Child Participation in Post-divorce or -separation Dispute Resolution

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Abstract

Both article 12 of the CRC and Sections 10 and 31(1) of South Africa's Children's Act 38 of 2005 require that children are given the opportunity to make their views known in matters that affect them. This chapter explores obtaining children's views in post-divorce or -separation disputes via a dispute resolution mechanism known as facilitation in South Africa. Three case studies have been selected to demonstrate the importance of taking children's views into account when post-divorce or -separation disputes arise.

1 Introduction

Articles 12(1) and (2) of the UN Convention on the Rights of the Child (CRC) support child participation by compelling States Parties to ensure that a child is given the right to freely express his or her views in any matter affecting that child and that a child is given the opportunity to be heard.

Child participation is effected directly through consultation with the child, or indirectly by consulting with an adult or adults involved with the child, such as a parent, teacher or therapist, or by investigating the specific circumstances of a particular child. This chapter sets out to demonstrate the importance of child participation in post-divorce or -separation dispute resolution by referring to three case studies in which the author had been appointed as the facilitator.

Furthermore, the chapter describes facilitation, a post-divorce or -separation dispute-resolution mechanism in the Western Cape province of South Africa, and compares it with mediation, another post-divorce dispute resolution mechanism available in South Africa.

1 South Africa ratified the CRC on 16 June 1995. The sixteenth of June is a public holiday in South Africa known as National Youth Day; more information is available at http://www.sahistory.org.za (accessed on 27 January 2016).

2 Art. 12(1) and (2) CRC.
The chapter outlines the obligation on the facilitator to hear the ‘voice of the child’, as required in the Children’s Act.\(^3\) The importance of hearing the ‘voice of the child’ in post-divorce or -separation disputes is demonstrated in the three case studies that follow. It is submitted that obtaining the voice of the child in these case studies assisted the facilitator to successfully mediate the disputes or, alternatively, issue a directive that was in the best interests of the child. It is further submitted that, without the involvement of the children, the resolution of the disputes might not have been in their best interests.

2 Post-divorce or -separation Dispute-resolution Mechanisms in South Africa

With the introduction of the Children’s Act, parents who are co-holders of parental responsibilities and rights post-divorce or -separation, are obliged to give ‘due consideration’\(^4\) to the views and wishes expressed not only by the child but also by the other co-holder of parental responsibilities and rights before decisions can be made which could have an adverse effect on, amongst other things, the child’s contact with the other co-holder of parental responsibilities and rights, the child’s education and the child’s well-being. The Children’s Act also makes provision for a parenting plan in which parents could agree that certain aspects of their child or children’s care would require a decision to be made jointly between the holders of parental responsibilities and rights.\(^5\) Parents post-divorce or -separation are not always able to come to agreement around issues that require joint decision-making and disputes frequently arise that require quick and relatively inexpensive dispute-resolution mechanisms. Other than continued litigation, two such mechanisms are currently available in South Africa.

It is noted here that arbitration in family matters is not permitted in South Africa in terms of the Arbitration Act.\(^6\)

2.1 Mediation

Mediation as an alternative dispute-resolution mechanism has been formally introduced in the field of family law in South Africa since the 1980s.\(^7\) The

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\(^3\) Children’s Act 38 of 2005 (hereinafter, the Children’s Act).
\(^4\) S. 31(1)(a) and s. 31(2)(a) Children’s Act.
\(^5\) S. 33 Children’s Act.
\(^6\) S. 2 Arbitration Act 42 of 1965.