept that adversarial phases may sometimes have to be allowed in care proceedings when there is no other way to establish the truth; but it is altogether another thing to promote contestation as is done in regs 5(3)-(4) and 10(1)(b) by requiring parties to offer challenges. These regulations also do not empower commissioners to

[40] Regulations 5(3)-(4) were inserted by *Government Gazette* 18770 (GN R416 of 31 Mar 1998). Regulation 10(1)(b) was part of the original regulations: see *Regulation Gazette* 4030 (GN R 2612, GG 10546 of 12 Dec 1986).

[41] Regulation 5(3) requires that parties be given the opportunity to cross-examine the writer of any authoritative report that has been accepted by a court. The purpose is 'to refute any statement appearing therein'. This clearly envisages a formal, adversarial approach and consequently creates uncertainty about the extent to which an amicable atmosphere should be maintained. Regulation 5(4) strongly promotes an adversarial approach. It requires the commissioner to 'clearly explain to a party… the consequences of a failure to refute a statement appearing in a report referred to in subregulation (1)'. This is supported by reg 10(1)(b) which provides that commissioners must note 'reports, documents and submissions' for which 'the contents were not disputed'.

intervene to cure ineffective questioning of witnesses, but simply add to the confusion in our law.

Since ordinary magisterial conduct of proceedings is merely a reference for children's courts in terms of s 9(1) of the 1983 Act an alternative interpretation is that there is scope for commissioners to take on an inquisitorial rather than accusatorial function. At the time when the Act was being finalised the Hoexter Commission proposed that a more inquisitorial approach was appropriate for cases involving children.[42] In line with this, it could be argued that the term 'inquiry' as used in the 1983 Act to refer to a dispositive main care hearing implies at least some inquisitorial powers for commissioners. It could thus be claimed that it enables them to 'enter the arena' and question parties and witnesses to the extent needed to establish the best option for the child who is the subject of the case.[43]

Regulation 4(5) published in terms of the 1983 Act expressly provided commissioners with some powers of an inquisitorial nature.[44] This states that a 'children's court… may cross-examine any person who adduces evidence for or on behalf of any party'. Also, reg 4(4)(b) allows the commissioner to 'examine any person who is present although not summonsed' and to 're-examine any person who has already been examined'.[45]

Given the mixed signals and different possible interpretations of the 1983 Act and regulations it is not surprising that empirical findings in 1996 indicated profound concern amongst many commissioners about what they saw as a confused duality of expectations about their role-functions.[46] Rothman, in providing in-service training for commissioners, has more recently noted widespread uncertainty about the specific aspect of the extent to

[42] Hoexter Commission (1983) op cit note 5 at 482 & 523.
[43] Even under the accusatorial system as utilised in civil and criminal courts in South Africa it is accepted that adjudicating officers have a right to conduct limited questioning of witnesses, including putting leading questions: see A St Q Skeen & SE Van Der Merwe 'Oral Evidence' in PJ Schwikkard & SE Van Der Merwe (main authors) *Principles of Evidence* (2002) 337 at 349.
[44] *Regulation Gazette* 4030 (GN R 2612, GG 10546 of 12 Dec 1986).
[45] Ibid.
[46] FN Zaal *Do Children Need Lawyers in the Children's Courts?* (1996) 13-14.

which they are entitled to intervene during the presentation of evidence by parties.[47] A consequence has been that commissioners tend to select personal-management styles along a spectrum ranging between opposite extremes of active-inquisitorial or else passive-accusatorial approaches when presiding.[48]

Attorneys Essack and Wessels observed, for example, a variety of responses by commissioners to *viva voce* substantiation of investigative social workers' reports during care hearings.[49] Some commissioners take on a strongly inquisitorial role and question social workers in detail. Others preserve an accusatorial function by assigning their children's court assistant or clerk to lead oral testimony by the social worker and to conduct re-examination if any other party disagrees with evidence thus presented. Yet other commissioners simply ask the parties whether anyone disagrees with anything in the investigative report. If no one expresses an objection the social worker may be excused from giving any oral evidence at all.[50] A further variation is for commissioners to require investigative social workers to go through their reports with the parties (and any legal representatives) outside court immediately before the inquiry.[51]

6.2.3 The Negative Consequences of Inadequate Direction

As noted earlier, where parties do appear in court there may be fertile ground for fiercely adversarial confrontations because parents appreciate that their children may be removed and are in contest with welfare services or each other.[52] Essack has commented that commissioners who believe they must follow a predominantly accusatorial approach

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[47] Rothman (2005) supra note 39.
[48] Attorney T-L D Wessels: personal communication, 16 June 2004; commissioner A Bacharam 'A Children's Court Field Study' (unpublished Masters research paper, University of KwaZulu-Natal, 18 Oct 2004) 1; and social worker G Job: personal communication 21 Oct 2004. Researchers D McConnell, G Llewellyn & L Ferronato 'Disability and Decision-making in Australian Care Proceedings' (2002) 16 *International Journal of Law, Policy and the Family* 270 at 278 noted exactly the same consequence of insufficiently clear legislation in New South Wales, Australia. Here too, children's court magistrates chose whether they would work in a predominantly inquisitorial or adversarial manner -with the latter often disadvantaging vulnerable parties.
[49] Wessels ibid; Essack (2002) op cit note 38 at 3.
[50] Wessels ibid.
[51] Job (2004) supra note 48.
[52] See part 3.4.2, above.

tend to sit back and allow hostility to take its course as a supposedly necessary part of the proceedings.[53]

Emotions may run particularly high where a person's competence as a parent is in question. Olmesdahl, when appearing as a legal representative in the children's courts during the period 1988-2002, noted frequent instances of family members being subjected to intensively hostile cross-examination by opposing parties or their lawyers where commissioners adopted an entirely passive-accusatorial role.[54] And as noted earlier, even experienced social workers are sometimes intimidated where adversarialism is given free rein.[55]

Of particular concern are stresses on children where commissioners view their function as noninterventionist.[56] In 1989, in an investigation of the situation of child witnesses in the South African courts generally, the law commission found that the neutral role which many presiding officers tended to take on as part of the adversarial system meant that they were reluctant to control cross-examination.[57] As a result, child witnesses in particular were frequently subjected to intimidating questioning which went far beyond what was required for ascertaining the truth.[58] There is some empirical research which indicates generally high levels of stress specifically for children in the children's courts.[59] Practitioners with experience in these courts have expressed the view that a primary cause

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[53] Essack (2002) op cit note 38 at 3. This accords with the idea that in an adversarial system presiding officers should limit the degree to which they 'enter the arena' and should allow the parties a considerable degree of latitude even in the nature of their cross-examination: see Skeen & Van Der Merwe (2002) op cit note 43 at 346.

[54] Professor MCJ Olmesdahl: personal communication 28 Oct 2002. This is despite a general rule against gratuitous or disproportionately hostile or insulting cross-examination in our law: see Skeen & Van Der Merwe (2002) op cit note 43 at 347-48.

[55] See part 4.3.1, above. For this problem in the United Kingdom see M Lane & T Walsh 'Court Proceedings and Court Craft' in K Wilson & A James (eds) *The Child Protection Handbook* (2002) 342.

[56] For research findings linking stress to a noninterventionist approach in all types of court proceedings see K Müller & M Tait 'Are Children Beheaded and Fed to Wild Animals? A Study of the Perceptions of South African Children Relating to the Judicial Process' (1998) 115 *SALJ* 447 at 455.

[57] South African Law Commission *Protection of the Child Witness* (Working Paper 28, 1989) 7.

[58] Ibid. K Müller & K Hollely 'Empowering Child Witnesses against the Legal System' (2001) 34 *De Jure* 330 at 333-35 showed that in South Africa presiding officers sometimes allow lawyers who are conducting cross-examination to continue using aggressive and even insulting language even after they have reduced child witnesses to tears. See also K Müller & A Van Der Merwe 'Judicial Management and Child Abuse Cases: Empowering Judicial Officers to Be "the Boss of the Court" ' (2005) 1 *SACJ* 41 at 51-52.

[59] See the findings of FN Zaal 'Hearing the Voices of Children in Court: a Field Study and Evaluation' in S Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 158 at 162.

of this, just as in other courts, is insufficient curbing by presiding officers of extreme adversarialism because they believe that it is improper for them to 'enter the arena'.[60]

Olmesdahl has observed that, aside from the direct psychological harm, where hostile questioning is not restrained the outcome of care cases can be adversely affected. He has stated that such questioning is, for example, sometimes unduly sustained until caregivers concede that they are dangerously neglectful when in fact they are not. [61] He is of the view that in order to correct the problem of inappropriate cross-examination within an accusatorial framework it would be necessary to provide lawyers to represent all parties in care cases.[62] It may be commented that a need for numerous lawyers to provide 'equality of arms' surely represents a significant disadvantage of the accusatorial system given the limited resources available in South Africa.

Based on her involvement in children's court cases, attorney Wessels has also expressed the view that serious weaknesses in the passive-accusatorial approach tend to manifest when parties are not legally represented. She considers that a non-interventionist stance by many commissioners exacerbates inequalities between parties. She claims it produces a situation where welfare is completely successful in nearly all cases.[63] This is because their professional qualifications and greater court experience enable them to present more plausible evidence than unassisted lay family members.

Wessels has argued that commissioners should be required to assist unrepresented family members by closely-interrogating the evidence of social workers.[64] In failing to do so, children's courts frequently tend to become mere rubber stamps for the latter.[65] She has claimed that their essential function of serving as a check and balance disappears and they

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[60] Commissioner A Vermooten 'Protecting the Child Witness' (Unpublished Masters seminar paper, University of Durban-Westville 13 Aug 2003) 3. R Govender (legal aid board attorney) personal communication 1 Jun 2005 -referring particularly to rural jurisdictions; and commissioner P Booysen: personal communication 12 Sept 2006).
[61] Olmesdahl (2002) supra note 54.
[62] Ibid.
[63] Wessels (2004) supra note 48.
[64] Ibid.
[65] By contrast, in New South Wales children's court magistrates are generally cognisant of this danger, often override the wishes of welfare, and are careful not to simply rubber stamp their requests: see McConnell, Llewellyn & Ferronato (2002) op cit note 48 at 281.

may simply give legal effect to the sometimes serious errors of overburdened welfare services.[66]

Interestingly, Rothman, having served for many years as a commissioner, has expressed a view almost directly opposite to that of Wessels. He suggested that the role of children's courts in conducting inquiries should ordinarily be a relatively passive and minimalist one. In his opinion, in alternative care matters commissioners tend to have less expertise than social workers. Therefore, the decision-making role of the latter should be predominant and the function of a children's court should be 'significant only to the degree that it provides a judicial forum for confirming the intervention and role of welfare bodies by the making of a finding that the child is indeed in need of care and issuing a placement order'.[67] In *Swarts v Swarts*, in a rare recent reported high court case arising out of a children's court matter, Bertelsmann J supported this approach of considerable deference to the expertise of social workers in care matters.[68]

As against the less active function, however, another consequence of not rigorously testing the preferences of welfare has been commented on by Denge. She noted that some of her fellow-commissioners with a more passive impression of their role tended to be very cooperative when social workers sought adjournments of care proceedings.[69] As a result hearings frequently extended over months and even years.[70] It has been generally noted in chapter 3 that delays in case processing is one of the potential pitfalls for courts.[71] The problem of adjournments has also been a concern in the USA.[72]

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[66] Wessels (2004) supra note 48. Wessels expressed the view that case overloads caused by the AIDS pandemic have produced an over-readiness of some social workers to recommend administratively-easier placements of children at poorly-resourced institutions, rather than with suitable extended family members or foster parents, even where these are available. She stated that many children's courts tend to accept such recommendations without engaging in sufficient interrogation to discover that they are confirming second-best placements.

[67] DS Rothman 'The Need for Legal Representation for Children in Children's Court Proceedings -Fact or Phobia?' (2001) 4 *The Judicial Officer* 4 at 7.

[68] [2002] 3 All SA 35 (T) at 42b, 44b & 47i. For a discussion of this case see part 7.2.1.2, below.

[69] NE Denge 'The Best Interests of the Child and Speedy Determination of Children's Court Matters' (April 2004) *News and Views for Magistrates* 7.

[70] Ibid.

[71] See part 3.4.2, above.

[72] JK Heldman 'Court Delay and the Waiting Child' (2003) 40 *San Diego LR* 1001 especially at 1023.

Unfortunately, where courts too readily allow delays children may be seriously disadvantaged. They may die at the hands of abusive caregivers or else bond too strongly with temporary substitutes from whom they later have to be removed.[73] As hearings drag on the chances of older children being adopted diminish.[74] A second group of commissioners are well aware of these dangers. They are extremely resistant to delays that might prejudice children.[75] Some members of this group develop and apply techniques designed to create intense pressure on social workers and other participants to complete cases as quickly as possible.[76]

A problem with the diverse approaches of commissioners is that parties are impeded in preparing for court. Gaining clarity before hearings on how a particular commissioner will proceed is sometimes difficult. Citing the need to avoid any appearance of partiality, some commissioners are not available beforehand to provide information about how they intend to manage a case.[77] Others consider it proper to allow only indirect communication via children's court assistants or court clerks.[78] And even where sufficient prior guidance from a commissioner can be obtained, on the day of court it may be discovered that another commissioner with an entirely different interpretation of her function has been substituted.[79] The likelihood of this is increased by the practice, still continuing in many jurisdictions in recent years, of rotating magistrates between children's courts and other courts.[80]

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[73] Ibid at 1007-09. On the problem of delays in Australian children's courts see McConnell, Llewellyn & Ferronato (2002) op cit note 48 at 285; and RJ McLachlan 'The Children's Court's Power to Limit the Presentation of Evidence or the Cross-examination of the Deponents of Documents' (2004) 4 *Children's Law News* 47 at 56.

[74] Heldman ibid at 1020. See also the cases discussed by M Guggenheim & C Gottlieb 'Justice Denied: Delays in Resolving Child Protection Cases in New York' (2005) 12 *Virginia Journal of Social Policy and the Law* 546 at 549-553.

[75] Denge (2004) op cit note 69 at 7.

[76] Ibid. Some commissioners responded to adjournment requests by requiring satisfactory written motivations and issuing finalisation deadlines. Others subpoenaed social workers to appear before them to explain delays and summarily terminated the authority of places of safety to continue to hold children.

[77] L Dhabcharam **(**deputy-director, Childline): personal communication 20 Sept 2002; Job (2004) supra note 48.

[78] Job, ibid.

[79] Dhabcharam (2002) supra note 77.

[80] Govender (2005) supra note 60; Wessels (2004) supra note 48.

Examples of what appears to be the extreme of disengagement from involvement with participants have been noted by commissioner Bacharam. Based on personal observation and empirical research in 2004 she recorded wide variations on such a basic aspect as the extent to which commissioners required appearances in court by persons involved. She noted that some commissioners were running care cases mainly as paper exercises.[81] They encouraged parties to provide documentary evidence, and because many involved family members are illiterate and unrepresented, this was usually forthcoming only in the form of investigative agencies' case reports. Commissioners then merely read the documentation privately. They made a final decision on alternative care without anyone appearing to give *viva voce* testimony before them unless this was specifically requested.[82]

Based on the evidence reviewed above, it must be concluded that the long-subsisting uncertainty about even fundamental aspects of the role of commissioners has had some unfortunate effects. Although only limited data is available it provides strong indications that expecting them to utilise civil magistrates' court practices as a primary guide, but with the vague *mutatis mutandis* proviso and some mixed signals arising from scattered provisions in the 1983 Act, has not proved successful. Effective participation by parties is often prevented because they are unable to prepare properly, face difficulties of access because of courts' preferences for documentary evidence[83] or alternatively are subjected to demeaning cross-examination and expected to return to court many times because of adjournments.

The serious problems which have arisen because of insufficient direction on the role of commissioners raise troubling questions of fair-hearings compliance with s 34 of

[81] Bacharam (2004) op cit note 48 at 6.
[82] Ibid.
[83] It is true that in countries such as Australia and England there is a considerable emphasis upon the mandatory prior lodging of most evidence in documentary form: see, for example, McLachlan (2004) op cit note 73 at 53 & 56 (Australia); and J Brophy *Research Review: Child Care Proceedings under the Children Act 1989* (2006) 61 (England and Wales: accessed at http://www.dca. gov.uk/research/2006/05_2006.pdf). The problem in South Africa is that for most parties language and literacy barriers inhibit the submission of such evidence.

the Constitution.[84] The review undertaken above indicates that much better guidance is essential. In the discussion below, wording of the 2005 Act which relates to adjudicators is analysed to establish whether it will provide such guidance.

6.2.4 The Children's Act 38/2005

The 2005 Act certainly makes some important changes. Children's court adjudicators are to lose their distinguishing title of 'commissioners of child welfare'.[85] They will thus in future presumably have to be referred to simply as magistrates who happen to be currently presiding in children's courts. This is unfortunate because as has been noted children's court work is unique in nature.[86] The need to recognise children's court adjudicators as dedicated specialists[87] has if anything been increased by the host of extremely demanding new judicial functions in the Act.[88]And our own historical experience in the period 1937-1950 as referred to in part 6.2.1 above provides indications that such adjudicators are needed to create child-friendly and relaxed court environments which optimise the quality of communication.

The failure to retain the distinguishing title of commissioner runs contrary to the Act's major purpose of continuing the evolution of the children's courts as specialist forums that perform skilled and unique functions. Although s 42(3) of the Act expressly allows for the possibility of some magistrates being appointed as 'dedicated' presiding officers it is clear from s 42(2) that any magistrate can preside, and without any particular training requirements.[89] This will permit continuing rotation of magistrates between children's courts and other courts. It will thus perpetuate impediments to the development of appropriate expertise and implementation of suitable procedural methods.

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[84] On this provision see further part 1.3.2, above.
[85] Section 42(2).
[86] See especially parts 3.7 and 5.2, above.
[87] One of the key findings in some English research has been that adjudicators require high levels of expertise: see E Larkin, D McSherry & D Iwaniec 'Room for Improvement? Views of Key Professionals Involved in Care Order Proceedings' (2005) 17 *Child and Family LQ* 231 at 243.
[88] Aside from the new functions noted above in parts 3.6-7, 4.2.5 and in this chapter, further additional important responsibilities for children's court magistrates will be discussed in part 8.3, below.
[89] This subsection follows our previous legislation in rendering every magistrate and additional magistrate *ex officio* 'a presiding officer of a children's court'.

A relatively low status for children's courts will unfortunately also continue because it is stated in s 43 that they are to have 'a similar status to that of a magistrates' court at district level'. It has been recognised in England that many care cases are too complex or serious to be dealt with at magisterial level.[90] Given the nature of their work[91] children's court presiding officers should surely be accorded a higher status than that of the lowest ranking district magistrates. To attract and retain suitable candidates their status should at least be that of regional magistrates and preferably higher.

The nearest equivalent to s 9(1) of the 1983 Act is s 52 of the 2005 Act. This reads:

> '(1) Except as is otherwise provided in this Act, the provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and of the rules made in terms thereof as well as the rules made under the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), apply, with the necessary changes required by the context, to the children's court in so far as these provisions relate to-
> (a) the issue and service of process;
> (b) the appearance in court of advocates and attorneys;
> (c) the execution of court orders;
> (d) contempt of court; and
> (e) penalties for-
> (i) non-compliance with court orders;
> (ii) obstruction of the execution of judgments; and
> (iii) contempt of court,
> (2) Rules made in terms of subsection (1) must be designed to avoid adversarial procedures and include rules concerning-
> (a) appropriate questioning techniques for-
> (i) children in general;
> (ii) children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication;
> (iii) traumatised children; and
> (iv) very young children; and
> (b) the use of suitably trained or qualified interpreters.'

As can be seen, just as in the 1983 Act a basic point of reference for children's court processes is once again the Magistrates' Courts Act 32/1944.[92] Similarly to the currently applicable s 9(1) of the 1983 Act, a broad discretion to depart from Magistrates' Courts Act processes is perpetuated -although in place of '*mutatis mutandis*' appears the more

[90] See A Head 'The Work of the Guardian *ad litem*' in Wilson & James (2002) op cit note 55, 355 at 356.
[91] On the unique and demanding nature of adjudication in care cases see further part 6.3, below.
[92] A definition of 'lower court' in s 1 of the Rules Board for Courts of Law Act, 1985 Act 107/1985 allows for rules to be formulated at a future unspecified date for magistrates' courts but not directly for children's courts. So the most important guide is still the Magistrates' Court Act.

modern but equally vague terminology 'with the necessary changes required by the context'.

Key differences from s 9(1) of the 1983 Act, however, are the omission of references to 'the…functions of officers' and 'the conduct of proceedings' in the list of processes included in s 52(1). Prima facie, this suggests that children's courts are no longer to use magistrates' courts as a default guide to the role of adjudicators and hearings-procedures. What immediately renders this interpretation doubtful, however, is that s52(2) expressly relates s 52(1) to matters that quite clearly do relate to the conduct of proceedings. The statement in s 52(2) that rules made under s 52(1) must be designed to avoid adversarial procedures and cover appropriate questioning techniques for children makes little sense if the conduct of proceedings is not part of s 52(1). It would therefore appear that the phrase 'the conduct of proceedings' was accidentally omitted from s 52(1). The resulting unclarity in s 52 renders it difficult to interpret and is likely to reduce its value in countering the procedural confusion that currently exists.

The omission also of any reference to the functions of officers in s 52(1) raises, inter alia, the question of the nature of the role of adjudicators. Like the 1983 Act before it, the 2005 Act provides only limited and somewhat dissonant specific information on this. Section 48(1)(c) allows magistrates to impose time deadlines and this could usefully strengthen their hand in countering the problem of delays.[93] Although it is stated in s 52(2) that future rules of court must be designed to avoid adversarial procedures, as noted in part 4.2.5 above s 58 of the Act expressly provides for the adversarial technique of cross-examination by persons appearing and also for addressing children's courts 'in argument' if the adjudicator grants permission. The new power to grant or withhold such permission implies intervention powers for magistrates that go beyond the traditional accusatorial model.

[93] Also, ss 65(2)(ii) and 155(2) allow specifically for time limitations on preparation of social workers' reports.

But are magistrates empowered to become inquisitors and actively enter the arena under the 2005 Act? A limited inquisitorial capability in all types of children's court hearings is certainly allowed for in s 50(1). This directs that a magistrate may in any matter order any person to conduct an investigation and then report findings that may assist in resolving a case. Another discrete inquisitorial allowance is to be found in s 60(1)(a)-(b). Here, presiding magistrates are empowered to call before court any person and then either 'question or cross-examine' them. This shows that, at least in respect of witnesses whom they call themselves, adjudicators are to have an inquisitorial function.

Some further information on the role of adjudicators is provided in s 60(3). This possibly suggests an active function because it states '[c]hildren's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings'. Could this be broadly interpreted as meaning that magistrates must take on a primarily inquisitorial function in managing care cases? On the other hand, the long-established word 'inquiry' is no longer utilised in the 2005 Act to describe care hearings. This could be understood as weakening the basis for presuming that adjudicators must utilise a predominantly inquisitorial function in these cases.

The broad requirement in s 60(3) that magistrates must as far as possible avoid adversarialism begs the question of how. And it is confused by the references elsewhere in the Act to cross-examination by parties and other participants. It is a pity that the one piece of specific direction provided -the statement in s 60(1)(c) that magistrates should allow parties and participants to question or cross-examine witnesses only 'to the extent this is necessary to resolve any factual dispute which is directly relevant in the matter'-[94] has been quite unnecessarily limited to witnesses called by magistrates themselves. The direction in s 60(3) that proceedings must be so managed as to retain a relaxed atmosphere is likely, as our historical record shows, to be undercut by the move away from a specialist status for adjudicators. The instruction in s 52(2) that rules covering appropriate questioning

[94] See further part 4.2.5, above.

techniques for children must be developed is encouraging, but leaves unsettled the important question of what form they should take.

It must be concluded that the sketchy and somewhat discordant allusions to the role of magistrates in the 2005 Act fall far short of the kind of coherent guidance on role functions in children's courts that is required. And the removal of the previous legislative references to ordinary magisterial conduct as a default model means that they are currently the only guidance. Unless they are supplemented, the relatively bare 2005 provisions will at best have only a limited impact on the serious problems that have been identified in the previous parts of this chapter.

On the positive side, it is stated in s 75(1)(a) of the 2005 Act that '[t]he Minister for Justice and Constitutional Development, after consultation with the Minister [of Social Development], may make regulations concerning -the procedures to be followed at or in connection with the proceedings of children's courts...' [insertion added].[95] It is to be hoped that this will be interpreted as including regulations on the role of magistrates. With reference to the problems that have emerged in our system, some recommendations concerning the nature of the guidance most urgently required will be put forward below.

6.3 Some Directions for Reform

It has been shown above that for more than half a century inadequate legislative guidance has caused both uncertainties for adjudicators themselves and impediments to effective participation for other persons involved in care proceedings. It has also been pointed out that s 52(2)(a) of the 2005 Act will in future require that 'appropriate questioning techniques' be maintained during all children's court hearings. And it has been noted that s 60(3) of the same Act requires that adversarialism be minimised and cooperation amongst involved persons encouraged. A question which arises is how our law on the role of presiding officers in children's courts should best be developed to overcome the current problems and achieve the laudable aims of the Act.

[95] It may be suggested that the s 52(2) qualifications concerning the nature of procedural rules as discussed above should have been made applicable to this provision rather than s 52(1).

Experience in Australia supports the argument above that the move away from recognition of children's court adjudicators as specialists is a serious shortcoming in the 2005 Act. In 1998 findings on the unique and complex nature of the work of children's court presiding officers in Victoria were published.[96] Soon afterwards, in terms of the Children and Young Persons (Appointment of President) Act 2000, Victoria children's courts were separated from the magistrates' courts establishment. They now formed an entirely independent network with its own judge-president. The aim of the division was stated as 'to demonstrate the important role played by the Children's Court in our judicial system in providing a specialised court catering for children and young people'.[97] In New South Wales it has also been found necessary to provide dedicated full-time children's court adjudicators who receive ongoing specialist training, are appointed for three-year terms and serve under a senior children's magistrate.[98]

Reviewing the English experience, Brophy stated that different judgecraft skills not historically valued for other types of legal proceedings are increasingly being found to be important for care matters.[99] Specialist, child-related non-legal knowledge is also required.[100] From an American perspective Heldman has proposed that it is essential for adjudicators to be accountable to their own court president.[101] Experience elsewhere thus supports the view that in our 2005 Act a valuable opportunity to create a separate court

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[96] One respondent described it as 'the most difficult area that a magistrate could work in': see R Martyn & G Levine 'If Your Worship Pleases: An Australian Perspective on the Role of the Magistrate in Child Protection' (1998) 7 *Child Abuse Review* 254 at 262. On the specialised nature of care adjudication see also ibid at 260 [& 264].

[97] The quoted phrase is taken from the Victoria children's court website 'History' 1 at 3: accessed at: <http://www.childrenscourt.vic.gov.au/CA 256CA811129>.

[98] New South Wales children's court website 'The Role of the Magistrate' 1: accessed at <http://www lawlink.nsw.gov.au/law link/children's_court>. On the functions of the senior children's magistrate see s 16 of the Children's Court Act 1987: accessed at <http://www.austlii.du.au/au/legis/nsw/consol_act/cca1987>.

[99] Brophy (2006) op cit note 83 at 63.

[100] Australian children's court magistrates interviewed by Martyn & Levine (1998) op cit note 96 at 260 considered that they needed training in aspects of psychology and family welfare. M Ells, RB O'Neal, V Weisz & J Conner 'Unravelling the Labyrinth: A Proposed Revision of the Nebraska Juvenile Code' (2004) 82 *Nebraska LR* 1126 at 1146 concluded that experience in Nebraska showed care case adjudicators needed 'specialised knowledge regarding children and the services available to them and their families'.

[101] Heldman (2003) op cit note 72 at 1034. As is noted, ibid, real accountability can only be achieved with a court leader who is sufficiently knowledgeable about care proceedings to conduct meaningful discussions with adjudicators. It is thus little wonder that the South African children's courts, being placed under the leadership of generalist chief magistrates who manage a variety of courts, continue to manifest serious shortcomings.

structure and thus recognise the need for independence and a specialist status for children's court magistrates was missed.[102]

With reference specifically to the role of adjudicators in encouraging effective participation at care proceedings, the assessment of primarily South African data in part 6.2 above indicates a fundamental aspect on which a firm and clear legislative position must be taken. This is whether they should adopt a primarily inquisitorial or else accusatorial function. It has been demonstrated that the more passive role associated with the latter is behind many of the participation problems in our children's courts. Evidence that it may even impede discovery of the best possible outcome for the child has also been noted. Aside from our own experience, it will be suggested in part 6.3.1 below that experience in other systems also shows that there are strong reasons in favour of a predominantly inquisitorial rather than accusatorial function as a basic norm. It will further be proposed that this could most easily be implemented with regulations that expand upon the 2005 Act.

If an inquisitorial role is to be successfully established magistrates will obviously need guidance. In particular, such guidance must clarify how they should manage *viva voce* evidence at hearings. The nature of direction required on this is discussed in part 6.3, below. The aspects covered are: supporting participants and supplementing their evidence, preventing systemic abuse at hearings, managing the leading of evidence, controlling cross-examination, and time management. Proposals on appropriate rules are put forward. These are related to experience both locally and in foreign systems where historically-imposed accusatorial functions and the adversarial system have been transformed.

6.3.1 Reasons in Favour and Basic Purposes of an Inquisitorial Function

Experience in developed systems provides further compelling arguments in favour of an inquisitorial approach at care hearings. Just as has been noted above in relation to

[102] The argument that it would be difficult to provide specialist adjudicators in rural jurisdictions is not tenable. With lower caseloads in these, it would be feasible for small numbers of presiding officers to go on circuit and thus serve large geographical areas.

South Africa, so too in the USA it has been found that the accusatorial system encourages aggressiveness between opposing parties.[103] American commentator Wriggins has made the same point as Wessels above that the equal contest basis for an adjudicator serving relatively passively as umpire is inappropriate because welfare tend to have far greater resources at their disposal than opposing family members.[104]

On the basis of research in Australia Sheehan reached a similar conclusion and also linked uncontrolled adversarial behaviour to a hostile win-or-lose approach amongst parties.[105] In England, non-interventionism by adjudicators has been discarded in care cases because it allows parties to show other participants in the worst possible light rather than encouraging a joint exploration of available options.[106] Despite a long tradition favouring an accusatorial role for court adjudicators it has been recognised there that under the 1989 Children Act children's cases must be managed differently from other forms of litigation.[107] The judicial function in care cases in particular is thus becoming increasingly inquisitorial.[108]

It seems telling that even in Anglo-American systems that have traditionally favoured an accusatorial function and legalistic approach[109] there is support for moves towards a more interventionist, inquisitorial role for adjudicators. In South Africa, the arguments about requiring adjudicators to actively protect vulnerable parties and redress imbalances

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[103] ML Zwiers & PJ Morrissette *Effective Interviewing of Children. A Comprehensive Guide for Counselors and Human Service Workers* (1999) 100.

[104] J Wriggins 'Parental Rights Termination Jurisprudence: Questioning the Framework ' (2000) 52 *South Carolina LR* 241, at 258-59. For the same problem in Australia see McConnell, Llewellyn & Ferronato (2002) op cit note 48 at 279. As H O'Donnell 'What's Wrong with the Picture: the Other Side of Representing Parents in Child Protection Cases' (2005) 4 *Appalachian Journal of Law* 73 at 77 puts it '[t]he State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defence'.

[105] R Sheehan *Magistrates' Decision-Making in Child Protection Cases* (2001) at 62 & 66.

[106] N Freymond 'Using Intermediary Structures to Support Families: An International Comparison of Practice in Child Protection' (Oct 2001- accessed at <www.wlu.ca./pcfproject>) at 12; Lane & Walsh (2002) op cit note 55 at 343.

[107] See R Probert *Cretney's Family Law* (2003) at 288. Probert, ibid, cites *In Re L (Police Investigation: Privilege)* [1996] 1 FLR 731, HL. She points out that in this case the House of Lords approved of an earlier conclusion by Sir Stephen Brown P in *Oxfordshire CC v M* [1994] Fam. 151 at 161. He held that proceedings under the 1989 Children Act are not adversarial. Rather, they fall into a special category because courts need to take all steps necessary to reach a result that is in the best interests of the child.

[108] Brophy (2006) op cit note 83 at vi.

[109] See further part 1.3.1, above.

obviously apply with at least equal force. It could even be claimed that there is a stronger case for our adjudicators intervening to redress disadvantages because lawyers are less likely to be available to perform this function than in the developed systems referred to above.[110]

As Lyon has pointed out from an English perspective, diminution of an accusatorial function is particularly valuable for care cases because it frees adjudicators to make decisions about children which are quite independent from what is urged by any of the parties.[111] And Australian children's court magistrates interviewed by Martyn and Levine were quite clear that they sometimes need to make such decisions.[112] This has implications for the relationship between adjudicators and investigative agencies. Despite the more supportive interaction favoured by Rothman and Bertelsmann J,[113] as part of a vigorous inquisitorial approach which avoids rubberstamping, presiding magistrates should ensure that at court no special status is enjoyed by welfare. This is again supported by Australian children's court research in which preserving independence from agencies was found essential and linked with a need to enhance the status of children's courts and their adjudicators as much as possible.[114]

It must be concluded that because of the numerous benefits magistrates in our children's courts should in future be required to adopt a predominantly inquisitorial role-function as a standard norm in care cases. The best way to end the current confusion and achieve this would surely be a clear and unequivocal[115] statement to this effect in a regulation published in terms of the 2005 Children's Act. However, as noted above merely to direct an inquisitorial function without indicating what this should entail would be insufficient. It will further be essential to indicate in regulations the main purposes of an interventionist role at hearings.

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[110] See the low legal representation statistics in part 5.2, above.
[111] C Lyon *Child Abuse* (2003) at 372.
[112] Martyn & Levine (1998) op cit note 96 at 256-57.
[113] See part 6.2.3, above.
[114] Martyn & Levine (1998) op cit note 96 at 258-59. A related finding (at 261 ibid) was that a low status for children's courts is problematic because it increases pressures on magistrates to defer to social work agencies.
[115] As noted by McConnell, Llewellyn & Ferronato (2002) op cit note 48 at 278-79 in New South Wales legislation which provides only hints of an inquisitorial function has allowed many children's court magistrates to retain a predominantly adversarial role. This has tended to disadvantage parents when faced by opposing investigative agencies.

Arising from the problems noted in part 6.2 above it may be suggested that two main purposes should be expressed. Firstly, it should be stated that a key aim is to enable magistrates to balance or supplement the efforts of parties and legal representatives to obtain relevant information. Secondly, magistrates should be required to maintain an atmosphere that is as conducive as possible to an amicable joint exploration of information about care intervention grounds and outcome options.

The current state of procedural disarray in the children's courts indicates that, aside from the general directions recommended above, magistrates will need more specific guidance on the application of the proposed inquisitorial function.[116] Important aspects are when they should intervene whilst parties and other participants are attempting to communicate at hearings and how they should do so. The need for direction on these responsibilities is increased by the fact that we do not have a firmly established inquisitorial tradition. How magistrates should intervene will be considered next.

6.3.2 Guidance on How Adjudicators Should Manage Hearings

In the Children's Bill 70/2003 which preceded the 2005 Act it was proposed that presiding officers in children's courts be accorded an express power to 'intervene in the questioning or cross-examination of the child if the court finds that this would be in the best interests of the child'.[117] Best interests provided rather a vague ground in this provision and also showed no consideration of the needs of older vulnerable witnesses. It did not appear in the Act, and the question of how and when exactly magistrates should intervene during the testimony of witnesses remains entirely open. Suggestions for more specific guidance will be put forward below.

6.3.2.1 Supporting and Supplementing Questioning

[116] Brophy (2006) op cit note 83 at vi concludes that it has been detailed rules in the form of '[p]ractice directions, guidance and protocols' that have successfully moved care hearings to a more inquisitorial model in England and Wales.
[117] Clause 61(1)(c).

As noted in the previous chapter, stress experienced at care proceedings may cause particularly private parties to become inarticulate.[118] In the proposed regulations it could therefore be required that one ground for intervention by a presiding officer is where a questioner proves to be unable to question a particular witness effectively.[119] This ground could be broadly worded to state that '[w]here an attempt by a witness to communicate in court appears to be hampered, inappropriately managed or incomplete, the adjudicator must consider the feasibility of helping with the formulation of questions'. This is wide enough to apply where there is a lack of competence on the part of the questioner or witness, or both.[120] Where this proves to be insufficient magistrates should be expressly empowered to take over questioning themselves.[121] The proposed supplementary questioning function for magistrates should also apply when another participant has finished questioning a witness but the adjudicator considers there is additional information which could be sought.[122]

6.3.2.2 Preventing Systemic Abuse

Aside from intervening where there is inadequate questioning, presiding officers must be required to do so where it is harmful to the extent of constituting secondary, systemic abuse. A future children's court rule must direct magistrates to be aware that questions put to vulnerable witnesses can be inappropriate not only because of the way in which they are asked but because of the information which they are intended to derive. For

[118] See part 5.4.1, above. McConnell, Llewellyn & Ferronato (2002) op cit note 48 at 289 note that intellectual disabilities and sometimes simply unfamiliarity with the court environment are other factors that may render it necessary for parents to receive assistance in communicating in care proceedings.

[119] This is supported by Brophy (2006) op cit note 83 at 59-60. In *S v Department of Community Services* (2002) 29 FAMLR 144 at 153 para 40 Davies AJA of the New South Wales court of appeal suggested that lack of legal representation or high levels of stress in participants might be amongst factors rendering it necessary for magistrates to intervene and assist them with questioning in children's court care proceedings. For a discussion see RJ McLachlan 'The Unrepresented Party: What Duty Does the Court Owe to Assist in the Presentation of Their Case?' (February 2003) 2 *Children's Law News* 6. Accessed at <http://www.lawlink.nsw.gov.au/lawlink/children's_court/II_cc. nsf>.

[120] See the approach of Australian children's court magistrates noted by McConnell, Llewellyn & Ferronato (2002) op cit note 48 at 278.

[121] See Martyn & Levine op cit note 96 at 262. From a US perspective WW Patton *Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers* (2006) 6 notes the example of a judge needing to intervene when incompetent questioning 'might result in a disposition that is dangerous for the children before the court'.

[122] An example noted by Martyn & Levine ibid is where presiding officers need to derive further testimony from family members to better assess proposals of welfare.

example, as has been noted in chapter 4 it is usually inappropriate for a child to be asked to choose between living with one parent or the other.[123]

Considering whether assertive questioning has reached the point of being unduly harmful for a particular witness clearly requires an exercise of discretion. However, magistrates should be directed to note the degree of hostility or coercion evinced by a questioner. It is now known that a variety of methods including repetition,[124] voice tone,[125] comments to third parties,[126] and non-verbal inducement of fear[127] can be coercively misused to influence the evidence of vulnerable persons at care proceedings. These examples should therefore all be noted in our rules as techniques that magistrates must remain alert for and discourage.

In deciding whether they need to intervene because questioning has become unduly harmful magistrates should additionally be guided by a principle of proportionality. This must require them to take into account the developmental and psychological capabilities of witnesses as described in pre-hearing documentation and manifested at court. These will have to be balanced against the degree of pressure being exerted by a

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[123] See part 4.2.4, above.

[124] C Wilson & M Powell *A Guide to Interviewing Children* (2001) at 59 cite the example of a lawyer who asks '[j]ust tell me where Uncle Joe touched you… Go on, tell me... Where did he touch you?…It's okay, just tell me'. As they comment this use of repetition increases pressure and is 'likely to result in errors in the child's account'. W Bourg, R Broderick & R Flagor *et al, A Child Interviewer's Guidebook* (1999) at 117 concluded that research showed that particularly young children may interpret repetition as a signal to change their answer to please the questioner.

[125] For example, if a questioner's voice tone becomes friendlier and she increases eye-contact whenever the child talks adversely about his mother, he is being encouraged to portray her negatively.

[126] Zwiers & Morrissette (1999) op cit note 103 at 100 explain that a hostile professional may attempt to intimidate and discredit a child by making critical remarks about her in her presence. For example, a lawyer may use conversation with the presiding officer to undermine a child who understands his remarks.

[127] LM Copen *Preparing Children for Court. A Practitioner's Guide* (2000) at 37 explains that non-verbal intimidation often takes the form of 'control cueing'. This is behaviour by the adult which the child recognises from previous experience. It is intended to intimidate the child and thus interfere with her ability to give evidence. As Copen has explained it can 'take place in the courtroom and in front of everyone, but unless you know to look for it, it can be so innocent and subtle, it is missed by all except the intended target - the victim/witness'. As an example, Copen (ibid, at 37-38) cites a case where a child-witness suddenly stopped giving evidence and froze in fear when an adult put on a pair of dark glasses. Afterwards the child explained that this particular adult always put on the glasses when he was about to abuse the child. In a care case recorded in Scotland, a child stated 'my stepdad always used to cough, just a little cough to warn me. He gave me that cough in the hearing and I couldn't speak': see Scottish Office *Scotland's Children Speaking Out: Young People's Views on Child Care Law in Scotland* (HMSO, 1994) 4. See also C Hallett & C Murray 'Children's Rights and the Scottish Children's Hearings System' (1999) 7 *International Journal of Children's Rights* 31 at 37.

questioner. Although fair trial considerations are important and will be further considered in the next sub-part below, they must be expressly rated in our rules as secondary to protecting witnesses from systemic abuse in court.[128] In applying the principle of proportionality magistrates must as already suggested necessarily be allowed a degree of discretion. But gratuitous or disproportionate attacks upon persons who testify must be thwarted or stifled by them.

Another way in which questioning may be inappropriate is through being extended over too long a period of time relative to the capabilities of a witness. This may have a wearing down effect. Cases have been recorded of children, for example, being subjected to days of cross-examination -particularly in matters where an adult is determined at any cost to refute an allegation of abuse.[129] To assist them in deciding when questioning is being unduly extended children's court magistrates will need to be trained to recognise that it is gradual build-ups of pressure in coercive relationships established over what may be a long series of questions, rather than any one particular inappropriate question, that is most likely to cause vulnerable witnesses to provide inaccurate information.[130] Our future rules must expressly require that adjudicators are to intervene once they decide that questioning is being extended for too long, given the capabilities of the witness.

6.3.2.3 Managing the Leading of Evidence

To facilitate participation a future children's court rule should indicate that parties and other participants must in the first instance be free to communicate their personal evidence and lead their witnesses. As evidence in chief is presented, the management role of the adjudicating magistrate should be described as initially merely a limited one in guiding evidence so that time is not wasted with irrelevant or repetitive testimony. An issue which may soon arise during the presentation of evidence in chief, however, is the

[128] With reference generally to all types of court cases Skeen & Van der Merwe (2002) op cit note 43 at 355-58 rightly argue that protection of child-witnesses should take precedence over fair trial assertions by adults who wish to engage in confrontational questioning.
[129] NW Perry & LS Wrightsman *The Child Witness: Legal Issues and Dilemmas* (1991) at 5 noted the extreme example of a ten-year-old child being required to defend his evidence for sixteen days.
[130] See Bourg, Broderick & Flagor *et al* (1999) op cit note 124 at 89.

extent to which parties, participants or adjudicators themselves should be permitted to utilise leading questions.

In the useful definition of Wilson and Powell leading questions are ones 'that suggest a certain answer is desired or assume the existence of facts that have not yet been proved or have not already been mentioned' by a witness.[131] On the one hand, the crucial need to obtain sufficient information supports a less restrictive approach to leading questions. On the other hand, the potentially drastic consequences for the child and other family members raise fair trial considerations if witnesses are unduly influenced and therefore provide inaccurate replies.

It is certainly true that suggestible children and even adults can sometimes be influenced by inappropriate leading questions to give false or misleading evidence.[132] However, it would not be correct to assume that a blanket prohibition on putting any leading questions during evidence in chief would be a correct solution. Entirely preventing the use of these can render it impossible to prove that a child is in need of alternative care because lay witnesses with a limited understanding of forensic needs may be unresponsive to open, non-leading questions. It is thus understandable that in English care proceedings the usual rule against asking leading questions during evidence in chief is, as Lane and Walsh put it, 'often relaxed to the point of being ignored'.[133]

In order to meet evidence validity and fair trial considerations, however, it should be indicated in a future South African regulation that as a general rule adjudicators must ensure that questioning of a child or other witness during evidence in chief is as non-directive as possible in relation to the capabilities which the witness exhibits in court. However, where it is clear that a witness is having difficulty in providing relevant evidence, a magistrate or another questioner leading evidence should be permitted to move

[131] Wilson & Powell (2001) op cit note 124 at 58-59. They further describe 'closed' questions (at 58 ibid) as 'a form of specific question because they focus the child on the specific information that is required'. In their depiction a closed question is the same as a leading question because it limits the answers that the child can provide to -'yes' or 'no'. Alternatively, it requires a choice between two other possible answers.

[132] Wilson & Powell ibid provide the following two examples of particularly inappropriate use of leading questions: '[d]addy hurt you, didn't he?' when the child has not yet claimed Daddy did anything; and '[d]id Joe touch your front bottom or back bottom?' when the child has not stated that Joe has touched him.

[133] Lane & Walsh (2002) op cit note 55 at 348.

to questions of a partially directive kind. The choice in this situation need not be between the opposite extremes of putting words in the mouths of witnesses or leaving them totally adrift. As Bourg, Broderick and Flagor *et al* have pointed out a compromise between the two is a multiple-choice question.[134] This includes a range of possible answers and the witness is requested to select one. For example '[d]id it happen at your house, at your grandmother's house, or at someone else's house?'[135]

Although concerns about reliability of information may arise where a witness is offered possible answers Bourg, Broderick and Flagor *et al* argue that an appropriate situation in which to use a multiple-choice question is 'when children indicate that something happened, but they are having difficulty providing details'.[136] Such situations can obviously arise in care proceedings. Children's court adjudicators should therefore be accorded an express power to use or allow multiple-choice questions during evidence in chief where non-leading questions have been found to be ineffective. Where the communication abilities of a child or adult witness are very poor there could be a natural progression from multiple-choice questions to leading questions with limited answer options.[137]

It may be concluded that future rules must indicate that in order to meet the fair trial requirement in s 34 of the Constitution evidence in chief should be obtained in as nondirective manner as possible. However, presiding magistrates need to be provided with a discretion to allow multiple-choice questions where they decide that the incapability of a

[134] Bourg, Broderick & Flagor *et al* (1999) op cit note 124 at 81.
[135] Ibid.
[136] Ibid. An example which they provide (ibid, at 96) is where: '[t]he child has disclosed that someone touched him in a way he didn't like, but when asked where he was touched, provided no response. The interviewer could ask, " Were you touched on your nose?"; "Mouth?"; " Belly button?"; " Private part?"; " Leg?" and so forth'.
[137] In support of this is § 767(b) of the California Evidence Code (accessed at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid & group=>). This states '[t]he court may, in the interests of justice permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment…'. In the Rhode Island case of *State v Brown* 574A. 2d 745 (R.I. 1990) at 748 it was held on appeal that the trial court acted correctly in allowing a questioner to use leading questions after a child witness stated that the defendant 'touched her vagina' but did not understand further questions intended to show whether he had penetrated her digitally.

witness indicates this is necessary.[138] Magistrates must initially allow parties or other participants to speak for themselves or lead their own witnesses. But as proposed in part 6.3.2.1 above where incapacity or other factors hamper this process or leave it incomplete our rules must expressly require them to supplement it. Magistrates must do this by asking questions that assist the party/participant. They must also be empowered to obtain whatever evidence they themselves believe is still required.

6.3.2.4 Controlling Cross-Examination

Once the evidence of a witness has been led the issue of how it should be tested may arise. Since experience in our system indicates that vulnerable witnesses have been intimidated and even traumatised when subjected to inappropriate forms of cross-examination future rules for children's courts must provide direction on the use of this technique. Although as will be recalled the 2005 Act allows for cross-examination with the permission of the magistrate it might perhaps be questioned whether it should be allowed at all. Traditional wisdom has it that cross-examination is one of the greatest tools ever developed for ensuring that a court hears the truth, but this may be far from correct if it is too intensively applied to vulnerable witnesses such as children.

What is currently known is that, although many children can under appropriate conditions recall even stressful events with considerable accuracy, their ability to remember details tends to be 'contaminated' -to use the description of Wilson and Powell- when they are subjected to intensely coercive questioning techniques.[139] Whilst there is still disagreement amongst researchers on points of detail, numerous studies have begun to show that adversarial questioning which puts high levels of pressure on children 'to give a particular type of response' not only tends to derive less accurate information, but may also have negative psychological effects on them.[140]

[138] And the children's court hearing record will provide evidence of the witnesses' incapacity, should the case go to a higher court on appeal or review.
[139] Wilson & Powell (2001) op cit note 124 at xv. Previous research is cited ibid in support.
[140] The quoted phrase is that of Bourg, Broderick & Flagor *et al* (1999) op cit note 124 at 86. For a discussion of research see ibid at 86-89.

Despite the dangers of intensely-coercive questioning, there are strong arguments in favour of finding ways to test evidence properly in care cases. As Perry and Wrightsman have contended this is essential because 'incorrect reports of neglect or abuse by caregivers may be made by paranoid or delusional individuals and result in court cases because of inadequate investigatory follow-ups undertaken by inexperienced or case-burdened social workers'.[141] Ramsey supports the view that matters may come to court simply because investigative social work agencies have made mistakes in case preparation or failed to explore all alternative avenues.[142]

Testing of evidence may also be needed because family members hoping to avoid removals of children or consequent criminal law sanctions collude with a view to misleading courts. And there are as noted earlier important fair trial considerations. It is understandable that in England, for example, these have been a major consideration in preserving parties' rights to challenge disputed evidence in care cases despite the move towards a more active function for adjudicators in reducing hostile competitiveness.[143] In the Australian children's courts it has also been found necessary to maintain the possibility of adversarial phases for dealing with contested issues.[144]

In a child participatory model as supported in this thesis further reasons for ensuring that evidence is properly tested emerge. Obviously, children's testimony is not always reliable. In care cases they occasionally lie about the behaviour of their parents

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[141] Perry & Wrightsman (1991) op cit note 129 at 4. See also their discussion of the 1990 American case of *Buckey* at 4-10 ibid.

[142] H Ramsey 'The United States Child Protective System -A Triangle of Tensions' (2001) 13 *Child and Family LQ* 25 at 32. See also Martyn & Levine (1998) op cit note 96 at 261. For a South African perspective on the danger of inappropriate recommendations by social workers see the assertions of Wessels (2004) in part 6.2.3, above. On mistakes by welfare see also parts 1.1, 1.3.1 & 3.4.1, above.

[143] Lyon (2003) op cit note 111 at 372. Brophy (2006) op cit note 83 at 60 recorded that early in the existence of the Children Act 1989 some English researchers and commentators took the view that 'traditional adversarial approaches to cross-examination, drawn from criminal proceedings, were inappropriate to care proceedings'. But subsequent British research has qualified this impression. She points out that it has been found that some cases, particularly where child abuse is alleged, require a robust questioning of evidence. Evidence by either social services or parents may need to be properly tested in court. Even expert witnesses are not infallible and may also need to be tested. She concludes ibid '[t]hus where the ultimate sanction of society is the permanent removal of children from birth parents, mechanisms for cross-examination and the testing of evidence remain crucial to a fair and just legal system…' .

[144] Martyn & Levine (1998) op cit note 96 at 258.

because of feelings of anger or motives of revenge.[145] Alternatively, guilt or a desire to protect a parent may influence a child's evidence. As has been noted in part 4.2.4 above a child may have been intimidated, bribed or in other ways influenced and coached to give false replies on key issues.[146] Some children tailor their answers to provide what they believe will please or satisfy questioners.[147] There have been findings which suggest that this last problem is particularly relevant with black South African children who have had a traditional upbringing in which they have been taught not to disagree with elders.[148] Thus testing of evidence should include that offered by children.

It must be concluded that the many reasons in favour of testing the evidence of all categories of witnesses indicates that cross-examination is sometimes appropriate.[149] The general requirement in s 52(2) of the 2005 Act that rules must be developed to enable adversarial procedures to be 'avoided' will thus hopefully not be interpreted as rendering it exceptional.[150] But if it needs to be utilised, how is cross-examination to be controlled to prevent the problem of systemic abuse of witnesses as discussed above?[151] The solution put forward in s 58 of the 2005 Act is that it may only occur if permission is granted by the magistrate.[152] This represents a significant procedural change because the general

[145] The New Zealand case of *B v Attorney-General* [1997] NZFLR 550 arose out of a false allegation made by a daughter to a school friend that her father had abused her.
[146] For a discussion of research findings which indicate how susceptible young children are to giving false information if they have been influenced by their parents beforehand or believe that they are protecting them see SK Hewitt *Assessing Allegations of Sexual Abuse in Preschool Children: Understanding Small Voices* (1999) at 67-68; and Bourg, Broderick & Flagor *et al* (1999) op cit note 124 at 169-70.
[147] For an analysis of the problems of coaching of children and tailored replies see Wilson & Powell (2001) op cit note 124 at 85-87.
[148] See the comments of respondents interviewed by Zaal (2003) op cit note 59 at 174.
[149] From an English perspective Lyon (2003) op cit note 111 at 380 supports the need for procedures which allow for a testing of evidence generally in cases involving children.
[150] This will depend on the interpretation of the wording once this section is implemented. As noted in part 4.2.5 above s 58 & s 60(1)(b) expressly allow for some cross-examination. McLachlan (2003) op cit note 119 at 6-7 has pointed out that a statement in s 93(3) of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales that proceedings are 'not to be conducted in an adversarial manner' has necessarily been interpreted by children's courts as indicative of a 'general complexion' of proceedings and not as entirely precluding adversarial phases.
[151] In part 6.3.2.2.
[152] On s 58 see further part 4.2.5, above.

approach in South African courts has been to permit a right of cross-examination with a considerable degree of freedom from intervention by adjudicators.[153]

What the 2005 Act unfortunately does not also include is a power for magistrates to control or even terminate cross-examination once they have given permission for it to be undertaken. Since children's courts are entirely creatures of statute such a power cannot necessarily be implied.[154] And surely it should be put beyond doubt that they are able to change their ruling if cross-examination becomes abusive or gratuitously confrontational.[155] A capability to so intervene would be in line with s 60(3) of the 2005 Act. As will be remembered, this reads '[c]hildren's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the cooperation of everyone involved in the proceedings'.

Generally, how adjudicators should utilise intervention powers when evidence needs to be tested is a question of balance. Their task of protecting vulnerable witnesses must obviously not be taken so far as to completely stifle questioners so that they cannot effectively seek the truth. This would be to deny the constitutional right to a fair hearing. In fairness to parties, adjudicators must allow them a reasonable degree of space to challenge evidence.[156] To do so, magistrates should as recommended above initially adopt

[153] DT Zeffertt, AP Paizes & A St Q Skeen *The South African Law of Evidence* (2003) at 753 describe the freedom ordinarily accorded to cross-examiners as follows ' [t]he cross-examiner should be allowed as far as possible to question the witness without interruption from the court…Questions cannot be disallowed merely because the witness has already answered a similar question in chief, because asking a witness to repeat his or her evidence is one way of testing his or her accuracy of narration -but a limitation on cross-examination will be justified… if the cross-examiner appears to be unreasonably attempting to exhaust the witness by repeating questions… repetitive cross-examination is permissible within reasonable bounds, because it is a means of testing consistency'. See also Skeen & Van Der Merwe (2002) op cit note 43 at 342 & 345-46.

[154] The failure to issue clear legislation on this point has caused problems of interpretation in New South Wales: see McLachlan (2004) op cit note 73 especially at 49.

[155] See further PJ Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' 1996 *Acta Juridica* 148 at 157-58.

[156] Brophy (2006) op cit note 83 at vi is clear that care hearings adjudicators have been successfully guided in England and Wales to balance 'rigorous testing of evidence if that becomes necessary' with the provision of 'a protected, managed space in which assessments can be undertaken and where parties can attempt to work towards a solution. In that process all parties, including the local authority, are made accountable to courts for actions and decisions'.

a passive role similar to the accusatorial approach.[157] However, a difference is that they must remain ready to intervene, guided by the capabilities of participants as manifested in court.[158] This accords with the principle of proportionality proposed in part 6.3.2.2 above.

In particular, magistrates must be required to ensure that testing does not exceed what witnesses are able to endure without harm. As an example of how rules could be worded §765(a) of the California Evidence Code provides that courts must 'exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment'. And § 765(b) states '[w]ith a witness under the age of 14 or a dependent person with a substantial cognitive impairment, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions'.[159]

The stage of proceedings is also a relevant consideration in deciding whether to limit testing. In England, judges usually restrict adversarial questioning almost entirely at the final, outcomes stage.[160] Although our law has not developed to the point of delineating separate phases of care hearings, the case for this will be put in part 8.4 below. If this is done our magistrates could be directed to follow the English approach once grounds for intervention have been established and only alternative care options are being considered.

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[157] As pointed out by McConnell, Llewellyn & Ferronato (2002) op cit note 48 at 279 in New South Wales many children's court magistrates have found it appropriate to reduce their interventions and allow adversarial phases at stages in proceedings where disagreement between parties needs to be expressed.

[158] It is noted ibid at 288 that assessing participants and drawing conclusions from their courtroom behaviour of participants is a basic function of adjudicators at care proceedings.

[159] California Evidence Code: accessed at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid & group=>. See further JL Richards 'Protecting the Child Witness in Abuse Cases' (2000) 34 *Family LQ* 393 at 404.

[160] A Sealey 'Comment: A Plan for Parents' (2002) 32 *Family Law* 247 at 247 & 253 indicated that a practice was emerging in terms of which English judges restrict the adversarial approach in care cases by preventing its application in the final stages where the emphasis falls on deciding upon an appropriate outcome for the child. C Cobley 'The Quest for Truth: Substantiating Allegations of Physical Abuse in Criminal Proceedings And Care Proceedings' (2006) 20 *International Journal of Law, Policy and the Family* 317 at 319 describes this as follows '[a] distinction has been made between the trial procedure at the threshold and welfare stages. Whilst the courts commonly adopt an inquisitorial approach at the welfare stage, it seems that the primary approach adopted at the threshold stage is an adversarial one, although the courts may take a more proactive role and adopt a quasi inquisitorial approach if necessary'.

As has been proposed,[161] it is essential that our future rules require magistrates to maintain an overall characterisation of proceedings as primarily a joint exploration to find the best care option for the child, rather than a contest between adults.[162] In order to achieve this in a way that balances fair trial and protection requirements they will need a range of options allowing different degrees of intervention. Where slightly inappropriate questioning methods are utilised what adjudicators should first have to apply is mere guidance or a warning. This might be sufficient to nip in the bud, for example, mildly disproportionate attempts at pressuring sensitive witnesses by opposing parties or their legal representatives.[163]

Where limited intervention does not suffice children's court magistrates must be expressly required to more extensively control questioning and other forms of communication. In particular, because this has been a problem in our system[164] it is essential for them to firmly limit cross-examination which is so hostile as to inflict psychological harm.[165] As an example of a provision designed to achieve this, s 6(3) of the South African Domestic Violence Act 116/1998 provides magistrates in domestic violence cases with a discretion to decide whether an alleged abuser should be denied the right to cross-examine witnesses directly. Instead, he may be required to direct his questions via the magistrate.[166] Children's courts need to be given a similar power.

Aside from terminating inappropriate questioning, taking over themselves or acting as a conduit, adjudicators should be able to respond by ordering a sheltered method for giving testimony from outside the courtroom or in the absence of other parties.[167] In support of this, in § 3509(b)(1) of the Child Victims' and Witnesses' Rights Statute 2005

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[161] In part 6.3.1, above.

[162] In England answerability and establishing partnerships with families and children is increasingly being recognised as the ideal approach: see C Wattam 'Making Inquiries under Section 47 of the Children Act 1989' in Wilson & James (2002) op cit note 55, 238 at 241.

[163] On the need for even welfare to be curbed in some cases see J Dickens 'Being "The Epitome of Reason": The Challenges for Lawyers and Social Workers in Child Care Proceedings' (2005) 19 *International Journal of Law, Policy and the Family* 73 at 80-84.

[164] See part 6.2.3, above.

[165] JA Lipovsky 'The Impact of Court on Children: Research Findings and Practical Recommendations' (1994) 9 *Journal of Interpersonal Violence* 238 at 255 considered that this duty should apply generally in cases involving children. See also Brophy (2006) op cit note 83 at 61.

[166] Section 6(3) applies only if the alleged abuser is unrepresented.

[167] On what are referred to in this thesis as sheltered participation methods see part 4.2.3, above.

US federal courts are directed to allow a child to give evidence from outside court if '[c]onduct by the defendant or defense counsel causes the child to be unable to continue testifying'. This provision also allows them to do so on grounds of fearfulness, significant likelihood of trauma and mental or physical infirmity.[168]

6.3.2.5 Time Management

Generally in any situation where time in court is being wasted adjudicators must be required to utilise inquisitorial powers to speed cases along. In an English practice direction issued in 1995 Sir Stephen Brown P stated that in order to reduce costs and delays in civil cases courts should 'assert greater control over the preparation for and conduct of hearings than has hitherto been customary'.[169] A similar direction for South African children's courts would be useful in helping address our problem of delays as identified by Denge.[170] In care cases where parties often have closely-allied interests time can easily be wasted when multiple questioners traverse similar ground.[171] We thus require a rule to enable us to emulate Australian children's court practice[172] by constraining subsequent questioners in this situation.

As regards how to intervene to expedite proceedings, in Brown P's 1995 practice direction he specified that courts should not hesitate to control the length of time spent on oral submissions by parties and leading and cross-examination of witnesses.[173] They should also regard themselves as empowered to curtail witnesses and legal representatives. And finally, they should limit parties to addressing them on relevant issues which they needed to be addressed upon.[174]

To counter the problem of unnecessary or lengthy adjournments, in California detailed provisions have been issued specifically to encourage adjudicators to expedite children's cases. The California Family Code at § 7667(b) provides that on the date set for

[168] 18 U.S.C. (2005).
[169] Sir Stephen Brown JP *Practice Direction* of 31 Jan 1995 [1995] 1 All ER 586-87 at 586C.
[170] See part 6.2.3, above.
[171] McLachlan (2004) op cit note 73 at 53.
[172] See ibid.
[173] Brown (1995) op cit note 169 at 586D.
[174] Ibid.

trial termination of parental rights proceedings must be given precedence over all other matters. And § 7668(c) requires that adjournments ('continuances') be granted 'only upon a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause'. It also requires in § 7668(d) that an adjournment can only be allowed for the minimum time justified by evidence.[175] In New South Wales s 94(4) of the Children and Young Persons (Care and Protection) Act 1998 directs that a children's court:

> 'should avoid the granting of adjournments to the maximum extent possible and must not grant an adjournment unless it is of the opinion that:
> (a) it is in the best interests of the child or young person to do so, or
> (b) there is some other cogent or substantial reason to do so'.[176]

Heldman, in an analysis supported by extensive evidence from the USA, has argued that provisions like this which provide some leeway should be replaced by more detailed ones containing specific and mandatory time deadlines that adjudicators must enforce.[177] She has asserted that research findings prove it is essential for them to take a very active role in care case management -and be especially strict when delays are requested.[178] These suggestions could usefully be incorporated as part of rules guiding implementation of s48(1)(c) of the 2005 Act[179] and enabling a more active role for children's court magistrates in South Africa. In addition, the local South African measures noted by Denge[180] should be evaluated and the most successful ones considered for incorporation.

It may be concluded that a set of children's court rules requiring magistrates to utilise different methods of intervention proportionate to the needs of children and other persons is quite feasible. It would go a long way towards addressing the procedural confusion, traumatising of witnesses, delays and failure to achieve the best outcomes which currently appear to be not uncommon. As has been demonstrated, it would not be

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[175] Accessed at <http://www.leginfo.ca.gov/cgi-bin/display code?section=fam&group =...>. And r 8.474 (a), Title 8 'Appellate Rules' of the California Court Rules (Jan 2007 renumbering) requires superior and reviewing courts to 'expedite the processing of all appeals and writs in juvenile cases'. Accessed at <http://www.courtinfo.ca.gov/rules/documents> p146.

[176] Accessed at < http://www.austlii.edu.au/au/nsw/consol_act.>. However, McConnell, Llewellyn & Ferronato (2002) op cit note 48 at 276 found that in practice cases are rarely finalized within 42 days.

[177] Heldman (2003) op cit note 72 at 1028 & 1033.

[178] Ibid at 1022.

[179] As noted in part 6.2.4 above this enables children's court magistrates to impose time deadlines.

[180] See part 6.2.3, above.

difficult to formulate the rules so as to provide a repertoire of intervention and time management options appropriate to different situations. The rules could also indicate with a fair degree of precision how presiding officers should manage presentation of *viva voce* evidence. If published in the form of regulations in terms of the 2005 Act they would make the proposed inquisitorial function for magistrates much more effective.

6.4 Conclusion

Ever since the official establishment of children's courts in 1937 there has been inadequate guidance on the procedures to be followed at hearings. Using ordinary civil magistrates' court practice as an approximate guide has proved to be inappropriate. In particular, attempts to apply this to the role of presiding officers in care cases have been problematic. Commissioners are confused about their functions and therefore adopt widely differing interpretations. In consequence, the functioning of the children's courts has been impeded. Persons involved in cases are often at a disadvantage both when it comes to preparing beforehand and in participating at hearings.

Especially where magistrates adopt a relatively disengaged accusatorial role, participants face communication barriers and are highly vulnerable to secondary, systemic abuse caused by inappropriate questioning at court. With reference to the evaluative criteria requiring fair proceedings and hearing the voices of children and caregivers the inadequate dispensation on how presiding officers should function is a major weakness in our system. Not merely prejudice at proceedings themselves but even failures to discover best possible outcome for the child sometimes result.

In part 6.2.4 it has been shown that the 2005 Act does relatively little to improve our law on the functions of presiding officers. Whilst requiring a host of extremely demanding new duties which will certainly require dedicated specialists it counteractively demotes the idea of specialisation by taking away the title of commissioner of child welfare and making it clear that any magistrate can preside -and on even a part-time basis. The need to provide children's courts with a separate structure and leadership has

unfortunately not been recognized. Whilst the hortatory provisions in the Act requiring appropriate questioning methods for children, a relaxed atmosphere and a minimum of adversarialism are laudable, they beg the question of what exactly magistrates should actually do to achieve all this effectively and expeditiously. And the removal of the conduct of presiding officers in civil magistrates' courts as a point of reference takes us from inappropriate to almost no law.

Despite its shortcomings, a positive feature of the 2005 Act is the scope it creates for publishing future regulations on children's court procedures. Although it will take time to develop a detailed body of these a start should be made by issuing rules on the key functions of presiding officers. With many of our current problems attributable to magistrates functioning too passively in accordance with an accusatorial approach the foundation of the proposed rules must be a clear statement that their normal mode is inquisitorial. As has been shown, in many developed systems with similar historical roots to our own the role of adjudicators in care cases has been shifted to predominantly interventionist.

An inquisitorial function would represent such a break with our past that some description of its content will be needed for successful implementation. The proposed rules should as an introduction express teleology. Their two primary purposes should be described as facilitation by magistrates of information-gathering at hearings and the maintenance of these (as far as possible) as amicable explorations of care grounds and outcomes by all concerned.

An inquisitorial approach will clearly require magistrates to exercise a realm of discretion. However, because children's courts are creatures of statute, and since there are training concerns and serious participation problems, it will be essential to provide some detailed guidance. A crucial aspect is how they should manage presentation of *viva voce* evidence during care hearings. The proposed rules should require them to intervene whenever questioning by other persons is ineffective, harmful to the extent of constituting

secondary, systemic abuse, or wasteful of time through being unduly drawn out or irrelevant.

The proposed inquisitorial role must not be so extensive as to preclude opposing parties testing evidence. This recommendation accords with the criterion of a system in which proposals such as those by welfare can be subjected to real challenge. Although it is essential that evidence be sufficiently tested for veracity, this must be expressly rated in the proposed rules as secondary to protecting vulnerable witnesses. Protection at hearings should be guided by a principle of proportionality which will require magistrates to monitor the capacity of witnesses to manage coercive questioning. As in England such questioning should particularly be limited when only care alternatives remain to be considered.

In relation to how magistrates should intervene, it has been shown that it would be quite feasible to provide a gradated repertoire of different remedies in the rules. These should be proportional to the nature and seriousness of communication problems which need addressing. They should range from mere warnings directed at questioners, allowance of multiple-choice questions, limited direct assistance, serving as a conduit, to a complete taking over of questioning by a magistrate. The rules must additionally facilitate sheltered participation methods for vulnerable witnesses of all ages. They must further as in some developed systems direct magistrates to be strict with adjournments so as to counter the serious problem of time delays which frequently harm children.

Aside from the urgent need for introducing a primarily inquisitorial role, it has been shown in this chapter that it is essential that a future dispensation recognise children's court adjudicators as specialists who undertake a unique function. A final point is that, just as with the ADR responsibilities noted in chapter 3, the proposed new inquisitorial function will obviously have training implications -although guiding rules and specialisation as recommended in this chapter would minimise these. Proper directions on the core role functions of presiding officers would be a big step forward; but they also

require guidance on when precisely they should be available to provide court services. This question is taken up in the next chapter.

CHAPTER 7

PRELIMINARY AND INTERIM HEARINGS: A PROPOSAL FOR IMPROVED SERVICES

7.1 Introduction

In a typical case once a child has been identified as potentially a candidate for mandatory alternative care her needs and situation will have to be investigated by welfare personnel and perhaps other professionals. The investigation will probably extend over a period of weeks or even months.[1] Upon its completion, a decision will need to be taken on what if any medium- or longer-term measures are required. In our system if they are to be mandatory they will be ordered by a children's court at a care hearing after an evaluation of the evidence.[2] Although this terminology is not included in our legislation, for purposes of clarity the words 'dispositive hearing' will be used in this and subsequent chapters to refer to such a post-investigation hearing.[3] The focus in this chapter is on earlier court services at initiation of formal proceedings and during the interim period which subsists whilst the investigation of the child's situation is ongoing.

Of particular relevance for this chapter is the primary evaluative criterion that alternative care services should be incrementally available over a period of time. Children's lives obviously do not go on hold during care investigations. It will be contended that yet another way in which our law is underdeveloped is through very limited provision for children's court services pending the dispositive hearing. This will be shown in part 7.2 by means of an evaluation of the 1983 and 2005 Acts. It will be demonstrated that little scope for interlocutory relief has been provided in these statutes.

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[1] As has been noted in part 6.2.3 above, cases sometimes unfortunately extend even over years.
[2] The 1983 Act s 15; 2005 Act s 46 & ss 155-56.
[3] It will be shown in this chapter that care hearings are inadequately categorised in our legislation. The terms 'dispositive' and 'disposition' are used with reference to outcomes hearings in some developed systems. An example is s 2-27(1.5)(a) of the Juvenile Court Act, Illinois as cited in part 7.3.2, below. See also parts 8.1 & 8.4.3, below.

In part 7.3 it will be shown that there is a wide range of valuable functions courts can perform pending dispositive hearings. This will be done by means of a comparative review. Foreign systems with well developed law will be selectively drawn upon for the purpose of illustration. The aim of the comparisons is to provide a foundation for recommendations on how our legislation should be expanded to provide much better protection for children whilst their cases are being prepared.

It will be shown in part 7.4 that the concepts of preliminary and interim children's court care hearings need to be introduced into our system. It is not suggested that this simple, binary naming system is the only approach. An alternative is to formulate a variety of descriptions according to different court functions performed at many kinds of predispositive hearings.[4] From a South African perspective, however, it will be suggested that in view of our lack of development the binary model would be a suitable way forward. Its advantages include avoiding a proliferation of court hearings and the danger that a needed service in a particular case might fall outside more detailed hearing 'labels'.

A preliminary hearing may be understood for the purposes of this chapter as a first formal court proceeding in a case.[5] It could be defined as the first formal appearance before a children's court of any informant, party, participant[6] or applicant for such status. As will be further explained, at it guidance can be provided on preparations for the dispositive hearing and any necessary initial decisions can be taken by the court.[7] Subsequently, and prior to the date of the dispositive hearing, the child's circumstances

[4] For example, the Juvenile Court Act 1987, Illinois as amended and contained in chapter 705, Illinois Compiled Statutes <http://www.ilga.gov/legislation/ilcs/ilcs4.asp> provides for 'temporary custody hearings' (s 2-9), 'shelter care hearings' and 'shelter care rehearings' (s 2-10(3)), 'restraining orders' hearings (s2-23(3)), 'orders of protection' hearings and 'orders of protective supervision' hearings (s 2-26(1)) (hereafter cited as 'Illinois Juvenile Court Act'). For other examples see P Chill 'Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings' (2004) 42 *Family Court Review* 540 at 541 N14.

[5] A detailed definition of a preliminary hearing is provided in the Connecticut 'Definitions Applicable to Proceedings on Juvenile Matters' at s 26-1(f)(4). It reads 'means a hearing on an ex parte order of temporary custody or an order to appear or the first hearing on a petition alleging that the child or youth is uncared for, neglected or dependent'. The 'Definitions Applicable to Proceedings on Juvenile Matters' comprise s 26-1 of the Connecticut Practice Book. Accessed at <http://www.jud.ct.gov/Publications/PracticeBook/PB2.pdf>.

[6] On the difference between parties and mere participants see part 4.3.2.3, above.

[7] See part 7.3.1, below.

may change or new issues may arise on which parties need guidance. It is for these situations that the concept of interim hearings becomes relevant.

Aside from generally motivating for the introduction of preliminary and interim hearings as a means of improving children's court services in care cases, in this chapter an attempt will be made to show that our law should be further developed to indicate when they ought to be held and what functions should be performed at them.

7.2 Current South African Law and Practice

In the next two subparts the 1983 and 2005 Acts are separately considered. Although the former Act is due to be replaced its approach to predisposition functions requires some analysis because of its influence in some important respects on the 2005 Act. Also, its application has revealed weaknesses in our system which need to be considered from a reformist perspective. It will be demonstrated in relation to care matters that the concept of pre-dispositive hearings for children's courts is not strongly developed in either statute. It will further be shown that this disadvantages participants and is conducive to confusion and a lack of uniformity.

7.2.1 The Child Care Act 74/1983

In the next two sub-parts first the wording and then the application of the 1983 Act is evaluated.

7.2.1.1 The Wording of the 1983 Act

In the 1983 Act children's court care hearings have not been systematically categorised by type or purpose. Some pre-dispositive functions are certainly provided for but the nature of these is not clearly depicted. Where formal court proceedings are unambiguously referred to, the term most commonly used to describe them is 'inquiry'.[8]

[8] See ss 13, 14, 15 & reg 9. Gazette publication details for the latter are provided later in this part.

South African commentators have noted that this word primarily indicates a main post-investigation care hearing[9] (dispositive in the sense described above). However, in the absence of any authority on the question it has been speculated that since 'inquiry' is not defined it could possibly include earlier hearings as well.[10] What renders such a broad interpretation somewhat uncertain is that (as will be discussed further) the different term 'review' is used with reference to preliminary appearances and court assessments of emergency action in reg 9 published in terms of the Act.

At ss 11(1), 11(2), 12(1) and 13(2) the Act provides four different methods for instigating care cases. These are, respectively, initiation by any court, commissioners, persons undertaking emergency removals and children's court assistants. With the first three, children thought to be in need of mandatory alternative care are to be immediately removed to a place of safety. In s 11(1) a court of any kind (not merely a children's court) is given the power to instigate this process if a child appearing to need care comes to its notice in the ordinary course of any proceedings before it. In s 11(2) an instigation power is conferred on commissioners themselves. This states:

> 'If it appears to any commissioner of child welfare on information on oath given by any person that there are reasonable grounds for believing that any child who is within the area of his jurisdiction has no parent or guardian or that it is in interest of the safety and welfare of any child who is within the area of his jurisdiction that he be taken to a place of safety, that commissioner may issue a warrant authorising any policeman or social worker or any other person to search for the child and take him to a place of safety, to be there kept until he can be brought before a children's court.'

The third preliminary removal power arises in emergencies when there is no time to obtain court authority. Section 12(1) authorises the police and certain social workers[11] to immediately remove children thought to be in need of alternative care. It further entitles other persons authorised by them or by commissioners to undertake such removals. Police and social workers can take a decision on the spur of the moment because no authority is required from anyone else. With an authorised person (who could even be an untrained

[9] HM Bosman-Swanepoel & PJ Wessels *A Practical Approach to the Child Care Act* (1995) 35-37; and B Van Heerden 'Judicial Interference with the Parental Power: The Protection of Children' in B Van Heerden, A Cockrell & R Keightly *et al* (eds) *Boberg's Law of Persons and the Family* (1999) 497 at 610 N378.
[10] Van Heerden ibid.
[11] In terms of the limited definition of 'social worker' in s 1 only social workers in the employ of the state or authorised welfare organisations have this power.

ordinary member of the public) there has to be a prior written instruction from a police member, social worker or commissioner.[12]

Under s 12(1) of the 1983 Act the ground is that the person undertaking an emergency removal must have 'reason to believe that the child is a child referred to in s14(4) and that the delay in obtaining a warrant will be prejudicial to the safety and welfare of that child'. This sets an objective standard[13] but does not insist on imminent harm. Section 14(4) of the Act contains the grounds for children being found to be in need of alternative care at dispositive hearings and so the person would reasonably have to believe that one of them applied.[14] Without any specific deadline, the person must also under s12(2)(b) inform a children's court assistant of the reasons for the child's removal 'as soon thereafter as may be'.

Whilst preliminary removals of children will sometimes be necessary they are a drastic way to initiate a case.[15] For less serious instances the power to commence without a preliminary removal is accorded to children's court assistants in s 13(2) of the Act. This reads:

> 'Any child in regard to whom a children's court assistant is of opinion that he or she is a child in need of care may be brought before the children's court of the district in which the child resides or happens to be, by any policeman, social worker or authorized officer, or by a parent, guardian or other person having the custody of the child.'

There is no indication about how the assistant should reach such an opinion or whether the validity of this should subsequently be tested. So it is not clear whether s 13(2) was intended to give rise to a preliminary hearing of some kind.

With all four methods of instigation there is a proviso that the child be subsequently 'brought before a children's court'.[16] However, no specific time is provided for this. A possible interpretation, therefore, is that it need only occur when all is ready for

[12] See the definition of 'authorised officer' in s 1.
[13] See the conclusions of Zaal, Van Huyssteen and Robinson as cited in part 7.2.1.2, below.
[14] On s 14(4) see further part 8.2, below.
[15] The serious consequences which typically result are noted in part 7.4.1, below.
[16] In relation to s 12(1) this is provided for in s 12(2)(c).

the dispositive hearing. This interpretation is strengthened by the fact that it is not stated in the Act that there must be an earlier hearing at which the child appears. With instigations by children's court assistants, as can be seen from the quotation above in s 13(2) there is a variation which indicates that the child 'may' rather than must be brought. This could be understood as permitting no appearance of the child at all even at the dispositive stage.

Concerning extracurial care assessments of children by experts s 14(1) of the 1983 Act states that any children's court holding a care inquiry 'may at any time *during the inquiry* order any medical officer or psychologist to examine the child concerned and to report to the court thereanent' [emphasis added].[17] The drafters thus only envisaged the ordering of an examination once an inquiry had begun. As noted above 'inquiry' has not been defined -and so there is uncertainty about whether examination can occur only after the beginning of the dispositive hearing proper. A question which arises is whether it would not be better to provide expressly for forensic examinations well before dispositive hearings so that the results are available to the courts at them. In care cases assessments -and particularly mental health assessments- often need several sessions, so that a period of time is typically essential.[18]

Some types of assessment require periods of observation of individuals or child-parent interactions in controlled environments as opposed to direct examination.[19] For example, welfare may regard this as necessary for gaining evidence on whether a child or one of her parents has special needs because of a mental or physical problem.[20] In s 14(3) it has arguably been implied that forensic observation can only begin at the dispositive stage. It states:

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[17] Section 14(1) was substituted by s 5(a) of the Child Care Amendment Act 96/1996.

[18] R Holt, J Grundon & R Paxton 'Specialist Assessment in Child Protection Proceedings: Problems and Possible Solutions' (1998) 7 *Child Abuse Review* 266 at 267. See also J Cohen & C Hale 'Treatment or Therapy: the House Of Lords Decision in *Re G (Interim Care Order: Residential Assessment)*' (2006) 36 *Family Law* 294 at 295.

[19] For an English case which involved lengthy observation of parenting skills at a specialised hospital unit see Cohen & Hale ibid.

[20] As noted in part 2.3.4 above, observation was first provided for in our law in s (1)(*i*) of the Children's Act 33/1960.

> 'The court holding such inquiry may, if it deems it expedient, from time to time postpone or adjourn the inquiry for periods not exceeding 14 days at a time, and may order that in the interim the child remain in a place of safety or be kept in a place of safety for observation for the information of the court.'

It must be concluded, however, that neither s 14(1) or (3) are entirely clear about when exactly forensic processes that might arguably be seen as part of welfare's pre-disposition care investigation should be undertaken. Special adjournments as envisaged in s 14(3) could obviously delay completion of cases. As noted by Holt, Grundon and Paxton, courts should make requests for assessments at an early stage in care proceedings because where they impose unrealistic timeframes the quality of assessment tends to suffer.[21]

And what of the feelings of recipients? By not including a right of refusal for children s 14 allows them to be subjected to compulsory forensic assessments regardless of whether or not they are willing. Reviewing the wording of the Act shortly before it was promulgated, Barlow defended this approach. He argued that mandatory assessments are sometimes essential for obtaining vital evidence.[22] In support he cited cases of family collusion which had rendered it very difficult to prove sexual abuse without subjecting children to medical examinations.[23]

In s 54 of the Act age estimations, as another form of forensic assessment, are provided for somewhat differently. Many South African children involved in care cases are without birth documents, identity documents or other proof of their ages.[24] A remedy that is therefore frequently required is a legally binding estimation of the age of the child concerned. [25] Section 54 enables commissioners to provide age assessments '[w]henever

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[21] Holt, Grundon & Paxton (1998) op cit note 18 at 270.
[22] G E Barlow 'Child Care Bill -Best Interests of the Child?' 1982 (July) *De Rebus* 339.
[23] Ibid.
[24] Social worker C Jood 'The Post-Court-Order Phase for Children in Need of Care. What Happens and What Should Happen?' (Unpublished Masters seminar paper, University of Durban-Westville, 21 Oct 2002); Commissioner P Booysen: personal communication 12 Sept 2006. This is particularly likely to be a problem with young, abandoned children.
[25] Jood ibid has pointed out that this may be needed urgently to obtain a place of safety accommodation grant during the period pending the main inquiry. Where birth documents are not available a children's court age-estimation will be essential before welfare can apply for an identity document. The department of home affairs may take several months to process such an application. Jood has drawn attention to the fact that where a private individual acts as a place of safety for a child the state grant is not payable to that individual until identity documents become available. As she notes, this is unfair and disadvantages children. An

in any proceedings in terms of this Act the age of any person is a relevant fact'. The terminology '[w]henever in any proceedings' is much broader than the confinement to inquiries in s 14(1) and (3). It thus appropriately provides clearer scope for completing an age estimation prior to the onset of a dispositive hearing.

It is not indicated in the Act that children's courts should be available for parties who wish to challenge assessments or indeed pre-disposition removals or any other preliminary action that might be undertaken by welfare or a children's court. Nor is it stated that children's courts should review these *mero motu*. However, it was recognised by the legislature that more direction was needed. In an attempt to address this at least partially reg 9(2) was published in 1998.[26] It is limited to cases where there has already been a preliminary removal of the child. And it is further limited only to s 11(2) or s 12(1) removals. It thus applies to only two of the four instigation methods.

As will be remembered s 11(2) and s 12(1) provide, respectively, for preliminary removals authorised by commissioners and those undertaken where there is no time to seek their authorization. Under reg 9(2)(b)(i) it is made necessary in both cases for the person undertaking the removal to notify a children's court assistant about its implementation within forty-eight hours afterwards. And reg 9(2)(d)-(e) provides some consequential functions for commissioners. This reads in relevant part as follows:

> '(d) The commissioner shall, after consideration of the reasons for the detention of the child as stated in the authority and such other information as he or she may obtain or as may be furnished to him or her by the parent or the guardian of the child, the person, institution or place of safety in whose custody the child was immediately before the removal or apprehension, the child, the children's court assistant, the social worker, policeman or authorised officer, as the case may be-
>
> (i) confirm the detention of the child by issuing an order of detention in the form of Form 5 with such special requirements, subject to variations, as may be deemed necessary in the interests of the child from time to time; or
>
> (ii) set the authority aside and direct that the child be restored to the custody of his or her parent, guardian or person in whose custody he or she was immediately before the removal;
>
> …
>
> (e) No authority shall be set aside in terms of paragraph (d) (ii) without prior consideration of any information given on oath as to the grounds of the removal, which may be furnished any stage of the *review proceedings* by the policeman, social worker or authorised officer concerned' [Emphasis added].

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official court estimation of the age of a child and place of safety order should be sufficient to allow for payment of the grant -and if necessary retrospectively.

[26] Child Care Act 74/1983 Regulation Amendments of 1998 (Government Notice R416, *Government Gazette* 18770 of 31 March 1998).

Van Heerden has suggested that the intention:

> '… is apparently to enable the Commissioner of Child Welfare concerned either to confirm the detention of the child in the place of safety and "open" the children's court inquiry, or to set aside the detention authority and direct that the child be restored to the custody of his or her parent or guardian or of the person in whose custody the child was immediately before the removal, without any further inquiry. '[27]

This appears to be both a logical and appropriate interpretation, but an important question is what kind of process should be followed when making such a crucial decision.

In relation to process, some of the language in reg 9(2)(d)-(e) is against an interpretation that requires children's courts to sit in formal session. As can be seen, it refers to 'the commissioner' (not the court) considering 'information' (not evidence) provided by relevant persons.[28] This language appears to contemplate something less than a formal, preliminary hearing. However, in terms of reg 9(2)(e) if the commissioner contemplates revoking a removal as unwarranted this cannot be done 'without prior consideration of any information given on oath as to the grounds of the removal, which may be furnished at any stage of the review proceedings'. This wording, and particularly the last two words, could be seen as implying an actual court hearing. It can only be concluded that, although reg 9(2) at least showed that commissioners needed to review preliminary removals, it is unclear on how this should occur.

7.2.1.2 The Application of the 1983 Act

How then, has the sparse wording on preliminary and interim functions been applied in practice? Empirical findings and anecdotal accounts show unsurprisingly that it has produced uncertainty on when and even whether children's courts should hold pre-disposition hearings. The statement in s 13(2) that children 'may' be brought before

[27] Van Heerden (1999) op cit note 9 at 609. See also Bosman-Swanepoel & Wessels (1995) op cit note 9 at 32; and FN Zaal 'Children's Courts: an Underrated Resource in a New Constitutional Era' in JA Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 95 at 108.

[28] It is clear from the wording of reg 9(2)(d) that such information must include the reasons for the removal of the child as written on a Form 4 by the person who undertook the removal.

children's courts is frequently interpreted as not requiring these.[29] Generally, commissioners have understandably been uncertain about their predisposition jurisdiction.[30] Where they take the view that they should not be available persons in desperate need of a preliminary ruling require substantial financial resources to approach the high court.[31]

Even where preliminary removals have occurred the requirement that the child must be brought before the children's court in s 11(1)-(2) and s 12(1) is indeed sometimes taken to mean that the child need not be seen prior to disposition.[32] Some commissioners, however, take the different position that the child must be available at court if it is feasible for her to be brought.[33] In relation to process, some commissioners require only the submission of preliminary documentary evidence and a viewing of the child in chambers, whilst others require a formal appearance of all involved persons at a preliminary hearing.[34]

Depending on the approach taken by the commissioner, where preliminary hearings (often referred by practitioners to as 'opening hearings')[35] are held, they may be *ex parte* with an appearance only by the court's informant.[36] Alternatively, the commissioner may require that they be *inter partes* with caregivers, an investigative social worker and possibly the child expected to attend.[37] Commissioners who hold opening hearings differ not only on who should attend but also on whether the evidence to be provided concerning the child's circumstances should be as detailed and weighty as would be required at a

[29] Commissioner A Bacharam: personal communication 26 July 2007. See also the finding on 'the attitude of the commissioner' in CR Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* (1997) 48 para 7.1.
[30] Bacharam ibid; Matthias ibid at 46.
[31] See the *Womack* case in part 4.3.2.2, above; and the *Swarts* case discussed later in this subpart.
[32] DS Rothman 'The Functioning of Children's Courts' (Visiting lecture, University of KwaZulu-Natal 8 Sept 2005); Booysen (2006) supra note 24.
[33] In other words, if the child is not too young, ill or far away: Matthias (1997) op cit note 29 at 46 & 48; Jood (2002) supra note 24; and Bacharam (2007) supra note 29.
[34] Matthias (1997) ibid 46. Rothman (2005) supra note 32; Bacharam (2007) ibid.
[35] Bosman-Swanepoel & Wessels (1995) op cit note 9 at 32.
[36] Meaning the person who has informed the court that a particular child is in need of consideration for mandatory alternative care measures: Booysen (2006) supra note 24.
[37] Ibid.

dispositive hearing.[38] Available data on preliminary processes thus supports the conclusion in the previous chapter about a general situation of procedural unpredictability and confusion.

Aside from leaving uncertainty about early court processes generally, a specific issue not settled by the insertion of reg 9(2) is what degree of scrutiny commissioners should apply when reviewing preliminary removals of children. It is unclear whether they should allow persons undertaking such removals a wide degree of discretion or else subject their behaviour to a close evaluation in the interests of providing a 'safety net' for the child and her family.

As will be remembered, the ground for an emergency removal in s 12(1) of the Act is that there is 'reason to believe that the child is a child referred to in s 14(4) and that the delay in obtaining a warrant will be prejudicial to the safety and welfare of the child'. In interpreting this some South African commentators have concluded that it indicates that the belief of the person removing the child must be measured by commissioners against an objective standard of reasonableness under the circumstances.[39]

In 1992 Robinson argued that the phrase 'reason to believe' in the s 12(1) ground places social workers in a difficult position when deciding whether or not to undertake an emergency removal. He showed that our courts have interpreted this phrase in other legislation as meaning that the belief must not only have been objectively reasonable but must also have been based upon pre-existing facts.[40] In Robinson's view the exacting standard set by the courts in interpreting the same wording in other legislation could discourage social workers from removing children in situations where, although such a

[38] Ibid; and Jood (2002) supra note 24.
[39] FN Zaal 'Child Removal Procedures under the Child Care Act: Some New Dangers to Contend With' (1988) 105 *SALJ* 224 at 233; B Van Huyssteen 'Verwydering van Kinders Sonder n' Lasbrief: Artikel 12 van die Wet op Kindersorg van 1983' (1989) 24 *The Magistrate/Die Magistraat* 15 at 18; and Van Heerden (1999) op cit note 9 at 607.
[40] JA Robinson 'Artikel 12(1) Van Die Wet Op Kindersorg En Die Posisie Van Die Maatskaplike Werker' (1992) 55 *THRHR* 74 at 75-76.

removal is needed in the best interest of the child, they fear that their opinion that there was no time to get court authority will not be upheld.[41]

The solution put forward by Robinson is that merely a subjective and not objective and fact-based test should be applied to persons who undertake emergency removals.[42] This would mean that the primary consideration for a court in conducting a review would be whether the remover was bona fide in her motives. She would not be tested against the objective standard of a reasonable person placed in the same situation. In Robinson's view the danger of a higher proportion of inappropriate removals resulting from easier standards is not critical because court reviews can occur soon thereafter.[43]

Robinson's warning about deterring removals and his proposal for prompt reviews are important and will be returned to later.[44] However, his fears have so far proved unfounded. With neither the Act nor regulations providing clear guidance on a process for commissioners, in practice most of them apply very limited scrutiny.[45] In fact, so little oversight is provided that in the last two decades in many jurisdictions social workers have extended their s 12(1) powers. In order to avoid the time and effort involved in going to court to obtain a warrant under the s 11(2) procedure they frequently invoke s 12(1) for removals in non-emergency situations where time is not of the essence.[46] It has been claimed that the police have displayed the same tendency -although in their case because of insufficient training on what constitutes real emergencies for children.[47]

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[41] Ibid at 78.
[42] Ibid at 79.
[43] Ibid.
[44] In part 7.4, below.
[45] Booysen (2006) supra note 24; Bacharam (2007) supra note 29. Generally on the practice of limited scrutiny see part 6.2.3, above.
[46] E Swanepoel, social worker: unpublished presentation, law commission workshop 'Evaluating the Child Care Act 74/1983' (Pretoria, 26 June 2001); Jood (2002) supra note 24; Rothman (2005) supra note 32; Booysen (2006) supra note 24.
[47] Booysen ibid. This view was also expressed by a Pretoria commissioner, S Snyman: unpublished presentation, law commission workshop 'Evaluating the Child Care Act 74/1983' (Pretoria, 26 June 2001).

The limited utilisation of emergency reviews by children's courts reduces their accessibility to family members who wish to challenge preliminary removals.[48] Such members who are confronted by situations where relief is urgently required may therefore have to approach the high court. However, because of the expense of high court litigation only a small minority of parties are able to do so. A reported example of such a case is *Swarts v Swarts*.[49] Here the high court had an ideal opportunity to provide direction on the role of courts in reviewing preliminary removal decisions by social workers.

As noted in part 6.2.3 above, *Swarts* provides a strong endorsement of wide discretion for social workers. An 'emergency' removal from a single, divorced mother who was employed and maintaining her children was upheld. There was no suggestion of her abusing or intentionally neglecting them. Despite conceding that the motives of the father who instigated the removal were open to question[50] the court was not swayed by the fact that the use of s 12(1) here had effectively reversed a fiercely contested court custody decision in favour of the mother only shortly before.[51]

Nor was the court in *Swarts* swayed by the fact that a pretext of enabling access by the father was used to secretly remove the children while the mother was at work.[52] And in terms of technical requirements under the 1983 Act the social worker had not followed an entirely correct procedure. In completing a form 4 she had not as required in s 12(1) indicated a *prima facie* s 14(4) ground. The court noted that her entries on the form were inadequate because they were '*weliswaar kripties en onvolledig*'.[53] And furthermore, the father had been at the receiving end of domestic violence litigation and criminal charges instigated by the mother.[54] In deciding that the judgment and good intentions of the social worker outweighed all of these counter considerations[55] the court applied an approach of limited scrutiny.

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[48] Booysen ibid.
[49] [2002] 3 All SA 35 (T).
[50] Ibid at 42j-43a.
[51] The removal had been followed by placement of the children with the father's parents.
[52] At 40h.
[53] At 44i -meaning 'undoubtedly cryptic and incomplete'. See the judgment also at 41c.
[54] At 37g.
[55] At 42b.

As a rationale, Bertelsmann J in *Swarts* held that the act of a social worker in undertaking an emergency removal of a child must be defined as a quasi-judicial administrative act.[56] Therefore, although it was necessary for the court as upper guardian of all minors to consider whether the removal was in the best interests of the child it should not inquire so far into the merits as to substitute its own opinion for that of the social worker.[57] Thus, the court should not try to decide whether the removal had been justifiable because one of the s 14(4) grounds reasonably appeared to apply. All it need do is establish whether the social worker had genuinely believed that this was the case.[58]

There were no binding precedents so directly in point as to compel the conclusion reached by Bertelsmann J. And his deference to the social worker meant that an objective test was hardly applied. He did not express awareness that single, working mothers are an at-risk group for overzealous removals by welfare.[59] Whether or not his approach was appropriate will be considered in part 7.4, below. Certainly, it was one which supported the established practice in children's courts of allowing considerable autonomy to social workers undertaking preliminary removals of children.

It may be concluded that limited use of preliminary and interim care hearings has become a standard norm for children's courts under the 1983 Act. The fact that it has little to say about these and specifically is not clear about processes and the degree of scrutiny to be applied by courts in reviews of preliminary child removals has led to limited monitoring. Little pre-dispositive protection is thus available to affected families and even persons without financial means are expected to approach the high court. The degree of confinement of commissioners to pre-inquiry removals rather than less drastic preliminary action is also a matter for concern. In many cases the harm to a child from inadequate care is gradual or likely to occur only in the future. In these instances a removal prior to the main dispositive proceedings is not required and may even be counter-productive. In the

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[56] At 45e. In discussing the nature of emergency removals undertaken in terms of the 1983 Act, Van Heerden has suggested that 'the better view is that the detention of a child is a *legal* procedure and not merely an administrative act' [emphasis in the original]. See Van Heerden (1999) op cit note 9 above, at 610 N378.
[57] At 45f.
[58] At 44h.
[59] See H O'Donnell 'What's Wrong with the Picture: the Other Side of Representing Parents in Child Protection Cases' (2005) 4 *Appalachian Journal of Law* 73 at 75.

next part below the wording of the 2005 Act on interlocutory remedies will be compared with the 1983 Act.

7.2.2 The Children's Act 38/2005

The 2005 Act follows the broad approach of the 1983 Act in not providing expressly for preliminary and interim children's court hearings. Like its predecessor it is strongly focused on a main hearing which follows after completion of a full investigation by welfare.[60] Thus, although it lists fifteen different types of care orders in s 156, it is expressly enjoined in s 155(6) that none of these may be issued until a children's court 'finds that the child is in need of care and protection'.[61] It does, however, in s 46 include other orders for children's courts which are not so confined.

In generally providing children's courts with a broad jurisdiction to adjudicate 'any matter involving' inter alia, care and protection of children[62] the legislature has certainly not entirely limited these courts to disposition functions. Their new role in providing some preliminary and interim services pending dispositive care hearings will be discussed in the next two subparts below. Court functions that are clearly in terms of the wording of the Act to be undertaken prior to such hearings and those which might be so intended are separately considered.

7.2.2.1 Explicitly Stated Preliminary and Interim Functions

Although it does not expressly refer to preliminary or interim hearings the 2005 Act does require children's courts to undertake several pre-dispositive functions which are relevant for care cases. For example, s 45(1)(g) broadly empowers them to adjudicate matters involving 'temporary safe care of a child'.[63] Such care is described in s 1 as care '…pending a decision or court order concerning the placement of the child…'. It is thus by

[60] See, for example, the directive 'after an investigation' as used in relation to children's court processes in s155(5).
[61] This is supported by the title of s 156 'Orders When Child Is Found to Be in Need of Care and Protection'.
[62] See s 45(1).
[63] They may thereafter issue temporary safety orders in terms of s 46(1)(a)(iii).

definition clearly pre-disposition in nature. These provisions read with s 151(2) of the Act enable children's courts to instigate preliminary removals to temporary safe care in a manner similar to removals into places of safety authorised under s 11(2) of the 1983 Act.

With temporary safe care, ambiguous wording once again raises doubts about whether or when a prior court hearing would be needed. In s 151 it is stated that 'evidence given by any person on oath or information before a presiding officer'[64] must lead to a conclusion that temporary safe care appears to be necessary for the safety and well-being of the child.[65] This might possibly be interpreted as allowing for either an *ex parte* preliminary hearing of a formal kind or merely an informal report to the magistrate in chambers.

Other courts besides children's courts now have only authority to refer the case of a child apparently in need of care to a social worker for investigation.[66] This is less draconian than the power to summarily remove children conferred on other courts in s11(1) of the 1983 Act. In relation to emergency preliminary removals, the 2005 Act follows its predecessor in enabling specially designated persons to undertake these without any prior court authority.[67] It is once again the police, social workers or specially authorised persons who are empowered.[68] The latter category has been narrowed, however, because they can now only be authorised by a children's court magistrate.[69]

The legislature was clearly concerned by the widespread use of emergency powers in non-emergency situations. In s 152(5)-(7) are detailed new provisions indicating a variety of sanctions for 'misuse' of emergency removals. These include disciplinary proceedings against police personnel or social workers and even withdrawal of welfare agencies' licences. Robinson's fears about social workers being deterred may at long last become a reality when s 152 enters into force.

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[64] Section 151(1).
[65] Section 151(2).
[66] Section 47(1).
[67] Section 152(1).
[68] Section 152(1).
[69] Section 151(5).

That good intentions will not suffice is made clear by s 152(1). This clearly sets an objective test. It indicates that at the time of the removal there must have been 'reasonable grounds for believing' that a child 'needs immediate emergency protection' and that a delay to obtain court authorisation 'may jeopardise the child's safety and wellbeing'. A further requirement is that 'the removal of the child from his or her home environment is the best way to secure the child's safety and well-being'.[70] Although the test continues to be objective its additional legs combine to set a higher standard than under the previous s12(1) wording. Curiously in view of the strong stand taken against inappropriate removals, no explicit provision is made in the 2005 Act for children's court review hearings after preliminary removals have been undertaken. Although the broad wording of s 45(1)(g) might be interpreted as allowing for them, they are not established as a standard norm.

Aside from instigating preliminary removals, children's courts are also empowered to order the less drastic alternative of merely a care investigation by a social worker. Although these two concepts are not defined, s 50(1) specifies orders for 'an investigation or further investigation'. Since it is expressly stated that either would have to be undertaken before a children's court 'decides a matter' it would seem that they would occur, respectively, at preliminary or interim stages of a case. This if correct may be seen as a slight improvement on the 1983 Act which hardly distinguishes between preliminary and interim aspects. However, in relation to the actual process when a magistrate wishes to instigate an investigation or further investigation the new legislation is not entirely satisfactory. Since s 151(1) again applies, the same uncertainty exists as with court decisions about preliminary removals into temporary safe care. It is not clear whether or when a hearing is required.

Aside from a power to instigate investigations, yet another new predisposition function for presiding officers has been created in s 153. This arises in cases where the police, either on their own initiative or at the request of a designated social worker, decide

[70] This includes an assessment on whether it would be better to remove another person rather than the child. The new removal alternative applies to perpetrators of domestic violence. It is discussed later in this subpart.

that a perpetrator of child abuse rather than the child victim must be removed from a family home.[71] The involvement of a children's court in terms of this provision[72] is only a post-removal one. When serving a removal notice on the perpetrator the police are required in terms of s 153(1)(c) to include a date for a children's court hearing at which the perpetrator ('alleged offender') may choose to 'advance reasons why he or she should not be permanently prohibited from entering the home or place where the child resides'.

Section 153(1)(c) requires that the date must be 'the first court date after the day upon which the notice is issued'. This short timeframe[73] implies that the domestic violence hearing would be a separate one held long before any dispositive hearing. That it is separate is put beyond doubt by s 153(6)(d). This allows for the normal predisposition welfare investigation to be instigated by a children's court at the end of its domestic violence hearing. That the latter is in fact a formal hearing is clear from s 153(6). This refers to an alleged offender 'appearing' to be heard and a court order subsequently being issued. Such order could confirm the perpetrator's removal if the evidence justified this and could also deal with related aspects such as family maintenance and contact with the child.[74]

The new capability to confirm removal of abuse perpetrators rather than children in care cases and provide for consequential aspects is to be welcomed. It should be noted, however, that children's courts have not been expressly given the power to order such removals themselves as an interim measure -they are merely described as reviewing removals ordered by the police. The question of whether more extensive domestic violence powers should be described will be considered in part 7.4.

[71] The police are accorded this power in s 153 read with s 105. The latter is due to be inserted in 2005 Act when the Children's Act Amendment Bill 19/2006 is promulgated.
[72] The Act elsewhere at s 46(1)(ix) permits a children's court to issue an order 'instructing that a person be removed from a child's home'. It is not, however, expressly indicated that this may be predispositive in a care case.
[73] It is so short as to render it difficult for alleged perpetrators of abuse to instruct legal representatives. For further discussion of this provision see part 8.3.2, below.
[74] Section 153(6)(a)-(d).

In relation to assessments, s 62(1) of the 2005 Act enables children's courts 'if necessary' to order that 'a designated social worker, family advocate, psychologist, medical practitioner or other suitably qualified person carry out an investigation'. It is further indicated that this must be to establish the circumstances of the child, a caregiver or 'any other relevant person'. Particularly psychologists and medical practitioners such as paediatricians would tend if presented with forensic assignments of this kind to carry out assessments which focus primarily on the mental or physical condition of individuals.[75] Although the Act does not utilise the ideal terminology it appears that the word 'investigation' in s 62(1) includes assessments in this sense. If it does not, then there would be little point in including psychologists and medical practitioners in the list of 'investigators'. By comparison with the analogous provision in the 1983 Act, observation in a controlled environment as a form of assessment is unfortunately no longer expressly referred to -thus again it will be a matter of interpretation as to whether this is included under the term 'investigation'.

Section 63(2) provides that the investigators listed in s 62(1) can submit their findings in the form of a written report 'prior to the date of the hearing of the matter'. From this it can be seen that the issuing of the order to investigate was envisaged by the legislature as an interim aspect occurring prior to the dispositive hearing. This is an improvement on the opaque wording of the 1983 Act. However, the nature of the process to be followed by a children's court when instigating such an investigation has once again not been delineated. It is not even clear, for example, whether it is necessary to hold an interim hearing in cases where persons to be subjected to an investigation/assessment wish to resist it by raising a constitutional right to privacy or other grounds. That court orders for investigations might be challenged as unwarranted or too intrusive seems not to have been contemplated.

[75] See, for example, Cohen & Hale (2006) op cit note 18 at 294-95.

7.2.2.2 Some Possible Further Preliminary and Interim Functions

Aside from children's court services that are definitely available at preliminary or interim stages, there are others where the Act is so unclear or incomplete as to render this less certain. Section 45(1)(e), for example, empowers children's courts to give decisions on early childhood development services, prevention services and early intervention services.[76] As their titles suggest, these might often best be interposed at an early stage.[77] An important question is therefore whether they can be ordered by a children's court prior to a formal finding that a child is in need of care and protection at its dispositive hearing.

Under s 46(1)(h) children's courts may issue forms of 'child protection order' that might also be especially relevant at an earlier rather than later stage. These include orders:

> '(iii) instructing a parent or caregiver of a child to undergo professional counselling, or to participate in mediation, a family group conference, or other appropriate problem-solving forum;
> (iv) instructing a child or other person involved in the matter concerning the child to participate in a professional assessment;
> (v) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, *pending further inquiry*; [emphasis added]
> (x) limiting access of a person to a child or prohibiting a person from contacting a child;'

The new power in subparagraph (v) is to be welcomed. In some cases it may be essential to provide an immediate sanctuary -for example, against an abusing parent. The hospital retention wording will also create opportunities to obtain medical evidence.

A difficulty is that the s 45(1)(e) and s 46(1)(h) orders cover therapeutic as well as merely forensic services. They may be expensive to supply and are likely to interfere with fundamental constitutional rights of persons subjected to them. Absent any clear indication that they should do otherwise (except in the case of hospital retention under subpara 46(1)(h)(v)) presiding officers might well therefore out of caution wait until the dispositive stage. Aside from the obvious cases of temporary safe care or hospital retention, they may interpret s 45 and s 46 orders as outcomes from dispositive hearings.

[76] See also s 46(1)(g).
[77] For foreign research findings showing this see part 7.3.2, below.

The questions of when therapeutic services can be supplied, whether they can be mandatory and who is to pay should have been clarified in the Act.

In s 48(1)(a) it is stated that children's courts may as an 'addition' to their powers 'grant interdicts and auxiliary relief in respect of any matter contemplated in s 45(1)'. The terminology 'auxiliary relief' has not previously appeared in South African care legislation and is unfortunately not defined in the 2005 Act. Although it might be interpreted as generally providing supplementary powers there is no clear indication that it enables children's courts to issue orders (besides those specifically indicated) prior to a dispositive finding that a child is in need of care and protection. A logical conclusion is that if the legislature had intended broad interim powers it would have indicated this explicitly.

As will be remembered from the discussion in chapter 3, s 49(1) of the 2005 Act states that 'before it decides a matter or an issue in a matter' a children's court may choose to order ADR.[78] What is not included in relation to ADR is information on children's court process -so it is not clear whether a court should receive written representations from parties, hold a special hearing or else wait until the onset of the dispositive proceedings before issuing a s 49(1) order.

In conclusion on the 2005 Act, although it certainly contemplates a wider range of preliminary and interim functions for children's courts than the 1983 Act it is just as unclear on the nature of the processes they are to follow. In most cases it thus remains uncertain whether children's courts are required to hold formal hearings. As has also been noted another fundamental concern is that there is a group of functions which might or might not be pre-dispositive. On the aspects of challenge by opposing parties or court reviews of preliminary action the Act is almost as silent as its predecessor. Given our history of children's courts applying minimal functions and responding cautiously to their role as inferior courts and creatures of statute, simply leaving them to interpret the Act broadly is not a sufficient solution. There is clearly a need for supplementary wording.

[78] See part 3.6.

7.3 Approaches in Some Selected Foreign Systems

In order to establish how to improve our legislation so as to better utilise children's courts for provision of preliminary and interim services in care cases it is useful to note approaches in other systems. For reasons of space only some selected examples of foreign legislation mainly from well-developed systems are briefly considered. This is done primarily for the limited purposes of showing how courts can become involved at an early stage, demonstrating that they can perform a wide range of useful preliminary and interim functions, and thirdly for discerning which aspects have proved to be problematic.[79]

7.3.1 Preliminary Hearings

By comparison with South Africa in some systems there is more specific legislative wording on how court proceedings are to be initiated. For example, in s 26-1(j) of the Connecticut Practice Book it is directed that care cases are to be commenced by 'petition'.[80] This is defined as 'a formal pleading, executed under oath' which must 'invoke a judicial hearing'.[81] At that hearing the court must decide whether there is sufficient reason to instigate a welfare inquiry and continue with proceedings.

In the General Laws of Massachusetts, s 24 of chapter 119 provides an extremely detailed commencement process.[82] Similarly to Connecticut, any person may provide a 'petition under oath' alleging that a child is in need of care. Upon reviewing this, a juvenile court must decide whether there is a prima facie case for an urgent preliminary removal or merely for commencement without one. Where it decides that there is a prima facie case for commencement the court must order a preliminary hearing. The hearing (as in Connecticut) serves the useful purpose of enabling the court to decide whether there are sufficient grounds for proceedings to continue.

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[79] Additional aspects such as procedures in detail, the role of lawyers and nature or weight of evidence required are therefore either not considered or touched upon only briefly.
[80] 'Definitions Applicable to Proceedings on Juvenile Matters' op cit note 5.
[81] Ibid.
[82] The General Laws of Massachusetts, chapter 119 -accessed at <http://www.mass.gov/legis/laws/mgl/119-24.htm>.

It is further stated in s 24 of the Massachusetts legislation that the child must be present at the preliminary hearing. This avoids the kind of uncertainty which has existed in our law. And both welfare and the parents must be summonsed 'to show cause why the child should not be committed to the custody of the department [providing welfare]or that any other appropriate order should not be made' [insertion added]. After considering evidence at the preliminary hearing the court must 'at that time, determine whether temporary custody shall continue until a hearing on the merits'. Thus the court not only decides on whether there is a case for continuation of proceedings; it also decides whether any immediate care measures are necessary.

If a court in Massachusetts decides that a petition indicates that 'there is reasonable cause to believe' that the child may need an immediate preliminary removal s24 further requires it to summon the petitioner to provide a 'recitation under oath…of the facts of the condition of the child who is the subject of the petition'. If this confirms its view on the papers that the child requires an immediate removal 'the court may issue an emergency order transferring custody of the child to the department or to a licensed childcare agency or individual'. It will then commence with preparations for the preliminary hearing as described in the previous paragraph.

Courts may be involved in other aspects besides commencement decisions and initial temporary care arrangements. In s 2-10(3) of the Illinois Juvenile Court Act[83] expressly described preliminary hearing functions include decisions on whether the child should present evidence at different stages of the case[84] and on state subsidised legal representation for indigent parties. Similarly under s 1022 of the Family Court Act, New York, a form of preliminary order is the appointment of a state-financed legal representative for an indigent caregiver.[85] Usefully, under s 1027(f) it is expressly required that when any preliminary order is granted or refused the court must 'state the grounds for such decision'.

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[83] Supra note 4.
[84] On special hearings to determine participation status for children see further the findings of Kleinman and the Nova Scotia legislation cited in part 4.2.4, above.
[85] Family Court Act, New York State Consolidated Laws: accessed at <http://www.caselaw.1p.findlaw.com/nycodes/c42/a82.html>.

In England, initial court involvement often takes the form of a 'directions hearing'. This can be requested by any party who wishes to receive early guidance or support from the court. Directions hearings are frequently used to settle timetabling and dates issues.[86] The approach usually followed by courts is to consult with the parties to establish their perspectives on time-frames. They then use their authority to impose a timetable that is realistic but does not allow for undue delays that would prejudice the child.[87]

Directions hearings are also used to clarify what documents or other materials need to be disclosed to parties and to identify the contested issues that will need to be focused on at the dispositive hearing.[88] Courts also use them to direct in broad terms what information should be given to and provided by any proposed expert witnesses.[89] As Masson has pointed out the purpose of this is 'to ensure that they provide well-informed, impartial, and relevant evidence, which clarifies rather than confuses decisions'.[90] In general it has been concluded that active case management by courts from an early stage as permitted by directions hearings is an effective way of saving time and resources.[91]

Whilst early court involvement in matters that are not urgent does not appear to have been controversial, the same cannot be said about emergency cases. As has been shown, the position in South Africa is that certain categories of persons are permitted to undertake urgently needed removals of children without obtaining prior court authorisation. Since this power is frequently misused, approaches in other systems are of particular interest.

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[86] J Masson 'Representation of Children in England: Protecting Children in Child Protection Proceedings' (2000) 34 *Family LQ* 467 at 471 indicated that deadlines for filing evidence and submitting reports are typically considered.

[87] See s 32 of the Children Act 1989 and r 4.14(1)(b) of the English Family Proceedings Rules 1991 (SI 1991/1247).

[88] M Lane & T Walsh 'Court Proceedings and Court Craft' in K Wilson & A James (eds) *The Child Protection Handbook* (2002) 342 at 347.

[89] Masson (2000) op cit note 86 at 472.

[90] Ibid.

[91] See the discussion of Dame Margaret Booth's report *Avoiding Delay in Children Act Cases* (1996) by CM Lyon 'Child Protection in the Civil Law' in Wilson & James (2002) op cit note 88, 191 at 226.

Under the influence of the European court of human rights the balance in Europe has swung in favour of preliminary removals without court authority only in limited situations when there is imminent, serious danger for the child concerned.[92] Gillespie has pointed out that English law does not favour the idea of social workers having the power to undertake unauthorised removals.[93] He has explained that the effect of r 4 of the Family Proceedings Courts (Children Act 1989) Rules 1991[94] is that '[e]ven in an emergency, the local authority has to apply for an emergency protection order -albeit that *ex parte* applications are possible'.[95]

In Canada, a different approach has been taken. Howe noted that several widely publicised cases of child deaths in the early 1990s tilted the balance in favour of children's rights and protection rather than family autonomy.[96] One result was that Canadian child protection workers gained more discretion to intervene and remove children in emergency situations because courts were now given 'less ability to control and delay the process of apprehension through tight procedural rules'.[97]

In *Winnipeg Child and Family Services v KLW* the supreme court of Canada approved even a non-emergency removal without prior court authority.[98] It had to consider whether s 21(1) of the Manitoba Child and Family Services Act[99] contravened the Canadian Charter of Rights and Freedoms. This provision permitted Manitoba welfare agency staff, without prior judicial authorisation, to search for and remove any child whom they believed was 'in need of protection'. Using this broad allowance agency workers had removed a baby from the hospital where she had just been born. This was because of

[92] M Verheyde 'The Protection of Children's Rights by the European Court of Human Rights' in A Alen, H Bosly, M De Bie *et al* (eds) *The UN Children's Rights Convention: Theory Meets Practice* (2007) 107 at 110.
[93] AA Gillespie 'Establishing a Third Care Order in Care Proceedings' (2000) 12 *Child and Family LQ* 239 at 248.
[94] SI 1991/1395.
[95] Gillespie (2000) op cit note 93 at 248.
[96] B Howe 'Implementing Children's Rights in a Federal State: The Case of Canada's Child Protection System' (2002) 9 *International Journal of Children's Rights* 361 at 371-72.
[97] Ibid 372.
[98] [2000] 2 SCR 519.
[99] SM 1985-86.

concerns about the parenting abilities of the mother based on her previous neglect of her older children.

Since the removal in *Winnipeg Child and Family Services* was clearly not undertaken in an emergency the mother challenged it. However, the supreme court upheld the validity of s 21(1). In a majority judgment Madame L'Heureux-Dube` stated that what was determinative was the underlying purpose of the legislation -that of protecting children from harm.[100] Removal of children in non-emergency situations without prior court authority was thus held to be justifiable when undertaken for this purpose. Bala and Jaremko have pointed out that the position adopted in Canada has been influenced by fears that a legislative requirement of prior judicial authority might increase the risk of harm to children by reducing the willingness and ability of social services workers to remove them.[101]

Chill, in an analysis of emergency removal legislation in the USA, has noted three broad approaches. Some US states prefer the strict approach favoured in Europe. They thus place considerable emphasis on a prior court hearing except in cases where very serious harm to the child is clearly imminent.[102] A few states follow the opposite Canadian approach of allowing non-emergency unauthorised removals.[103] In Illinois, for example, such removals have been permitted by statute.[104] The predominant approach in the USA, however, is something of a via media -unauthorised removals are legislatively permitted only in situations of potentially serious harm, even if it is not imminent.[105]

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[100] At para 80.

[101] N Bala & R Jaremko 'Canada: Non-marital Unions, Finality of Separation Agreements and Children's Issues' in A Bainham (ed) *The International Survey of Family Law 2002 Edition* (2002) 109 at 130.

[102] Chill (2004) op cit note 4 at 541. The California Welfare and Institutions Code at s 305(a) allows for removals into the temporary custody of the police or welfare without a court warrant only in situations of emergency where there is 'reasonable cause for believing' that the child's needs are 'immediate': accessed at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=wic &group=00001-01000 &file=>.

[103] Chill ibid at 547. T Liebmann 'What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards' (2006) 28 *Hamline Journal of Public Law and Policy* 141 at 147 NN 22-23 places nine states in this category.

[104] See s 2-5 of the Juvenile Court Act, Illinois op cit note 4.

[105] Chill (2004) op cit note 4 at 540-41, 544 & 547. Liebmann (2006) op cit note 103 at 145-46. For example, s 1024 of the Family Court Act, New York supra note 85 allows for an 'Emergency removal without court order' provided there is not time to apply for one and the removal is necessary 'to protect a child's life or health'. The Abused and Neglected Child Reporting Act: chapter 325 Illinois Compiled

Where preliminary court authorisation is required there is generally a recognition that expeditious procedures are needed. A common solution, therefore, is to permit applicants to appear at *ex parte* hearings rather than entitling family members to offer an initial challenge.[106] In some systems welfare agencies have even been permitted to make rapid *ex parte* applications for emergency apprehensions of children simply by telephoning courts.[107] Under s 7(1) of the Children's Protection Act 6/1980 of Lesotho where there is no time to go to court emergency removals in rural areas may be undertaken 'after obtaining a temporary removal order from the Chief of the area'.

Although there is variation on when, how or even whether courts should be involved prior to preliminary removals it is widely accepted that they should certainly have a review function afterwards. The European court of human rights has held that there is a strong obligation on states to have proper procedures in place for assessing whether a child really needed to be taken into public care.[108] The Illinois Juvenile Court Act attempts to ensure that a review will happen very quickly by requiring that the child must be released 'if not brought before a judicial officer' within 48 hours.[109] It also indicates expressly that there must be a formal court review hearing.[110] It usefully requires that at this hearing welfare must not only prove the need for the removal but also that at the present time 'no efforts reasonably can be made to prevent or eliminate the necessity of removal of the minor' continuing. [111]

Statutes, at art 5/5 s 5 authorises the police or welfare department employees to take 'temporary protective custody' of a child provided there is no time to apply for a court order and if there is 'reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety': accessed at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID>.

[106] See Chill (2004) op cit note 4 above at 540. Examples are General Laws of Massachusetts op cit note 82, at chapter 119 s 24; and the Family Court Act: New York State Consolidated Laws op cit note 85, at s 1022. See also Gillespie's explanation of English law at the text accompanying note 95, above.

[107] See S Grover 'On Meeting Canada's Charter Obligations to Street Youth' (2002) 10 *International Journal of Children's Rights* 313 at 336.

[108] See the discussion of *Haase v Germany*, 8 April 2004 <http://www.echr.coe.int> by Verheyde (2007) op cit note 92 at 110.

[109] Supra note 4 at s 2-9(3). Under chapter 119 s 24 of the General Laws of Massachusetts supra note 82 the time deadline is 72 hours.

[110] Ibid s 2-10.

[111] Ibid s 2-10(2).

Some US jurisdictions place considerable stress on the right of family members to initiate post-removal challenges. Under s 1028 of the New York Family Court Act caregivers must be informed that they have a right to apply to court for a 'reversal'.[112] Under s 1028(a) if a caregiver was not present at an application or review hearing she has an absolute right to require the court to hear her application for the return of the child within three days. 'Reviews of reviews' are also possible under the Illinois Juvenile Court Act.[113] Under s 2-10(3), where a family member was not present in court to contest a removal, regardless of the reason for the absence court authorisation is only valid for ten days. To prevent expiry of the right to retain the child away from her family 'the moving party' will have to prove 'diligent efforts' to serve further notice. In such further notice caregivers must be informed of their absolute right to a 'rehearing on temporary custody'. And under s 2-10(4) caregivers, relatives and children themselves all have the right to require that the rehearing be held 'not later than 48 hours, excluding Sundays and legal holidays'.

From a Canadian perspective Grover has argued that it is essential that sufficiently mature children who have undergone preliminary removals receive appropriate assistance if they are to be placed in a position to offer an effective challenge.[114] She has proposed that they must immediately be informed of a right to dispute their removal in a court where they will be able to talk freely to the presiding officer.[115] In order to prepare them for this she considers that they must be provided with the reasons for the removal and information about when and where the first court hearing will be held. In her view they should also have a right to be represented by a lawyer.[116]

A useful example of legislation which facilitates challenges by children is the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, Australia. Section 51 expressly requires that when there is an emergency removal a child of ten years or older must be given information about how to challenge it. Section 234

[112] Supra note 85.
[113] Supra note 4.
[114] Grover (2002) op cit note 107 at 331.
[115] Ibid 331-32.
[116] Ibid 332.

further assists by requiring that the reasons for the removal be provided. And it is stated in s 234(4) that 'in giving such notice to a child or young person, the person must do so in language and in a manner the child or young person can understand having regard to his or her development and the circumstances'.[117]

In relation to the test to be applied by courts in reviewing whether unauthorised preliminary removals are lawful most US states require (similarly to our legislation) an objectively reasonable standard of decision-making by the remover.[118] A few states set the standard higher by requiring clear or compelling grounds at the time of the removal.[119] The New York Family Court Act[120] gives consideration to the difficult choices which often have to be made under trying circumstances. In s 1024(c) it provides an immunity clause which states '[a]ny person or institution acting in good faith in the removal or keeping of a child pursuant to this section shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed as a result of such removal or keeping'.

It may be concluded in relation to preliminary functions that examples of detailed legislative guidance on how precisely court involvement should commence are certainly available to guide reforms in our system. It is also clear that there is a wide variety of valuable services which courts can be empowered to provide at an early stage. Differences in approach in developed systems indicate, however, that an aspect with which particular care will need to be taken in developing our law is the role of courts in cases where urgent removals of children are required.

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[117] See further P Parkinson 'The Child Participation Principle in Child Protection Law in New South Wales' (2001) 9 *International Journal of Children's Rights* 259 at 264.

[118] For example, art 5/5 s 5 of the Abused and Neglected Child Reporting Act in chapter 325, Illinois Compiled Statutes supra note 4 authorises the police or welfare department employees to take 'temporary protective custody' of a child provided there is no time to apply for a court order and if there is 'reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety'. For other examples see Chill (2004) op cit note 4 at 544 N51.

[119] Chill ibid.

[120] Supra note 85.

7.3.2 Interim Hearings

An example of a system where the concept of interim court involvement in care cases is well established is England. Detailed wording on interim orders is contained in s38 and s 44 of the Children Act 1989. Despite having extensive interim powers, English courts follow a general policy of not overusing them in attempts to micro-manage welfare or other parties pending disposition.[121] However, where disputes or serious difficulties arise which may impede preparation for the dispositive proceedings or endanger the child English courts are available to provide a variety of interlocutory remedies.

For example, under s 38(1) of the English Children Act 1989 a court can issue an interim supervision order. This allows for the care of the child to be supervised by social workers until disposition. Under s 44(4) where access to the child by investigative social workers is being prevented a court can order that the child be produced to them. And it can even if necessary instruct that the child be removed to a place that will enable them to have better contact and/or conduct their investigation properly.[122] Throughout the United Kingdom, where an investigation by social workers is hindered by an unreasonable refusal of access to a child whose care is in question such a refusal may constitute grounds for welfare taking over temporary custody in terms of an emergency protection order issued by a court.[123]

Under s 44(6) and (13) of the 1989 Act English courts can also deal with issues of interim contact between the child and family members. It has been recognised that this may sometimes be essential where parents utilise access for abusing the child or attempting

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[121] C Smith '*Re W and B; Re W (Care Plan) and Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan)* Human rights and the Children Act 1989' (2002) 14 *Child and Family LQ* 427 at 443 explained that a distinction is drawn between courts making decisions about matters which will have a major impact on a child's future, and welfare authorities being left with sufficient discretion to deal with the smaller decisions involving 'day-to-day management' of a child's alternative care.
[122] Article 63 of the Children (Northern Ireland) Order 1995 is to a similar effect.
[123] See s 47 of the Children's Act 1989; s 57(2) of the Children (Scotland) Act 1995; and art 66 of the Children (Northern Ireland) Order 1995. For detailed discussion of the Scottish provision see K McK Norrie *Children (Scotland) Act 1995* (2ed 2004) 115; and K McK Norrie *Children's Hearings in Scotland* (2005) 229-30.

to influence the evidence that she will later give at the dispositive hearing.[124] Sealey has interpreted the English experience as showing that it is particularly where domestic violence is a factor that courts may need to hold interim hearings to consider possible limitations on contact.[125] Kaganas has noted that there has been a need to sensitise English judges because for many years opposition to access by allegedly violent fathers manifested by mothers and children tended to 'cut little ice with the courts'.[126] She further notes that English courts are becoming more willing to limit contact in domestic violence cases -a gradually better understanding of the harm that may result is permeating the judiciary.[127]

On the other hand, as the European court emphasised in *Roda and Bonfatti v Italy*[128] it is essential that sufficient access be provided for family members with whom contact will be constructive for the child. The Illinois Juvenile Court Act supports this by providing extremely detailed coverage on interim access where children have been subjected to preliminary removals. Under s 2-10(2) the welfare agency responsible for the child must, within ten days of the initial court hearing, file with the court and serve on the parties a detailed 'parent-child visiting plan'. This provision states that the plan 'shall set out the time and place of visits, the frequency of visits, the length of visits, who shall be present at the visits, and where appropriate, the minor's opportunities to have telephone and mail communication with the parents'. It further stipulates that any party has the right to require the court to hold a review hearing in which it will receive evidence on whether the visiting plan is appropriate. The court must then decide if it:

> 'is reasonably calculated to expeditiously facilitate the achievement of the permanency goal and is consistent with the minor's best interest. The frequency, duration, and locations of visitation shall be measured by the needs of the child and family, and not by the convenience of Department personnel. Child development principles shall be considered by the court in its analysis of how frequent visitation should be, how long it should last, where it should take place, and who should be present.'

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[124] See A Sealey 'Comment: A Plan for Parents' (2002) 32 *Family Law* 247.
[125] Ibid.
[126] F Kaganas '*Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* Contact and Domestic Violence' (2000) 12 *Child and Family LQ* 311 at 312.
[127] Ibid at 314-15.
[128] Chamber judgment (2006). Damages were awarded in favour of a mother and brother of the child where their contact had been unduly impeded. Accessed at <http://www.coe.int/t/transversalprojects/children/caselaw/default_en.asp>.

Further detailed provisions allow Illinois juvenile courts to issue orders against any person impeding implementation of the visiting plan.

Useful provisions on interim contact are also contained in s 1030 of the Family Court Act, New York. As a basic norm, caregivers have an automatic right 'to reasonable and regularly scheduled visitation' to a child subject to a preliminary removal 'unless limited by an order of the family court'.[129] Where reasonable contact is not provided by welfare a caregiver can apply for a direct order from the court.[130] When approached for such an order family courts are directed to grant reasonable and regularly scheduled visitation 'unless the court finds that the child's life or health would be endangered thereby'.[131] Courts may order that the visitation be supervised by welfare personnel if this would be in the best interests of the child.[132] The section further provides for visitation modification hearing procedures. It states that any party may apply for such a modification hearing. And it requires that at the hearing all other parties 'shall be afforded an opportunity to be heard thereon'.[133]

Aside from dealing with access issues, interim hearings may also be utilised for modifying other aspects of preliminary care arrangements. In s 2-10(9) of the Illinois Juvenile Court Act[134] wide grounds are provided for 'any interested party' to 'file a motion that it is in the best interests of the minor to modify or vacate' preliminary removal arrangements. Grounds include availability of a relative to take over care or an improvement in the child's home circumstances which justify a return. The court must hold a hearing within fourteen days. This subsection thus supports the minimum duration of preliminary removals wherever possible.

Another valuable function at interim hearings is provision of authoritative decisions on access to information. It is not unusual for disputes to arise concerning sharing of

[129] Op cit note 85 s 1030(a).
[130] Ibid s 1030(b).
[131] Ibid s 1030(c).
[132] Ibid.
[133] Ibid s 1030(d).
[134] Supra note 4.

information between parties. And difficult questions of confidentiality -for example in relation to sensitive materials held by welfare- may arise where family members demand access to such materials as essential for their court preparations. In 2002 Charles J of the English family division held in *Re R (Care: Disclosure: Nature of Proceedings)* that in care proceedings an interlocutory hearing should be sought as the appropriate route whenever access to information or material is required and this is prevented because welfare or another party is unwilling to make it available.[135]

The need for courts to be able to remove violent adults pending disposition in care cases has been recognised in the USA.[136] In England s 38(A) of the Children's Act 1989 specifically allows for the exclusion of domestic violence perpetrators from their homes as a form of an interim court order.[137] And factors which a court should consider when deciding whether to do so are set out in s 44(A)(2). It must be satisfied that there is reasonable cause to believe that if the person who perpetrates or threatens violence is excluded from where the child lives the child will be likely to avoid significant harm. It must also establish that another person living in the home is able and willing to give the child care which it would be reasonable to expect a parent to give him.[138]

As can be seen, the English wording is somewhat different and also more nuanced than that contained in the 2005 Act in South Africa. It is courts rather than police which have the power to instigate removal of perpetrators. And the child's future care situation is taken into account. This is done through the useful requirement that the court must weigh up the nature of the care which the child is likely to receive at home if the perpetrator (who may be a caregiver) is removed from the household.

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[135] (2002) 32 *Family Law* 253 at 254. As has been noted in part 7.3.1 above, if access to information issues are pertinent *ab initio* English courts can deal with them at directions hearings.

[136] An example is s 1029 of the Family Court Act, New York note 85 supra. According to LM Copen *Preparing Children for Court. A Practitioner's Guide* (2000) 33 such an order is referred to in some US states as a 'no-contact order'. Perpetrator removals may also be used to protect co-victim mothers: see JA Dunlap 'Sometimes I Feel like a Motherless Child: the Error of Pursuing Battered Mothers for Failure to Protect' (2004) 50 *Loyola LR* 565 at 618-19.

[137] Inserted by schedule 6, Family Law Act 1996.

[138] Article 57(A) of the Children (Northern Ireland) Order 1995 as inserted by art 29(2) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 is to a similar effect. The latter was accessed at <http://www.opsi.gov.uk/si/si1998/81,071--d.htm#29>.

The equivalent Scottish provision is s 76 of the Children (Scotland) Act 1995. This includes a condition in s 76(9) that the court 'shall not make an exclusion order if to do so would be unjustifiable or unreasonable'. This *caveat* has had the effect of discouraging inclusion of domestic violence exclusion injunctions in emergency child protection orders in Scotland.[139] Whilst it is obviously important to protect the rights of alleged abuse perpetrators it would appear that any legislative conditions which discourage the use of interim removals of adults could be disadvantageous to abused children.

In domestic violence cases other solutions besides access restrictions and removal of perpetrators may be needed. Under s 2-23(3) of the Illinois Juvenile Court Act[140] 'restraining orders controlling the conduct of any party' can be provided. In addition, an 'order of protection' obtainable under s 2-25(1) provides courts with very wide powers to order any person, inter alia, to stay away from the child or 'to abstain from offensive conduct against' the child or a family member. It is stated in s 2-25(5) that 'an order of protection may be sought at any time during the course of any proceeding conducted pursuant to this Act if such an order is consistent with the health, safety, and best interests of the minor'. In terms of process, it can be urgently sought *ex parte*, but under s 2-25(4) a person thus subjected to it must be given an opportunity for a challenge hearing subsequently. Under s 2-26(1) violation of an order of protection constitutes contempt of court. If it decides this is necessary for the protection of the child the court can even issue a warrant for an 'alleged violator' to be immediately arrested and brought before it.

As regards interim therapeutic services and forensic assessments of children and family members, in many developed systems it is necessary to obtain court orders if these are to be provided. As will be shown, the role of a court may be coercive in providing legal authority compelling cooperation by recipients. Alternatively, where persons to be subject do not evince resistance, a court order may be utilised simply as a means of ensuring that the state pays the costs.[141] Since somewhat different issues arise in relation to

[139] Lyon (2002) op cit note 91 at 201. For a detailed analysis of the wording of this provision see Norrie (2004) op cit note 123 at 172.
[140] Supra note 4.
[141] See Cohen & Hale (2006) op cit note 18 at 297.

primarily forensic assessments and primarily therapeutic services examples of foreign court involvement in applications for these will be noted separately.

Forensic assessments have for many years been viewed as useful in care cases. In Denmark, for example, there was an emphasis on them in the early 1990s when it was concluded in the Graverson Committee Report that they would often be an essential prerequisite to deciding on appropriate help in care matters.[142] In England they have also been found useful. Humphreys and Harrison have gone so far as to state in relation to care matters involving abuse that '[w]ithout comprehensive assessments, the wishes and feelings of children, the safety of survivors and the risks from perpetrators and whether they have the capacity to change over time cannot begin to be ascertained'.[143] They concede that risk assessment 'is an imperfect tool that can only allow informed decision-making and planning, not the elimination of risk' but maintain that 'in the absence of comprehensive assessment it is comparatively easy for a dangerous history of abuse to be overlooked, particularly if the abuser is superficially charming and behaves well towards staff and children'.[144]

As regards legislative wording on forensic assessments a difficult issue on which there is a variation is whether or when children should be compelled to be assessed. In England what are termed 'child assessment orders' are provided under s 43 of the Children's Act 1989.[145] And in s 38(6) of this Act it is made quite clear that medical examinations or other assessments of children may be the subject of interim hearings. The detailed wording of s 43 includes many protective limitations. For example, such orders can only be made when essential,[146] can allow only seven days for assessment[147] and can include specific court directions on how it is to be carried out.[148] Significantly, in s 43(8)

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[142] J Melbye 'Denmark' in MJ Colton & W Hellinckx (eds) *Child Care in the EC* (1993) 34 at 42.
[143] C Humphreys & C Harrison 'Focusing on Safety -Domestic Violence and the Role of Child Contact Centres' (2003) 15 *Child and Family LQ* 237 at 250.
[144] Ibid.
[145] See also s 55 of the Children (Scotland) Act 1995 and art 62 of the Children (Northern Ireland) Order 1995. The latter was accessed at<http://www.opsi.gov.uk/si/si1995/uksi_19950755_en_1>. On these systems see further note 149, below.
[146] See s 43(1)(c).
[147] Section 43(5)(b).
[148] Section 43(6)(b).

it is provided that a child 'of sufficient understanding to make an informed decision' can 'refuse to submit to a medical or psychiatric examination or other assessment'. It would appear that the analogous s 55 of the Children (Scotland) Act 1995 places courts under a similar limitation in respect of medical examinations of mature children.[149]

Mitchels and James have stated that in England courts are generally reluctant 'to overrule a child's refusal of an assessment for forensic purposes'.[150] Thus only limited use is made of the power to compel an unwilling child to submit on the basis that she is insufficiently mature to offer an informed refusal. Occasionally, however, courts decide that assessment is so essential for a particular case that it is necessary to take this route even for an older child.[151] In Australian legislation very similar to that in England it is stated in s 53(4) of the Children and Young Persons (Care and Protection) Act 1998 of New South Wales that 'if a child or young person is of sufficient understanding to make an informed decision, the child or young person may refuse to submit to a physical, psychological, psychiatric or other medical examination or an assessment'.

However, in s 2 of the Alberta regulations 5/1999[152] a very different approach to forensic assessments of children has been taken. This allows for a child in Alberta, Canada, to be subjected to a compulsory seventy-two hour assessment period. Its validity was upheld in the Queen's bench decision *Alberta (Director of Child Welfare) v K.B.*[153] According to Jordan J of the provincial court as quoted by the Queen's bench mandatory assessments are often found necessary to evaluate 'the child's physical and nutritional health; the child's use of alcohol, drugs and other intoxicating substances; the child's risk of

[149] See the discussion of Norrie (2004) op cit note 123 at 107 & 198. In Northern Ireland a right of refusal for children of sufficient understanding has been expressly created. It applies to assessments generally: see arts 57(6) & 63(7) of the Children (Northern Ireland) Order 1995.
[150] B Mitchels & H James *Child Care Protection Law and Practice* (2001)115.
[151] J Fortin 'Children's Rights and the Use of Physical Force' (2001) 13 *Child and Family LQ* 243 at 261 N144 is critical of what she describes as the controversial decision of Douglas Brown J in the case of *South Glamorgan County Council v W and B* [1993] 1 FLR 574 at 584. He had permitted a local authority 'to take all necessary steps' to remove a 15 year old child from her home against her wishes, and thereafter to take her to doctors at a specialised unit where she could be assessed and treated.
[152] Published in accordance with the Protection of Children Involved in Prostitution Act RSA 2000 (S.A. 1998, Chapter P-19.3).
[153] 2000, ABQB 976.

self-harm and of engaging in or attempting to engage in prostitution; and whether the child is in need of protective services under the Child Welfare Act'.[154]

In Scotland, in terms of s 69(3) of the Children (Scotland) Act 1995 even lay children's hearings panels[155] can compel children to undergo forensic assessments where they are necessary for the state's care investigation.[156] If essential to ensure co-operation they may under s 69(4) issue a warrant for a child to be confined in a suitable place (if necessary under secure care)[157] for up to twenty-two days so that the assessment can be carried out.[158] Although the powers here are wide, there are qualifications. It appears that children mature enough to refuse cannot be forced to submit to assessments which take the form of medical examinations.[159] Compulsion in other situations can only be applied where a subsequent continuance hearing has become necessary[160] -thus it is never a first resort. A mandatory assessment cannot be ordered if it is disproportionate to the needs of the case.[161] And furthermore, the panel must take careful account of the child's view if she is able to express one [162] -although it can be overridden.

In an approach opposite to that in Scotland, in some US legislation only medical assessments -as often of great value in deriving evidence of children's physical condition- are specified as mandatory. For example, under s 2-19 of the Illinois Juvenile Court Act[163] where the court decides that a medical examination of a child is needed there is no right for

[154] Ibid para 76.
[155] See part 3.2, above.
[156] Norrie (2004) op cit note 123 at 151. Norrie (2005) op cit note 123 at 129-30.
[157] Section 69(11) Children (Scotland) Act 1995 as amended by the Antisocial Behaviour etc (Scotland) Act 2004: schedule 4. Accessed at <http://www.opsi.gov.uk/legislation/scotland/acts2004/asp_20040008_en_1>. See also Norrie (2005) ibid 199. Norrie points out ibid at 196-97 that the panel merely provides discretion to a local authority chief social work officer to make a final decision on secure care.
[158] Norrie (2005) ibid at 130 & 198; and Norrie (2004) op cit note 123 at 151.
[159] It is probable that any assessment which is physically intrusive enough to constitute assault if unconsented is unlawful in Scotland. See Norrie, ibid (2004) 198; and (2005) 195.
[160] Norrie (2004) ibid 151.
[161] See ss 16(3) and 16(4)(a)(ii) of the Children (Scotland) Act 1995.
[162] Norrie (2005) op cit note 123 at 130. That the duty to seek the child's views applies before issuing a warrant for her attendance at a place of assessment is made quite clear by r 26(1)(a) read with r 26(1)(d) of the Children's Hearings (Scotland) Rules (SI 1996/3261). Accessed at <http://www.opsi.gov.uk/si/si 1996/Uksi_1996 3261_en_7.htm#mdiv 26>.
[163] Supra note 4.

the child to refuse. And it is specifically directed in s 1027(g) of the Family Court Act, New York that:

> 'In all cases involving abuse the court shall order, and in all cases involving neglect the court may order, an examination of the child… by a physician… As part of such examination, the physician shall arrange to have colored photographs taken as soon as practical of the areas of trauma visible on such child and may, if indicated, arrange to have a radiological examination performed on the child.'[164]

The contrary pressures of the need to respect children's refusals and obtain what may be crucial evidence have thus produced a range of very different responses on the issue of mandatory forensic assessments of children.

In relation to forensic assessments involving or including caregivers as opposed to children, encouragement or coercion rather than actual compulsion appears to be the predominant approach.[165] As noted by Gillespie welfare investigators can usually persuade parents who wish to keep their children to submit to forensic assessments.[166] And with other parents mandatory assessments would tend to be a waste of resources. Although court powers to compel parents who have expressed objections in court appear to be rare, they are often strongly encouraged by welfare to agree to such orders. This is because, as noted earlier, assessment can be used to obtain important evidence. However, Gillespie has warned that 'a technique sometimes employed by welfare services in England is to put great pressure upon caregivers to cooperate under threat of their child being removed'.[167] As he notes, this can be abusive of parents and does not promote an atmosphere of genuine cooperation in undergoing assessment.[168]

In the USA using a desire of parents to regain their children as a way of pressuring them to cooperate is a standard technique.[169] Threats of removal have actually been made a

[164] Supra note 85.
[165] See Gillespie (2000) op cit note 93 at 241. Examples are noted in the discussion immediately following.
[166] Ibid.
[167] Ibid at 241-42.
[168] Ibid at 242.
[169] Chill (2004) op cit note 4 at 545.

requirement in the Illinois Juvenile Court Act.[170] Under s 2-10(2) where a child has been subjected to a preliminary removal:

> 'the court shall admonish the parents, guardian, custodian or responsible relative that the parents must cooperate with the Department of Children and Family Services, comply with the terms of the service plans, and correct the conditions which require the child to be in care, or risk termination of their parental rights.'

And to ensure that this is less likely to be regarded as an idle warning, under s 2-28(4)(b) the Illinois state attorney has power to file a motion to finally terminate parental rights 'of any parent who has failed to make reasonable efforts to correct the conditions which led to the removal of the child or reasonable progress toward the return of the child'.

Gillespie's concerns about pressuring parents have been corroborated in a review of North American research by McConnell and Llewellyn. They have drawn attention to the vulnerability of the large proportion of intellectually disabled parents in care cases. They note that they are often coerced to 'agree' in court to assessments.[171] They conclude that the results as later put before court are frequently unduly negative[172] and they propose that courts should therefore generally refuse to support welfare by issuing assessment orders unless the need for these has been extremely well motivated.[173]

Similar conclusions have been reached by Wasow. She agrees that courts should be cautious about agreeing to assessments of parents. She notes that evaluators often 'over-predict dangerousness and lack the tools to assess parental competence accurately'.[174] She points out that empirical studies have shown that they frequently conduct too few sessions and are less than candid about sharing with courts limitations which affect the accuracy of their predictions.[175] Of particular importance is that at mandatory assessments the trust needed for providing full information is absent because the parent knows that whatever she reveals to the assessor will be reported in court. She will thus tend to be defensive and

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[170] Supra note 4.
[171] D McConnell & G Llewellyn 'Disability and Discrimination in Child Protection Proceedings' (2000) 15 *Disability and Society* 883 at 890.
[172] Ibid 890.
[173] Ibid 892.
[174] N Wasow 'Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities' (2006) 31 *New York University Review of Law and Social Change* 183 at 207.
[175] Ibid 213-14.

have 'a strong incentive to lie'. Although being closed is therefore a natural response it is routinely reported to courts 'as evidence that a parent cannot put her child's needs before her own'.[176]

Of particular relevance from a South African perspective is that some studies have also shown that care assessments carried out by persons of a different culture tend to be much less accurate.[177] A solution to the problem of less than neutral assessments has been found in New South Wales. Special children's court clinics have been established there specifically to allow courts the benefit of entirely independent and properly conducted forensic assessments of both children and parents.[178]

In relation to primarily therapeutic rather than forensic services, there is certainly a case for them occurring prior to disposition. There are research findings from the United Kingdom which suggest that this will sometimes be the best time.[179] In referring to early intervention services in particular, Kelly has argued that family preservation is often most effectively achieved when they are implemented soon after the crisis that has resulted in the initiation of care proceedings. [180] He has noted that in some cases they should ideally be provided 'within twenty-four hours of the precipitating event'.[181] Another reason in favour of therapeutic services earlier on is that their success or failure may assist courts in deciding what outcome to impose at the dispositive hearing. [182]

However, although interim therapeutic services may be advantageous, ordering them can result in high costs and impose lengthy delays before disposition -and for these reasons English courts have moved towards an interpretation which confines s 38(6) of the Children Act 1989 to interim court orders for forensic assessments rather than therapeutic

[176] Ibid 216.
[177] Ibid 217.
[178] RJ McLachlan 'Assessment Orders, The Role and Accountability of Clinicians from the Children's Court Clinic' (2002) 2,5 *The Children's Court of New South Wales: Case Law News* 2.
[179] Department of Health *Child Protection: Messages from Research* (1995) 54.
[180] See RF Kelly 'Family Preservation and Reunification Programmes in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy' (2000) 34 *Family LQ* 359 at 365.
[181] Ibid.
[182] Department of Health (1995) op cit note 179 at 54.

services.[183] Thus rather than ordering primarily therapeutic treatment at state expense, courts will confine themselves at the interim stage to ordering forensically relevant assessments on aspects such as the quality of child-parent relationships, parenting skills, and the risk to the child which a caregiver presents.[184]

Rather than avoiding them entirely, in some US states interim therapeutic services have been limited to specific situations. The Family Court Act, New York, directs that when reviewing a preliminary removal, if the court determines that welfare services to the child and/or family might reasonably prevent the need for the removal continuing, it 'shall' immediately order them.[185] It further provides that at an interim hearing a court may order 'the child protective agency to provide or arrange for the provision of appropriate services or assistance to the child or the child's family' in two circumstances. Firstly, where it has found that the child has been abused and secondly where it finds these services necessary to avoid a preliminary removal of the child.[186] And it additionally provides that emergency medical procedures can be authorised where necessary 'to safeguard the life or health of the child'.[187] Since no right of refusal is included it appears that all of these services could be mandatory as far as recipients are concerned.

The Illinois Juvenile Court Act also follows the route of mandatory therapeutic services in some specific, narrowly defined situations. At s 2-10(9) it states '[i]n the event that the court modifies or vacates a temporary custody order but does not vacate its finding of probable cause, the court may order that appropriate services be continued or initiated in behalf of the minor and his or her family'. Additionally, s 2-11 allows for courts to order therapeutic 'medical, dental or surgical procedures' for children in situations where they 'are necessary to safeguard the minor's life or health'. Welfare can also in terms of this provision compel an AIDS test of the child if it has been awarded temporary guardianship by a court. In Illinois the method of pressuring parents to cooperate is utilised with therapeutic services. Under s 2-27(1.5)(a) of the Illinois Juvenile Court Act at a dispositive

[183] Cohen & Hale (2006) op cit note 18 at 296.
[184] Ibid.
[185] Supra note 85 at s 1028(d).
[186] Ibid s 1022(a)(iii) & s 1027(b)(iii), respectively.
[187] Ibid s 1022(c).

hearing a court is directed to take into account whether any family preservation or reunification services have been unsuccessful.

It may be concluded that at the interim stage between preliminary and dispositive hearings there is once again a wide range of useful functions which courts can perform. As with preliminary services, only a minority of these are problematic because of complexities arising from countervailing considerations. In the next section below some suggestions will be made for reforming our system.

7.4 Recommendations on Reforming Our System

As has been shown in part 7.2 inadequate wording in the South African legislation has led, and if not addressed is likely to continue to lead, to under-utilisation of the potential of children's courts and inconsistent approaches. Our system fails badly when measured against the primary evaluative criterion of services that can be made available incrementally over time. In line with the general orientation of the 2005 Act towards providing a much greater range of remedies it needs to be expressly enacted that our children's courts must be available to hold hearings at the pre-dispositive stage of care cases. In light both of local conditions and the variety of uses to which courts have been put in other systems some recommendations on how best to achieve this will now be put forward.

As a foundational proposal, it may be suggested that a simple, binary concept of preliminary and interim children's court hearings would be apposite as a start towards developing our law. They could readily be distinguished in future South African legislation as constituting, respectively, a first or a subsequent pre-disposition hearing. Although they can be conveniently differentiated in this manner it is not suggested that an absolute demarcation of the court services available at them be too rigidly maintained. The review of foreign systems indicates that, except with emergency or other urgent issues, an aspect usually appropriate for decision at an initial hearing might sometimes be dealt with only later and vice versa. The general approach in our law should therefore be that children's

courts, with due consideration for urgent aspects and giving parties sufficient time to bring evidence where appropriate, must decide predisposition matters when this is necessary in the interest of the child concerned. This would accord with the primary evaluative criteria of according sufficient access to children's courts and hearing the voices of vulnerable participants.

A useful way of empowering and educating children's court magistrates would be to provide them with a list of specific functions they must be available to perform at predisposition hearings. Whilst it should be indicated that most of these can be performed at any stage, direction should be given on certain exceptions which (as will be further discussed below) must be completed early on. Also, it would be helpful to distinguish for magistrates between responsibilities usually best performed at a first hearing or only subsequently. In the next two subparts, proposals on predisposition functions are put forward. For convenience, tasks that would tend to be most appropriate (or even essential) at preliminary or subsequent interim hearings are separately discussed.

7.4.1 Recommendations Concerning Preliminary Hearings

It has been shown that preliminary hearings have considerable potential for assisting parties at an early stage. A first suggestion, therefore, is that they be expressly established in our legislation as a form of children's court hearing available in care cases. In defining them, it should be indicated that they are pre-dispositive, may be *ex parte* at the discretion of the court and would be the first formal hearing. In view of the variety of valuable uses to which they have been put in other systems a question which arises is whether they should be mandatory in all our care cases.

The time saved and valuable direction given by courts in some overseas systems means that there is certainly a case for preliminary hearings as a standard norm. As against this, in some situations (for example, of abandonment or gradual neglect) there may be no aspect which initially merits a formal court hearing. Because of our limited available court

resources it may perhaps therefore be suggested that it would be best to provide that preliminary hearings are only required in four situations.

Firstly, in accordance with the evaluative criterion of creating access they should certainly be held when any person (including the child) can make out a *prima facie* case. This would need to be in written form or orally in chambers. And the case to be made out must be for a legal decision on temporary care arrangements pending disposition[188] or on a disputed aspect of the applicant's case preparations.[189] It might, as suggested in chapter 4,[190] need to be coupled with an application by the instigator for party or merely participant status. [191]

Secondly, children's courts must be required to hold a preliminary hearing *mero motu* where information received by them from any source indicates a *prima facie* case for one on any aspect. With reference to the approach in some US systems this should include cases where initial allegations (particularly by non-professionals) leave them uncertain whether there are grounds for initiating a care investigation.

Given the significant new ADR responsibilities for children's courts discussed in chapter 3 above[192] a third situation in which it should be mandatory to hold a preliminary hearing has been created. There should surely be one, *inter partes*, whenever a presiding magistrate contemplates referring a case for any of the forms of ADR allowed in the 2005 Act. At the hearing the attitude of the parties, who is to participate, locally available ADR resources, the method to be selected, how ADR results will be utilised by the court,

[188] Children's courts must be expressly empowered to decide that any suitable person may have temporary custody and/or that the care of the child will be under supervision by social workers, pending disposition.
[189] For example, in cases where issues of confidentiality versus disclosure of information become pertinent, these should, just as in England, be dealt with.
[190] See parts 4.3.2.2 and 4.3.2.3, above.
[191] To avoid unnecessary hearings, future rules could indicate that any would-be party/participant who can establish a *prima facie* case on documents has a right to a decision in this regard. See the discussion of the South African law commission proposal in part 4.3.2.2, above. If the presiding officer decides to grant the application a special hearing should not be required. If, however, the presiding officer has doubts the would-be party/participant should have the right to an *ex parte* hearing as a matter of urgency. An *ex parte* procedure would save time on what is not a central issue. Also, a court should often be able to determine applications without hearing opposing evidence. Another person who was prejudiced should be permitted to offer a subsequent challenge and also appeal if unsuccessful.
[192] See part 3.6.

payment and timetabling aspects should all be canvassed. After considering all necessary evidence on these aspects the court should be obliged to issue an order, together with reasons, on whether or how ADR will be attempted.

A fourth category is cases which require urgent preliminary removals. Because of the seriousness of the stakes it may be recommended that preliminary court hearings must occur. However, in view of the different responses in developed systems,[193] a key question is whether children's courts should take on a stronger pre-authorisation function. Again, it may be suggested that the factor of limited resources is overriding in South Africa. So as not to overburden our system and create the danger that children are left in hazardous situations whilst permission is being sought the position in the 2005 Act should be maintained. A factor which weighs in favour of a continuation of the existing removal powers of social workers, the police and lay authorised officers is the sometimes limited access to courts, particularly in rural jurisdictions. Thus we should continue to allow for these classes of persons to carry out urgent removals without first obtaining court authorisation.

The next question which arises is whether the power to undertake preliminary removals without court authority should be extended in future legislation to non-emergency situations. This has been proposed by Rothman as a realistic acceptance of the current unofficial practice in South Africa.[194] Rothman has suggested that some overuse of emergency powers should be accepted as inevitable and that the way forward is proper court reviews afterwards.[195] As will be remembered, this approach has survived challenge in Canada.

A crucial consideration which counts against Rothman's proposal, however, is the severe psychological impact of preliminary removals on caregivers and particularly children subjected to them. As pointed out by Chill these are typically terrifying experiences -they tend to cause serious reactions such as panic attacks, grief and feelings

[193] As noted in part 7.3.1, above.
[194] Rothman (2005) supra note 32.
[195] Ibid.

of abandonment.[196] They may also harm children's later ability to form secure attachments.[197] In view of this, from human rights and particularly children's rights perspectives and with reference to our Constitution[198] unauthorised removals in non-emergency situations cannot be justified in South Africa, regardless of how convenient they may be for child protection personnel. They are in contradiction to the 'last resort' evaluative criterion which requires sufficient protection against premature or unnecessary removals.

As has been shown with reference to other systems the way to address convenience needs is to provide protection personnel with simple and quick procedures for obtaining court authorisation. Except in situations where harm to a child is imminent, a social worker, police member or authorised officer contemplating a preliminary removal should be required to make an *ex parte* application at the children's court which is most convenient. It should be established in a rule of court that such applications must receive priority on the roll and may be entirely by telephone unless the court finds this insufficient in a particular case. As has already been done in South Africa with urgent domestic violence court applications[199] so too with preliminary removal applications courts should be made contactable when necessary after regular hours.

It has been shown that neither the 1983 nor 2005 Act explicitly requires children's courts to hold formal hearings for reviewing preliminary removals of children. In this respect they fail to meet the evaluative criterion of using courts to ensure a balance between protection and family nurturing of children. It has been noted that such hearings are a standard requirement in developed systems. The potential for serious psychological harm if mistakes are made surely renders it essential that in South Africa also review hearings must happen after all preliminary removals, whether court authorised or not.

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[196] See Chill (2004) op cit note 4 at 540-41. Liebmann (2006) op cit note 103 at 161-62 notes that 'the devastating effect of even short separations on a child emotionally and physically' has been well-documented.

[197] Chill ibid at 541.

[198] It is well arguable that non-emergency unauthorised removals contravene the right to respect for inherent dignity in s 10, the right not to be deprived of freedom arbitrarily in s 12(1)(a) and children's foremost right to family care in s 28(1)(b).

[199] Domestic Violence Act 116/1998 s 4(5).

Unlike in the developed systems reviewed, in South Africa lay 'authorised officers' sometimes undertake removals and this further strengthens the argument for such hearings.

If it is accepted that our legislation must be amended to expressly require children's courts to review all preliminary removals the next question is what the nature of their role should be. A first suggestion with reference to the primary criterion of accessibility is that the review must occur soon afterwards. It has been noted that some developed systems impose very short deadlines. Chill has contended that reviews should be held 'no later than one week following the removal -just enough time for counsel for parents and children (who should be appointed immediately when the case is filed in court) to prepare for trial'.[200] In South Africa a short timeframe between removals and reviews should also be required.

It should further be indicated in our legislation that both space for parties to challenge preliminary action and an evaluation by the court itself will occur at the proposed review hearings. Chill has argued that rigorous and not merely rubber-stamping court evaluations are imperative.[201] One reason for this is US statistics indicating that inappropriate preliminary removals may be occurring in as many as a third of all cases.[202] The causes include errors by inexperienced or overburdened social workers and false reports of harm to children.[203] Another reason for careful judicial scrutiny is the inability of most family members to offer an effective challenge.[204]

The reasons for intensive evaluation noted by Chill are applicable in South Africa.[205] Also in favour of a close-scrutiny function for courts here is that constitutional rights to liberty and dignity may be affected. And unless courts are going to apply a close scrutiny there is little point in their being involved. It may therefore be suggested that Bertelsmann J's limited scrutiny approach in *Swarts* based on an analogy with other

[200] Chill (2004) op cit note 4 at 547.
[201] Ibid.
[202] Ibid at 541.
[203] Ibid at 543, 546 & 548.
[204] Ibid at 543.
[205] Here too, the problem of overburdened and inexperienced social workers is a major one: see Sewpaul (2006) as cited in part 3.4.1, above.

categories of quasi-judicial administrative acts fails to meet the primary criterion of providing sufficient protection for children. Deference by courts to opinions of persons who undertake removals is surely not justifiable given the seriousness of the issues at stake and the lack of equality of arms likely from the side of private parties. The *Swarts* judgment set an unfortunate precedent and rendered the need for express legislative provisions compelling rigorous reviews even greater.

Concerning procedures at reviews, three stages should be provided for. Firstly, persons who undertook the preliminary removal must explain their reasons and so attempt to justify (or in a case of prior court authority, confirm) the grounds for it with the assistance of any supporting witnesses. In a second stage the child or a caregiver (and again their witnesses, if any) could provide testimony on record in opposition.[206] This would accord with the criterion of hearing appropriate voices. And finally the court should be directed to reach a prompt decision about whether to revoke the removal, apply other remedies and/or instigate further investigation. In accordance with the criterion of removals of children as a last resort it should be specifically required to consider interposing a domestic violence remedy if this would make it possible for the child to be returned home immediately.

Regarding the standard for measuring the legality of a decision to undertake an unauthorised preliminary removal it will be remembered that s 152(1) of the 2005 Act provides that the test is one which combines reasonableness, imminent harm and a consideration of whether it is the best alternative. It may be suggested that this is a correct approach. The multifaceted test meets the evaluative criterion of a balancing of protection and family care considerations. As has been noted, the reasonableness standard has predominated in the USA. And the addition of 'immediate emergency protection' and best option requirements fits with Chill's finding about setting a high threshold.

[206] The useful suggestions of Grover and the legislative approach in New South Wales for helping children prepare for reviews (as noted in part 7.3.1, above) should be drawn upon in developing the detail of our future provisions.

Although the 2005 Act is well worded on the test for a lawful preliminary removal it misses the mark when it comes to consequences for persons who fail to apply it correctly. It will be remembered that in an attempt to stop the practice of unauthorised removals in non-emergency situations s 152(5)-(7) provides for disciplinary hearings and removal of professional licences. The Act is thus designed to work *in terrorem* against 'misuse' of emergency powers. However, as South African commentator Robinson warned[207] and the Canadian experience has shown[208] interposing barriers may result in child deaths.

Persons applying the relatively complex s 152(1) test should surely not be deterred from rescuing children in seemingly dangerous situations for fear of draconian sanctions if their decision is later found not to meet one of its requirements. A subjective belief that there was an emergency dictating an immediate removal should therefore be made sufficient for providing immunity from any penalties. In support of a second and lower standard specifically for immunity (as opposed to the lawfulness of a preliminary removal) is the reality that genuine emergency action is often unpremeditated and taken hastily in very difficult circumstances. In an overburdened child protection system the danger of children being left in hazardous situations is surely far more serious than occasional mistakes by overcautious removers.

Just as in New York, proof of a genuine belief that there was an emergency should trigger a legislative immunity clause providing protection from any form of legal liability. And in contrary cases where a children's court finds that a preliminary removal was undertaken in a non-urgent situation purely out of a lazy unwillingness to follow proper procedures it should be accorded a power to award summary damages.[209] This would be quicker than referrals for possible disciplinary action and should be quite sufficient to curb the current overuse of emergency powers.

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[207] See part 7.2.1.2, above.
[208] See part 7.3.1, above.
[209] An argument that children's courts should have the power to award damages in certain situations is developed in more detail in part 8.4.4, below.

At either emergency action reviews or preliminary hearings instigated for other purposes children's courts should always, in view of the proven usefulness of directions hearings in England, be directed to take the opportunity to decide on timetabling. They should also give guidance on evidence required and ascertain the language-familiarity of the parties. Yet another standard task that ought to be carried out at preliminary hearings is establishing whether any party should be advised to contact the family advocates' office for state funded legal representation as proposed in chapter 5.[210] This would accord with the primary evaluative criterion requiring efficient deployment of legal representatives for vulnerable parties.

7.4.2 Recommendations Concerning Interim Hearings

As suggested at the beginning of this chapter children's court interim hearings in care cases should be defined in future South African provisions as those held subsequent to a preliminary hearing and prior to a dispositive one. It should be stated that their basic purpose is considering either relevant aspects not dealt with at a preliminary hearing or possible amendments or additions to any order made at one. It should further be stated that they may be initiated by children's courts *mero motu*. Alternatively, parties, participants or persons seeking status as these should be permitted to apply for them.

To prevent the time of courts being wasted applicants must be required to make out a prima facie case beforehand in documentary form or in chambers.[211] It should be expressly required that if they wish to traverse issues already settled they must provide justification. This should be by showing, prima facie, additional or more accurate information, a situational change relevant to the child or an inability to attend at the preliminary hearing which justifies the interim hearing. Regarding court functions at interim hearings, from the perspective of improving accessibility and just as in many developed systems, these ought to be described in detail, together with relevant court

[210] See part 5.4.2, above. The need for state-funded legal representation to be allocated at an early stage has been stressed by Harding. She noted that experience in the USA shows that where this is not done clients in care cases, and particularly the child, are likely to be severely prejudiced: see TB Harding 'Involuntary Termination of Parental Rights: Reform Is Needed' (2000-2001) 39 *Brandeis LJ* 895 at 918.
[211] Similarly to the use of written or oral petitions in some US systems as noted in part 7.3.1, above.

orders, in guiding legislation. In the discussion below a general overview on proposed functions will be provided.

In accordance with the evaluative criterion of providing incremental services it may be suggested firstly that at interim hearings there should be scope for considering amendments of or additions to any care arrangements, preparation rulings or other rulings made at a preliminary hearing. This would provide for situations where inaccurate or incomplete information was originally received or where a change in the circumstances of the child or a caregiver has occurred.[212] Because of the frequent need for these in care cases[213] it should be provided that interim hearings may be held for considering late applications for party or participant status. It should also be specified that children's courts must be available at the interim stage to give rulings on access to documentary information or other evidential material.

With interim access to children, we have had an unfortunate history. In *Van Schoor v Van Schoor* which was heard under the 1960 Children's Act it was held by the then appellate division of the supreme court that children's courts have no power to interfere with parents' common-law right of reasonable access to their children even where alternative care measures are required.[214] Although this case was praised as providing important protection for parents[215] it unfortunately denuded children's courts of any power to limit or prevent access by caregivers with whom contact might be seriously damaging. In the absence of authority to the contrary it has been followed ever since.[216]

In s 45(1)(b) of the 2005 Act it is stated that children's courts may adjudicate any matter involving contact with a child. This would certainly seem to include interim access but it is unfortunate that the only express reference to it pertains to domestic violence

[212] For example, it has been shown in part 3.6 above with reference to experience in developed systems that interim hearings may sometimes be needed to make new decisions about ADR. As will be remembered, parallel ADR may sometimes be appropriate because of positive indicators that emerge subsequent to a preliminary hearing.
[213] See the *Womack* case and findings of Hunt, MacLeod & Thomas (1999) noted in part 4.3.2.2, above.
[214] 1976 (2) SA 600 (AD) at 610D.
[215] R Soni 'The Right of Reasonable Access by a Non-custodian Parent' (1976) 93 *SALJ* 383 at 384-85.
[216] Snyman (2001) supra note 47; Booysen (2006) supra note 24.

cases.[217] It would be useful to clarify the position on interim access by explaining expressly in regulations that in all types of care cases children's courts can and should where appropriate issue interim orders for limitation, supervision or even prohibition of contact. The legislature should draw on particularly well-developed systems such as Illinois and New York to create the kind of detailed legislative coverage needed on this important aspect.

Where intimidation or domestic violence is a factor there should be an express power for identifying perpetrators and warning them against interfering with parties or witnesses. When it is necessary to remove perpetrators from children's homes, children's courts should not be confined to reviewing police action as in s 105 and s 153 of the 2005 Act. It needs to be clearly specified that they are required to respond directly to applications from parties or even use their own initiative in preventing perpetrators from having contact with a child or allowing only supervised access. In relation to criteria, future South African provisions should require that likely effects of a perpetrator's removal on the child's care situation to be considered as in the English Children's Act 1989. This would accord with the standard of a balance between care and protection considerations.

Concerning forensic assessments, it has been noted that there are differences in the approaches of developed systems. It may be proposed from the perspective of hearing appropriate voices that our children's courts need to be generally empowered to give rulings on any questions or disputes which may arise in relation to them. A particularly important issue which clearly must be properly addressed in future South African legislation is whether children who are subject to care proceedings should ever be compelled to submit to forensic assessments. This will require a difficult judgment call from the legislature on the priority to be accorded to children's autonomy rights on the one hand, and scope for deriving evidence that may be vital. [218] Children's rights to human dignity (s 10 of the Constitution) bodily and psychological integrity (s 12(2)) and privacy

[217] See the discussion in part 7.2.2.1, above.

[218] For example, where there are grounds to believe that a child has a drug-problem and she denies this, drug-testing may be needed so that the court will know whether to place her in a facility or program that has drug-rehabilitation services available. In a country with limited availability of such services, definite evidence may be essential. See further the reference to the Alberta regulations in part 7.3.2, above.

(s 14) would have to be balanced against the paramountcy of the best interests of the child as provided for in s 28(2) of the Constitution.

It could be argued that the primary evaluative criterion of hearing children's voices counts against compulsory assessments. However, that of maintaining a balance between protection and undue state interference could be said to allow for occasional compulsory assessments where these are essential for ensuring protection. As shown by Jood, for example, age assessments may sometimes be crucial to secure grants in South Africa.[219] The review of developed systems shows that as a *via media* limitations could be imposed upon compulsory assessment powers. For example, they could be available only with immature children, only for medical assessments or only in abuse cases. If it is decided by the legislature that something as drastic as compulsory assessments of unwilling children should be included in any form, it should be made clear that these must be authorised by courts, and only as a last resort. Magistrates should be expressly required to carefully weigh up the motivation for, likely benefits, degree of intrusiveness and extent of lack of consent, before ordering them.

With reference to the ideal of hearing appropriate voices magistrates could also be directed to consult with children being considered in exceptional cases for mandatory assessments. They could be required to discuss both the advantages and any available ways of minimising stress. This would once again create important training implications for presiding officers. It would need to be made clear that an assessment should only be ordered against the will of a child where it is essential in her best interests.[220] Courts should be required to order the least intrusive assessment that will serve evidential needs. In view of the potentially invasive nature of assessments *ex parte* applications for them should not be permitted unless good cause is shown.

[219] See Jood as cited in part 7.2.1.1, above.

[220] For example, a court should carefully consider the evidential need before ordering the physical examination against the will of a child to establish whether she has been sexually abused. If such abuse has occurred she may already have experienced a lack of control over her own body. A court's respect for the wishes of the child in this situation may help to re-establish her sense of control over her person.

With caregivers, a simple and pragmatic approach would be to entirely prohibit compulsory forensic assessments. One rationale is that, unlike the child, they are not the primary subject of the proceedings. A second is that if a caregiver's desire to keep her child is not strong enough to motivate her to agree to an assessment it is probably a waste of resources. The review of foreign experience has shown, however, that a common situation is one in which caregivers are subjected to pressure. They agree to 'voluntary' assessments because of explicit or implicit threats that failure to do so will increase the likelihood that their child will ultimately be removed permanently. The implication for South Africa is that we should have protective responsibilities for presiding magistrates. They should be required to question caregivers in the absence of welfare in order to establish whether consent is genuine.

Children's court applications for assessment orders should be required. In deciding these magistrates should protect caregivers rather than (as in some US states) adding to pressure by 'admonishing' them. They should be directed to consider carefully whether applications are sufficiently well motivated, whether the caregiver's consent is genuine and whether the least intrusive alternative has been requested. And magistrates should be expected to take particular care with parents alleged by welfare to be too physically or mentally challenged to care for their children.

Turning to therapeutic services, it has been shown that these will often be most effective if applied at an early stage. However, in compulsory form they raise similar constitutional issues to forensic assessments. And, unlike the latter, they are not implemented primarily to derive evidence. The fact that they are thus not crucial to the proceedings themselves means that the case for compelling them at the predispositive stage (with consequent delays) is weaker than with forensic services. Because the child will not yet have been formally found in need of care and protection it would be inappropriate to use the best interests of the child criterion to trump caregiver's or children's constitutional rights to privacy and dignity. Therefore, it is recommended that therapeutic services should never be imposed on unwilling recipients. Since as has been shown the 2005 Act is

ambiguous[221] clarification to this effect is urgently needed. In relation to consensual receipt of therapeutic services at the predispositive stage what should be stated in future regulations is that children's court orders can be issued only once magistrates have applied the same checks for duress as recommended above for forensic assessments.

7.5 Conclusion

It emerges that, just as with responsibilities of adjudicators discussed in the previous chapter, there is little appropriate legislation to guide children's courts in providing pre-dispositive services in care cases. The 1983 Act provides only brief references to age estimations, assessments and reviews of preliminary removals. Aside from the complete lack of coverage on other interlocutory services it is of concern that the Act does not create procedures for challenge or modification of initial welfare measures. The evaluative criterion of hearing appropriate voices indicates that it is essential that scope for this be created.

Unsurprisingly, the sparse wording in the 1983 Act has resulted in a variety of interpretations in practice. Many commissioners currently only utilise pre-dispositive hearings for age estimations. Amongst commissioners who allow them for other purposes there is little uniformity in procedures. Some hold 'opening hearings' only if requested by a party or welfare. Others hold them in preliminary removal cases -particularly where there was no prior court authority. Some allow *ex parte* hearings and others prefer hearings *inter partes*. Some accept only prima facie proof and some prefer the child to be present. Overall, the poor coverage in the Act has produced confusion and very limited predisposition services. It thus fails badly on the criteria of court accessibility and incremental support.

One particularly disturbing consequence of the low levels of early court involvement is that welfare has free rein. Child protection personnel even routinely use the emergency removal ground in s 12(1) of the Act as a convenient means of avoiding court

[221] See part 7.2.2.2, above.

applications in non-urgent cases. Unfortunately, in the case of *Swarts* the high court supported wide powers for welfare by confirming a weak, limited-scrutiny predispositive role for courts. This set the seal of approval on children's courts providing little real predisposition protection for children and families.

As an intended replacement for the 1983 Act, the 2005 Act certainly contemplates a wider range of preliminary and interim functions for children's courts. Notable amongst these are decisions on hospital retention and some domestic violence remedies. Unfortunately, however, its approach to predisposition services is problematic in some important respects. In s 45(1) and s 46(1) children's courts have been accorded powers to order a variety of family services orders but it has not been explicitly stated whether these may be pre-dispositive. Generally, the Act provides little specific coverage on predisposition functions. It does not even refer expressly to interlocutory relief or preliminary or interim orders. Despite establishing court access for children as a fundamental right in s 14[222] it does not follow through sufficiently. It fails to provide the explicit procedural routes which are essential for challenging disproportionate action by welfare or having other disputes on preparatory aspects settled.

Like its predecessor, the 2005 Act is implicitly built around a climactic, main hearing, day-in-court approach. In s 155(6) it even expressly places many children's court orders 'off limits' until after the child has formally been found to be in need of care and protection. It thus unfortunately to some extent continues with the simplistic expectation that a child's life will remain on hold in the months pending a court's final decision about her care status. Because children's courts are long accustomed to a constrained function expecting them to overcome the limited wording in the 2005 Act by engaging in radically creative interpretations of its provisions is unrealistic. Extending their role by this means is likely to be a slow process -and will not bring the uniformity that is badly needed.

The review of developed systems in part 7.3 indicates that there is certainly a variety of extremely useful predispositive functions that courts are able to perform. Their

[222] For a discussion of this provision see part 4.2.5, above.

early involvement can greatly improve protection of children and reduce wastage of time and resources. As has been shown, the way forward in broadening and improving dispositive services in South Africa needs to be legalistic. Detailed rules on the nature of court involvement are now urgently required to provide proper guidance.

An essential first step in reforming our law would be the legislative introduction of preliminary and interim children's court hearings. These could be effective as basket concepts for a wide range of services. Future South African legislation should indicate that preliminary hearings must occur where applicants make out a prima facie case for direction on court preparations or predispositive care arrangements. And children's courts themselves must also be required to consider whether they are needed for the same purposes. Children's courts must also be directed to hold preliminary hearings where a decision on ADR is appropriate and (on grounds of seriousness) in all preliminary removal cases.

It is clear that preliminary removal cases are a problematic category requiring special consideration. The review of foreign systems indicates that there have been some fundamental differences on the nature of court involvement. What causes difficulty is the inescapable tension between protecting children from potentially harmful domestic situations and from the trauma of being abruptly uprooted from their families. As a response, the objective test for lawful preliminary removals in the 2005 Act is appropriate. A reasonable prognosis on grounds coupled with the child’s imminent need for protection constitutes a good balance between protection and family care.

However, the Act unfortunately fails to establish explicitly that court hearings to review preliminary removals must always occur. Because of the drastic consequences and danger of error such proceedings are vital. Another deficiency is that the Act does not provide immunity to persons who remove children in the honest belief that there is an emergency, but fail the objective test. On the contrary, it specifies disciplinary proceedings and even possible removal of professional licences. It has been noted that the Canadian experience shows that leaning too heavily in the direction of deterrence may

result in deaths of children left in dangerous situations. The 2005 Act thus fails here in balancing protection and family care. As a replacement for the sanctions in s 152(5)-(7) a children's court power to issue summary damages against persons who intentionally misuse emergency procedures would be a quicker and more focused response.

In relation to interim hearings, children's courts should be obliged to hold these whenever there is a need for a review, addition or amendment of an order issued at a preliminary hearing. They should also have suitable powers such as those in developed systems for domestic violence cases. As has been shown, the limited role of children's courts in such cases envisaged in the 2005 Act is entirely inadequate. Children's courts also need better guidance on interim contact disputes and remedies. And when contact has been granted but is impeded children and other family members must be given effective re-access to the children's courts as in Illinois and New York.

A final aspect which has emerged as appropriate for interim hearings is forensic assessments and therapeutic services. The simple approach in the 2005 Act that these may be ordered by children's courts as compulsory shows little appreciation of the constitutional rights at stake. Also, a practical consideration is that compelling caregivers is likely to achieve little more than a waste of precious resources. Thus, the orientation in our law should be fundamentally changed from compulsion to a supportive recognition of the extreme vulnerability of caregivers who want to keep their children.

In considering assessments or services for caregivers, the role of children's courts must be amended to one of careful scrutiny aimed at ensuring that their rights to dignity and privacy are protected against undue pressure. Presiding officers must be empowered to order where appropriate that assessments or services be *not* initiated. As has been pointed out this does not preclude a useful function (similarly to some developed systems) in incorporating genuinely consensual and appropriate agreements as orders of court so that parameters and costs-liability are formalised.

In relation to children, their autonomy and participatory rights dictate that they should not be unwillingly subjected to mandatory therapeutic services prior to being found in need of care in protection at dispositive hearings. The uncertainty in the 2005 Act about when such services are to be interposed is therefore dangerous from a children's rights perspective. There is an urgent need for regulations which make it quite clear that compulsion may not occur prior to disposition.

With forensic assessments of children, tensions between the need to gain vital evidence and yet respect the right of children to refuse have produced contrary approaches in developed systems. In South Africa if the legislature decides that compulsion is sometimes justified on a best interests basis it will need to choose whether to add limitations. The review of other systems indicates that mandatory assessments are sometimes confined to less mature children, certain categories of cases or forms of assessment. In South Africa it would be appropriate to allow for them where it reasonably appears that essential evidence cannot be derived by other means.

If the legislature opts to continue with any form of compulsory assessment or therapeutic service order, detailed regulations on court process will once again be essential. These must indicate that compulsion is a last resort. Magistrates must be required to listen carefully and interact supportively with sufficiently mature children and other family members before deciding on the shortest and least intrusive alternative that is appropriate.

In conclusion, it is unfortunate that the 2005 Act perpetuates a fundamental weakness of its predecessor by not providing sufficiently for pre-dispositive children's court hearings. In view of their considerable potential, express legislative provisions should be introduced as a matter of urgency. In the next chapter, it will be shown that the general failure to conceptualise care proceedings as capable of division into incremental stages has also constrained the quality of support which children's courts are able to provide at the main or dispositive proceedings which commence at the end of the welfare investigation.

CHAPTER 8

GROUNDS, OUTCOMES AND BEYOND -AN EVALUATION OF THE NEW APPROACH TO DISPOSITIVE PROCEEDINGS IN THE CHILDREN'S ACT 38/2005

8.1 Introduction

The dispositive proceedings[1] which begin at a children's court after the welfare investigation into the child's circumstances is clearly an important phase in a care case. It will now be necessary to establish whether there are sufficient reasons to formally designate the child as in need of mandatory alternative care measures. And if there are, it will further be essential to decide what these should be. Since long-term or even permanent removal of the child from her family is a possibility the stakes for parties are highest at this stage. Because of the serious consequences likely to result from any court decision it is crucial that our law on all aspects of disposition be well formulated.

South African legislation on dispositive proceedings before children's courts has traditionally tended to focus mainly on the two fundamental aspects of grounds for finding a child to be in need of alternative care and consequential remedies.[2] The current grounds and remedies are contained in the 1983 Act.[3] The 2005 Act will replace these with very different provisions when it is fully brought into force. As will be shown it will bring about significant changes in the role of children's courts. In a quantum leap, it aims to completely transform their dispositive functions. The nature of that transformation is explained and critically evaluated in this chapter.

In part 8.2 below the main changes which the 2005 Act brings in relation to grounds for mandatory care measures are considered. In part 8.2.1 their structuring is

[1] The Connecticut Practice Book at s 26-1(f)(3) of the 'Definitions Applicable to Proceedings on Juvenile Matters' describes a '[d]ispositive hearing' as ' …a court hearing in which the judicial authority, after considering the social study or predispositional study and the total circumstances of the child, orders whatever action is in the best interest of the child and where applicable, the community'. Accessed at <http://www.jud.ct.gov/Publications/PracticeBook/PB2.pdf>. Hereafter cited as 'Connecticut Practice Book'.
[2] See parts 2.3.1-2.3.5, above.
[3] Sections 14 and 15, respectively.

critically evaluated. The new scheme provides for proof of both primary and sub-grounds in certain instances, and even complete avoidance of grounds in others. The effectiveness of this dispensation is discussed. Another salient reform is the provision of definitions of core concepts. This has the effect of circumscribing the reach of many of the new grounds. In part 8.2.2 the foreseeable consequences and appropriateness of this are considered.

A significant aspect of the 2005 Act is a considerable increase in dispositive remedies made available to children's courts in care cases. In part 8.3 the nature and effectiveness of these are explored. Again, the structuring is considered first (in part 8.3.1). It is shown in parts 8.3.2-3 that many of the new remedies are intended to enable children to remain within their families or communities rather than be removed. Although it is not stated they create an expectation that children's courts must interact more supportively with children and other family members in order to achieve this goal.

In part 8.4, some consequences of this new expectation are explored. A question considered in parts 8.4.1-2 is what the implications of the extensive changes in substantive law are for development of new procedures. In particular, whether it is now essential for dispositive proceedings to be divided into a series of stages is discussed. Possible stages which could be interposed are considered. In part 8.4.3 attention is focused on how children's courts should utilise new monitoring and review powers which the Act provides. Once again, attention is given to the procedural implications.

In part 8.4.4 the question of what children's courts should do when their remedies prove unsuccessful is taken up. Their new sanctions jurisdiction is critically evaluated. It is considered first whether courts dealing with care cases ought to have a punitive function. The question of how this could best be applied is also explored. Thirdly, the issue of whether jurisdiction to award compensatory damages should have been included in the 2005 Act is discussed. An earlier theme which resurfaces in this chapter is that of the training and status needs of presiding officers.

8.2 The New Approach to Alternative Care Grounds

As noted in chapter 2 above the 1983 Act in its original form introduced parental fault grounds.[4] It was eventually recognised that the fault approach was counter-productive.[5] In 1998, s 14(4) was amended so as to bring back the 'child in need of care' criterion which had been foundational since the Children's Act 31/1937.[6] In s 150 of the 2005 Act 'child in need of care and protection' instead of merely 'child in need of care' becomes the primary, overarching formulation.[7] Compared with our previous legislation, the extending words 'and protection' are arguably significant. Protection brings additional connotations. The implication is that children's courts must be available to evaluate whether there are reasons for protection that fall short of requiring such drastic solutions as removal. In an apparent extension of their functions they are therefore to be repositioned to act more proactively.[8]

The grounds indicative of whether a child is in need of care and protection are listed in s 150(1) of the 2005 Act. This reads:

> 'A child is in need of care and protection, if the child-
> (a) has been abandoned or orphaned or is without any visible means of support;
> (b) displays behaviour which cannot be controlled by the parent or care-giver;[9]
> (c) lives or works on the streets or begs for a living; [10]

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[4] See part 2.3.5, above.

[5] For the deficiencies see G Barlow 'Child Care Bill-Best Interests of the Child?' (1982) *De Rebus* 341; FN Zaal (1988) 105 *SALJ* 'Child Removal Procedures under the Child Care Act: Some New Dangers to Contend With' 224 at 226-27; and B Van Heerden 'Judicial Interference with the Parental Power' in B Van Heerden, A Cockrell & R Keightly *et al* (eds) *Boberg's Law of Persons and the Family* (1999) 497 at 604 N361.

[6] This was done in terms of s 5(d) of the Child Care Amendment Act 96/1996.

[7] Following recommended wording in clause 166 of the draft Children's Bill of 2002: see South African Law Commission *Report on the Review of the Child Care Act* (RP 17/2003) part 3 p136.

[8] As will be shown particularly in part 8.3.2 below a reading of other wording in the Act confirms that this is indeed the intention.

[9] The wording here is somewhat broad. In the analogous s 31(2)(b)(ii) of the English 1989 Children Act the child being out of control is not, in itself, sufficient as a ground. It is essential that the child must additionally be 'suffering, or… likely to suffer significant harm' which 'is attributable to-… the child's being beyond parental control'. This more nuanced wording guards better against any danger of inappropriate interventions. The English approach is followed in art 50(2) of the Children (Northern Ireland) Order 1995 (Statutory Instrument 1995 No.755 N.I.2) -accessed at <http://www.opsi.gov.uk/si/si1995/uksi_19950755_en_1>.

[10] In not admitting of exceptions, this takes a strict position. The analogous s 17(2)(c) of the Botswana Children's Act (Cap 28:04 of 1981) provides that a child is in need of alternative care if the child 'engages in any form of street trading, unless he has been deputed by his parents to help in the distribution of merchandise of a family concern'. The exemption here indicates that parent-authorised street trading on behalf of a family concern must be viewed by courts as an exception: see further B Maripe 'The Recognition

(d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
(e) has been exploited or lives in circumstances that expose the child to exploitation;
(f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
(g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
(h) is in a state of physical or mental neglect; or
(i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child, or by a person under whose control the child is.'

In relation to proof, one difficulty with s 150(1) is that it is not clear whether a children's court can find a different ground proved from the ground/s alleged by the investigative agency. From a children's best interests perspective this should be possible. It would be unfortunate if a needed remedy had to be denied because the wrong ground had been asserted. On the other hand, it could be argued that substitution by the court of a different ground would be unfair to a party who appeared well prepared to refute the grounds on which the agency's case was based. A solution would be to indicate in a future supplementary regulation that a court could consider the applicability of a different ground, subject to providing any party wishing to contest it with sufficient opportunity (including the option of a short adjournment) to do so.

Whilst the choice of grounds issue could be relatively easily resolved there are two more fundamental difficulties which can only be addressed by amending the Act itself. As will be shown these concern, firstly, whether proof of grounds should always be essential, and secondly, whether grounds should have been limited by linking them to definitions of core concepts in s 1 of the 2005 Act. These aspects are considered separately in the next two subparts.

8.2.1 Situations in Which Grounds Are Not Required

By comparison with earlier legislation a substantial change in s 150(1) is that proof of grounds is no longer a *sine qua non* for every form of mandatory dispositive care order.

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and Enforcement of Children's Rights in Domestic Law: An Assessment of the Child Protection Laws in Botswana in Light of Prevailing International Trends' (2001) 9 *International Journal of Children's Rights* 339.

Section 155(1) of the 2005 Act states '[a] children's court must decide the question of whether a child who was the subject of proceedings in terms of section 47, 151, 132 or 154 is in need of care and protection'. A noticeable omission in the list of sections here is s46. As will be further discussed below in part 8.3, s 46 provides an extensive set of children's court orders, many of which would be appropriate for disposition in care cases. For example, s 46(1)(a) reads:

> 'A children's court may make the following orders:
> (a) An alternative care order, which includes an order placing a child-
> (i) in the care of a person designated by the court to be the foster parent of the child;
> (ii) in the care of a child and youth care centre; or
> (iii) in temporary safe care;'

It is stated in s 156(1) that a children's court which has formally found a child to be in need of care and protection 'may', inter alia, make a s 46 order. It is not expressly stated anywhere, however, that such a finding is a pre-requisite for such an order. The implication, strengthened by the omission of s 46 from s 155(1), is that children's courts may even at the disposition stage of care cases issue a s 46 order without any prior proof of grounds that a child is in need of care and protection. This is significant because as can be seen s 46(1)(a) allows for children to be placed even in foster or institutional care.

Aside from the list of children's court orders in s 46 another is to be found much later in the Act at s 156(1).[11] This second list opens with the wording '[i]f a children's court finds that a child is in need of care and protection'. This appears to indicate that grounds would need to be proved. However, a proviso in s 156(4) states that '[i]f a court finds that a child is not in need of care and protection the court may nevertheless issue an order referred to in subsection (1) in respect of the child, excluding a placement order'.[12] Grounds are thus only essential prerequisites to s 156(1) 'placement orders'. Unfortunately, placement orders are not defined. Out of the ten order categories included as paras (a)-(k) of s 156(1), the term 'placed' is used only in (e) (g) and (h). A logical interpretation would therefore be that the latter are the placement orders requiring proof of grounds.

[11] For the wording of this see part 8.3.1, below.
[12] This exception renders the title of s 156 'Orders when child is found to be in need of care and protection' somewhat misleading.

A question which arises is why the legislature chose to make proof of grounds essential only with placement orders in s 156(1) and not for any orders in 46. In this regard, it is necessary to compare the wording of s 156(1)(e) with that of s 46(1)(a) as quoted above. The former reads as follows:

> '(e) if the child has no parent or care-giver or has a parent or care-giver but that person is unable or unsuitable to care for the child, that the child be placed in-
> (i) foster care with a suitable foster parent;
> (ii) foster care with a group of persons or an organisation operating a cluster foster care scheme;
> (iii) temporary safe care, pending an application for, and finalisation of, the adoption of the child;
> (iv) shared care where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods; or
> (v) a child and youth care centre designated in terms of section 158 that provides a residential care programme suited to the child's needs.'

Quite strikingly, two of the same types of placement -those involving foster care or residential care in a child and youth care centre- appear both here and s 46(1)(a). It would seem that, whilst the s 156(1)(e) versions require prior proof of grounds, this is merely optional for the same types of 'placement' orders under s 46(1)(a)! This is illogical and indicative of disjuncture in the way the Act has been structured.

By comparison with our earlier legislation, the reduction in grounds requirements represents a new approach. Aside from the seeming arbitrariness of retention for only some orders, a more basic question is whether any dispositive remedies should have been made available without proof of grounds. Diminished reliance on grounds is not without precedent elsewhere. In some systems there is a preference for imposing outcomes based on agreement by family members rather than proof of grounds by welfare. The rationale is that grounds are best avoided because of their potential for stigma. Examples of such systems are some anti-legalistic continental European ones such as Sweden, France and Germany; and also New South Wales, Australia.[13] In these jurisdictions there is a preference for basing proceedings on requests for assistance by either children or caregivers rather than mandatory imposition of grounds.[14]

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[13] G Cameron, N Freymond & D Cornfield *et al* 'Positive Possibilities for Child and Family Welfare: Options for Expanding the Anglo-American Child Protection Paradigm' (2001) 81 & 84: accessed at <http: www//.wlu.ca/documents/7171/positive.pdf>; R Sheehan *Magistrates' Decision-Making in Child Protection Cases* (2001) 214-15; P Parkinson 'The Child Participation Principle in Child Protection Law in New South Wales' (2001) 9 *International Journal of Children's Rights* 259 at 263.

[14] Parkinson ibid. Cameron, Freymond & Cornfield ibid at 85.

However, from a South African perspective arguments can be made in favour of retaining grounds as a prerequisite in all cases. Requiring them for some dispositions but not others obviously complicates the 2005 Act. It thus does not accord with the criterion of legislation which is user-friendly for non-lawyers. Secondly, even in seemingly voluntary cases where caregivers appear to agree to court orders such as removals, there is the danger, as discussed in the previous chapter, of their having been subjected to pressure by welfare.[15] In South Africa, unlike in the three foreign systems just referred to, it is not likely that legal representatives for caregivers will often be available to ensure that their agreement is genuine.[16] And even if they are, there is still the issue of sufficient respect for the child's foremost right to family care as contained in s 28(1)(b) of the Constitution.[17] Furthermore, dispositive measures imposed by courts may have significant effects on other fundamental constitutional rights of family members such as privacy, dignity, freedom of movement and freedom of association.

Although it could possibly be argued that there may justifiably be less emphasis on grounds in emergency situations and even generally whilst an investigation is continuing pending a dispositive hearing, an order issued formally at one must surely be based upon prior proof of just cause. The *lacunae* in the 2005 Act allowing avoidance of proof of grounds are a matter for concern. They raise dangers of constitutional challenges based upon, inter alia, rights to fair proceedings, insufficiently substantiated invasions of family privacy and undue interference with fundamental rights. Of particular concern is s 156(4). As has been noted, it goes to the extreme of permitting mandatory interventions (other than 'placement orders') even where a court has specifically found that a child is *not* in need of care and protection. Amendments creative of a more uniform approach requiring grounds always to be proved before care measures are imposed upon children and families at disposition are thus needed.

[15] See part 7.3.2, above.
[16] As will be remembered a problem of low rates of representation has been noted in part 5.2, above.
[17] In the Montana case of *In re P.S.*, 127 P. 3d 451 (Mont. 2006) at 243 para 8 [Westlaw International] it was held that courts are not obliged to accept voluntary termination of parental rights.

8.2.2 Using Definitions to Limit the Reach of Grounds

Aside from whether they can sometimes be dispensed with altogether, a second fundamental concern with the s 150(1) grounds is their limitation by means of definitions in the 2005 Act. Explanations of some key terms have been included in s 1 to provide general guidance. Amongst these are definitions of abandonment, abuse, commercial sexual exploitation, exploitation, neglect and sexual abuse.[18] They have not been expressly linked to grounds but are clearly applicable to them because of the use (as can be seen from the quotation in part 8.2. above) of one or more of these terms in subgrounds (a), (e), (h) and (i) of s 150(1). They might also in some cases be relevant to interpretations of 'harm' in subgrounds (f) and (g).

The linking of many of the grounds to legal definitions is by comparison with our earlier legislation once again a new feature of the 2005 Act. On a preliminary point of clarity, in view of the fact that grounds will often be selected and asserted by non-lawyers such as social workers, cross-references alerting readers to the relevance of the definitions could usefully have been included in s 150(1). The nature of their applicability should also have been explained. For example, s 49-6-1(a) of the West Virginia Code shows expressly how definitions should be referred to in alleging grounds. It states in relevant part '[t]he petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto…'.[19]

Under the 1983 Act none of the grounds were limited by definitions -and thus presiding officers were entirely free in deciding on their parameters. It is important to consider whether the new approach represents an improvement. In arguing for either a definition or more explanation on when abandonment justifies alternative care measures Wessels noted that the undefined abandonment ground in s 14(4)(aB)(i) of the 1983 Act[20] is frequently problematic in kinship care cases. She pointed out that it is common in South Africa for particularly black children to be left with extended family members -and often

[18] These will where relevant be quoted in the discussion following.
[19] West Virginia Code -accessed at <http://www.legis.state.wv.us/WVCODE/49/WVC>.
[20] This refers simply to a child who 'has been abandoned or is without visible support'.

from birth.[21] In the absence of legislative clarification on what exactly constitutes abandonment for the purpose of care cases children's courts have generally adopted a cautious approach. They refuse to apply the abandonment ground in kinship care situations even when parents have maintained no contact for years.[22] This has caused difficulties because many children living with relatives are denied alternative care measures such as foster child grants.[23]

As a test of the appropriateness of appending definitions it may be useful to consider whether that of 'abandoned' as now provided in s 1 of the 2005 Act assists in solving the problem noted by Wessels. This definition has been formulated as 'a child who- (a) has obviously been deserted by the parent, guardian or care-giver; or (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months'. Where children have been intentionally placed with relatives it would be difficult to categorise this as desertion -and therefore the first part of the definition would not often assist. In applying the second part, it should frequently be feasible to prove the fact of no contact for a three-month period. But the wording 'no apparent reason' is problematic. It seems to require either entering the mind of the caregiver to prove a negative, or else justify not investigating very deeply whether there was any reason. In some other systems, the essence of abandonment in care situations is a caregiver intentionally avoiding contact when nothing prevents it.[24] The new South African definition doesn't properly capture this and also utilises a dangerously short time period.[25] It therefore insufficiently addresses the problem of informal kinship placements.

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[21] T-L Wessels 'Problem-Shooting: Child Care Act -Problems Relating to Adoptions' (Unpublished paper, 2002) 1.

[22] Ibid. See also Van Heerden (1999) op cit note 5 above at 626 N434; and South African Law Commission *Review of the Child Care Act* (Discussion Paper 103, Project 110, 2001) vol 3 para 17.2.2.

[23] Wessels & Law Commission ibid. That this has been a problem for many years appears from MM Eckard 'Kan die Voog van 'n Minderjarige Moeder as Pleegouer van haar Buite-Egtelike Kind Aangestel Word? – Pleegsorg en Artikel 3 van die Wet op Status van Kinders 82 van 1987' (1991) 26 *Die Magistraat/The Magistrate* 33.

[24] See the Idaho case *Roe v. Doe*, 125 P. 3d 530 (Idaho 2005) 535 para 12 [Westlaw International]; the California case *In re Amy A.*, 33 Cal. Rptr. 3d 298 (Ct. App.2005) at 301-02 [Westlaw International]; and the Tennessee case *In re F.R.R., III*, 193 S.W. 3d 528 (Tenn. 2006) 530 para 4 'wilful failure' [Westlaw International].

[25] In *Roe*, ibid, four six-month periods were found to be sufficient; in *In re Amy A.*, ibid at 300, abandonment had been for two years; and in *In re F.R.R., III*, 531 para 5 ibid, the period was two and a half years.

The simpler approach of providing grounds unqualified by definitions has been predominant in some jurisdictions. For example, Zuravin has noted a prevalence of unqualified wording in many US states.[26] As she points out, this is because many American judges prefer the resultant flexibility in care case decision-making.[27] There has been debate between advocates of open and more constrained wording in the USA. In particular, the question of employing definitions in American grounds has been controversial.[28] In the analysis below the feasibility of providing precise verbal guidance by defining core concepts such as neglect, abuse, harm or maltreatment of children will be considered.

8.2.2.1 Defining Neglect

Garbarino favours a definition of neglect formulated by Worlock and Horowitz as 'the failure of the child's parents or caretaker who has the material resources to do so, to provide minimally adequate care in the areas of health, nutrition, shelter, education, supervision, affection or attention, and protection'.[29] He stresses that '[*f*]*ailure* is the key word here. Neglect is easily distinguished from abuse operationally. Neglect is an act of omission; abuse is one of commission' [emphasis in the original]. [30] He is further of the view that cultural sensitivity is required before deciding upon a finding of neglect.[31]

Holden and Nabors have pointed out that it has proved very difficult to achieve consensus on how a definition of neglect should be worded.[32] In part, this is because of the choices available. Amongst the possibilities are definitions which focus on resultant

[26] SJ Zuravin 'Child Neglect: a Review of Definitions and Measurement Research' in H Dubowitz (ed) *Neglected Children: Research, Practice and Policy* (1999) 25. See also P Chill 'Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings' (2004) 42 *Family Court Review* 540 at 546.
[27] Zuravin ibid.
[28] Ibid at 26.
[29] I Worlock and B Horowitz 1984 as quoted by J Garbarino & CC Collins 'Child Neglect: the Family with a Hole in the Middle' in Dubowitz (1999) op cit note 26, p1 at 12.
[30] Ibid.
[31] Ibid.
[32] EW Holden & L Nabors 'The Prevention of Child Neglect' in Dubowitz (1999) op cit note 26, 174 at 176.

harm to the child, parental acts of negligence, or the intention of the parent.[33] Some commentators believe that different definitions are required for different forms of neglect.[34] It has also been suggested that different definitions should be utilised for legal and social work purposes[35] -an approach which could of course raise considerable difficulty in care cases where the two professions interact closely.

Gelles has warned that definitions of neglect tend to direct attention towards parental behaviour without taking sufficient account of 'structural, cultural, and community influences on parents'. [36] He argues that an over-defining of neglect, by producing a concentration upon parental responsibility, draws attention away from failures in implementation of government policies which 'directly harm children'.[37] In his view the problem with detailed definitions of neglect (and also maltreatment) is that is that they emphasise responsibility of and blame for caregivers, and tend to exclude the liability of 'institutions, social policies, and organisations that directly and indirectly neglect children'.[38] From a South African perspective these are important concerns. The definition of neglect in s 1 of the 2005 Act is 'a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs'.

With Gelles' arguments in mind it may be asked - if an impoverished single mother who does not have friends, family or quality day care leaves her children unattended when she goes to work, is she a neglectful parent or a victim of inadequate South African social services? The new definition of neglect in the 2005 Act would be a serious retrograde step if it shifts blame to disadvantaged caregivers. It appears to be dangerously broad and could easily be interpreted by children's courts in a manner that encourages poverty-based removals. More nuanced formulations which require a failure by a parent to have been 'serious' and not because of factors beyond that parent's control could be postulated, but

[33] See further Zuravin (1999) op cit note 26 at 25-26.
[34] Ibid at 26.
[35] Ibid at 30-31.
[36] R J Gelles 'Policy Issues in Child Neglect' in Dubowitz (1999) op cit note 26, 278 at 281.
[37] Ibid at 281. As Gelles also notes (ibid at 291) an important question is 'how far we expect parents to go to meet their children's needs in the face of economic disadvantage and discrimination'.
[38] Ibid at 281.

this could cause the opposite problem of deterring needed interventions.[39] In view of the difficulties that have been encountered in attempts to find a suitable definition for child neglect elsewhere and the danger of strengthening a parental-fault orientation in our grounds it may be doubted whether the basic definition in s 1 of the 2005 Act or any extension of it will improve the application of the neglect grounds in s 150(1)(h) and (i).

It must be conceded, however, that in the absence of a definition neglect is a difficult concept to work with because it is based upon inaction. In order to provide at least some direction it would be appropriate to include in future South African legislation guidelines which courts should take into account. These could provide more flexible assistance when deciding whether a child must be classified as neglected to an extent which justifies the imposition of mandatory alternative care measures. Such guidelines could include, in the useful formulation of Bonner, Crow and Logue 'the severity of the neglect and the resultant harm to the child, the probability that injury would appear as a result of this kind of neglect, a parent's capacity for judgment, and the community's standard of reasonable care'.[40] Other factors that could be included for evaluation by courts are: the age and developmental stage of the child, the length of time that the child has been left unsupervised, under what circumstances did lack of supervision occur, what are the caregivers' mental and physical capacities, has there been a history of a lack of supervision, is neglect income-related, and the ethnic-cultural context.[41]

Aside from listing criteria, future South African legislation should expressly direct that when evaluating whether a caregiver is unfit to continue to care for a child because of neglect it is important not to focus upon the caregiver in isolation. A court should be required to evaluate the caregiver in her social context. In addition, what Bonner, Crow and Logue term any 'other systemic factors' that impact upon the child must also be taken

[39] Holden & Nabors and also English have argued that a requirement that parental conduct must be 'serious' in its consequences is problematic. See the text accompanying notes 53-54, below.
[40] The quotation is from BL Bonner, SM Crow & MB Logue 'Fatal Child Neglect' in Dubowitz (1999) op cit note 26, 156 at 169.
[41] These factors were formulated by D Rosenberg (1994) as cited by Bonner, Crow & Logue ibid, at 170.

into consideration.[42] And most importantly, a contextual approach must include an assessment of the financial and social services resources that were available to a caregiver.

8.2.2.2 Defining Abuse

As an alternative to neglect, many care-intervention cases are grounded upon the concept of abuse of children. Here again, the question of whether it is appropriate to utilise fixed definitions arises. Howe, writing from a Canadian perspective, noted that from the late 20th century simplistic abuse criteria which required some form of observable physical injury began to be supplemented by wider legislative wording that allowed proof of other forms of harm and even substantial risk of future harm.[43] Subsequently, in both legislation and guides to its application attempts began to be made in some systems to define different categories of abuse as these were increasingly recognised in other disciplines besides Law. For example, in England in 1999 the following definitions were provided in a government report:

> 'Physical abuse may involve hitting, shaking, throwing, poisoning, burning, or scalding, suffocating, or otherwise causing physical harm to a child...
> Emotional abuse is the persistent emotional ill-treatment of a child such as to cause severe and persistent adverse effects on the child's emotional development…
> Sexual abuse involves forcing or enticing a child or young person to take part in sexual activities, whether or not the child is aware of what is happening…' [44]

The final definition above can be contrasted with a very different formulation which appeared the following year in s 1(3) of the Alberta Child Welfare Act in Canada. This described a child as sexually abused 'if the child is inappropriately exposed or subjected to sexual contact, activity or behaviour, including prostitution related

[42] Ibid at 169. These might presumably include school or peer influences.
[43] RB Howe 'Implementing Children's Rights in a Federal State: The Case of Canada's Child Protection System' (2002) 9 *International Journal of Children's Rights* 361 at 368. As an example of an attempt to provide a broad definition, the West Virginia Code op cit note 19 at s 49-1-3(a) states: ' "Abused child" means a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home'. The 1984 version of this definition more narrowly required *substantial* mental or emotional injury.
[44] Department of Health, Home Office, Department for Education in Environment *Working Together to Safeguard Children: A Guide to Inter-Agency Working to Safeguard and Promote the Welfare of Children* (HMSO 1999) 5-6.

activities'.[45] The ambiguous term 'inappropriately,' whilst difficult to improve upon because it provides a broad reach for the definition, clearly detracts from the specificity of the guidance provided. In contrast, in s 1 of the South African 2005 Act definitions are based largely on particular situations. For example, 'commercial sexual exploitation' of children has been defined as:

> '(a) the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person; or
> (b) trafficking in a child for use in sexual activities, including prostitution or pornography'.

And sexual abuse has been defined as:

> '(a) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;
> (b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person;
> (c) using a child or deliberately exposing a child to sexual activities or pornography; or
> (d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child'.

A difficulty with including a list of varying situations in a definition is that a case may occur which arguably falls outside it. For example, evidence may show that it is a child who is initiating inappropriate sexual relations with an adult, rather than the other way round. Or a parent may be sexually molesting older siblings but not yet the youngest one.[46]

Just as with sexual abuse, widely varying approaches are possible when attempting to define emotional abuse. Howe has noted that one method is to define it by reference to its symptoms: for example, where a child demonstrates 'anxiety, depression, withdrawal, or self-destructive behaviour'.[47] He points out that alternatively it can be defined more simply as harm requiring psychiatric assessment.[48] These two approaches can be

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[45] Alberta Child Welfare Act, Revised Statutes of Alberta RSA 2000 (S.A. 1984, c. C-8. 1). For a discussion of this provision, see S Grover 'On Meeting Canada's Charter Obligations to Street Youth' (2002) 10 *International Journal of Children's Rights* 313 at 336.

[46] Situations occur in which evidence of abuse of other children may assist courts to reach an appropriate decision. US examples are the Arizona case *Linda V. v. Arizona Dep't of Economic Sec.*, 117 P.3d 795 (Arizona Ct. App. 2005) 798 para 11 [Westlaw International]; and the Kentucky case *Ky Cabinet for Health & Family Servs. v. R.H.*, 199 S.W 3d 201 (Ky. Ct. App. 2006) at 204-05 [Westlaw International]. Section 24 of the Family Law (Scotland) Act 2006 amends s 11 of the Children (Scotland) Act by inserting wording on child abuse. The latter is described as including 'abuse of a person other than the child': see the new s11(7C)(b).

[47] Howe (2002) op cit note 43 at 368.

[48] Ibid.

contrasted with the emphasis on the persistence both of ill-treatment and its consequences in the 1999 English definition of emotional abuse quoted above.

It would seem that, just as with negligence, there is little consensus internationally about how to define abuse. And again, the question of how far to extend the reach of definitions is a difficult one. In the USA, even delays or failure to report abuse on the part of a non-abusing spouse have been used by courts as reasons for terminating parental rights.[49] Sheehan concludes that child abuse is difficult to define precisely because it is not an absolute concept. It tends to occur as part of a continuum of longer-term emotional and physical harm.[50] This casts doubt on the idea of utilising compartmentalised legal definitions for supposedly different 'categories' of abuse -such as physical, sexual and emotional. It also casts doubt upon the use of lists of specific situations as in s 1 of the South African 2005 Act.

Sheehan has pointed out that, despite the fact that a combination of social, economic and environmental factors typically contribute to abuse, legal inquiries can easily become preoccupied with particular abusive events rather than the processes which underlie them.[51] It would seem that, just as in the case of negligence, attempts to create definitions of abuse may serve merely to fixate courts upon isolated aspects of supposed fault of parents. This may discourage due appreciation of underlying social causes such as poverty.

8.2.2.3 Defining Maltreatment and Harm

Aside from neglect and abuse, two other core concepts relied on in the 2005 Act, namely, maltreatment and harm, have also proved difficult to define. In the USA, in 1996

[49] In *Shapely v Texas Department of Human Resources*, 581 S.W.2d 250 (Tex. Civ. App. 1979) a husband had abused both his child and wife. The child was removed from the wife/mother because she delayed reporting the abuse of the child until after her husband had gone to work. In this instance, Justice Ward of the court of civil appeals of Texas (at 254) concluded that the mother had been motivated by fear and held that her rights should not be terminated. On the difficulties faced by non-abusing parents see further part 5.4.1, above.
[50] Sheehan (2001) op cit note 13 at 222 & 225.
[51] Ibid at 221-22.

the following definition of child maltreatment was added when the 1984 Child Abuse Prevention and Treatment Act was re-authorised by Congress as a guide for states: '[a]t a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death or serious physical or emotional harm, or sexual abuse or exploitation, or presents an imminent risk of serious harm'.[52] Holden and Nabors criticised this as inappropriately limited 'to *recent* cases involving *serious* or imminent harm' [emphasis in the original].[53] English similarly criticised it for discouraging protective interventions on behalf of many vulnerable children by requiring proof of harm or imminent risk of serious harm.[54] In her view, fewer high-risk cases were likely to be brought before care-proceedings courts as a result of this definition. She gave the following example:

> 'What about a four-year-old child whose mother lives in a house with broken glass on the floor, rotten food in the refrigerator and cupboards, or used needles on the floor? The child has not been cut, does not have food poisoning, or has not been pricked by a needle; in fact, the child has not experienced actual physical observable harm.'[55]

In the opinion of the English there are numerous cases of children who are seriously at risk but who will not receive child protection services because they arguably fall outside the 1996 definition. She contended that '[i]f we value child well-being and the right of our most vulnerable children to an environment that promotes healthy growth and development, then we must address potential as well as actual harm'.[56]

More generally, Gelles has suggested that there have been pervasive difficulties in the USA with both federal and state attempts to provide detailed definitions of child maltreatment.[57] These definitions have often been formulated upon an underlying assumption that it is possible to distinguish between acts of omission which are within the control of parents and those which are not. In practice, it may be difficult to decide whether a child is underfed or exposed to risk of harm because of deliberate behaviour by caregivers or because of structural or community problems which are beyond their

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[52] Section 110.
[53] Holden & Nabors (1999) op cit note 32 at 176.
[54] DJ English 'Evaluation and Risk Assessment of Child Neglect in Public Child Protection Services' in Dubowitz (1999) op cit note 26, p191 at 194.
[55] Ibid at 195.
[56] Ibid at 206.
[57] Gelles (1999) op cit note 36 at 281.

control.[58] These concerns expressed by Gelles are similar to those noted above in respect of definitions of neglect and abuse. Once again, the danger of blaming parents who live in disadvantaged circumstances and receive little state assistance arises as a consideration.

In England, intervention grounds have been formulated around the broad concept of 'harm'. In s 31(10) of the Children Act 1989 it is directed that '[w]here the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child'. In terms of what are often referred to as the 'threshold conditions' s31(2) of the Children Act 1989 indicates that:

> 'A court may only make a care order or supervision order if it is satisfied-
> (a) that the child concerned is suffering, or is likely to suffer significant harm; and
> (b) that the harm, or likelihood of harm, is attributable to-
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or
> (ii) the child's being beyond parental control.'

As can be seen, the wording here permits a court to make an order only where specific requirements are met.[59] As para (b) clearly indicates, these requirements include an appropriate attribution in relation to the harm or its likelihood. Attribution of harm must be linked to care and suggests that courts have to discern the source of harm. As Perry has shown, this has raised difficulties in several English cases where children were at risk but it was not possible to prove which of several adult carers was the cause or likely future cause of harm.[60]

Despite the difficulties, in the English Adoption and Children Act 2002 the definition of significant harm in s 31(9) the Children Act 1989 was extended to include 'harm suffered as a result of seeing or hearing ill-treatment of another person'.[61] However, in the current version of s 31(9) there has been a shift from cause to effect. Harm is now

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[58] Ibid.
[59] See also C Lyon *Child Abuse* (2003) 378.
[60] See generally A Perry '*Lancashire County Council v B* Section 31-Threshold or Barrier?' (2000) 12 *Child and Family LQ* 301.
[61] Adoption and Children Act 2002 [England and Wales] accessed at <http://www.opsi.gov.uk/acts/acts2002/ukpa_20020038_en_9>. This Act at s 120 inserted the additional wording in s 31(9) of the 1989 Act: see *Explanatory Notes to Adoption and Children Act 2002* (The Stationary Office) para 5 accessed at <http://www.opsi.gov.uk/acts/en2002en38.htm>.

broadly and simply defined there as 'ill-treatment or the impairment of health or development'.[62] Sheehan has noted that in Australia there has been a lack of agreement on the fundamental aspect of what constitutes harm to a child.[63] Because of the difficulties in reaching consensus on how to define harm, in direct contrast to English care law, there has been much less reliance in Australia upon legally-formulated criteria to provide thresholds for intervention.[64]

8.2.2.4 The Need for Guidelines Rather Than Definitions

The problem of attribution as experienced in England could as a result of the definitions in s 1 of the 2005 Act for the first time become an issue in our law. For example, the definition of abuse reads as follows:

> '**abuse**, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on the child, and includes-
> (a) assaulting a child or inflicting any other form of deliberate injury to a child;
> (b) sexually abusing a child or allowing a child to be sexually abused;
> (c) bullying by another child;
> (d) a labour practice that exploits a child; or
> (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.'

Although it does not expressly state that one must be found, the cast of wording here clearly directs attention towards a perpetrator rather than merely the nature or consequences of harm. The same can be said of the definitions of abandonment, commercial sexual exploitation, exploitation, neglect and sexual abuse contained in s 1.

If the causes of care problems are typically accretional, complex and intertwined, directing adjudicators to focus narrowly on fixed definitions is surely inappropriate. In praising a move away from grounds definitions in the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, Australia, Parkinson has argued that they simply constrain courts by compelling them either to label caregivers or categorise

[62] Children Act 1989 [England and Wales] accessed at <http://www.opsi.gov.uk/acts/acts1989/ukpga_19890041_en_6>.
[63] Sheehan (2001) op cit note 13 at 221.
[64] Ibid, at 222 & 225.

situations.[65] Aside from labeling and stigma, a further argument against definitions can be fashioned around the inherent nature of the work of adjudicators in care cases. Wriggins has asserted that in the utilisation of law in these inevitably 'the application of the standards to the facts is murky in many instances. The judicial determination is very different from that involving application of a clear rule. The termination of parental rights context is radically different…'.[66] It is thus in her view not possible for presiding officers to follow a purely mechanical approach based strictly on precise directions. They must be left with a sufficient realm of discretion.[67]

In support of the view of Wriggins, as noted above s 150(1)(f) of the South African 2005 Act categorises a child as 'in need of care and protection' if the child 'lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being'. Under a mechanical approach this ground could be applied to a high proportion of South African children -particularly those living in impoverished conditions in shack settlements. In practice, it is necessary to select out from large numbers of children who currently fall into this category those who are in such harmful circumstances that they would actually benefit from alternative care measures.

In light of both the technical difficulties that result from circumscribing grounds by appending definitions and the need for a selective application in an under-resourced child protection system such as South Africa's, a recommendation can now be put forward. It may be concluded that grounds which leave children's courts with a degree of discretion would be more suitable than those which aim to narrowly circumscribe their powers. In particular, we should not have created definitions of core concepts which narrow the reach

[65] Parkinson (2001) op cit note 13 at 263.

[66] J Wriggins 'Parental Rights Termination Jurisprudence: Questioning the Framework' (2000) 52 *South Carolina LR* 241 at 259. As noted by Wriggins (ibid) in *Santosky v Kramer* 455 U.S. 745 (1982) at 762 the US supreme court found that the standards for terminating parental rights tend to be lacking in precision and 'leave determinations unusually open to the subjective values of the judge'.

[67] As an example of a 'murky' issue, in the Oregon case of *State ex rel. Dep't of Human Servs. v Rardin* 134 P. 3d 940 (Or. 2006) 445 para 3 [Westlaw International] it had to be decided whether failure to exercise parental responsibilities at a time when a father genuinely did not believe himself to be the father must count in favour of terminating parental rights. In the Massachusetts case of *Adoption of Yale,* 838 N.E. 2d 598 (Mass. App. Ct. 2005) 602-03 para 6 [Westlaw International] the court was confronted with the shades of grey question of how recent abuse must be to be relevant.

of grounds. And by encouraging children's courts to look for perpetrators of misdeeds the s 1 definitions in the 2005 Act to some extent reintroduce the fault approach that was abandoned in the face of severe criticism under the 1983 Act.[68]

However, there is certainly (as has been noted above with reference to neglect) a need for guidance. The important concern of Wessels -that many children's court magistrates doubt their jurisdiction to apply grounds in anything but the narrowest and most cautious fashion- urgently needs to be addressed. It may be proposed that a suitable compromise between insufficient direction on how to apply grounds and too much restriction would be official guidelines. Instead of being tied to definitions that might prove to be too narrow in particular instances magistrates should, on the contrary, be informed that they will inevitably have to exercise a degree of flexibility in interpreting and applying grounds.

In order to provide a suitable degree of assistance rather than control, criteria which courts need to consider when applying a particular ground should be included in future legislative regulations. As has been shown in the discussion above there are a variety of potential indicators based conduct or intention of perpetrators, symptomatic manifestations in children, palliative requirements, comparison with other children and domestic or community context. These could easily be gathered together to form a useful set of guidelines which presiding officers could traverse when making a determination on grounds.

In conclusion, two major points of departure in the 2005 Act need to be reconsidered by the legislature. Restricting the s 150(1) grounds by connecting many of them to fault oriented definitions and even rendering them avoidable completely in some situations weakens the effectiveness of the new legislation.

8.3 The New Approach to Court Ordered Remedies

It has been noted by South African commentators that a serious shortcoming in the 1983 Act is insufficient children's court remedies. [69] As mentioned earlier, those available

[68] See part 8.2, above.

for care cases are in s 15. Aside from supervision by a social worker[70] this allows for a child to be transferred to the custody of a separated parent or guardian[71] or placed in foster care[72] a children's home or (still following the old English terminology) a school of industries.[73] The remedies function of children's courts has thus been narrowly conceptualised as primarily that of ordering removals.

In the 2005 Act the scope for issuing different kinds of children's court orders is vastly increased. The provisions of the Act which provide for these will be analysed in the discussion below. The focus is on children's court orders that are relevant for care cases. It will be shown that the 2005 Act entirely transforms the dispositive role of children's courts by according them far greater capability to provide customised solutions designed to meet the needs of individual children.

Part 8.3.1 below provides a general overview of how remedies have been structured and described in the Act. In a more specific focus in part 8.3.2, proactive remedies aimed at keeping children in existing familial groups are considered. It will be suggested that these constitute a particularly significant reform because they enable children's courts to attempt other measures wherever possible before resorting to removals. In part 8.3.3 the remedies for situations where children need removals into new environments are briefly evaluated. It is shown that even here some important new options have been added.

8.3.1 The Structuring of Remedies in the 2005 Act

As has been noted, two main sets of children's court orders are provided in s 46(1) and s 156(1) of the 2005 Act. In order to understand the new approach specifically to

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[69] Inter-Ministerial Committee on Young People at Risk *Interim Policy Recommendations for the Transformation of the Child and Youth Care System* (1996) 57-58; South African Law Commission *First Issue Paper on the Review of the Child Care Act: Issue Paper 13* (Project 110, Apr 1998) para 7.2.8.; N Zaal & C Matthias 'The Child in Need of Alternative Care' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 116 at 129; South African Law Commission (2001) op cit note 22 at vol 1 p120.
[70] Subsection 15(1)(a).
[71] Ibid.
[72] Subsection 15(1)(b).
[73] Subsections 15(1)(c) and (d), respectively.

dispositive remedies in care cases it is necessary to read the whole of these subsections together. The former is entitled 'Orders children's court may make'. It sets out a substantial list as follows:

> '(1) A children's court may make the following orders:
> (a) An alternative care order, which includes an order placing a child-
> (i) in the care of a person designated by the court to be the foster parent of the child;
> (ii) in the care of a child and youth care centre; or
> (iii) in temporary safe care;
> (b) an order placing a child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court;
> (c) an adoption order, which includes an inter-country adoption order;
> (d) a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night or for a specific period;
> (e) a shared care order instructing different care-givers or child and youth care centres to take responsibility for the care of the child at different times or periods;
> (f) a supervision order, placing a child, or the parent or care-giver of a child, or both the child and the parent or care-giver, under the supervision of a social worker or other person designated by the court;
> (g) an order subjecting a child, a parent or care-giver of a child, or any person holding parental responsibilities and rights in respect of a child, to-
> (i) early intervention services;
> (ii) a family preservation programme; or
> (iii) both early intervention services and a family preservation programme;
> (h) a child protection order, which includes an order-
> (i) that a child remains in, be released from, or returned to the care of a person, subject to conditions imposed by the court;
> (ii) giving consent to medical treatment of, or to an operation to be performed on, a child;
> (iii) instructing a parent or caregiver of a child to undergo professional counselling, or to participate in mediation, a family group conference, or other appropriate problem-solving forum;
> (iv) instructing a child or other person involved in the matter concerning the child to participate in a professional assessment;
> (v) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, pending further inquiry;
> (vi) instructing a person to undergo a specified skills development, training, treatment or rehabilitation programme where this is necessary for the protection or well-being of a child;
> (vii) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure;
> (viii) instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure;
> (ix) instructing that a person be removed from a child's home;
> (x) limiting access of a person to a child or prohibiting a person from contacting a child; or
>
> (xi) allowing a person to contact a child on the conditions specified in the court order;
> (i) a contribution order in terms of this Act;
> (j) an order instructing a person to carry out an investigation in terms of section 50;
> (k) any other order which a children's court may make in terms of any other provision of this Act.'

As can be seen, many of these orders besides those expressly described as alternative care orders in para (a) appear suitable for dispositive remedies in care cases. In relation to the second list of orders, s 156 is more specifically entitled 'Orders when child is found to be in need of care and protection'. Section 156(1) reads as follows:

> '(1) If a children's court finds that a child is in need of care and protection the court may make any order which is in the best interests of the child, which may be or include an order-
> (a) referred to in section 46;
> (b) confirming that the person under whose control the child is may retain care of the child, if the court finds that that person is a suitable person to provide for the safety and well-being of the child;
> (c) that the child be returned to the person under whose care the child was before the child was placed in temporary safe care, if the court finds that that person is a suitable person to provide for the safety and well-being of the child;
> (d) that the person under whose care the child was must make arrangements for the child to be taken care of in a partial care facility at the expense of such person, if the court finds that the child became in need of care and protection because the person under whose care the child was lacked the time to care for the child;
> (e) if the child has no parent or care-giver or has a parent or care-giver but that person is unable or unsuitable to care for the child, that the child be placed in-
>
> (i) court-ordered kinship care, if the child has a family member who is able, suitable and willing to be entrusted with the care of the child;
> (ii) foster care with a suitable foster parent;
> (iii) foster care with a group of persons or an organisation operating a cluster foster care scheme;
> (iv) temporary safe care, pending an application for, and finalisation of, the adoption of the child;
> (v) shared care where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods; or
> (vi) a child and youth care centre designated in terms of section 158 that provides a residential care programme suited to the child's needs;
>
> ***[*sic* -indicating a deletion at this point from an earlier draft]
> (g) that the child be placed in a facility designated by the court which is managed by an organ of state or registered, recognised or monitored in terms of any law, for the care of children with disabilities or chronic illnesses, if the court finds that-
>
> (i) the child has a physical or mental disability or chronic illness; and
> (ii) it is in the best interests of the child to be cared for in such facility;
>
> (h) that the child be placed in a child and youth care centre selected in terms of section 158 which provides a secure care programme suited to the needs of the child, if the court finds-
>
> (i) that the parent or care-giver cannot control the child; or
> (ii) that the child displays criminal behaviour;
>
> (i) that the child receive appropriate treatment or attendance, if needs be at State expense, if the court finds that the child is in need of medical, psychological or other treatment or attendance;
> (j) that the child be admitted as an inpatient or outpatient to an appropriate facility if the court finds that the child is in need of treatment for addiction to a dependence-producing substance; or
> (k) interdicting a person from maltreating, abusing, neglecting or degrading the child or from having any contact with the child, if the court finds that-
>
> (i) the child has been or is being maltreated, abused, neglected or degraded by that person;
> (ii) the relationship between the child and that person is detrimental to the well-being or safety of the child; or
> (iii) the child is exposed to a substantial risk of imminent harm.'

A question which arises is why two sets of children's court orders were provided. A logical expectation is that they are intended for different situations. However, although the s 156(1) set have been more specifically described as for children formally found to be in need of care and protection, it is immediately indicated in s 156(1)(a) that s 46 orders can also be selected when a child has been so designated. And as has been noted, the wording of many of those in s 46(1) renders them equally apposite for care cases.

A textual comparison indicates that some of the orders in the two subsections are very similar. For example, both s 46(1)(a) and s 156(1)(e) allow for foster care, temporary safety care or placement in a child and youth care centre. Although s 156(1)(e) additionally allows for cluster foster care and shared care with different caregivers s 46(1)(e) also allows for the latter. Section 46(1)(d) provides that a children's court may make 'a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night or for a specific period'. Section 156(1)(d) similarly enables a children's court to make an order 'that the person under whose care the child was must make arrangements for the child to be taken care of in a partial care facility at the expense of such person, if the court finds that the child became in need of care and protection because the person under whose care the child was lacked the time to care for the child'. The only real difference with the second provision is that it specifies that the caregiver must pay.

The arrangement of pairs of similar orders placed far apart offends against the criterion of user-friendliness. It once again makes it more difficult -particularly for nonlawyers- to understand and apply the Act. It raises difficulties of interpretation. For example, does the express mention of caregiver payment for s 156(1)(d) partial care mean that s 46(1)(d) partial care could be at the expense of the state or another person? And, as another example, s 46(1)(c) provides that a children's court may make 'an adoption order, which includes an inter-country adoption order' without setting any prerequisites. But s156(1)(e)(iii) requires a children's court first to place a child in 'temporary safe care, pending an application for, and finalisation of, the adoption of the child'. So does the former provision bypass the requirement of the latter by allowing for a one stage process?

Under a s 46(1)(f) supervision order a child and/or caregiver are to be supervised by 'a social worker or other person designated by the court'. But if supervision is provided in terms of s 156(3)(a)(i) it must be 'by a designated social worker or authorised officer'. Arising from definitions in s 1, the terminology 'designated social worker' and 'authorised officer' are restricted categories.[74] But it would seem that the qualifications on supervisors imposed in s 156(3)(a)(i) can be avoided by using s 46(1)(f). It must be concluded that the pairs of rather similar orders in s 46(1) and s 156(1) are a recipe for confusion. Eventually, pair members perceived as more onerous to utilise than their counterparts may become mere *doppel-gängers* that are never applied in practice.

Although there are similar provisions in s 46(1) and s 156(1), as can be seen from the quotations above there are also many significant differences in the kinds of remedies they provide. A positive aspect is that when read together they equip children's courts with a wide range of choices. And it is clear from the preamble to s 156(1) that these courts can even go beyond the listed remedies and 'make any order which is in the best interests of the child'. There is thus untrammelled scope to tailor individualised outcomes according to the needs of a child in any particular case. Waldfogel has argued that care and protection remedies in many countries are so limited that they clumsily produce a 'one-size-fits-all' solution when what is really needed is a 'more customised response to the diverse array of families being referred'.[75] A great strength of the 2005 Act is its capacity to meet this requirement.

8.3.2 A Family Services Orientation for Children's Courts

In relation to care cases what is arguably one of the most valuable features of the 2005 Act is the remedies designed to enable children's courts *not* to remove children. As will be shown, presiding magistrates will be expected to undertake a constructive role in deciding whether to issue proactive services enabling children to remain at home. It is encouraging to note that there are research findings which indicate that deliverance of such services can sometimes be successful in improving the capabilities of even extremely

[74] As noted in part 7.2.2.1 above an authorised officer is a person authorised in writing by a children's court magistrate. A designated social worker is only one employed by the department of social development, a designated child protection organisation or a municipality.
[75] J Waldfogel 'Protecting Children in the 21st Century' (2000) 34 *Family LQ* 311.

disadvantaged families.[76] And as will be shown below the proactive services approach has proved effective in many systems.

As an example of a useful provision intended to enable an at-risk child to remain at home, under s 156(1)(k) a children's court will be able to issue two categories of interdict. The first would forbid any person who has 'maltreated, abused, neglected or degraded' a child from continuing to do so. The second would prohibit any person found to represent a serious risk of harm 'from having any contact with the child'.[77] And s 46(1)(ix) provides that a children's court may issue an order 'instructing that a person be removed from a child's home'. These three remedies will for the first time enable children's courts to provide long-term[78] protection in domestic violence cases. It will thus no longer be necessary to subject children to a different set of procedures in a separate domestic violence court when it emerges that such remedies are required.

Section 46(1)(b) of the 2005 Act is groundbreaking because it for the first time provides recognition of child-headed households as a legal family form. As will be remembered, it allows for an order 'placing a child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court'. It may be assumed that in reality this would often entail legal recognition of a pre-existing de facto situation, rather than an actual 'placement' in the sense of a child being moved. In view particularly of South Africa reportedly having the highest number of AIDS orphans of any country in the world[79] the importance of enabling children to remain within their communities[80] and the general undesirability of separating siblings,

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[76] N Wasow 'Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities' (2006) 31 *New York University Review of Law and Social Change* 183 at 210-11.

[77] These remedies would also be useful in cases of bullying. In England, a court hearing a care case can similarly grant a 'non-molestation order' as a domestic violence remedy even if one has not been applied for: see J Masson 'Representation of Children in England: Protecting Children in Child Protection Proceedings' (2000) 34 *Family LQ* 467 at 474.

[78] As recommended in the previous chapter, there is also a need for similarly broad powers in the interim phase of cases pending disposition: see part 7.4.2.

[79] UNICEF *The State of the World's Children 2007: Women and Children -The Double Dividend of Gender Equality* (2007) at Table 4, p 116. Accessed at <http://www.unicef.org/sowc07/report/report.php>.

[80] As noted in part 1.2, above.

this provision is surely most appropriate.[81] The idea that children can be legally required to care for other children may admittedly be seen as radical because it requires them to take on adult responsibilities.[82] But it should be noted that something of a *via media* has been taken on this controversial question. A supervising adult must be appointed by the children's court if it makes a s 46(1)(b) order.[83] And there is no suggestion that a court would ever be under any pressure to place a child under another child if it did not deem this to be the best available option. If s 46(1)(b) results in the continuance of even a few successfully-functioning child-headed familial groups its inclusion in the Act will have been well worthwhile.[84]

As has been noted above s 156(1)(d) of the Act provides that a children's court can order a caregiver to pay for attendance of a child at 'a partial care facility' (unfortunately not defined but suggesting something such as a creche or after-school facility) where the caregiver lacks 'the time to care for the child'.[85] This, along with shared care in s 156(1)(e)

[81] It is supported by recommendations from some South African researchers. V Sewpaul 'Models of Intervention for Children in Difficult Circumstances in South Africa' LXXX (2001) *Child Welfare* 571 at 582 stated that, whilst trial projects and other research in South Africa 'indicated that many communities wanted to care for local AIDS orphans, they lacked material capacity and needed help and support'. She concluded that government must therefore develop community care support mechanisms. S Giese & H Meintjes 'The Government and HIV/AIDS: The challenge lies in implementing policy' (2003) 7 *Children First: A Journal on Issues Affecting Children and Their Carers* 42 at 43-44 argued similarly that, because of the huge numbers of persons affected and infected by HIV/AIDS '[a] core response in South Africa and elsewhere in Southern Africa' must be for governments to find creative new ways to provide home and community-based care and support on behalf of children.

[82] For an analysis of arguments for and against legally recognising child-headed households with particular reference to the South African situation see J Sloth-Nielsen 'Of Newborns and Nubiles: Some Critical Challenges to Children's Rights in Africa in the Era of HIV/Aids' (2005) 13 *International Journal of Children's Rights* 73 at 76-79; and M Couzens & FN Zaal 'Legal Recognition for Child-Headed Households: An Evaluation of the Emerging South African Framework' forthcoming in *International Journal of Children's Rights*.

[83] In the late 20th century in some continental European systems supervised child-headed household placements were found to be generally successful for many older children: see W Hellinckx, B van den Bruel & C vander Borght 'Belgium and Luxembourg' in MJ Colton & W Hellinckx (eds) *Child Care in the EC* (1993) 1 at 4-5 & 25-26. See also T Vecchiato 'Italy' in Colton & Hellinckx ibid at 140-41 & 143 and D van der Ploeg 'The Netherlands' in Colton & Hellinckx ibid 153 at 156-57.

[84] Some supplementary child-headed household provisions are contained in clause 136 of the Children's Amendment Bill 19/2006. Couzens & Zaal (forthcoming) op cit note 82 provide a detailed critical analysis of the scheme in the Bill and the 2005 Act.

[85] In some continental European systems, orders requiring part-day placements of children in day-care centres were introduced in the late 20th century and proved useful: Hellinckx, van den Bruel & vander Borght (1993) op cit note 83 at 4-5 & 25-26; and Vecchiato (1993) op cit note 83 at 144.

(iv),[86] is clearly another means for enabling some children whose domestic nurturing is borderline-inadequate to receive supplementary care that may enable them to remain at home. Many parent-figures will of course lack the necessary financial means rather than merely the time to care for their children properly - and as has been discussed in part 8.3.1 s46(1)(d) may possibly allow for a different source of payment.

Despite a recommendation in the 2002 draft Children's Bill[87] in the 2005 Act there is no capability for children's courts to order payment of a short-term monthly care grant where this is needed to enable a child to remain in her familial group. The usefulness of such a remedy has been proved in the past. As noted in part 2.3.3 above, s 11 of the Children's Protection Act Amendment Act 26/1921 enabled children's courts to undertake a valuable function for many years by authorising temporary care grants to avoid removals of children from impoverished families. It will also be remembered that financial assistance is amongst the remedies recommended in art 35(b) of the UN Guidelines, 2007.[88] As noted by Telfer family services orders will often be ineffective if courts are not able to address the underlying problem of poverty by ordering direct support in the form of financial assistance.[89] It is a pity that (presumably because of concerns about resource constraints) emergency grants have not been provided for in the 2005 Act.[90]

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[86] As an illustration of the potential of shared care, in the Maine case of *In re Thomas H.*, 889A. 2d. 297 (Me. 2005) 309 paras 32 & 34 [Westlaw International] a court decided that termination of parental rights was not currently needed where contact and nurturing by different persons on different days was sufficiently meeting the children's needs. It has also proved successful in Sweden -a technique used here is to link two families together: see G Cameron & N Freymond 'Canadian Child Welfare: System Design Dimensions and Possibilities for Innovation' (2003) 31: accessed at <http:www//.wlu.ca/documents/7180/Canadian_child_welfare_systems_design.pdf>.

[87] In clause 175(1)(e) of the Bill the law commission proposed 'that an emergency court grant be paid to the child to provide for the basic needs of the child until the person under whose control the child is becomes able to provide for those basic needs, if the court finds that the child became in need of care and protection because the person under whose control the child was and the person who is legally obliged to maintain the child lacked the means to care for the child'. See South African Law Commission (2003) op cit note 7 at part 3 p143.

[88] See the quotation in part 1.3.2, above.

[89] D Telfer '*In Re T.M.*: Who Protects the Indigent Parents?' (2004) 6 *Journal of Law and Family Studies* 161 at 169-70.

[90] RS Sackett J 'Terminating Parental Rights of the Handicapped' (1991) 25 *Family LQ* 253 at 286-87 argued that there are cases, particularly where families are experiencing delays in accessing other forms of grants, where immediate, short-term financial assistance will prevent the need to remove children into alternative care. See also SH Ramsey 'Child Protection: New Perspectives for the 21st Century' (2000) 34 *Family LQ*

Although emergency grants are not included other remedies requiring resource allocation decisions have been. In s 156(1)(i) it is provided quite broadly that a children's court can instruct that a child must 'receive appropriate treatment or attendance, if needs be at state expense, if the court finds that the child is in need of medical, psychological or other treatment or attendance'. [91] This will have to be interpreted by the courts or clarified in regulations. Potentially, and particularly because of the words 'or other' it could cover a wide range of services. Considering that South Africa is a developing country, this is an impressive financial commitment to the well-being of vulnerable children. If the legislature is willing to go so far, the possibility of a court-ordered care grant should perhaps be revisited. It might prove to be more proactive and sometimes even less expensive[92] in meeting a child's care needs before she reaches the stage of requiring treatment or attendance services under s 156(1)(i).[93]

Aside from s 156(1)(i) treatment or attendance orders for children, it can be seen from the wording of s 46(1) and s 156(1) that further resources have been committed because children's courts can issue a variety of other services orders that would tend to require state financing. These include ones providing for rehabilitation of children

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301 at 305 for a reference to American research by Kelly which indicated that success in keeping children with their families was often dependent upon providing emergency material aid coupled with other services.

[91] 'Attendance' is not defined further.

[92] For example, Wasow (2006) op cit note 76 at 217 points out that family services involving psychological assessments tend to be particularly expensive and suggests that where they are contemplated consideration should be given to whether other forms of support might be more cost-effective.

[93] In considering the desirability of such a grant what should also be taken into account is that the alternative will often be foster care for which a state grant is already payable or institutional care which is generally highly expensive. F Coughlan 'Enough, Soon Enough? Changes in Residential Care' (2001) 37 *Social Work/Maatskaplike Werk* 343 at 346 estimated the cost of keeping a child in a state-run South African alternative care institution as between R2327-4000 per child per month. He calculated that privately-run institutions cost about one-third of this. In relation to expense to the state Sloth-Nielsen and Van Heerden have argued that it will in many cases be less costly to maintain a child in her family than to remove her when poverty is a significant factor: see J Sloth-Nielsen & B Van Heerden (1996) 12 *SAJHR* 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' 247 at 258-60; and J Sloth-Nielsen & B Van Heerden 'New Child Protection Legislation for South Africa? Lessons from Africa' (1997) 8 *Stellenbosch LR* 261 at 272-73.

addicted to dependence-producing substances[94] and, as noted in the previous chapter, more generally early intervention, family preservation, and (for carers) parental skills or rehabilitation services.[95]

It might be considered that decisions about what family services ought to be provided should more appropriately be made by social workers than court adjudicators. However, Stein has pointed out that where social workers have high caseloads they tend to spend more time with the least troublesome client -the prospective alternative caregiver- rather than the biological parent who often has substance abuse or other serious problems and is difficult to work with.[96] Also, if left unmonitored welfare may find it more convenient to supply generic services not adapted to the needs of particular families.[97] Particularly parents with problems such as mental disability may consequently not only receive insufficient attention; they may also be provided by welfare with inappropriate services intended for cognitively normal parents.[98] But where courts have oversight service providers are encouraged to work optimally.[99] There is thus certainly scope for courts, provided they have sufficient training and guidelines about services,[100] to play a valuable role. The importance of subjecting welfare to monitoring together with the far greater

[94] Section 156(1)(j). Data provided by the US National Centre on Addiction and Substance Abuse indicates that in at least 70% of American child abuse and neglect cases which come before court a parent is addicted to alcohol or drugs: see Waldfogel (2000) op cit note 75 at 325.

[95] Section 46(1)(g) & (h)(vi).

[96] TJ Stein 'The Adoption and Safe Families Act: Creating a False Dichotomy between Parents and Children's Rights' (2000) 81 *Families in Society: the Journal of Contemporary Human Services* 586 at 591. Wasow (2006) op cit note 76 at 206 similarly notes a tendency of welfare to bypass 'parents who are unappealing, or who present especially difficult challenges'.

[97] Telfer (2004) op cit note 89 at 169 states that welfare has a tendency to provide generalist services in 'cookie cutter' formats. As she notes at 170 ibid courts can therefore play a valuable role in checking services. BA Green & AR Appell 'Representing Children in Families -Foreword' (2006) 6 *Nevada LJ* 571 at 583-584 point out that families must also be protected from being overwhelmed by too many or overly intrusive services.

Generally on the usefulness of courts for monitoring welfare see also part 3.4.1, above.

[98] EN DeVault 'Reasonable Efforts Not so Reasonable: The Termination of the Parental Rights of a Developmentally Disabled Mother' (2005)10 *Roger Williams University LR* 763 at 764-65 & 785.

[99] Waldfogel (2000) op cit note 75 at 325-26 concluded that drug courts in the US serve a valuable purpose 'because they hold treatment providers, as well as offenders, accountable. If a treatment provider is not providing adequate treatment or adequate reports to the court, the judge will discontinue use of that provider and refer families to another one; this tight accountability ensures that services are delivered as intended and also over time helps strengthen the quality of services on offer in the area'.

[100] DeVault (2005) op cit note 98 at 765. Wasow (2006) op cit note 76 at 187 notes that where courts are not properly equipped they often fall into the habit of ordering 'a standard menu of services' which is not sufficiently tailored to meet the needs of individual families. On guidelines see also part 8.4.3, below.

authority over family members possessed by court adjudicators are two important reasons in favour of a court power to order services.

Another factor in favour of court orders is that there may need for a formal finding on the main underlying causes of care problems, directly linked with an appropriate services order. For example, Gelles points out that after American courts establish that parental neglect results from drug abuse they will often require that the parents be offered drug rehabilitation treatment.[101] Where failures in care are due to a lack of parenting skills, courts would link this finding with an order for parenting classes. And where such failures are due primarily to a lack of resources, a court would require that parents receive assistance with housing applications or job searching.[102] The order of a court may therefore generally be useful in setting parameters. As it was put in the New Mexico case of *State of N.M. ex rel. CYFD v. Athena H.* '[t]he court must approve a treatment plan in an abuse and neglect case in order to provide the framework for the efforts of welfare and the parent'.[103]

Another reason in favour is the apparent effectiveness of court-ordered services in some cases. Hewitt has claimed generally that child protection systems which allow for the ordering of services are far superior to those which merely allow for defining parents as failures so that their children can be removed.[104] Aside from reduction in stigma, this is because with the authority of courts behind them consequential services and particularly those involving home visitations have 'been shown to drop rates of child abuse and neglect'.[105] Wilson, although mainly concerned with divorce cases, suggests that positive results for children frequently result from caregivers being required to attend parenting training programs.[106]

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[101] Gelles (1999) op cit note 36 at 288.
[102] Ibid.
[103] 142 P. 3d 978 (N.M. Ct. App. 2006) at 981 para 4 [Westlaw International].
[104] SK Hewitt *Assessing Allegations of Sexual Abuse in Preschool Children: Understanding Small Voices* (1999) at 275.
[105] Ibid.
[106] RF Wilson 'Fractured Families, Fragile Children-the Sexual Vulnerability of Girls in the Aftermath of Divorce' (2002) 14 *Child and Family LQ* 1 at 19-21.

A strong emphasis on proactive family support services in care cases has been characteristic of many continental European anti-legalistic systems during the last three decades.[107] Some commentators have favourably contrasted the 'family service model' as supportively and flexibly utilised in these with the Anglo-American approach.[108] Howe, for example, notes that in Europe there has been 'a major focus on providing programmes of prevention and support for families, including parent education, parent support groups, and counselling and therapeutic services'.[109] Waldfogel, in generally considering Anglo-American child protection systems, has argued similarly that courts in these can play a far more constructive role if they 'adopt a more service-oriented approach to many cases (and especially those cases where services had not yet been offered and failed), focusing less on the act the parent had committed and more on the underlying problems that led to the abuse or neglect'.[110]

Despite their undoubted advantages, just as with interim services discussed in the previous chapter, child and family services orders at the dispositive stage also raise fundamental questions about the constitutional rights of persons subjected to them.[111] If the child has now formally been found to be in need of care and protection this will strengthen the case for a mandatory order. However, the arguments for compulsion as a last resort and the superiority of court orders based upon real agreement by recipients still apply.[112] Regulations indicating that children's courts should consider whether recipients are willing to cooperate[113] and apply least intrusive forms of mandatory orders are thus also needed for dispositive family services orders.[114]

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[107] Cameron, Freymond & Cornfield (2001) op cit note 13 at 79-83 & 86.
[108] Howe (2002) op cit note 43 at 369; Cameron & Freymond (2003) op cit note 86 at 9.
[109] Howe ibid.
[110] Waldfogel (2000) op cit note 75 at 322-23.
[111] For some constitutional challenges that have been encountered in the USA see generally R Fowler 'Courts, Courses, and Controversies: the Constitutional and Procedural Challenges to Rules of Court Requiring Attendance at Parenting Seminars' (2002) 37 *New England LR* 25.
[112] See parts 7.2.2.2 & 7.4.2, above.
[113] This would be in line with art 20(2)(b) of the 1990 ACC. It imposes a duty on state parties 'to assist parents and others responsible for the child in the performance of child-rearing…'. For criticisms of a proposal by the Dutch minister of justice to introduce legislation enabling courts to impose compulsory

On balance, it may be concluded that the new service delivery orientation and resource allocation functions for children's courts in the 2005 Act are entirely appropriate. They represent a major step forward in the modernisation of South African care law. In particular they accord with the criterion of minimum state intervention and removal of children as a drastic last resort. However, the responsibility to select appropriate proactive services to enable children to remain in their families will bring significant new demands for specialist interdisciplinary knowledge and skills required of children's court magistrates.[115] Although they will be able to receive guidance from welfare they must clearly have sufficient expertise about local resources[116] to avoid the dangers of mere rubber stamping.[117]

8.3.3 Remedies Involving Removal of Children

In further considering the nature of the remedies provided for in s 46(1) and s156(1) of the 2005 Act it can be seen that children's courts will of course continue to have the power to remove children from their families where risks are high or care extremely poor. However, as opposed to merely ordering traditional foster care or one of only two categories of institutional placement as under s 15 of the 1983 Act, there are now some important changes and additional options for removal orders.

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family services orders where parents would not accept these voluntarily as '*een stap in de verkeerde richting*' ('a step in the wrong direction') see M Bruning 'Herziening kinderbeschermingsmaatregelen: over noodzaak en uitstel' (2002) 4 *Tijdschrift voor Familie- en Jeugdrecht* 102 at 103.

[114] See parts 7.3.2 & 7.4.2, above.

[115] Ramsey (2001) op cit note 90 at 32 notes that judges who are not sufficiently experienced sometimes make the mistake of assuming that it is safe to return a child to parents who have complied with a court-ordered program and not safe to return the child to parents who refused to undergo the program. She cites a study of 447 cases of abused children reported by B Rittner & C Davenport Dozier 'Effects of Court-Ordered Substance Abuse Treatment in Child Protective Services Cases' (2000) 45 *Social Work* 131 at 133 & 138. Sheehan (2001) op cit note 13 at 222 has warned that many family difficulties, and particularly those resulting from family violence or serious psychiatric disorders, may not be susceptible to management solely by family support services. Courts contemplating the ordering of such services must therefore be careful not to view them as a panacea.

[116] After observing in Australian children's courts researchers D McConnell, G Llewellyn & L Ferronato 'Disability and Decision-Making in Australian Care Proceedings' (2002) 16 *International Journal of Law, Policy and the Family* 270 at 291-92 noted the importance of a knowledge of local resources for appropriate design of family services orders.

[117] On these see part 6.2.3, above.

In relation to residential care facilities, under either s 46(1)(a)(ii) or s 156(1)(e)(v) a children's court may place a child in a 'child and youth care centre'. These provisions read with s 158 indicate that, in place of the present children's homes and schools of industry, child and youth care centres will offer a much wider variety of developmental, therapeutic, educational and other programs for children. Different centres may specialise in offering different programs. This is similar to the approach taken under the English Care Standards Act 2000[118] and follows recommendations in the South African law commission's 2002 draft Children's Bill.[119] It would appear that the purpose of the centres will be to cater without stigma for children with different needs, including children with disabilities[120] or those who need secure care.[121]

In relation to secure care s 156(1)(h) of the 2005 Act fills a gap by providing for it as an alternative care measure for the first time in our law. As can be seen from the quotation in part 8.3.1 the two subgrounds are findings by a children's court that 'the parent or caregiver cannot control the child' or 'the child displays criminal behaviour'.[122] The first subground inappropriately bases secure care on shortcomings in a parent or caregiver. The second raises the question of how criminal behaviour must be proved. A narrow interpretation would confine children's courts merely to utilising records of previous criminal trials. An alternative interpretation could see these courts temporarily taking on the role of criminal courts as they attempt to decide whether conduct of a particular child being considered for secure care was criminal.[123] This is problematic because it might subvert the supportive role which children's courts should maintain in relation to all

[118] Under s 1(2) of the Care Standards Act 2000 children's homes are defined very broadly in order to allow for different kinds of services to be provided at different homes. See *Explanatory Notes to Care Standards Act 2000* (HMSO 2000) 8, para 25. Accessed at <http://www.opsi.gov.uk/acts/en2000/2000en14.htm>.
[119] Clauses175(1)(f)(vi), 177(2), 228(b) & 230(j): see South African Law Commission (2003) op cit note 7 above at part 3 pp 144, 146 & 175-76.
[120] As can be seen from the wording quoted in part 8.3.1 above s 156(1)(g) refers to state managed or monitored facilities which specialise in 'the care of children with disabilities or chronic illnesses'.
[121] Section 156(1)(h) refers to child and youth care centres that provide secure care programs.
[122] This wording is taken from clause 175(1)(i) of the 2002 draft Children's Bill: see South African Law Commission (2003) op cit note 7 at part 3 p144.
[123] Only serious and usually violent crime should have been specified as relevant to the question of secure care.

children in need of alternative care. Instead of the grounds included in s 156(1)(h) children's courts should rather have been required to consider whether the child is a serious danger to himself or others.[124]

It will also be essential to formulate regulations covering admission criteria and arrangements for secure accommodation.[125] Our regulations should indicate that secure care can only be ordered after presentation of expert evidence. They should require children's courts to evaluate whether the motivation is sufficient and ensure that there is no punitive intention. They should be directed to permit only the least restrictive form of restraint that is appropriate under the circumstances. They should also have to give consideration to whether an appropriate facility with suitable resources (for example, in the form of skilled staff) is available. It should be expressly stated that incarceration for the purpose merely of confining a child, rather than working constructively with her, cannot be approved by a children's court. It should further be laid down that the length of time that a secure placement is to last must be a particular concern, with courts requiring a strong motivation if medium to longer-term secure accommodation is proposed.[126]

With reference to all placements in residential facilities s 158(1) of the 2005 Act states that a children's court may order a child and youth care centre placement 'only if another option is not appropriate'. This once again accords with the criterion of minimum intervention and removal as a last resort. It is noteworthy that s 158(2)(a) requires a children's court and not welfare to determine what kind of residential care program would best suit a child who is the subject of care proceedings.[127] This will clearly require greater skills and knowledge about therapeutic programs than merely deciding between a

[124] See s 25 of the English Children Act 1989. Under s 158(3)(e) of the 2005 Act a provincial head of social development must consider 'the safety of the community and other children' when choosing a particular facility. But this applies only after a children's court has already ordered secure care.
[125] Some guidance in formulating secure care regulations could be derived from the Secure Accommodation (Scotland) Regulations 1996 (SI 1996 No. 3255) -accessed at <http:/www.edinborough-gazette.gov.uk/si/si1996/Uksi_19963255_en_1.htm>.
[126] In the English case *Re W (A Minor) (Secure Accommodation Order)* [1993] 1 FLR 692 at 697 Booth J held that secure accommodation should not be ordered unless it has been fully justified, both as regards its purposes and the length of the order.
[127] On the historical origins of this approach see the reference to *S v Van Rooi* in part 2.3.4, above.

children's home or school of industries as under our present law. Just as has been noted in relation to family services orders, this has training implications for magistrates. And it strengthens the argument put forward in chapter 6 that because of the nature of their responsibilities our children's courts need to be established as a separate entity with specialist adjudicators.[128] Expecting generalist magistrates to make independent decisions about what kind of residential care programs are required by children with special needs is unrealistic.

In relation to foster care, aside from the traditional option of placement with 'a suitable foster parent' as provided in s 156(1)(e)(i) a new possibility for placing a child in 'foster care with a group of persons or an organisation operating a cluster foster care scheme' arises in s 156(1)(e)(ii). This follows a recommendation by the law commission that there was a need for a type of care by a 'grouping of caregivers who are linked together to provide mutual support in the care of a number of children, and who receive some form of external support and monitoring'.[129]

A key difference between cluster foster care and the traditional Western form is that with the former children are placed with a cluster of other children rather than with individual foster parents.[130] Thanks to pioneering work by some South African NGO's, cluster foster care has already been tested and found to be viable.[131] The Pietermaritzburg Child and Welfare Society has even utilised it successfully for children with disabilities.[132] It thus appears that, with ever-growing numbers of AIDS orphans,[133] cluster foster care orders will be a useful addition to the dispositive remedies that children's courts can

[128] See parts 6.2.4 & 6.3.
[129] South African Law Commission (2003) op cit note 7 at part 2 p217.
[130] Clause 1 of the Children's Amendment Bill 19/2006 defines a cluster foster care scheme as 'a scheme providing for the reception of children in foster care in accordance with a foster care programme operated by- a social, religious or other non-governmental organization; or a group of individuals, acting as care-givers of the children, and managed by a provincial department of social development or a designated child protection organization'.
[131] Sewpaul (2001) op cit note 81 at 582; A Strebel *The Development, Implementation and Evaluation of Interventions for the Care of Orphans and Vulnerable Children in Botswana, South Africa and Zimbabwe: A Literature Review of Evidence-based Interventions for Home-Based Child-Centred Development* (2004) at 10.
[132] Sewpaul ibid and Strebel ibid.
[133] UNICEF (2007) op cit note 79 at Table 4, p116.

provide. However, detailed regulations on the precise responsibilities of cluster carers will be required to ensure that cluster schemes function appropriately.

As will be remembered there has been a long-standing problem with kinship carers being unable to obtain foster care grants.[134] In response the law commission recommended that a new legislative provision was needed. It suggested that this should indicate expressly that relatives can like anyone else apply to children's courts for alternative carer status which could lead to such grants.[135] Unfortunately, this has not been addressed in the 2005 Act. It is a pity that the opportunity was missed because it would have been another way of assisting, inter alia, AIDS orphans.

Despite some deficiencies, it is clear that the 2005 Act is set to considerably improve the position on alternative care removal options. The possibility of cluster foster care, the concept of a wide range of residential care programs at child and youth care centres and the general requirement that children's courts must provide solutions tailored to the needs of individual children are significant advances in our law. The new provisions should potentially enable magistrates to play a far more useful role in the serious situations where it is not appropriate to support children within their families.

8.4. The Case for Stages in Dispositive Proceedings

The introduction of so many major substantive reforms in the 2005 Act raises questions about how these should be implemented. With reference to the role of children's courts in care cases, as has been noted in the previous chapter the Act continues to be built around the concept of a main hearing. In many US states care legislation instead provides expressly for multistage dispositive proceedings.[136] These typically include grounds

[134] See part 8.2.2, above.
[135] South African Law Commission (2001) op cit note 22 at vol 3 para 17.2.5. See also its proposals for 'court-ordered kinship care' in the 2002 draft Children's Bill chapter 14; and *Report on the Review of the Child Care Act* (2003) op cit note 7 part 2 at paras 16.2.1-3.
[136] The predominant approach in the US recognises a basic distinction between an 'adjudicatory' stage at which grounds must be proved and a 'dispositional' stage at which the court must decide on a remedy: Chill (2004) op cit note 22 at 543. In England it has been proposed by the department for constitutional affairs that

adjudication hearings, progress reviews and final termination of parental rights hearings.[137] It will be contended in the discussion below that if South African children's courts are to effectively perform the greatly extended functions envisaged for them in the 2005 Act it is essential to provide similarly for a series of logical sub-phases in dispositive proceedings.

8.4.1 Distinguishing between Grounds and Remedies

Despite requiring children's courts to perform far more complex tasks at dispositive hearings even such a basic division as a separation between proof of grounds and outcomes stages has not been provided for in the 2005 Act.[138] In fact, in place of the silence of the 1983 Act, there will sometimes be a positive duty placed upon children's courts to interweave their investigations about grounds and outcomes. As can be seen from the wording quoted in part 8.3.1 above, a variety of additional sub-grounds have been inserted throughout s 156(1) of the 2005 Act. These are prerequisites for many of the orders which can be made under it.[139] Thus, in addition to having to reach a conclusion on what might perhaps now have to be referred to as one of the primary s 150(1) grounds for finding a child to be in need of care and protection, when contemplating imposition of a s156 order a children's court will need proof of any additional sub-ground required. Courts will therefore have to revisit the question of proof of grounds when considering outcomes.

The sub-grounds linked to particular orders may drag out proceedings unduly. Parties who have failed in a bid to thwart proof of a primary ground would in many cases

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the grounds and outcomes stages of care proceedings be more distinctly separated: see D Jockelson 'The Threat to Care Proceedings' (2005) 35 *Family Law* 891.

[137] An example is the Juvenile Court Act 1987, as amended, in chapter 705 of the Illinois Compiled Statutes. At s2-18(1) and s 2-21(1) courts are directed first to hold an 'adjudicatory hearing' to establish whether there is sufficient evidence showing abuse or neglect. A subsequent 'dispositional hearing' at which the court will decide upon an appropriate alternative care remedy is provided for in s 2-22(1). The latter also allows for a later 'court review' at which a state attorney can file a motion to finally terminate parental rights 'of any parent who has failed to make reasonable efforts to correct the conditions which led to the removal of the child or reasonable progress toward the return of the child'. Finally, s 2-28(2) provides for a 'permanency hearing' to decide upon a permanent new placement. Accessed at <http://www.ilga.gov/legislation/ilcs/ilcs4.asp> and hereafter cited as 'Illinois Juvenile Court Act'.

[138] This need not necessarily require extra court hearings. The Connecticut Practice Book op cit note 1 at s26-1(f)(3) provides courts with a discretion to complete adjudication and disposition phases at a single sitting.

[139] Note, for example, the prevalence of the phrase 'if the court finds that…' followed by subgrounds attached to specific orders in the wording quoted in part 8.3.1, above.

be motivated to request a subsequent opportunity to dispute a sub-ground. And this could arise when a court might wish to be concentrating entirely on the issue of an appropriate remedy for the child -for it will only be when parties know which remedies a court is contemplating that the relevant sub-ground will emerge. At that point they might justifiably request an adjournment in order to prepare.

It could be argued in favour of an interweaving of grounds and outcomes that a presiding officer might prefer to sound out what alternative care options are available for a particular child before declaring her to be need of alternative care. Thus, if no appropriate option seems to be available, this might influence a finding that a child is not in need of alternative arrangements at the present time. As against this, it can be argued that lack-of-alternatives arguments should never be permitted to weaken a child's entitlement to a court remedy if she genuinely needs one. Her right to alternative care is, after all, very clearly stated as a fundamental legal right in s 28(1)(b) of the Constitution.[140] And a too-ready acceptance of lack-of-placement arguments could result in situations where children who urgently need services end up on the streets. If circular reasoning prevails and resource arguments are allowed to influence children's courts in deciding whether to provide assistance an ethos that encourages a laissez-faire approach by welfare personnel could result. This might promote inefficiency and avoidance of the application of law in child protection work.[141]

An argument in favour of creating entirely separate grounds and remedies stages in dispositive proceedings is that it would enable parties who do not wish to dispute grounds to concentrate their efforts on (and perhaps only attend at) the outcomes phase. Masson has pointed out that in England:

> '…in only a small minority of cases are the grounds for an order actively contested at the time of the final hearing. In rather more cases there continues to be a dispute about the plans for the child's

[140] As noted part 1.2 above, this reads: '[e]very child has the right-…. (b) to family care or parental care, or to appropriate alternative care when removed from the family environment'.

[141] In a 1979 study in England it was found that the degree of determination and persistence exhibited by social workers in trying to obtain places for children in care facilities where vacancies were supposedly in short supply was a critical factor which could often overcome resistance to the acceptance of children in such facilities: see the conclusions of P Cawson and M Martell as discussed by R Bullock 'The United Kingdom' in Colton & W Hellinckx (1993) op cit note 83 p212, at 214-15. On the unfortunate consequences of a lethargic approach to children's needs see also the Irish judgments of Kelly J referred to in part 8.4.4, below.

> care, for example whether social work should be focused on the rehabilitation of the child with the family, supporting care by relatives, or arranging an adoption.'[142]

It is likely that in South Africa, just as in England, some parents would not dispute the fact that their child needs court-imposed alternative care arrangements but would wish to give evidence regarding the nature of those arrangements. By introducing a separate-phase approach, valuable time for witnesses and the court might be saved. [143]

There are further arguments in favour of separate stages. Involved lay persons (importantly, including the child herself) are more likely to understand and be able to participate effectively at hearings that have a single, clear purpose rather than intermingled purposes which produce a circularity of discourse. So stages accord with the criteria of user-friendliness and hearing appropriate voices. Also, a separate grounds phase would allow for a less adversarial approach and less stigma imposed upon parents if it so happens that they do not dispute the fact that the child is in need of alternative care. This phase can then be shortened and kept amicable.

Additionally, a court which has found a child to be in need of alternative care may be uncertain about what measures to order. It is thus important that, even at this advanced stage in the proceedings, it should have the power to remand the matter whilst the child or other relevant person is assessed purely to guide its decision on the best possible remedy.[144] Not only will it be logical and convenient to do this at the end of a definable part of the proceedings but also an assessment which has the single purpose of ascertaining a child's needs after she has already been found to be in need of alternative care measures will be more likely to pass constitutional muster.[145]

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[142] Masson (2000) op cit note 77 at 472-73.

[143] For example, a witness might only have information relevant to the question of whether the child is in need of alternative care -her evidence may not be relevant to the outcome to be selected for the child, and therefore she would not attend the outcomes phase.

[144] This power should be subject to the limitations on assessment orders that have been proposed in part 7.4.2, above.

[145] Privacy and other fundamental-rights issues which arise from the inherently intrusive nature of assessments have been discussed in part 7.3.2, above.

8.4.2 The Concept of Improvement Periods

Having shown that there would be substantial benefits from amending the 2005 Act to differentiate between grounds and remedies phases it may be further proposed that dispositive proceedings should not necessarily be confined only to two main stages. An important question is what the implications of the new family services orientation are for the role of children's courts. Specifically, would binary dispositive proceedings divided into grounds and outcomes stages enable them to be sufficiently effective as family service providers? This question must be answered in the negative. What the transformed role for children's courts surely entails is that they should *not* as a standard norm merely order a dispositive remedy and then wash their hands of the matter.

The whole point of remedies such as professional counselling, anger management, parent skills training, substance abuse rehabilitation and even ADR orders as discussed in part 3.6 above is surely to see whether they prove successful in averting the need for more intrusive care measures such as removals.[146] The standard norm for children's courts issuing family services orders should therefore become one in which they provide these for trial periods and then receive evidence at a review hearing on the degree of success achieved. Aside from protecting children more effectively this would save precious resources by not having services drag on where they are failing.

In support of the proposal for a test period followed by a review it may be noted that an aspect of the 1983 Act which has drawn criticism is that it does not accord children's courts powers to monitor the success of their s 15 dispositive orders.[147] Once they issue one they are *functus officio*. They do not even have jurisdiction to ensure that it is properly implemented.[148] The child now falls completely under the authority of a

[146] And a procedural implication is that caregivers must be given the time and opportunity where they wish to bring expert evidence showing that they have sufficient potential for positive change: see the Wisconsin case *In Re Daniel R.S.*, 706 N.W. 2d 269 (Wis. 2005) 324 para 105 [Westlaw International].
[147] See C Matthias & N Zaal 'Can We Build a Better Children's Court? Some Recommendations for Improving the Processing of Child-Removal Cases' (1996) *Acta Juridica* 51 at 62-64; and South African Law Commission (2003) op cit note 7 at part 2 p270.
[148] South African Law Commission ibid at part 2 p306.

provincial welfare (or in the case of industrial schools, education) department.[149] The department can entirely change the children's court order. There is thus little scope under the 1983 Act for children's courts to follow up and check the effectiveness of their remedies.

It is clear that in formulating the 2005 Act the legislature aimed both to increase the authority of children's courts and provide them with a review capability. In particular, an attempt has been made to enable them to ensure that their orders are implemented. Under s 158(3) if a children's court decides that a particular category of residential care program is needed by a child the relevant provincial head of social development must ensure that the child receives it.[150] Under s 48(1)(b) a children's court may, inter alia 'monitor any of its orders'. And under s 48(1)(c) it may 'impose or vary time deadlines with respect to any of its orders'. In s 156(3)(b) it is stated that any s 156(1) order 'may be reconsidered by a children's court at any time, and be confirmed, withdrawn or amended as may be appropriate'.

How then, should children's courts utilise these new powers to control implementation of their orders? They should not merely await reports of non-implementation by aggrieved parties. In many cases the latter -particularly if they are children- may not have the capability to launch a follow up hearing. Where children's courts issue proactive family services orders and also where they have any concerns about effective implementation or sufficient success with removal orders they should provide dispositive remedies on a trial basis as suggested above with a return date set for a review hearing.

Regarding a procedural foundation for reviews of the progress specifically of caregivers it is useful to make reference to US law. In the USA after proof of grounds courts frequently permit an intermediate 'improvement period' to be followed by a progress review hearing. This is done if they decide caregivers have potential to improve

[149] For a detailed discussion see Matthias & Zaal (1996) op cit note 147 at 62-64.
[150] As noted in part 2.3.4 above, under s 9(5) of the Children's Act 33/1960 it was similarly indicated that children's court orders must be correctly implemented by welfare.

sufficiently to justify a retention or eventual return of the child.[151] An example of legislation is s 2-21(1) of the Illinois Juvenile Court Act.[152] This enables courts to provide parents with a chance to 'correct the conditions that require the child to be in care'.[153] In more detail, art 49-6-2(b) of the West Virginia Code[154] states (in relevant part):

> 'In any proceeding brought pursuant to the provisions of this article, the court may grant any respondent an improvement period in accord with the provisions of this article. During such period, the court may require temporary custody with a responsible person which [*sic*] has been found to be a fit and proper person for the temporary custody of the child or children or the state department or other agency during the improvement period. An order granting such improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section 3, article 6-d of this chapter.'

A more precise means of providing a second opportunity is the concept of 'specific steps' as used in Connecticut. These are defined in s 26-1(n) of the Connecticut Practice Book[155] as 'those judicially determined steps the parent or guardian and the commissioner of children and families should take in order for the parent or guardian to retain or regain custody of a child or youth'. Courts in Connecticut must thus be exact about what caregivers are required to achieve.

As can be seen, the improvement period mechanism is a constructive one. It accords with the criterion of minimum intervention into families because it allows parents an opportunity to better their skills or conditions of care in cases where this still appears possible.[156] It would fit extremely well with the new family services orientation of our children's courts and provide a useful procedural mechanism for the implementation of some of their new monitoring powers. Children's courts in South Africa should therefore be encouraged by means of regulations similar to the above quoted American wording to

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[151] See TB Harding 'Involuntary Termination of Parental Rights: Reform Is Needed' (2000-2001) 39 *Brandeis LJ* 895 at 897. Children may be removed and a case plan is usually implemented by welfare during the improvement period: see, for example, *Veronica T. v. Arizona Dep't of Economic Sec.*, 126 P. 3d 154 (Ariz. Ct. App. 2005) at 158 para 19 [Westlaw International].

[152] Op cit note 137.

[153] See also the similar wording in s 2-22(6).

[154] Supra note 19.

[155] Supra note 1.

[156] *In the Interest of Betty J.W.*, 371 S.E.2d 326 (W.Va.1988) illustrates the use of an improvement period where a mother of five children had potential but was subject to a bad influence. She sought an improvement period to allow her time to develop her parenting skills. The court *a quo* held that the child abuse which her husband was continuing to perpetrate was 'a compelling circumstance' justifying a rejection of her application (ibid, at 327). However, the West Virginia supreme court of appeals decided that an improvement period should be granted, but without leaving the children in her custody (ibid, at 330).

consider the interposing of an improvement period phase whenever it appears that caregivers have sufficient potential to be able to respond positively.[157]

8.4.3 Review Hearings

As has been suggested above a procedural direction is needed indicating that children's courts should consider setting dates for review hearings *mero motu* so that they can monitor implementation and success of their family services orders and also removal placements about which they have concerns. If the recommendation in favour of improvement periods is accepted we will require a rule indicating that court reviews are essential where these are ordered. Under r 38 of the West Virginia 'Rules of Procedure for Child Abuse and Neglect Proceedings' reviews are obligatory whenever improvement periods are granted. [158] Courts must hold what is called a final disposition hearing within sixty days after the end of an improvement period.[159] They must decide 'whether the conditions of abuse and/or neglect have been adequately improved'. They must also 'determine the necessary disposition consistent with the best interests of the child' and then issue a final disposition order within ten days.

Although it does not specifically refer to review hearings the 2005 Act certainly facilitates the holding of these. As has been noted, monitoring progress and setting timeframes for achieving goals are expressly provided for in s 48(1)(b) and (c), respectively. Section 46(2) states that a children's court 'may withdraw, suspend or amend an order made in terms of subsection (1), or replace such an order with a new order'. And s156(3)(b) performs a similar function in stating that a s 156(1) order 'may be reconsidered

[157] It would have to be selectively used, however. Gelles (1999) op cit note 36 at 294 warns that the US experience has shown that courts must not provide too many or overlong improvement periods because '[c]hildren must not be denied permanence' in the form of a long-term new placement where their parents are unable to improve. The Louisiana case of *State ex rel. J.P.A.*, 928 So. 2d 736 (La.Ct.App. 2006) 739 para 1 [Westlaw International] reveals the dangers of overlong improvement periods. It was found that a mother had failed for three years to comply with a plan for improvement. She had continued to show poor judgment to the extent of leaving her children alone with a known paedophile.

[158] West Virginia 'Rules of Procedure for Child Abuse and Neglect Proceedings' -accessed at <http://www.state.wv.us.wvaca/rules/abuse.htm>.

[159] This is a final deadline; art 49-6-2 (d) of the West Virginia Code supra note 19 provides that courts should hold a hearing immediately after the improvement period if possible.

by a children's court at any time, and be confirmed, withdrawn or amended as may be appropriate'. These provisions should be interpreted as allowing children's courts to instigate follow up hearings themselves -and would then provide them with substantial review powers.

What is missing from the 2005 Children's Act is guidance on how children's courts should utilise review powers.[160] In contrast, the Louisiana Children's Code provides very detailed directions on the approach to be taken by courts when reviewing the progress of caregivers after an improvement period.[161] At art 1015(5) it states that presiding officers must decide whether there has been 'substantial parental compliance' with a services plan. At a minimum there must now be a 'reasonable expectation of significant improvement in the parent's condition or conduct in the near future, considering the child's age and his need for a safe, stable, and permanent home'. In more detail art 1036 C. directs courts to evaluate the extent to which parents:

- kept in touch with welfare;
- maintained the children financially;
- complied with treatment or rehabilitation services;
- maintained visitation contact or other forms of communication if their children were removed,
- show substantial improvement in redressing problems preventing reunification;
- have overcome conditions which led to removal or could harm their children.

And art 1036 D. provides some further guidelines for deciding specifically on the minimum of whether there is now 'any reasonable expectation of a significant improvement' as required by art 1015(5). It requires courts to discern firstly whether a caregiver is currently affected by mental disability, substance abuse/dependency or

[160] For example, they may have to decide whether substantial rather than absolute compliance is sufficient. For a case of partial yet inadequate compliance see the Colorado case *People ex rel. T.E.M.*, 124 P.3d 905 (Colo. Ct. App. 2005) 909-910 para 10 [Westlaw International]. In the New Mexico case of *State of N.M. ex rel. CYFD v. Athena H.*, 142 P. 3d 978 (N.M. Ct. App. 2006) 981 para 4 [Westlaw International] it was held that the test to be applied is not whether a parent had tried her best to improve but rather whether she had succeeded in becoming capable of parenting within the foreseeable future.

[161] Louisiana Children's Code -accessed at <http://www.legis.state.la.us/lss/lss.asp?doc=72567>.

incarceration. If this is found to be the case the court must further consider the effect on the caregiver's ability to exercise parental responsibilities. In doing so, the court must consider expert opinion and/or patterns of behaviour. Generally the court must also weigh up the willingness and commitment of the parent to provide suitable nurturing.[162] It may be suggested that a similar set of guidelines would be very useful for assisting presiding officers in South African children's courts.

Besides assessing progress of caregivers, a second and often related reason for holding reviews is to see whether welfare have made sufficient efforts to supply court-ordered services.[163] Harding noted that US courts routinely perform a helpful monitoring function because they 'scrutinise the actions of the State's department or agency to ensure steps were taken to attempt reunification'.[164] Waldfogel suggested more generally that longer-term court involvement is useful in care cases 'to make sure that the prescribed services were delivered… '.[165] From an English perspective Masson has asserted that in care cases '[t]he position of the child and parents is considerably weakened without court supervision…'.[166] Some researchers have drawn attention to the role courts can play in checking to see that welfare not only delivered services but tailored them properly to meet the special needs of the family concerned.[167]

In South Africa monitoring of state implementation of care measures is likely to prove as valuable as elsewhere. In the unreported South African high court case of *Ngcobo and Shandi v the State* Levinsohn DJP recommended routine monitoring by magistrates' courts to counter failures by state departments to implement placements in reform schools

[162] This may involve assessing the extent to which parents have been able to take responsibility for the original causes of harm and the degree to which they have planned a better future for their children: see the New York case *In re Jennifer R.*, 817 N.Y. S. 2d 309 (App. Div. 2006) 312 paras 4-6 [Westlaw International].
[163] It has been held that the test to be applied is whether welfare made reasonable efforts: see the New Mexico case of *State of N.M. ex rel. CYFD v. Joseph M.*, 130 P. 3d 198 (N.M. Ct. App. 2006) 203 para 10 [Westlaw International].
[164] Harding (2000-2001) op cit note 151 at 897.
[165] Waldfogel (2000) op cit note 75 at 323.
[166] Masson (2000) op cit note 77 at 475.
[167] Wasow (2006) op cit note 76 at 211 warns that stereotyping and unfounded assumptions about the capabilities of disabled parents often lead to welfare organisations providing them with inadequate family services. See also DeVault (2005) op cit note 98 at 764-65 & 785.

for juveniles convicted of less serious offences.[168] As will be shown in the next part below there is a wider problem of non-implementation which also affects some children placed by children's courts.

Although this chapter focuses on dispositive proceedings, it may be noted in passing that court review hearings may also be necessary at a later stage if a party subsequently applies for an amendment of a dispositive order. To reduce the need for welfare agencies returning to court the South African law commission recommended that they should only require court permission if they wished to move a child to a more restrictive form of alternative care than originally ordered.[169] However, in keeping with the legislature's general approach of empowering children's courts to have complete control over their orders, no such exception has been included in the 2005 Act. Thus any party seeking any form of amendment requires court permission. And s 48(1)(b) and s159(1)(b) imply that the department of social development has not only lost its previously wide powers to amend orders; it has also lost its power to extend orders -because control over extensions will also pass to children's courts once these sections come into force.[170] By comparison with the situation under the 1983 Act the balance of power over what happens to children taken into the protection system has thus been substantially shifted in favour of children's courts.

8.4.4 Encouraging Compliance by Imposing Sanctions

Although giving much greater control over remedies to children's courts should help strengthen their authority there remains the question of actual sanctions. For example, if it is accepted that a final stage in dispositive proceedings should often be a progress

[168] Case No AR 359/2006 & 360/2006 (NPD) 14 Sept 2006.
[169] South African Law Commission (2003) op cit note 7 at part 2 p305.
[170] The former provision enables children's courts to extend any order. The latter, constituting surplusage, refers narrowly only to their extension of s 156 orders. Since there is no reference to extension powers for the department of social welfare it must be assumed that these will fall away. It is most appropriately laid down in s 159(2) that before deciding on an extension a court 'must take cognisance of ' the views of 'the child, parents, persons exercising parental responsibilities, any alternative care-giver' and even, where appropriate, the management of a 'centre where the child is placed'.

review hearing, what should children's courts be empowered to do if it emerges at the hearing that insufficient progress has been achieved? They can clearly alter the care situation of the child but a more difficult question relates to imposition of punitive measures against other persons who have failed to assist with implementation. On the one hand, it may be argued that in care cases courts should only be concerned with the needs of children and not punishment. Imposing sanctions might alienate individuals whose future cooperation is needed in the best interests of the child. On the other hand, if courts are to be effective they may need 'teeth' -indeed the mere possibility of adverse consequences may encourage more cooperation in implementing their orders.

Under the 1983 Act, in a situation where children's courts have been accorded no enforcement powers, there have sometimes been difficulties with implementation of orders. A persistent problem has been that of social workers either delaying for long periods or even completely failing to implement placements.[171] Although there are no recent reported cases directly illustrative of the problem the two departments most frequently involved, education and social development, have been challenged in several high court actions arising out of serious failures to implement placements of convicted juveniles in reform schools or youth centres.[172] One of these provoked harsh judicial criticism coupled with a suggestion that there was generally an urgent need for court powers to protect the constitutional rights of vulnerable children against 'systemic failures' by government departments.[173]

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[171] DS Rothman 'The Functioning of Children's Courts' (Unpublished visiting lecture: University of KwaZulu-Natal, 8 Sept 2005). The problem became so widespread that in January 2005 the department of social development resorted to fining social workers who were tardy: personal communication: S Dhlamini (social worker, provincial department of welfare and social development: Pietermaritzburg regional office, 8 Sept 2005). That this is a long-standing problem is apparent from *S v Van Rooi* 1979 (3) 899 (NC) at 901. According to Rothman, ibid, there have also been problems with state physicians negligently conducting superficial examinations of children ordered by children's courts. On disregard by welfare for children's courts see also part 2.3.5, above.

[172] *S v Z and 23 similar cases* 2004 (1) SACR 400 (E); *S v Mouers and Slinger* (Unreported: NC case no. 237 & 435/04, 11 Nov 2005); and *Ngcobo and Shandi v the State* (Unreported: NPD Case No AR 359 & 360/2006, 14 Sept 2006). In *Mouers* ibid at 3 Lacock J described two failures to implement court placement orders as 'shockingly inhumane'.

[173] *S v Z and 23 similar cases* ibid at 417c-e.

The inability of children's courts to enforce their orders and consequent harm suffered by many children motivated an earlier and similar recommendation by the South African law commission that they needed strong powers to enforce their orders and render persons accountable.[174] In response, in the 2005 Act the legislature has provided for a variety of different sanctions. For convenience these may be divided into general sanctions, those which are relevant for caregivers, and those which are applicable to welfare personnel or other representatives of the state involved in implementation of care orders.

In relation to general punitive powers for children's courts, under s 48(1)(d) of the 2005 Act they can 'make appropriate orders as to costs in matters before the court'. Whilst this might be seen as primarily compensatory, what is entirely a method for punitive sanctions has been created in s 45(2)(a). This enables them to 'try or convict a person for non-compliance with an order' or contempt of court.[175] It is broader than the power merely to sentence parents or guardians who contravened orders that was created with s 32 of the Children's Act 33/1960.[176] It is stated in s 45(2)(c) of the 2005 Act that children's courts must utilise the law 'applicable to magistrates' courts when exercising criminal jurisdiction'. Allowing children's courts to temporarily act as criminal courts is an extreme measure. It may be proposed that in order to avoid procedural complexity and an unduly adversarial atmosphere a rule of court is required indicating that they should only conduct criminal hearings at a separate sitting and not as part of care proceedings proper.

In relation to sanctions directed specifically at caregivers, as has been noted in part 7.4.2 above a form of pressure to which those who want to keep their children are sensitive is threats of removal. In s 156(3)(a)(iii) of the 2005 Act where courts allow children to be a left with caregivers under supervision by social workers they may expressly direct that if

[174] See South African Law Commission (2003) op cit note 7 above at part 2 p306.
[175] As noted in part 2.3.3 above, children's courts were similarly furnished with an express power to issue contempt of court orders in the Children's Act 31/1937.
[176] See part 2.3.4, above.

such caregivers fail to co-operate they will 'reconsider the placement'. This is an appropriate form of persuasion at the dispositive to stage.

Regarding sanctions directed at social workers, state employees or other persons involved *ex officio* in implementation it will be remembered that s 46(1)(h) enables children's courts, inter alia, to issue orders:

> '(vii) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure;
> (viii) instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure;'

It is clear from this wording that the legislature was determined to enable children's courts to compel state employees or welfare representatives to fulfil lawful obligations towards children. Presumably, where a children's court issues either of these orders it could subsequently 'convict a person for non-compliance with an order of a children's court or contempt of such court' as provided in s 45(2)(a). This would add point to s 46(1)(h) orders.

It is certainly clear that under the 2005 Act children's courts will no longer be paper tigers. But a question for consideration is whether they have been appropriately furnished with punitive powers. There is precedent for our introduction of criminal sentencing. Under s 10(4) of the Lesotho Children's Protection Act 6/1980 where a children's court places a child in the custody of a parent or guardian it may impose a fine and/or imprisonment upon any person who fails to comply with any requirement which it chooses to impose. This is very broad wording and allows for sentencing of a social worker, state employee or caregiver who fails to provide services to the child or family that the court ordered.[177]

In particular, however, whether a modern care-proceedings court with a supportive family-treatment orientation should be able to impose sanctions against parents is a

[177] See also the power of Malaysian courts to impose fines on parents as discussed below.

difficult issue. In England, Gillespie has argued in favour.[178] He points out that there have been major problems when leaving children with parents who subsequently refuse to co-operate with supervising social workers.[179] He recommends that breach of a condition imposed by a court should either constitute contempt of court or trigger an automatic power for the court to substitute a more drastic order without social services again having to prove grounds.[180] Waldfogel rightly describes caregiver accountability and the use of sanctions against parents as raising 'troubling issues'.[181] Nevertheless, she also considers contempt of court to be a possible mechanism for the imposition of sanctions and even contemplates that the latter might in an extreme case include 'jail time'.[182] As has been noted in part 7.3.2 above, in Illinois immediate arrest and contempt of court proceedings can be applied against persons who contravene domestic violence protection orders issued in care cases.

On the other hand, in art 49-6-4 of the West Virginia Code courts have been expressly prohibited from applying contempt of court sanctions against any party who refuses to submit to assessment.[183] Awal has warned generally of the dangers of taking the principle of parental accountability too far.[184] He has noted that under s 30(9) of the Malaysian Children Act 2001 if a court removes a child it can order the parent or guardian to 'visit the child on a regular basis as determined by the court' subject to a fine for failure to comply. Under s 91(1) of the same Act a parent or guardian may be ordered to execute a bond for a child's future good behaviour, with or without security and subject to any further conditions which the court may decide to impose upon the parent or guardian. Examples of such conditions referred to in s 91(1) include a duty to report with the child to welfare personnel at regular intervals or to accompany the child to interactive

[178] AA Gillespie 'Establishing a Third Care Order in Care Proceedings' (2000) 12 *Child and Family LQ* 239 at 243.
[179] Ibid.
[180] Ibid at 247.
[181] Waldfogel (2000) op cit note 75 at 325.
[182] Ibid.
[183] Supra note 19.
[184] NAM Awal 'Rights of Children: The Malaysian Experiences' at 10 (Paper: 11th World Conference of the International Society of Family Law, 2002). Accessed at <http://www.jus.uio.no/ifp/isfl>.

workshops.[185] Awal has criticised the Act for placing far too much emphasis on the responsibilities of parents and effectively blaming them for social problems that are beyond their control.[186]

It may be suggested that South African children's courts should be required to carefully investigate the causes before applying sanctions against caregivers who fail to comply with their orders. Because of the danger of unfairly pressuring or alienating them and thus subverting a family services approach they should be slow to utilise powerful condemnatory sanctions such as contempt of court or criminal sentences. Instead, the main response should be tighter restrictions on the exercise of parental responsibilities -in extreme cases by removing the child or a perpetrator of abuse.

In relation to liability of state employees or agents acting *ex officio*, Grover has contended that states should be subject to high levels of accountability based upon what she describes as a 'fiduciary duty' to children in need of alternative care.[187] Powers to call individual state officials to account as included in our 2005 Act may need to be exercised at the highest levels if they are to be effective. This is revealed by a discussion in which Ward identifies a line of Irish high court judgments and focuses particularly on two issued by Kelly J.[188] He notes that in the unreported matter of *D.H. v Ireland and Others* (23 May 2000) Kelly J eventually injuncted the ministers for health, justice and education to immediately provide an appropriate secure care placement that had for a considerable time been urgently needed by a 17-year-old girl.[189] He threatened them with contempt of court, fines, imprisonment or sequestration of departmental assets. Within days, a placement was found.[190] In the second case of *T. D. v the Minister for Education and Others*[191] he

[185] Ibid.
[186] Ibid.
[187] S Grover 'Nowhere to Turn: the Supreme Court of Canada's Denial of a Constitutionally-Based Governmental Fiduciary Duty to Children in Foster Care' (2004) 12 *International Journal of Children's Rights* 105.
[188] P Ward 'Family Law in Ireland: Family Law Issues in the Superior Courts' in A Bainham (ed) *The International Survey of Family Law: 2001 Edition* (2001) 147 at 147-51.
[189] Ibid at 150.
[190] Ibid.

granted an injunction compelling the minister of education not to extend the timeframe for completing high support secure care units urgently needed for certain children.[192]

The fact that it may be necessary to take a robust approach involving direct sanctions against individual officials at high levels of government once again supports the argument that South African children's courts require an enhanced status and independent management structure.[193] As mere inferior courts within the magisterial system they may find it difficult to successfully follow the vigorous example of the Irish high court in compelling services for children. What would also strengthen their hand in dealing with recalcitrant state officials or agents is a legislative deadline for the implementation of their orders. For example, under r 37 of the West Virginia 'Rules of Procedure for Child Abuse and Neglect Proceedings'[194] welfare must prepare a family case plan for the implementation of court ordered services within thirty days.

It is noteworthy that the sanctions provided in the 2005 Act are at opposite extremes. On the one hand it allows for the relatively gentle compliance mechanisms of prohibitions of misconduct or threats of removal of children. At the other end of the spectrum it provides for contempt of court or criminal penalties -and potentially against even top governmental officials acting *ex officio*. What appears to be missing is an intermediate power simply to award delictual damages. As has been mentioned s 45(1) provides very broadly that children's courts 'may adjudicate any matter involving' inter alia, care, protection and support of children. And it will be remembered that s 156(1) generally permits them to 'make any order which is in the best interests' of a child who is the subject of proceedings. This could be interpreted as allowing for certain delictual claims and damages awards on behalf of children. But as has been said previously it is unlikely that children's courts as creatures of statute will choose to take on jurisdictional

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[191] [2000] 2 ILRM 321 accessed at <http://www.bailii.org/ie/cases/IEHC/2000/21.html>.

[192] See further Ward (2001) op cit note 188 at 148. For an evaluation of subsequent Irish supreme court judgments when the *T.D.* case was taken on appeal, see C Breen 'Protecting the Rights of the Non-Offending Child in Ireland: Balancing State Rights with State Obligations' (2004) 12 *International Journal of Children's Rights* 379 at 384-86.

[193] See parts 6.2.4 & 6.3, above.

[194] Supra note 158.

powers not expressly described. And what would count against such a broad interpretation is that in finalising the 2005 Act the legislature chose not to retain wording expressly allowing for delictual damages proposed by the South African law commission.[195]

The fact that the legislature appears to be against a damages award capability raises the question of whether children's courts ought to have one. An argument contra is that our existing law of delict already allows for bringing care related delictual actions in ordinary civil courts. But in reply it may be contended that the model of a broadly-empowered children's court envisaged in the 2005 Act logically requires an inclusion of delictual jurisdiction. If children's courts are to become repositories of expertise on care-related matters it would be convenient and cost-effective for them to deal also with related questions of compensation. This would avoid the need for vulnerable family members, including children, having to describe what may be traumatic events in testimony before another court in different proceedings.

It may be suggested that a power to award damages would complete the armoury of children's court remedies by allowing for additional sanctions against both officials and private individuals. And they are better placed than other courts to provide care related compensation. In our over-burdened child protection system many children are receiving relatively poor-quality alternative care. It is essential that if a delictual claim is brought on behalf of such a child it is dealt with by a court which is sufficiently knowledgeable to be able to take into account the local resources available. Rather than automatically issuing damages based upon an ideal standard of care it should have sufficient familiarity with available care facilities and services to be able to compare what was provided for the child in the instant case with what is available to others similarly placed.

Whilst it is appropriate that persons in the care system who neglect or abuse children be exposed to delictual claims our courts must be able to strike a proper balance.

[195] Clauses 58(w) and 59(k) of the 2002 draft Children's Bill provided, respectively, for delictual claims and damages awards: see South African Law Commission (2003) op cit note 7 at part 3 pp70 & 72.

Harding has argued that welfare agencies should have some immunity from damages because of their budgetary constraints.[196] However, she also rightly states that this principle must not be taken too far because the existence of a real 'fear of lawsuits and money damages' usefully motivates agencies to work more efficiently on behalf of children and their families.[197]

That there is a need for such motivation is clear. In England, *X v Bedfordshire County Council and Others*[198] arose because of gross neglect at a residential facility. Young children had been left in filthy conditions where, for example, faeces and urine were not regularly cleaned up. Also illuminating is the facts of the English case of *W v Essex County Council*.[199] Here, foster parents who had specifically requested a foster child who was not a sexual abuser sued a local authority after they were given a foster child who sexually abused their three daughters.[200] Klein has argued that experience in the US shows very clearly that tort actions can play a vital part in curbing maltreatment of children in residential care situations.[201] From a Canadian perspective, Freymond has drawn attention to the fact that it may be necessary to allow for liability of managers of social workers where children die because of grossly negligent failures to remove them.[202] As has been noted in part 7.4.1 above it would also be useful for children's courts to be able to impose damages on social workers who out of laziness apply emergency procedure shortcuts to remove children in situations they are aware are not emergencies.

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[196] Harding (2000-2001) op cit note 151 at 920.
[197] Ibid.
[198] [1995] 2 FLR 276.
[199] [1997] 2 FLR 535.
[200] For a discussion of the *Bedfordshire County* and *Essex County* cases and an analysis of the impact of the European court in the sphere of care-related delictual actions see CM Lyon 'Child Protection in the Civil Law' in K Wilson & A James (eds) *The Child Protection Handbook* (2002) 191 at 233-34.
[201] SJ Klein 'Protecting the Rights of Foster Children: Suing under § 1983 To Enforce Federal Child Welfare Law' (2005) 26 *Cardozo LR* 2611 at 2654.
[202] N Freymond 'Using Intermediary Structures to Support Families: An International Comparison of Practice in Child Protection' (2001) 2. Accessed at the Canadian Partnerships for Children and Families Project website: <www.wlu.ca./pcfproject>.

It may be concluded that our legislature should have followed the law commission's recommendation by expressly including delictual jurisdiction for children's courts. From the wording of the sanctions that were included in the 2005 Act it is clear that parliament was particularly concerned to address the problem of failures to implement children's court orders. It is illogical that, although contempt of court and even criminal liability provisions were included, the option of compensatory damages was discarded. It is true that there may be difficult ethical concerns where care agencies fail because of a lack of resources or children bring damages claims against parents. But as a means of encouraging efficiency in child care and protection services they should nevertheless in the light of experience in other systems have been included. Since children's court magistrates have in any event been very firmly cast into the role of care specialists it would be cost-effective (and as already noted less traumatic for claimants) to allow children's courts rather than other courts of first instance to adjudicate care or protection related delictual claims.

8.5 Conclusion

It is clear that the 2005 Act has advanced our law on care case dispositions in three significant ways. Most importantly, it has provided for a far greater variety of children's court remedies than any previous South African legislation. This means that it will be more possible to shape outcomes to fit the needs of individual children and their families. Secondly, the orientation of children's courts has been transformed. As opposed to merely deciding between a few limited forms of mainly removal placements for children, they now have the more constructive task of considering whether an allocation of suitable family services resources will enable a child to remain with her family. And thirdly, instead of being obliged to stand helplessly by when their remedies are ignored or mismanaged, they have been empowered to monitor and even enforce their orders. As has been stated, our children's courts are no longer paper tigers.

Although children's courts are now poised to play a far more important role in supporting children than ever before, the legislature's new vision for them has been

somewhat imperfectly realized in the 2005 Act. As shown in part 8.2 the dispensation for grounds indicative of children requiring mandatory alternative care is problematic. Of particular concern is that proof of grounds can be entirely dispensed with in many instances. Where children's courts propose to issue any of the wide range of s 46(1) orders proof of a ground is not a prerequisite. But if no ground is proved, children's court decisions will be highly vulnerable to challenges based on constitutional rights to fair proceedings and due protection of children's right to family care. This danger will be even greater if children's courts choose to utilise the extreme power accorded to them in s 156(4) of applying mandatory alternative care measures (except undefined 'placement orders') to family members even in cases where they have specifically found children *not* to be in need of care and protection. Aside from failing on the criterion of balancing protection and children's right to family care, uncertainty about when grounds will be required causes the Act to fall short also on that of user-friendliness in wording.

Another basic deficiency which relates to grounds results from the decision to include definitions of abuse, sexual abuse, neglect, exploitation and commercial sexual exploitation in s 1 of the 2005 Act. As has been shown in part 8.2.2, although they have been provided for general guidance in interpreting the Act, they limit the reach of the main grounds for finding children to be in need of alternative care. This occurs because of the inclusion of the defined terms or similar ones where the grounds are listed in s 150(1). It has been demonstrated with reference to international literature that using definitions which restrict grounds is problematic. There is no consensus on how harm-related concepts such as neglect and abuse should be defined. And attaching definitions to grounds for alternative care measures opens possibilities for technical defences that may prevent them from being applied on behalf of children who require interventions.

A further danger -particularly with perpetrator or situation oriented definitions as included in s 1- is that they tend to fix the attention of courts narrowly on specific instances requiring fault attribution. This is likely to lead them astray because grounds-related factors are more typically accretional over time. And an overemphasis on fault distracts courts from giving due attention to contextual factors such as poverty or a lack of social

services. Also, as was discovered under the 1983 Act in its original form, it stigmatises caregivers in ways that may be counterproductive.

Aside from fundamental deficiencies in the way that grounds have been provided for, dispositive remedies have also not been ideally formulated in the 2005 Act. Although having two main lists of children's court orders in s 46(1) and s 156(1) connotes different purposes a cross-reference to s 46(1) in s 156(1) expressly indicates a degree of interchangeability. Confusion about when to utilise s 46(1) or else s 156(1) orders is increased because there is also parallelism. They include pairs of very similar orders with no indication of the reasons for the overlap. An interpretative difficulty which thus arises is whether choices can always be freely made between the pairs where they contain slightly different requirements. The failure to distinguish logically between the main two sets of remedies again causes the Act to fail on the criterion of clarity to enable user-friendliness. Even members of the legal profession seeking rhyme or reason may find its blurred scheme for orders perplexing. The confusingly-similar remedies in s 46 and s 156 need to be integrated and proper direction given on when each of these sections should be utilised.

If a substantial transformation in the dispositive functions of children's courts is to be successfully achieved it will also be essential to develop our procedural law. In part 8.4 it has been shown that the key to doing this is to divide proceedings into logical stages. Firstly, a basic division needs to be made between proof of grounds and ascertainment of care remedies phases. Unfortunately, the 2005 Act in its present form does not facilitate this. In addition to providing primary grounds for finding a child to be in need of care and protection in s 150(1) it links most of the remedies provided in s 156(1) to further sub-grounds. This complicates dispositive proceedings and introduces circularity by forcing children's courts to return to the question of grounds at a stage when they are ready to decide upon outcomes. As has been contended, the benefits to be gained would justify amending the Act to allow for a simpler approach in which grounds and remedies are separated.

In cases where caregivers have the potential for sufficient positive change children's courts should be enabled to interpose an intermediate 'improvement period' between grounds and final disposition stages as in US law. Whilst the 2005 Act does not expressly allow for this, its new provisions on setting timeframes and monitoring provide a suitable context. And the proactive family services remedies it contains will often best be implemented under a condition of fulfilment of preset goals that will need to be achieved within a fixed time period. Improvement periods should thus be established in our law by means of a procedural rule which could be formulated by making reference to US provisions.

As recommended in part 8.4.3 children's courts should be required to evaluate achievements during improvement periods at subsequent review hearings. It has been shown that these should not merely be used to evaluate the progress of caregivers. In order to counter the currently widespread problem of inadequate implementation of children's court orders by employees or representatives of the state acting *ex officio* presiding magistrates should be expressly directed also to evaluate the contributions of these participants. As a final leg of dispositive proceedings, review hearings would be an ideal mechanism for adjusting care measures in the light of progress made by all concerned.

As suggested in part 8.4.4, the proposed review hearings would also provide opportunities for children's courts to employ the new enforcement measures with which the 2005 Act has furnished them. It has been shown by means of a comparative review that having a repertoire of different grades of coercive powers can be useful for courts which specialise in care matters. Even the extreme of criminal penalties as provided for in s45(2) of the 2005 Act has its place as a response to blatant disregard of responsibilities which leads to serious harm for children. However, despite the fact that there is precedent in other systems, criminal penalties attendant on non-implementation of children's court orders should only in rare instances be applied against caregivers. Dangers of counterproductive alienation or unfairly punishing parents who are primarily victims of poverty or a lack of social services are reasons why children's court magistrates should be directed to exercise caution in implementing their new sentencing powers.

It has been shown that a gap in the 2005 Act is the omission of jurisdiction for children's courts to award delictual damages. Compensatory awards are a less extreme means than criminal penalties for, inter alia, encouraging proper implementation of care orders. Their availability at children's courts would assist some children who have been harmed by enabling them to provide testimony which they may find traumatic before only one court. And they would accord perfectly with the legislature's new vision of children's courts as powerful multitask fora with specialist expertise in care and protection disputes.

In conclusion, the evaluation of the new approach to dispositive proceedings in this chapter reveals the 2005 Act to be something of a flawed diamond. By comparison with earlier South African legislation it undoubtedly ushers in considerable advances. But as has been demonstrated -and perhaps understandably given the extent of the historical gap which it attempts to overcome- it contains fundamental structural deficiencies and has some serious *lacunae*. Two related final points need to be made. Even more than with aspects considered in previous chapters, the demanding dispositive tasks set for presiding officers in the 2005 Act have significant training implications. Choosing the most appropriate proactive family services remedies, evaluating whether children should be left in child-headed households, assessing the desirability of cluster foster care, selecting from amongst different residential programs at child and youth care centres, monitoring the progress of children and caregivers, and sentencing social workers or government officials who fail to implement children's court orders properly is not a group of tasks which generalist magistrates can be expected to perform efficiently. The recommendations made earlier about the urgent need to establish children's courts as a separate network and improve their management and status are strongly supported by the escalated demands which the disposition provisions of the Act will impose.

CHAPTER 9
CONCLUSION AND SUMMARY OF MAIN FINDINGS

9.1 Introduction

A general finding in this thesis is that our law applicable to children's court services in care cases is in many important respects poorly developed. This has emerged from the application of the primary evaluative criteria described in part 1.3.2. For convenience, these may be briefly restated as follows:

- Removals of children from their families must only be permitted as a measure of last resort -and removals to large residential facilities must be treated as the least desirable of all.
- Constructive nurturing of children by parents, within their families or within their communities must receive the maximum support which is feasibly available.
- An appropriate system consistently produces careful assessment and balancing of the care and protection needs of children whose domestic situations require consideration. This entails that mandatory measures proposed by welfare must be subjected to rigorous and independent evaluation at fair hearings guided by well-developed procedural law.
- Communication about care -and particularly by children themselves and primary caregivers- must be encouraged and fully taken into account so that appropriate voices are heard.
- An effective system requires that legal representatives and court presiding officers be efficiently utilised -and especially for facilitating meaningful communication by the persons most directly involved in care cases.
- Relevant law and procedures must be sufficiently clear and straightforward to attain transparency and user-friendliness for mature children and other nonlawyers.
- Care solutions must be readily accessible as an incremental, monitored and flexible process; and there must be an adequate systemic capacity for responding timeously to changes in the situations of children.

- To protect children and encourage effective implementation of alternative care measures there must be real accountability for persons involved.

The analysis in chapter 2 has provided a context by revealing historical causes for retardation in the evolution of our system as measured against these criteria. Throughout the rest of the thesis modern local conditions as experienced by participants at children's court proceedings have been considered. Our underpinning legislative framework has been compared with international standards and dispensations for courts in developed foreign national systems. It has consistently emerged that our law tends to fail in providing adequately for authoritative decision-making by children's courts on behalf of children in need of alternative care and their families.

At the level of detail, the nature of key deficiencies in our law and best means of addressing them have been explored. It has been demonstrated that our children's courts urgently need much better guidance, particularly in relation to procedures. They also require improved status, independence and scope for specialization. With respect to staff, better training for presiding officers and the addition of a middle ranking support staff member are needed. It has been shown that children's courts are underutilised and need to provide a considerably wider range of services. The 2005 Act in some respects begins the much-needed process of modernisation of our care legislation. However, although it addresses some of the fundamental problems that reduce the effectiveness of children's courts, parts of it require reconsideration or supplementation.

The rest of this chapter describes the main findings of the thesis in more detail. It follows the sequence of the substantive chapters. In part 9.1 it assesses the interaction of the most important historical influences which affected children's court services. In part 9.2 the primary reasons in favour of a continuing court function in care cases, despite the difficulties experienced in our system, are put forward. The recommendations on the best model for a link between children's courts and ADR processes are also summarised. Part 9.3 contains the main findings on assisting direct communication at children's court hearings. It describes the recommendations on legislative provisions and practical

techniques for facilitating such participation. Part 9.4 covers appropriate functions and selection methods for legal representatives. Part 9.5 summarises the reforms needed to improve the role of presiding officers in children's courts. The proposals for better legislative provisions covering preliminary and interim care hearings are described in part 9.6. And the strengths and weaknesses of the new approach to dispositive proceedings in the 2005 Act are summarised in part 9.7. Part 9.8 contains some closing remarks and suggestions on avenues for further research.

9.2 Historical Reasons for Underdevelopment

It has been shown in chapter 2 that the most significant historical influences which shaped South African care legislation and children's courts were disparate in their effects and sometimes even camouflaged. In understanding our current limitations it is firstly important to appreciate that in the pre-democratic period the politically dominant white group was fixated by two concerns. These were fears about children of colour from the under-classes flooding urban areas and secondly an earnest desire to provide the best possible resources for nurturing 'European' children in need of alternative care. The idea that lower courts could play a key part in addressing both these concerns can be traced back to English colonial influences in the 19th century. As has been shown in part 2.2 the most important measures received from England were the indiscriminate use of juvenile courts for both care and crime cases involving lower-class or 'difficult' children and large, regimented institutions for containing them.

The second aim of favouring children viewed as European was disguised throughout most of the 20th century because of political concerns and a realisation that the edges of the European group could not be legally defined with any precision. It gave rise to constant modernisation which rendered South African care legislation relatively advanced in the period 1913-1960. Of particular significance were the introduction of court-ordered care grants in 1921 and the unofficial creation of the first children's courts in 1926.

Although their title was copied from Australia the children's courts represented a major South African innovation because they were specialised forums designed only to deal with care matters and the reallocation of parental responsibilities. Until the 1950s their effectiveness was enhanced by frequently utilising dedicated presiding magistrates. Available evidence indicates that these officers were generally successful in facilitating amicable proceedings at which the voices of vulnerable family members such as mothers and even children could be directly heard.

Despite their undoubted strengths, for a balanced appreciation it is essential to take into account serious limitations which adversely affected the contribution of the children's courts. Although they were partly the result of a liberal initiative aimed at helping all children, this was subverted. During the first three and a half decades of their existence it was in practice mainly white children who appeared before them. They thus supported a covert governmental racial policy by serving as gatekeepers guarding access to the best available alternative care resources. Their primary function was to assist in ensuring that these were reserved for children regarded as 'Europeans'.

With the introduction of the Children's Act 33/1960 the nationalist government made a significant change in the work of children's courts. This occurred as part of an intensification of its apartheid program. It required them to hear cases involving children from all population groups. Despite rhetoric to the contrary this was only ostensibly for the purpose of care support. Instead of their previously limited role in ordering grants and placements mainly on behalf of white children, children's courts were now much more obviously and extensively used to promote racial segregation. They were to do so by ensuring that all mandatory alternative care placements for black, Asian, so-called coloured and especially white children were 'correct' in terms of racial matching to substitute families or residential facilities.

As has been shown it was thought by the nationalist government that dispensing with the covert approach to discrimination in care services had become juridically feasible by 1960. Requiring children's courts to assist with racial classification and matching of

children of colour was considered practicable because population classification criteria had been developed in 1950. And the supreme court had shown over the subsequent decade that it could generally be relied upon to oversee an application of these that was in accordance with nationalist policy.

Increasing resistance by activist social workers helped ensure that the aim of rendering racial appearance the primary consideration in all care cases was never fully achieved. However, the use of children's courts to enforce racial matching in child placements caused great hardship. Aside from direct psychological harm to children and caregivers from whom children were removed, the legacy of apartheid is to be seen in a failure to maintain the previous development of both our care legislation and personnel resources in the children's courts themselves. At the end of the 20th century the democratic South African government inherited both an inadequate legal framework and children's courts where staff had been trained to compromise the best interests of the child principle. This situation was clearly one which required extensive reform measures.

The promulgation of the 2005 Act on 19 June 2006 was a historically significant attempt by the democratic government to respond appropriately. The wording of the Act reveals it clearly as a major attempt make up for lost time by jettisoning the baggage of the past and radically modernising our law. A key decision was taken to retain the children's courts. This was despite their chequered history and an expressed intention to eventually introduce family courts. It is apparent from the Act that parliament even aimed to extend children's court services. The appropriateness and sufficiency of this extension has been critically evaluated with reference to care cases in subsequent chapters of the thesis.

9.3 Weighing the Respective Merits of Courts and ADR

In view of their relative ineffectiveness in providing for the majority of South African children in the 20th century and also the recent emergence of anti-legalistic approaches and a greater reliance upon ADR in some developed foreign systems, the appropriateness of the key decision in the 2005 Act to retain children's courts as a crucial

component in the South African child protection system has been investigated in chapter 3. Upon the basis of mainly comparative research it has been shown that the fundamentals of the new model put forward in the 2005 Act -requiring a system in which the children's courts will in future decide whether to instigate ADR, must oversee its implementation and subsequently consider whether to rely upon any extracurial resolutions achieved during it- are sound. The criterion of optimum means for hearing of the voices of vulnerable children and caregivers supports this approach.

Experience in other jurisdictions indicates that a tandem system which pairs courts and ADR fora is potentially effective for care cases. An advantage of this approach as taken in our 2005 Act is that it can be used to draw proportionately upon the differing strengths of both ADR and courts according to the needs of the parties in any particular case. The decision by the legislature specifically to establish courts as the authoritative partners in a future tandem system was also correct. Children's courts can play a valuable role in the child protection system as managers and also help to develop authoritative case precedents. These functions are essential as part of an all-out effort to overcome the past and create a modern system of care law. The use of courts as ADR directors is also indicated by the primary evaluative criteria requiring systemic oversight mechanisms and ready access to forums which offer fair processes.

Although the comparisons and analysis in chapter 3 lead to a firm conclusion in support of the 2005 Act's children's court-driven model for the provision of ADR it has three serious deficiencies which require amendments. The possibility of forced ADR against the will of participants and utilisation of untrained traditional leaders such as chiefs and headmen are not appropriate given the vulnerability of most families involved in care cases. Thirdly, a failure to provide for uniform national standards preserving a high degree of confidentiality for communications made during ADR processes will further tend to undermine their effectiveness.

Aside from the aspects which require legislative amendments it has been shown that there are two other shortcomings in the scheme for ADR established in the 2005 Act.

These are less serious because they simply require the formulation and publication of supplementary procedural rules for children's courts and guidelines for ADR participants. As noted in part 3.6 investigative social workers must be required to make recommendations concerning the need for and most appropriate form of ADR in their pre-hearing reports. Secondly, children's courts themselves and all parties must be accorded a power to instigate special court hearings for considering the appropriateness and also planning the initiation of ADR.

Although s 49(2) of the 2005 Act provides appropriate threshold criteria to guide children's courts on whether to instigate ADR, they need secondary criteria to assist them in deciding what form it should take if it is indicated. It has been shown that five categories of ADR have been extensively used in developed systems in recent years. The strengths-and-weaknesses analysis of these undertaken in part 3.3 indicates that, whilst our children's courts will need to retain a realm of discretion, useful guidelines which could greatly assist them in choosing the best form of ADR in each case could certainly be developed.

An important question is whether the child who is the subject of proceedings should participate directly in ADR. Section 49(2)(b) of the 2005 Act contains a general requirement that children's courts must consider whether the child is able to participate beneficially in any ADR that might be instigated. It has been concluded in part 3.6 that this is in principle appropriate as a threshold requirement. It facilitates the hearing of voices of children and is therefore in accordance with optimal support for child-participation.

However, children's courts can hardly be expected to decide whether children should participate in ADR if they are not, once again, provided with at least some criteria to guide them. Drawing upon experience elsewhere it has been shown that a set of these could easily be formulated for use in South Africa. It has further been recommended that where the proposed guidelines indicate that it will not be in the best interests of a child to participate directly in ADR it must be expressly required that possibilities for indirect

involvement and feedback for the child be explored by ADR facilitators. Two further essential components need to be added to the ADR scheme in the 2005 Act. These are firstly the training requirements needed to render facilitators eligible for court appointment. And secondly, a best practice framework is required to show in broad outline what steps facilitators must normally follow with any particular form of ADR and in what sequence.

In relation to deficiencies in the scheme for ADR in the 2005 Act a serious concern is that the legislature may not have sufficiently appreciated the human resources that children's courts will require. The analysis in part 3.6 shows clearly that the ADR provisions will if properly implemented significantly alter and extend the range of work of staff at these courts. It has been noted, for example, that they will need to develop considerable cross-disciplinary expertise if they are to manage and monitor ADR processes involving highly vulnerable family members. Requisite staff capabilities will therefore be essential.

On the question of staff, it is unfortunate that the office of children's court assistant as previously provided for under the 1983 Act appears set for termination because it is not mentioned in the 2005 Act. This middle-ranking officer would have been ideally placed to assist (similarly to Australian children's court registrars) with some of the new ADR-related responsibilities of children's courts. The decision to terminate the office of this functionary suggests an unrealistic expectation on the part of the legislature that children's courts are to do more with less. When the ADR provisions come into force it would be most unfortunate, and result in a subversion of the clear purposes of the Act, if children's courts were to be unable to exercise their new managerial functions properly. Without sufficient resources there is a danger that they may be reduced to consigning a large proportion of cases to any ADR available and then merely rubberstamping settlement documents put before them.

In conclusion on ADR, it has been demonstrated that a broadly correct approach which could potentially enable children's courts to take on a valuable managerial role has

been established in the 2005 Act. However, if these courts are to interact effectively with ADR facilitators the Act will need to be amended. It will also need to be supplemented with detailed rules and guidelines. In relation to both ADR facilitators and children's court staff the new interdisciplinary approach creates training and other human-resource imperatives that cannot be ignored if it is to be implemented properly.

9.4 Hearing the Appropriate Voices: Facilitating Direct Participation at Proceedings

Whilst in chapter 3 the focus was on extra-curial processes intended to be managed by children's courts in chapter 4 some aspects of direct participation in children's court proceedings themselves are considered. This begins a discussion which is followed up in subsequent chapters on different means for achieving effective and relevant communication at hearings. A crucial initial question considered in part 4.2 is whether direct court involvement by children who are the subject of care proceedings should be encouraged. It is shown that available South African research data and anecdotal accounts by practitioners suggest that in recent decades such involvement has generally not been strongly promoted especially in rural jurisdictions.

The issue of the desirability of direct child involvement has been resolved by weighing up arguments for and against, and also by drawing on local and international research. It is noted firstly in part 4.2.2 that some important new child-development related findings are beginning to emerge. These undermine traditional protectionist views that children must never be directly exposed to care proceedings at court. They indicate that the need for self-expression and the advocacy skills of many children who require alternative care are stronger than previously thought. And there are other findings which show that giving and hearing testimony in care cases is within the capability and may even be experienced as positive by a significant proportion of children. The traditional view that children should not be directly involved in care proceedings is further eroded by children's rights arguments. Important amongst these is the assertion that recognition of children as individuals will be advanced by facilitation of direct self-expression at care proceedings.

Although it must be conceded that many children will be too young, psychologically vulnerable or otherwise incapable of direct involvement it is clear that an ideal model for improving the future operation of South African children's courts requires promotion of opportunities for children to appear and participate effectively. In light of this, it has been suggested that the creation in the 2005 Children's Act of new rights for children to approach courts and participate at proceedings are entirely appropriate.

Although at the level of fundamental principle the 2005 Act adopts a correct approach to child involvement it has been shown in part 4.2.5 that there are deficiencies in regard to important details. A requirement in s 58 that permission must be sought from children's court magistrates before addressing them 'in argument' clumsily inserts technical and adversarial elements into what should be an entirely supportive and relatively informal relationship between adjudicators and children.

In s 61(1)(b) the test of whether a child should be expected to express a 'view or preference' is simply her willingness. This is misconceived because it does not signal that presiding officers should try to protect children from taking on burdens of choice (for example, choosing between parents) which are really those of the court. A further weakness is insufficient express provision for sheltered participation methods. This is a serious deficiency because they are often particularly appropriate in care cases. Yet another omission is a failure to provide cautionary guidelines for exercising the extremely broad powers which adjudicators are accorded for compelling participation by unwilling children.

Aside from the provisions on direct participation by children another measure for increasing participation in the 2005 Act is the allocation, for the first time in our law, of party status to investigative welfare agencies. Although supplementary regulations are again required this represents on balance another important step forward. It has been shown that the main resultant difficulty which can be foreseen is a more constrained, legalistic approach in agency work resulting from increased exposure to costs liability. However, this problem could fairly easily be addressed. It is essential that, just as has

occurred in some other systems, non-governmental agencies have their party status altered so that they appear in children's courts merely as representatives of the state. Also, a regulation is required which indicates that agencies may not reduce services for families purely on the basis that court proceedings are anticipated or in train. Further regulations should expressly provide agencies with at least some access to free legal representation from state entities such as the family advocate and legal aid board.

If the proposed refinements in the role of agencies are implemented they will be in a better position to take children's court decisions to higher courts on appeal or review. This is potentially significant because most family members involved in care cases lack the resources to do so. As a result, in recent decades relatively few children's court cases have reached higher courts. The unfortunate situation of children's courts functioning with almost no monitoring is one of the ways in which our system fails on the criterion of sufficient oversight. This aspect could be improved if legal costs and representation resources for agencies are addressed as has been recommended. Aside from helping to render children's court more accountable and thus improving their standards of practice, increased appeals and reviews would obviously assist with the development of our law.

The final question addressed in chapter 4 is which persons besides the child who is the subject of the proceedings should be eligible to receive private party status in children's court care cases. As a first step in resolving this two contrary approaches have been evaluated. These involve, respectively, either facilitating or restricting the presence of private parties at hearings. Although the former approach has been endorsed by some English commentators, by the South African law commission and in the 2005 Children's Act it has been shown that it is inappropriate for our system. It has been noted that observation data from our own and some other systems indicate that a continuous presence of hostile or numerous satellite parties with tangential interests is contraindicated. Not only do proceedings tend to be delayed and rendered more adversarial but, crucially, the core role players -children and their current caregivers- do not participate effectively because they feel intimidated. The criterion of hearing the most appropriate voices thus reveals that

our children's courts need to be supplied with means for controlling the number of private parties.

In relation to how private-party applications ought to be limited it has been suggested in part 4.3.2.2 that automatic party status should not have been accorded in the 2005 Act to all biological parents and all prospective foster or adoptive parents. Experience locally and in some foreign systems shows that there are non-custodian parents who value party status only for opportunities it brings to obstruct proceedings or continue a pattern of intimidation of the child or a custodian. The best approach is therefore one in which parents who do not currently have lawful custody or access responsibilities do not gain automatic party status. Instead, they should have to approach a children's court to make out a case for party status. The same should apply to prospective foster and adoptive parents. In relation to these it has been noted that if they wish to become parties this will usually be for the purpose of discrediting existing caregivers. They are therefore likely to increase levels of hostility and should certainly not have been provided in s 1 of the Act with a blanket right to automatic party status.

In further support of the contention in chapter 4 that children's courts should be able to screen many more applications than allowed for in the 2005 Act it has been suggested that workable criteria can easily be provided. The primary ground for discretionary private party status should be whether the applicant has provided substantial care for the child in the past. This would provide a much better predictor of constructive use of party status than the happenstance of biological parenthood or claims of willingness to provide future foster or adoptive care. Two additional exclusionary subcriteria should be whether the applicant (based on previous behaviour) would be likely to intimidate the child or her present caregiver or else merely duplicates the position of an existing party.

In part 4.3.2.3 it has been shown that the case for taking a restrictive approach to private party status applications is strengthened by yet another significant new feature of the 2005 Children's Act -the creation of the concept of participant status. As has been demonstrated this has been found to be effective in some foreign systems. It creates

greater flexibility by allowing for partial involvement rights which stand between the opposite extremes of full party and mere witness status. Unfortunately, however, inadequate wording in s 58 of the 2005 Act has resulted in a failure to provide sufficient differentiation between the categories of full party and participant. This section indicates that the primary distinguishing right for participants is that of adducing evidence. This creates ambiguity between the position of participants and mere witnesses. It would be better to direct that the distinguishing right for participants is that of addressing the court, with the possibility of requesting additional forms of communication during proceedings. Because of their valuable potential for enabling children's courts to prevent disproportionate involvement by satellite role players the participant provisions in the Act ought to be refined.

It emerges from the analysis in chapter 4 that, just as with the new ADR oversight responsibilities in the 2005 Act, so too with the in-court direct participation provisions high levels of skill will be needed from children's court staff for effective implementation. In particular, they will require an insightful appreciation of what is appropriate for children at different levels of psychological vulnerability and social development. Their effectiveness will depend upon an ability to make sound on-the-spot decisions about permitted forms of communication and who should be present at different stages of hearings. The Act will thus undoubtedly impose high demands on the competence of particularly magistrates -and the more so if clarification of unclear parts of the Act and more detailed guidance are not provided.

9.5 Optimising the Effectiveness of Legal Representation

What could greatly assist presiding officers in meeting the challenge of effectively implementing the 2005 Act is more frequent appearances by competent lawyers acting on behalf of parties. Limited local data and experience in other systems indicates that in many care cases legal representatives can provide valuable support for vulnerable family members and welfare representatives. In chapter 5 two fundamental questions have been

considered. These are what the basic function of lawyers should be and how greater levels of effective representation can be achieved.

In relation to the role of lawyers it has been shown that available South African data indicates that in children's court cases they are sometimes ineffective, and even occasionally obstructive, in the achievement of an appropriate outcome. This is not surprising in a system where no specific guidance concerning their functions has ever been provided.[1] It has been argued that such guidance is urgently needed and should take the form of a practice code. It has been shown that there are several such codes for lawyers in other systems that could usefully be drawn upon when formulating one for children's court work in South Africa.

With reference to local conditions and as a framework for the proposed code it has been recommended in part 5.3 that a primary orientation for lawyers must be established. The best model for South African care cases would be one which utilises the traditional strengths of lawyers. They should as in other matters be required to advocate versions of the evidence which sufficiently capable clients wish to put forward. It has been shown that such a client-directed approach can be rendered fully compatible with the paramountcy of the best interests of the child as established in s 28(2) of the Constitution. A lawyer representing a child who is the subject of care proceedings would support that child's best interests by ensuring that her voice is properly heard so that her version of events has sufficient impact in court. This conduces to a full recognition of children as human beings with fundamental participatory rights as established in art 12 of the CRC and art 4(2) of the ACC.

Generally, legal representatives who appear for private parties should be directed in the proposed code to concentrate on asserting their clients' evidence, regardless of the age of the client. It will be important to include a provision which expressly frees such lawyers from any expectation that they must undertake a dual role in both advocating for

[1] As noted in part 6.2.1 throughout much of the existence of our children's courts the only legislative direction has been to the effect that lawyers should function in the same way as in civil magistrates' courts, but with an unspecified degree of discretion to modify their role.

clients and assisting children's courts to establish what is objectively in the best interests of the child. It has been noted that recent experience in other systems indicates that this is impracticable because it tends to impose contradictory requirements. Only in situations where a private party is incapable of providing relevant evidence should her lawyer be expected to promote what is in her best interests from an objective standpoint.

In relation to more detailed aspects, because the factor of client vulnerability is pervasive across all family members in care cases the proposed practice code should provide similar guidance for lawyers representing clients with diminished capacity, regardless of whether they are children or adults. American codes provide some valuable wording on precisely how lawyers should interact with such clients both in and outside the courtroom. By drawing upon these with due consideration for local conditions it would not be difficult to provide detailed directions on how South African lawyers should function when representing private parties. In relation to client confidentiality one exception which has been widely recognised in many systems arises where lawyers receive information indicative of serious danger of harm to the child or another person. The proposed South African code should therefore expressly require that revelations in this regard must immediately be revealed by the lawyer concerned to the court.

The task of asserting what is in the best interests of the child from a neutral standpoint should be that of the investigative welfare agency. And with the new allocation of party-status to agencies in the 2005 Act it will be possible in future to provide them with their own legal representatives where there is a need for assistance in such assertion. If children's court adjudicators are expressly permitted to perform an inquisitorial function (as proposed in more detail in chapter 6) combined efforts by agencies and adjudicators will ensure that a quite sufficient proportion of resources is available for establishing what is in the child's best interests from an objective perspective.

In relation to appropriate direction on the role of lawyers as investigated in chapter 5 it can be concluded that it is clear that a South African guide indicative of the main functions of legal representatives in care cases could easily be developed. If this were

given official status and made available to lawyers and children's court staff it would remove much of the present uncertainty. And it would therefore go a long way towards creating a better overall standard of legal representation.

On the second problem of insufficient availability of lawyers, the best way to increase the proportion of cases in which legal representation is provided would be through the development of an improved scheme for state-financed legal representation. This is because the pervasive factor of poverty will obviously continue to ensure that most private parties and even many NGO welfare agencies will for the foreseeable future be unable to afford the fees of lawyers. However, governmental financial resources are clearly also limited. It is significant that in 1998 a detailed set of grounds for the provision of state-financed legal representatives for children was published in terms of reg 4A under the 1983 Act; however, concerns that it would prove too expensive led to a situation in which it was never implemented.

It has been shown in part 5.4 that it is possible to create a financially sustainable scheme for subsidised representation in children's court care cases. An essential starting point would be two threshold criteria which must be applied to all applications. These should be the current availability of sufficient state funds (based on a set scale) to pay for the representation sought in a particular case and a sufficiently skilled lawyer who is locally available to undertake it. Where these two conditions apply, secondary guidelines should then be applied to ensure that lawyers tend to be appointed to the parties who can derive the greatest benefit from their services.

It would be essential to utilise secondary guidelines rather than actual legal grounds because the latter would subject the state to increasing numbers of applications by establishing binding precedents. If the snowballing problem produced by uncontrollably expanding precedents can be avoided it will always remain possible to keep the number of cases for which representation is provided within available resource limitations. The evaluation in part 5.4.1 has shown that, by drawing on previous South African attempts and foreign sources, it would be quite feasible to draft at least a starting list of appropriate

secondary guidelines that would limit the granting of applications to parties likely to derive considerable benefit. Contrary to the narrow approach taken in reg 4A of the 1983 Act, not only children but also other parties must be rendered eligible to apply.

As further suggested in part 5.4.1 the proposed secondary guidelines for subsidised representation should be worded to target parties with significant participatory disadvantages that could be substantially overcome with the help of a lawyer. The applicant pool which needs to be created is thus one where the disadvantage is neither so extreme that it cannot be so addressed nor so minimal that utilisation of less expensive solutions -such as allowing sheltered participation at court- would suffice.

Local and international experience suggests that in an initial promulgation the secondary guidelines ought to be based on proof of significant language or cultural barriers, disability, psychological trauma, unusual case complexity of a kind which prevents the applicant's ability to communicate relevant evidence, or extreme disparity produced by the overwhelming assertiveness of an opposing party. A strength of the proposed guidelines is that they are based on manifestations in affected parties that could be readily recognised by professionals with appropriate training and experience. They are also practicable to implement because, unlike the vague best interests and future substantial injustice tests that have been relied on in our system, they are not entirely dependent upon difficult predictions about the future.

Clearly, the mere publication of threshold criteria and secondary guidelines will not produce cost-effective utilisation of precious state resources. An effective process for applying them must also be developed. It has been suggested in part 5.4.1 that children's court presiding officers will need to play a part. They will often be in a good position to recognise manifestations of disadvantage in parties that are indicative of eligibility for subsidised representation. It has been proposed, however, that they should merely make a prima facie determination and then refer applicants for a final decision elsewhere. This is necessary for three reasons. Firstly, because of their need to remain neutral, prejudging the capabilities of parties by adjudicators should be minimised. Secondly, application of the

criteria and guidelines requires administrative and other assessments inappropriate during court proceedings. Thirdly, the best process would be one which encourages applicants to save time by applying directly to the final decisionmaker before proceedings begin.

In relation to who should take the final decision on state funded representation it has been shown that in some systems application officers based at courts have proved effective. Although in South Africa children's court assistants appointed in terms of the 1983 Act could potentially have been trained for deciding applications, as will be remembered under the 2005 Act this officer has unfortunately been terminated. This contradicts the clear intention in the Act to significantly extend the functions and capabilities of children's courts. However, in the absence of any in-house capability being created in future it has been suggested in part 5.4.2 that family advocates should be empowered to finalise applications for subsidised representation.

In support of utilisation of family advocates is the fact that they already specialise in child-related aspects of certain domestic matters. Much of their work has to do with pre-hearing screening of cases and they operate in teams with social workers called family counsellors. Not only does this mean that they have cross-disciplinary expertise, but further, the social work training of family counsellors would enable them to provide useful input about the applicability of the proposed secondary guidelines.

Although family advocates are in some ways ideal for making final determinations the range of their responsibilities is such that they should not be the only lawyers eligible to actually undertake representation when applications are granted. The opposite extreme of rendering all lawyers eligible is also untenable. Both local and foreign experience indicates that representation in care cases is specialist work. A cost-effective subsidisation scheme must therefore be based on utilisation of a pool of lawyers who have at least a degree of the requisite expertise. In this regard, and drawing on both experience in several foreign systems and the suggestion of the South African law commission in 2002 for the establishment of a roster, it has been recommended in part 5.4.2 that eligibility requirements and inducements need to be developed for state-appointed representatives.

At least initially, training requirements should be relatively modest because of the current extremely low levels of representation. A short workshop course in ADR, basic welfare methodologies and local care services should form a first phase. The second phase should be a set number of hours of observation of children's court proceedings. All family advocates and at least some justice centre lawyers in all jurisdictions should be required to qualify. Although these lawyers would be able to provide free services improved capability would result from also attracting private practitioners with an interest in family litigation. Although there would still be a need for a budget to pay fees, experience elsewhere suggests that if cooperation could be obtained from lawyers' professional associations their members would sometimes be willing to appear *pro bono* as a form of community service.

In relation to the two main problems which currently impede the achievement of significant levels of legal representation and appropriate skills for lawyers it can be concluded that there are grounds for optimism. Guidance on role functions for all lawyers appearing in children's court care cases could easily be developed. And this could certainly be done in a manner that would improve overall quality of services. A financially sustainable scheme for the provision of state-appointed lawyers which would include training and thus further improve standards is also achievable. It would be quite feasible to arrange it to conform flexibly to available resources, reach applicants who would be likely to benefit substantially and draw upon the community-mindedness of private lawyers in a manner that would render it optimally cost-effective. With proper planning then, lawyers could become a much more significant resource. They could play an important part in the effort to establish a system which consistently achieves the best possible outcomes.

9.6 Changing the Role of Presiding Officers

In chapter 6 some basic aspects of the role of adjudicators in care cases and some related procedural issues have been considered. It has been noted that the children's courts have always operated as part of a broader magistrates' courts establishment. Despite this, until the early 1950s the use of dedicated, full-time magistrates facilitated child

participation and assured a degree of independence and specialisation. As noted in part 2.4.2, with the accession to power of the nationalist government a new policy of rotating ordinary magistrates was introduced. A side effect was confusion in procedures as these generalist magistrates attempted to import civil magistrates' court processes with which they were familiar, despite the very different nature of their functions in children's courts.

In the 1965 supreme court case of *Napolitano v Commissioner of Child Welfare, Johannesburg*[2] the appellate division unfortunately squandered an opportunity to provide clear guidance on children's court procedures. In the judgment *a quo*[3] Marais J had set a requirement for adversarial hearings with other representatives of the state besides presiding officers made responsible for eliciting relevant testimony. In the appeal judgment his suggestion of an accusatorial function for magistrates was not rejected. However, a confusingly mixed message was produced by holding that care inquiries could be less formal than civil magistrates' court proceedings, yet children's courts were just as subject to review for procedural irregularities as any other lower court. Not surprisingly, during the next two decades most magistrates responded cautiously by modelling children's court proceedings as closely as possible on those in civil magistrates' courts and proceedings thus remained predominantly adversarial.

Contemporary accounts indicate that the imposition of formal adversarial procedures by magistrates stifled participation by vulnerable family members. It even inhibited social workers because their work methodologies were not based on legal technicalities. A protean recognition of the need for at least some different methods in the children's courts came with the promulgation of s 9(1) of the 1983 Act. This set procedures of civil magistrates' courts as a basic guide for children's courts. But it allowed commissioners to deviate from these '*mutatis mutandis*'. As has been shown the vagueness of this allowance caused considerable confusion about the nature of children's court proceedings that has lasted to the present time.

[2] *Napolitano v Commissioner of Child Welfare, Johannesburg* 1965 (1) SA 742 (AD).
[3] *Napolitano v De Wet, N.O. and Others* 1964 (4) SA 337 (T).

In the face of uncertainty children's court commissioners have become divided into two camps. One group may be termed historical-originalists because they continue to interpret outdated dicta in the *Napolitano* decisions as requiring them to adopt a predominantly accusatorial function as managers of adversarial proceedings. The other group are progressive-individualists who have interpreted the proviso to s 9(1) as setting them free to create their own personally-tailored procedures and role functions.

Local empirical findings and anecdotal accounts of experienced South African practitioners evaluated in part 6.2 show consistently that the bifurcation into two groups of commissioners has produced an undesirable situation. The disagreement about how children's courts should operate has created confusion. Parties and other participants sometimes find it difficult to prepare matters because of uncertainty about what will be expected of them. Difficulties in obtaining access to commissioners, abusive questioning during hearings which may cause trauma, unnecessary delays in completion of cases, insufficient interrogation of the submissions of investigative agencies and ultimately failures to achieve the best possible outcomes for children have all been shown to have arisen from the inadequate procedural dispensation which has subsisted under the 1983 Act.

The evaluation of the 2005 Act as a possible cure for our procedural ills undertaken in part 6.2.4 has unfortunately revealed major shortcomings. In some important respects it is contradictory. Although it will require a host of highly demanding new functions from adjudicators it counteractively diminishes the idea of specialisation by withdrawing their distinguishing title of commissioner of child welfare. It refers to the possibility of 'dedicated' presiding officers, yet continues to allow for the rotation of ordinary, generalist magistrates.

The 2005 Act includes limited provisions which hint at an inquisitorial function for magistrates but it withdraws the long established term 'inquiry' as a general description for care hearings. It requires avoidance of adversarial procedures, yet expressly provides for cross-examination and argument. Of particular concern is that it withdraws civil

magistrates' court procedures as a basic guide for children's court procedures but leaves a vacuum by putting very little in place of these.

A positive feature of the 2005 Act, however, is the facility created in s 75 for the promulgation of regulations on, inter alia, children's court procedures. This should be utilised to issue a detailed set of children's court rules. In formulating these it would be useful to draw upon experience in developed systems. Locally effective mechanisms that have been evolved by some progressive commissioners should also be assessed for possible incorporation. Since many of the problems in the children's courts are directly traceable to our inadequate law on the role of presiding officers this aspect must receive priority in the development of rules of court.

A basic point of departure in the proposed rules should be an overarching provision which indicates unequivocally that the normal mode of functioning for children's court adjudicators is inquisitorial. As has been shown both local and foreign experience reveals quite clearly that where they retain an entirely passive, accusatorial function serious adverse consequences tend to result. These notably include secondary, systemic abuse of participants and failures to obtain sufficient evidence.

It will clearly not be enough merely to rename the function of adjudicators as primarily inquisitorial in the proposed rules. With children's courts being creatures of statute and with magistrates being used to an accusatorial role as managers of adversarial proceedings, proper guidance on the new function will be essential. It has therefore been suggested in part 6.3.1 that the rules should state that their two primary purposes are to enable presiding officers to supplement information-gathering by other persons involved and actively control hearings so that these become as far as possible amicable joint explorations of what is in the best interests of children.

At the level of detail, the proposed rules on the inquisitorial function must, despite the need to leave a realm of discretion, provide at least some meaningful guidance. Crucial aspects which will need to be dealt with are when and how magistrates should intervene

during the presentation of *viva voce* evidence at hearings. It has been shown in part 6.3.2 that commonly-occurring situations which require intervention could easily be listed in the rules. It has been suggested that these should include instances where questioning by other persons is ineffective, incomplete, abusive or wasteful of time. In relation to how presiding officers should be guided to intervene it is essential to provide a repertoire of different intervention forms. It has been recommended that they be expressly guided to issue warnings, assist with question formulation, take over questioning, act as a conduit to reduce confrontation and implement sheltered participation methods.

On the important aspect of the degree to which evidence should be tested at hearings it has been recommended that magistrates must be required to give higher priority to protection of witnesses than forensic needs. They must also be expected to bear in mind, however, that rigorous testing is often useful for care cases. In terms of keeping an appropriate balance it has been shown with reference to experience and rules formulations in developed systems that it is quite feasible to expect adjudicators to keep cross-examination -and indeed questioning generally- within the bounds of what is manageable for witnesses.

Although it has been demonstrated that suitable regulations published in terms of s75 of the 2005 Act could address many of the existing inadequacies it cannot be claimed that all problems relating to the functions of presiding officers could be solved in this way. The evaluation in chapter 6 yet again flags up training as essential because of the demanding and specialised nature of care case adjudication. And both our own local experience going back to the 1920s and findings from other systems (notably the Australian children’s courts) indicate that a key reform would be to create an entirely separate structure and leadership for our children's courts. It is only in this way that the required extent of specialisation and accountability is likely to be achieved.

9.7 Utilising Preliminary and Interim Hearings

Chapter 7 of the thesis begins an evaluation of what children's court orders are required for appropriate relief at different stages of care cases. In this chapter the focus is on the interim period which subsists from formal commencement of litigation until the onset of dispositive proceedings. As has been noted this may extend for many months whilst welfare conducts its investigation into the domestic circumstances of the child. It is demonstrated in part 7.2 that South African legislation is very poorly developed on interlocutory children's court services.

The 1983 Act includes only limited and vague wording. It refers briefly to age estimations, forensic assessments[4] and reviews of preliminary removals of children. Whilst the wording on age estimations is satisfactory in indicating clearly that these can be completed early on at a separate pre-dispositive hearing, the same cannot be said for the other two categories. The failure to indicate explicitly when or how assessments and reviews are to occur has had three unfortunate consequences. Firstly, they may not occur at all in cases where they are urgently needed. Secondly, they are sometimes viewed as requiring decisions by commissioners without formal hearings -thus reducing the scope for unwilling recipients to offer challenge. Thirdly, they may be delayed until the onset of dispositive proceedings -and thus retard completion of these.

Just as noted in chapter 6 with functions of adjudicators, so too with interlocutory court services the inadequate wording of the 1983 Act has led to a bewildering variety of procedures being adopted. Whether predisposition hearings will be *ex parte*, include the child, require evidence on a balance of probabilities or even be held at all in a particular situation are all subject to variation according to the preference of local commissioners. This is obviously not conducive to maximising protection for children or efficient preparation by family members or professionals who appear in care cases. It corroborates the finding in chapter 6 about endemic procedural confusion.

[4] Meaning, in the internationally recognised sense and as explained in part 7.2.1.1, extra-curial physical or psychological evaluations of children or family members by suitably qualified specialists.

Generally, early involvement of children's courts in care cases has been very limited under the 1983 Act. Child protection personnel therefore have considerable space to exercise broad powers against which family members tend to have little recourse. Of particular concern is the practice that has crept in of social workers extending their s 12(1) power to carry out preliminary removals of children without court authorization to situations which are not urgent. Although it creates dangers of insufficient protection of the constitutional right to family care and results in some children and their families being unnecessarily traumatised this practice was unfortunately upheld by the high court in *Swarts v Swarts*.[5]

As has been shown in part 7.2.1 an application of the primary evaluative criteria requiring accessibility of courts, incrementally-available services, hearing vulnerable participants and balancing rights to protection and family care all compel a conclusion that predisposition services under the 1983 Act have been utterly inadequate. It has further been demonstrated in part 7.2.2 that the 2005 Act will be capable of producing only limited improvements. It is true that the wording on jurisdiction for children's courts in care cases has been framed in very broad terms. But the new Act, like its predecessor, lacks specificity. As presiding officers of inferior courts, most magistrates are unlikely to break from the long established tradition of limited pre-dispositive engagement. And if a few of them do, without sufficient guidance their innovations will be *ad hoc* and thus not produce the uniformity that is urgently needed.

In its favour, the 2005 Act does provide expressly for some predisposition functions. These include preliminary removal injunctions ('temporary safe care' orders)[6] hospital retention orders[7] and confirmation of domestic violence perpetrator-removals by the police.[8] However, much of its wording on other aspects is just as vague as that in the 1983 Act. It refers tantalisingly to children's court orders on early childhood development,

[5] [2002] 3 All SA 35 (T).
[6] Sections 45(1)(g) and 152(2).
[7] Section 46(1)(h)(v).
[8] Sections 105 and 153.

prevention and early intervention services[9] but without stating explicitly when or even whether these can be issued before disposition. In two particularly unfortunate respects it betrays the influence of its predecessor. Firstly, it fails to provide for children's court review hearings in cases involving preliminary removals. Secondly, it allows for forensic assessments and even therapeutic services to be forced upon unwilling recipients without indicating grounds for this or creating procedural scope for challenge.

Where the legislature clearly has attempted to overcome a shortcoming in the 1983 Act is with preliminary removals of children that are not authorised by courts. In the 2005 Act it has tried to counter the currently widespread practice of utilising these as a matter of convenience even in non urgent situations. But it has done so inappropriately. Section 152 requires disciplinary proceedings and removal of professional licences for 'misuse' of emergency removal powers. This section has also created a stricter, multi-legged test for lawful preliminary removals which even bona fide participants could easily fail to apply correctly under stressful circumstances.

It has been suggested in part 7.4 with reference to approaches and experience in developed systems that the s 152 test is certainly well formulated as a measure of legality. However, for the protection of persons who genuinely believe they are rescuing children in emergencies a lower threshold requiring only a bona fide belief of urgency is needed as a second test. Participants who meet the second test standard should automatically benefit from an immunity clause similar to that in s 1024(c) of the New York Family Court Act. The decision to punish rather than shield child protection participants who make mistakes under difficult circumstances was a serious error. It has been suggested with reference to the Canadian experience that setting up anti-removal clauses designed to operate *in terrorem* may simply result in the deaths of children left in hazardous situations.

It must unfortunately then be concluded that the 2005 Act provides only a little progress on predisposition functions for children's courts in care cases. Like its predecessor it is still to a large extent implicitly built around the concept of a climactic main hearing,

[9] Sections 45(1)(e) and 46(1)(h).

prior to which children's lives must remain on hold. The insufficiency of the Act raises the question of a way forward. In a selective review of legislative provisions from some well-developed systems it has been demonstrated in part 7.3 that there is a wide variety of valuable predisposition functions which courts can perform in care cases. Significantly, holding appropriate court hearings at an early stage not only provides better protection for children and families but can sometimes also save time and other resources.

The comparative review in part 7.3 indicates clearly that detailed guidance enabling our children's courts to provide pre-dispositional support could certainly be developed. Just as has been recommended with other aspects, this would once again best be done with a set of procedural rules. As basic organizational tools the concepts of preliminary and interim hearings should be introduced in these. The former should be defined as the first formal appearance before a children's court of any informant, party, participant or applicant for such status. And interim hearings should be defined as any subsequent hearings at which interlocutory relief pending the onset of dispositive proceedings is sought.

In relation to preliminary hearings, the proposed rules should expressly enable children's courts to call them *mero motu* whenever they decide this is initially necessary for obtaining evidence or providing an authoritative decision. They should as in some developed systems be specifically required to do so where this is the best way to test an allegation about a child needing care before proceeding further. Presiding magistrates should also be required to call prompt preliminary hearings to rigorously review the appropriateness of any preliminary removal of a child (court authorised or not) and to decide whether separation of the child should continue until disposition. Finally, magistrates must be expressly required to call *inter partes* hearings when contemplating utilisation of ADR under the 2005 Act.

The proposed rules, in accordance with the criterion of court accessibility, must also provide sufficient scope for both private individuals (including children) and professional persons acting within the scope of their duties to instigate preliminary

hearings. It should be specified that anyone who can establish a relevant prima facie case on documents or by oral petition is entitled to do so. Relevant purposes of preliminary hearings should be limited to: making out a case for care proceedings on behalf of a particular child, seeking party or mere participant status, or obtaining an authoritative decision on a disputed and significant aspect of case preparation or care arrangements pending disposition. In relation to the latter, as has been shown with reference to experience in other systems, where child protection personnel seek permission to undertake preliminary removals they must be given high priority. Court hearings *ex parte*, by telephone or after hours therefore need to be provided for.

Aside from preliminary hearings, subsequent interim hearings must also be expressly provided for in the proposed rules. They should also be possible either *mero motu* at the discretion of a presiding officer or by application. It should be stated that their basic purpose is considering either relevant aspects not raised at a preliminary hearing or possible amendments or additions. The rules should require that applicants who wish to traverse issues already settled provide justification. This ought to be allowed by showing, prima facie, additional or more accurate information, a situational change relevant to the child or an inability to attend at the preliminary hearing which justifies the interim hearing.

Because of the importance of interim contact arrangements it should be expressly stated in the proposed rules that parties who can put forward a prima facie case for modifying them in the best interests of the child are entitled to a hearing. Guidelines for our courts on factors to be considered and appropriate conditions for inclusion in any resultant orders should be drawn from systems such as Illinois and New York which have well-developed interim contact legislation. Our current allowance in s 153(6) of the 2005 Act for children's court interim contact orders in cases where domestic violence perpetrators have been removed from children's homes is far too narrow. They should be expressly permitted to issue interim contact orders and deal generally with the question of interim care in all categories of care cases.

Where domestic violence is a factor children's courts need much broader interim powers than allowed for in s 105 and s 153 of the 2005 Act. Merely describing *ex post facto* functions for them once the police have decided to initiate removals of perpetrators is insufficient. Just as in many developed systems they need to be expressly required to hear applications for perpetrator-removals brought by parties and permitted to instigate them *mero motu*. As in the English Children Act 1989 they must be required to take into account the effect of any contemplated removal on the child's care situation. And besides the drastic step of perpetrator-removals they need some of the lesser warning and interdict remedies utilised in US systems.

In regard to forensic assessments and therapeutic family services orders it is essential that the proposed rules require children's courts to carefully scrutinise any applications by welfare. This is to ensure that constitutional rights to dignity and privacy of children and other family members are protected. As has been shown a defect of many systems is routine application of considerable coercion to submit to interim services and assessments. On the other hand, where courts conclude that assessment or services are appropriate and have been genuinely agreed to they should incorporate them in their orders. This serves useful purposes by authoritatively confirming parameters and liability for costs. As has been shown with reference to developed systems courts can also play a valuable role by including protective conditions which limit duration and intrusiveness of assessments and interim services.

It has been suggested in part 7.4 that, whilst the 2005 Act should be amended to indicate that therapeutic services for family members can never be mandatory at the predisposition stage, there may be a case for subjecting children to mandatory forensic assessments in exceptional instances. As has been shown this is a controversial issue which has produced a variety of approaches in developed systems. It raises difficult best interests considerations by pitting protection against autonomy for children. In order to provide proper guidance our legislature needs to take a much clearer position. In formulating appropriate provisions it should give careful consideration to the useful

protective limitations on mandatory assessment powers included (as has been shown) in the legislation of some developed systems.

If our legislature opts to continue with any form of compulsory assessment orders detailed regulations on court process will be essential. These must indicate to presiding officers that compulsion is a last resort. And where assessments appear to be essential for evidential purposes they must be expressly required to interact supportively with sufficiently mature children and seek the shortest and least intrusive alternative. This need for interaction gives further point to the recommendation in chapter 6 that presiding magistrates must be directed by means of procedural rules to change over to a predominantly inquisitorial role function.

Generally, the analysis in chapter 7 leads to an encouraging conclusion. Simply by formulating a suitably detailed set of procedural rules it would become possible to utilise children's courts for providing a valuable array of predisposition services in care cases. Against a criticism that this would require holding more hearings is the counterargument that time and other resources would be saved by resolving problems at the most appropriate stage. Another benefit would be far better protection and guidance for participants. Perhaps the strongest resources argument is that we already have a children's court network in place -so why not utilise it optimally by increasing the authoritative support it is capable of providing at the predisposition stage?

9.8 The New Approach to Dispositive Proceedings in the Children's Act 38/2005

As noted in chapter 8 the dispositive proceedings which follow upon completion of investigations by welfare are an extremely important stage in care cases. With the 2005 Act the legislature has aimed to completely transform the dispositive role of children's courts. In a critical evaluation of the new approach it has been shown that the Act produces three major improvements but is unfortunately inadequate in a number of important respects.

In relation to the improvements achieved the most significant feature of the Act is provision of a far greater variety of children's court remedies than any previous South African legislation. This creates considerable potential to creatively tailor outcomes to fit the needs of individual children and their families. Reference to the international literature indicates that when the Act is fully implemented this will be an important advance in modernising our law.

Secondly, the nature of the interactions between children's courts and families with care problems has been fundamentally changed. Rather than presiding magistrates merely deciding between a few limited forms of mainly removal placements for children, the 2005 Act envisages a much more constructive engagement. They will be required to consider whether allocation of suitable family services resources will enable a child to remain within or eventually return to her family. Again, it has been shown with reference to the international literature that this approach has proved to be successful in some developed systems.

Although it might be considered that social workers rather than court adjudicators should select family services programs at the dispositive stage it has been found that the greater neutrality and authority of courts renders properly trained presiding officers useful for this function. And social science findings indicate that court-ordered family service orders can sometimes bring about significant improvements in domestic environments even for families that are seriously dysfunctional. Thus the new family services orientation for our children's courts is clearly appropriate.

Even where children need to be removed children's courts will under the 2005 Act have a much greater variety of options than under any previous legislation. One reason for this is a planned transformation of residential care facilities. In place of the current children's homes and industrial schools the new blanket terminology will be 'child and youth care centres'. It is clear from the wording of the Act that different centres are to have different care programs so as to enable a wide variety of specializations. Crucially,

s158(2)(a) states that it is children’s court magistrates and not welfare who are to determine what particular residential program a child requires.

Aside from residential facility placements, magistrates will also be required to decide whether placements in child-headed households, cluster foster care, traditional foster care, supplemented parental care in the form of 'partial care,' or shared care alternating caregivers at different locations is the most appropriate outcome for a particular child. The new range of placement options is a significant advance in our care dispensation; but for effective implementation it will require the requisite skills. It is clear that, just as in the case of family services orders, magistrates will once again require new forms of specialist interdisciplinary expertise if they are to independently provide knowledgeable determinations and not merely rubberstamp what may be most convenient for welfare. An inquisitorial role function is yet again indicated so that they can interact as constructively as possible with family members before deciding on outcomes.

It has been shown that a serious gap in the 1983 Act is the omission of provisions enabling children's courts to monitor and enforce implementation of their orders. In consequence, these are often not put into effect properly. This has reduced the effectiveness of children's courts as a component of the child protection system. When the 2005 Act becomes fully operational the means to change this will be at hand. Children's courts will as in our pre-1983 legislation be able to exercise more control over the implementation of their orders. This aspect, which will be discussed further below, represents the third main contribution of the 2005 Act in improving our law on care case dispositions.

Although children's courts are now poised to play a far more important role in supporting children than ever before the legislature's new vision for them has unfortunately not been perfectly realized in the 2005 Act. As shown in part 8.2 the dispensation for grounds indicative of children requiring mandatory alternative care is problematic. It is of concern that proof of grounds can be entirely dispensed with in some situations. Where children's courts propose to issue any of an extensive list of orders contained in s 46(1)

prior proof of a ground is not an essential prerequisite. In relation to a second substantial set of orders in s 156(1) it is stated in s 156(4) that any of these except 'placement orders' may be utilised even where children's courts have found that the child is not in need of care and protection.

As has been argued the new approach of allowing proof of grounds to be omitted is dangerous. The drastic consequences for children and other family members which result from mandatory alternative care orders makes it essential that just cause be first established. If no ground is proved children's court decisions will become vulnerable to challenges based on constitutional rights to fair proceedings and due protection of children's right to family care. The diminution of grounds requirements in the 2005 Act causes it to fail on the criterion of properly balancing protection and children's right to family care. And the resultant uncertainty about when grounds will be required by particular magistrates is likely to perpetuate the confusion about procedures that has been shown in this thesis to be a major weakness of our system.

Another basic deficiency which relates to grounds has been produced by a decision to include definitions of abuse, sexual abuse, neglect, exploitation and commercial sexual exploitation in s 1 of the 2005 Act. As has been noted in part 8.2.2 these are simply for general guidance in interpreting the Act. However, one of their effects is to limit the reach of the main grounds for finding children to be in need of alternative care in s 150(1). It has been demonstrated with reference to international literature that definitions which restrict grounds are problematic. There is no consensus on how harm-related concepts such as neglect and abuse should be defined. And attaching definitions to grounds for alternative care measures simply creates scope for technical defences that may prevent courts from assisting children.

The likelihood of courts being unduly hampered is increased by the fact that the s 1 definitions are to a large extent perpetrator or situation oriented. Experience elsewhere indicates that this format tends to fix the attention of courts too narrowly on specific instances requiring fault attribution. This may cause difficulties where a specific

perpetrator cannot be identified. Alternatively, it may lead to courts reaching incorrect conclusions because grounds-related factors are typically multifaceted and accretional over time. A particular concern is that an overemphasis on fault as encouraged by many of the s1 definitions will distract courts from giving due attention to contextual factors such as poverty or a lack of social services. Experience in other systems aside, it was discovered locally under the 1983 Act in its original form that giving prominence to fault in grounds simply stigmatises caregivers in ways that are counterproductive. Insofar as it reintroduces an emphasis on fault in grounds, the 2005 Act must be seen as retrograde.

Besides fundamental deficiencies in the way that grounds have been provided for, dispositive remedies have also not been ideally formulated in the 2005 Act. As noted in part 8.3.1 there are two main sets of children's court orders which are contained in s 46(1) and s 156(1). Having two separate lists creates an expectation of different purposes. However, a cross-reference to s 46(1) in s 156(1) indicates a degree of interchangeability. This creates confusion about when children's courts should issue s 46(1) or else s 156(1) orders. The confusion is increased by overlap between the two subsections. They include pairs of very similar orders with no indication of the reasons for the parallelism. An interpretative difficulty which arises is on what basis children's courts should make choices between the pairs. The failure to provide guidance on this causes the Act to fail on the criterion of clarity in wording and structure to enable user-friendliness. The confusingly-similar remedies in the two subsections need to be integrated and proper direction given on when each subsection should be utilised.

Transforming the remedies capability of children's courts and introducing an interactive family services ethos will require more than merely clarifying which orders should be used when. It will also be essential to develop our procedural law substantially. In part 8.4 it has been shown that the key to doing this is to divide dispositive proceedings into logical stages. Firstly, a basic division needs to be made between proof of grounds and choice of remedies phases. Unfortunately, the 2005 Act does not facilitate this. Besides providing primary grounds for finding a child to be in need of care and protection in s 150(1), in s 156(1) it includes further sub-grounds that are attached to most of the

remedies provided in the latter. The addition of sub-grounds greatly complicates dispositive proceedings. It introduces circularity by forcing children's courts to return to the question of grounds at a stage when they are ready to decide upon outcomes. It could therefore encourage them to utilize the loopholes in s 46 or s 156(4) for dispensing with grounds entirely -leading to the dangers noted above. As has been contended in chapter 8 the benefits to be gained would justify amending the Act to allow for a simpler approach in which grounds and remedies are entirely separated.

In part 8.4.2 it has been shown with reference to US law that where caregivers have the potential for sufficient positive change it is often useful for courts to interpose an 'improvement period' after proof of grounds and before final disposition. This is constructive because it maximises opportunities for children to keep their families. It accords with the criterion of reducing removals. Whilst the 2005 Act does not expressly allow for improvement periods it has provisions on setting timeframes and monitoring which provide a suitable context. And the proactive family services remedies it contains will usually best be implemented under a condition of fulfilment of preset goals that need to be achieved within a fixed time period. Improvement periods should therefore be established as an option in our law. Suitable procedural rules could be formulated by making reference to the best developed US provisions.

As recommended in part 8.4.3 children's courts should be required to evaluate achievements during the proposed improvement periods at subsequent review hearings. It has been shown that these should not merely be used to evaluate the progress of caregivers. In order to counter the current problem of inadequate implementation of children's court orders by employees or representatives of the state acting *ex officio*, presiding magistrates should be expressly directed also to assess the contributions of these participants. As a final leg of dispositive proceedings, review hearings would then become an ideal mechanism for adjusting care measures in the light of progress made by all concerned.

As suggested in part 8.4.4 the proposed review hearings would also sometimes be suitable occasions for children's courts to employ new enforcement measures with which

the 2005 Act has furnished them. It has been shown by means of a comparative review that having a repertoire of different grades of coercive powers can be useful for courts which specialise in care matters. Even the extreme of criminal penalties as provided for in s45(2) of the 2005 Act has its place as a response to blatant disregard of responsibilities which leads to serious harm for children. However, despite the fact that there is precedent in other systems, criminal penalties attendant on non-implementation of children's court orders should only in rare instances be applied against caregivers. Dangers of counterproductive alienation or unfairly punishing parents who are primarily victims of poverty or a lack of social services are reasons why children's court magistrates should be directed to exercise caution in implementing their new sentencing powers.

It has been shown that a gap in the 2005 Act is the omission of jurisdiction for children's courts to award delictual damages. Compensatory awards are clearly a less extreme means than criminal penalties for, inter alia, encouraging proper implementation of care orders. Their availability at children's courts would be appropriate for assisting some children who have been harmed. They would be able to provide testimony which they may well find traumatic before only one court. Generally, a delictual jurisdiction would fit perfectly with the legislature's new vision of children's courts as powerful multitask fora with specialist expertise in resolving care and protection disputes.

In conclusion, the evaluation of the new approach to dispositive proceedings in chapter 8 reveals that the 2005 Act makes significant advances by expanding the range of children's court orders and providing some foundations for monitoring and enforcement. Given the extent to which development of our care law was historically retarded particularly during the apartheid period, it is understandable that this first major attempt at modernisation is primarily substantive, leaving essential procedural provisions still to be added. But as has been demonstrated the Act has some serious structural weaknesses. The linking of some of the grounds to restrictive definitions, the *lacunae* which enable grounds to be avoided entirely and the confusing overlap in the two main sets of remedies are fundamental defects which require reformulation of key provisions.

Aside from amendments to address the structural weaknesses and an addition of a detailed body of procedural guidelines as suggested in chapter 8, a third issue will need to be addressed if the legislature's vision of transformed children's court services is to be realised. The demanding dispositive tasks set for presiding officers in the 2005 Act have significant training implications. Selecting the most appropriate locally available proactive or rehabilitative family services, evaluating whether children should be left in child-headed households, assessing the desirability of cluster foster care, choosing from amongst different residential programs at child and youth care centres, monitoring the progress of children and caregivers, and sentencing social workers or government officials who fail to implement children's court orders properly is hardly a group of tasks which generalist magistrates can be expected to perform efficiently. The recommendations made in chapter 6 on the urgent need to establish children's courts as a separate network with dedicated management and improved status are strongly supported by the escalated demands which the disposition provisions of the Act will impose.

9.9 Final Conclusion and Some Directions for Further Research

Despite an overall finding of poor development in our law, the results derived from the analysis in this thesis are encouraging. The evaluation of six broad aspects of the modern function of children's courts in care cases in chapters 3-8 produces findings that are consistent in relation to solutions. By means of a few key amendments to the 2005 Act and development of a detailed body of supplementary rules and regulations along the lines indicated the effectiveness of children's courts can be considerably improved. If the structural and training needs that have been identified are also attended to these courts will at last be properly positioned to make an extensive contribution in protecting the rights of children in need of alternative care and their families. In so doing, they will become effective instruments for ensuring compliance with South Africa's related constitutional and international obligations.

The legislative, training and court-structural improvements that have been recommended are not generally ones which have impossibly vast resource implications.

And in relation to resources Grover has made the important point that financial costs for states in providing effective child protection systems 'are inevitably of a much smaller order then the incalculable long-term economic and societal costs involved' in failing to provide properly for vulnerable children.[10] It is now within our grasp to build further upon the recent reform initiative and fully overcome the progress gap produced by neocolonialism and apartheid. We can quite feasibly render our children's courts an exceptionally powerful resource. These courts would then become worthy of their name; and incidentally the dream of a few farsighted reformists in 1937 would at last become a reality.

Turning to avenues for further research, since this thesis has focused mainly on modern developments there remains scope for in-depth historical research on the work and significance of the children's courts during the 20th century. For example, as noted in part 2.4.3 useful further investigation could be done on causes of the significant transformation of welfare from abetting to opposing application of racial criteria in the children's courts.

In relation to ADR it will be remembered that it was concluded in part 3.7 that lay community panels are not appropriate for South African care cases. It was suggested that their scope for utilizing local community expertise and tribal leaders who could reintroduce indigenous practices will be outweighed by the dangers of placing lay decision-makers in positions of considerable authority. Since this was based only on Scottish research and limited local findings about attitudes towards children's views in indigenous cultures it could usefully be tested by further research.

Another question to which only limited attention has been given in the thesis is whether special evidential rules should be developed for care cases. On the aspect of sheltered participation methods, although it has been shown that they should be given more prominence in our legislation detailed further work is needed on what the indicators should be for selecting specific types in individual cases.

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[10] S Grover 'On Meeting Canada's Charter Obligations to Street Youth' (2002) 10 *International Journal of Children's Rights* 313 at 326.

As noted in part 1.4 an aspect which has not been considered at all is appropriate grounds and procedures for transferring cases between different jurisdictions of the children's court. Since this has been problematic under the 1983 Act[11] and has been left for future regulations under the 2005 Act it is another area which needs investigation.[12] As also noted in part 1.4 a subject not addressed in detail is how children's courts could best be utilised to protect children who have already been removed to longer term alternative care placements -for example, in foster care or at residential facilities. In view of the extreme vulnerability of such children in an under-resourced child protection system aspects such as effective complaints mechanisms and means of improving post-dispositive court access need to be the subject of focused research.

On the question of training, this thesis has mainly explored some salient aspects of what family advocates, other lawyers and presiding officers should be trained to do in care cases. Valuable further research could be done on precisely how they should be trained. This should particularly include the aspects of syllabus content and training methodologies. It should investigate the best content for both prior qualifications and in-service education.

The recommendations in this thesis are as noted in part 2.5 aligned to the present stage of development of the children's courts. If these courts are in future successfully established as a more independent network of specialist fora as has been proposed, some important avenues for further research will become particularly relevant. Firstly, it could usefully be investigated whether they should as in Kenya and Australia become additionally involved in trying, sentencing and addressing the needs of juvenile offenders. Secondly, it is important to bear in mind that the legislature has signalled an intention to eventually establish family courts.[13] It is possible that a unified family court model with broad jurisdiction will be selected.[14] Although the proposals in this thesis would empower

[11] Personal communications: Dr J Loffell 1 Aug 2002; and commissioner P Booysen,12 Sept 2006.
[12] JK Peters 'How Are Children Heard in Child Protective Proceedings in the United States and around the World in 2005: Survey Findings, Initial Observations and Areas for Further Study' (2006) 6 *Nevada LJ* 966 at 969 found that there is a need for 'good coordination between jurisdictions' in abuse and neglect cases.
[13] As noted in part 2.5 this has been indicated in s 45(3) of the 2005 Act.
[14] Characteristics of unified family courts have been briefly described in part 2.5, above.

children's courts to serve as a strong component in such a network, whether they should and how they might best be incorporated would need to be carefully investigated.

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IV Personal Communicants

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