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## What is the 'voice of the child' and why should we adhere to it?

The participation of a child in matters affecting them in a divorce or separation is mandatory according to the Children's Act 38 of 2005 (the Children's Act).

The 'best interest of the child' and the 'voice of the child' concept is used, so that an understanding about the child and their capacity can be formed by the court. It is advised to involve a child in the decisions that affect them from the start of the parents' divorce or separation.

Protecting a child from harmful exposure to anger, confrontation and messy details of their parents' divorce is important.

The focus of the 'voice of the child' is to -

- understand the child's world and all their role-playing systems;
- understand the child's socio-emotional functioning within these systems; and
- hear the child's emotional experience of these systems.

Sections 6(2)(a), 7(1)(a) - (n), 10 and 31(1)(a) of the Children's Act addresses the best interest of the child standard and the right of the child to participate and express their views in all matters that affect them, as well as their right to be heard in official proceedings in motion.

Section 10 of the Children's Act reads:

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

Section 31(1)(a) of the Children's Act reads:

'Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.'

The 'voice of the child' practitioner's mandate when performing a 'voice of the child' exercise is to:

- **See** the world through the eyes of the child.
- **Explore** and **understand** all the aspects and factors that influence the child's world and to understand the current way they experience being in that world.
- **Convey** and **inform** by ensuring that the child's needs and/or wishes are communicated and understood by the parents.
- **Induce change** by informing both the parents and the child regarding the decision-making process with creative solutions to challenging situations.

According to the article 'Child participation' on the World Vision International website ([www.wvi.org](http://www.wvi.org), 31-5-2019), child participation is one of the core principles of the United Nations Convention on the Rights of the Child, which asserts that 'children and young people have the right to freely express their views and that there is an obligation to listen to children's views and to facilitate their participation in all matters affecting them within the families, schools, local communities, public services, institutions, government policies, and judicial procedures. At World Vision, we consider child and youth's meaningful, safe, and appropriate participation a key strategic priority for ensuring sustained child well-being and creating democratic societies with informed and engaged citizens.

We believe that children and young people can play a significant role as agents of transformation with the capability to

engage in decision-making processes, in accordance with their evolving capacities and gradually increasing autonomy. When children and young people learn to communicate opinions, take responsibility and make decisions, they develop a sense of belonging, justice, responsibility and solidarity.'

### Divorce statistics

The importance of a child's view is even more important when we look at the divorce statistics released by Statistics South Africa in the 'Marriages and Divorces 2016 Report' released in May 2018:

- The statistics show that 25 236 divorces took place in 2016 and that 44,4% of divorces were marriages that lasted less than ten years.
- The highest portion of divorces occurred to couples who had been married for five to nine years.
- 13 922 (55%) of divorces include minors (children under 18).

### Growing concerns on the effect of divorce

There are a number of growing concerns, regarding the effects of divorce on the child. These effects include -

- feelings of anxiety and feelings of having no control, which include changes, uncertainty, and conflict;
- feeling unsafe - the fight, flight or freeze scenario;
- psychosomatic symptoms;
- grief and loss;
- insecurity, for example, separation anxiety;
- fear of abandonment and personal rejection;
- loneliness, helplessness and depression;
- isolation;
- escape into fantasy;
- guilt;
- low self-esteem or an unhealthy sense of self;
- dissociation;
- regression versus hyper maturity.

There is a need for a child to be raised within a stable family environment and, where this is not possible, in one resembling - as closely as possible - to a caring family environment.

A child should be protected from any physical or psychological harm that may be caused by:

- maltreatment, abuse, neglect, exploitation, degradation, violence or other harmful behaviour; or
- any family violence involving the child or a family member.

In the article 'Voice of the Child Reports ensure kids' perspectives are represented' ([www.advocatedaily.com](http://www.advocatedaily.com), accessed 31-5-2019) Jennifer Samara Shuber says "Children get input into the decisions being made, but they are not the decision-makers. I make that very clear to the children I work with," says Shuber. "They do not get to decide. That fact is a relief to most children, as they do not want the responsibility, and it should not be foisted on them. Rather, their parents must step up and act like adults, which includes making tough decisions about parenting.

Children are the focus of a custody and access dispute, but we have only recently understood the importance of hearing from them on these issues," says Shuber. "Particularly as kids get older, they develop more of a voice. In order to craft child-focused arrangements and plans, understanding the child's views and preferences is essential, so the Voice of the Child Report has been developed. This is all done in the larger context of collecting as much information as possible on the child's best interests."

### Factors that need to be considered when determining the 'best interest of the child' and a 'voice of the child' report

- The personal relationship between:
  - the child and the parents, or a specific parent; and
  - the child and any other caregiver or person relevant in the circumstances.
- The attitude of the parents, or a specific parent, towards:
  - the child; and
  - exercising of parental responsibilities and rights.
- The capacity of the parents, or a specific parent, or any other caregiver or relevant person to provide for the needs of the child, including emotional and intellectual needs.
- The effects of any change in the child's circumstances, including:
  - any separation from both or either of the parents; or
  - any sibling or other child, caregiver or relevant person, with whom the child has been living.
- Practical difficulties and expense that could influence contact with either or both parents, and whether it will substantially affect the child's right to maintain personal relations and direct contact with either or both parents on a regular basis.
- Specific needs of the child:
  - to remain in the care of the child's parent(s), family and extended family; and
  - maintain a connection with the child's parent(s), family, extended family, culture or tradition.
- The child's:
  - age, maturity and stage of development;
  - gender;
  - background and any other relevant characteristics;
  - the child's physical and emotional security, as well as their intellectual, emotional, social and cultural development;
  - any disability the child may have; and
  - any chronic illness from which the child may suffer.

### How does the 'collaborative child focussed mediation' process and the 'voice of the child' work?

- **Step 1(a)** - mediation, which includes a team of two co-mediators who mediate with the parents, and they involve a 'voice of the child' professional.
- **Step 1(b)** - an introductory session with the mediator and parents.
- **Step 2** - individual sessions with the child and the 'voice of the child' practitioner (one to three sessions).
- **Step 3** - feedback to the parents in the mediation or when the mediator, parents and 'voice of the child' professional are present. The voice of the child professional will give feedback to the parents in the mediation and together as a team they will consider the elements on the table and custom make a parenting plan.

- **Step 4** - the 'voice of the child' practitioner writes the report and the mediator attaches the report to the parenting plan.
- **Step 5** - reunification and facilitation-mediator will inform the child of the decisions that affects them and explain the parenting plan when the parents and 'voice of the child' professional are present.
- **Step 6** - signed parenting plan, completed Form 8 or 9 and 10 and the 'voice of the child' practitioner's report are handed in at the Office of the Family Advocate for approval.

### More about the introductory session between parents and 'voice of the child' professionals

The main goal of an introductory session is to gather information, provide forms, discuss the mandate and to share concerns. The session will consist of:

- Brief marital history and overview of most significant events (what has led to the divorce?).
- Has the child been exposed to trauma? How much does the child know and what have they seen?
- How did the parents tell the child that they are going to get divorced?
- What are the current living arrangements and contact with both parents?
- What is the child's current functioning and holistic overview?
- Discuss the sequence of events (separation, relocation).
- Discuss the intermediate contact plan.
- What contact have the parents suggested?

The individual sessions with the child aim to:

- build a rapport with the child;
- explain to the child what the purpose of the sessions are;
- explain your role as the 'voice of the child' practitioner or mediator;
- have the child understand that important decisions need to be made and that they will be a part of those decisions; and
- by using the 'voice of the child' toolkit and other 'voice of the child' techniques, the 'voice of the child' practitioner will gain a holistic view of the child, by taking a picture through their lens to determine the impact that the changes in the family structure has on the child.

Important aspects that need to be explored in these sessions:

- Sense of self - discuss the child's self-concept, self-statements, temperament, interests, talents, what they are good at, possible unresolved negative life events that has not been integrated, main source of emotional support.
- Child's relationship with significant people - what are the interactions between the mother and father, siblings and any important adults in their life (grandparents, aunts, uncles) like?
- Child's functioning at school - ask about their peer relationships, their ability to socialise and interact with others. Focus on their academic functioning, academic self-concept, the child's ability to follow rules and function within a set

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structure. Find out about their extra-curricular activities, after-care, homework and their parent's involvement therein.

- Child's views about the divorce – ask the child what they know and understand, and what their view is on how their parent's relationship disintegrated. How was this communicated to them? Discuss new partners and how they feel about the situation.
- The child's views on contact with their parents and other significant people in their lives – how do they feel about the transfer between two houses and ask whether they want to change anything about the current contact arrangements.
- What would the child like to change about their current situation?
- What needs to happen, for the child to cope better with the changes?
- Risk factors – discuss various types of abuse, namely, alcohol and drug abuse, verbal, physical, and emotional abuse. Speak about conflict, alienation and a parent's mental state.
- Ask permission to share the information that you have collected with the child's parents. Make a list with the child of what will be communicated to the parents and the suggestions that will be made.

### Feedback session's main goal: Communicate the child's needs

During the feedback session with the parents, communicate the child's needs and capacity. Provide feedback with examples and pictures. Discuss important aspects that will influence the parenting plan such as the relationships with the parents and discuss practical arrangements. The role of the 'voice of the child' professional is to empower and support the child's needs and wishes. Sometimes parents have their own

needs, which are not aligned with those of the child. Speak about possible points of conflict that need to be mediated. Work on an action plan and discuss the next steps towards a parenting plan, facilitation and reunification with the parents.

### The aim of 'voice of the child' report

The report must –

- comply with the prescripts of the Children's Act;
- act as a roadmap to establish guiding principles which will assist in reaching the eventual goal of acting in the best interest of the minor child involved;
- give a clear indication of the voice and needs of the minor child;
- serve the best interests of the minor child to avoid the risk of further litigation (s 7(n) of the Children's Act) or exposure to further chronic parental conflict based on the inability or unwillingness of the parents to co-parent peacefully; and
- include the requirements of s 33(2) of the Children's Act.

Child participation does not mean the child has the right to demand a particular outcome or course of action. The parents, mediator and 'voice of the child' professional must still mediate and reach an outcome that is in the child's best interests.

Child participation contributes to a child's development of individual identity, competence, responsibility and a child's sense of self-esteem and confidence.

It can also be helpful to remind parents of why it is important to find 'satisfying solutions' to the issues concerning the child.

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Abbreviation	Title	Publisher	Volume/issue
<i>DJ</i>	De Jure	University of Pretoria	(2019) 52.1
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<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2019) 16.1 April
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2019) 22
<i>PLD</i>	Property Law Digest	LexisNexis	(2019) 23.1 March
<i>SJ</i>	Speculum Juris	University of Fort Hare	(2018) 32.2
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**Quinot, G and van der Sijde E** 'Opening at the close: Clarity from the Constitutional Court on the legal cause of action and regulatory framework for an organ of state seeking to review its own decisions?' (2019) 2 *TSAR* 324.

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