

# REPORTING DIVORCE

**M**edia reports can give children a voice and encourage respect of children's rights. Media can also, however, violate children's rights in the way they report stories. Over the past nine years, Media Monitoring Africa (MMA) has been working to improve the way children are portrayed in news media in South Africa. In April this year, MMA and the Centre for Child Law celebrated a small but significant victory in our efforts to ensure that not only are children's rights protected but that media have to be more ethical in the way they report on divorce stories.

## **DIVORCE CAN HAVE A TRAUMATIC EFFECT ON CHILDREN THAT IS BOTH PROFOUND AND LASTING – AND PRIVATE DETAILS MADE AVAILABLE THROUGH THE MEDIA MAY EXACERBATE THIS. WHAT IS THE ROLE OF THE LAW IN PROTECTING THE RIGHTS OF CHILDREN, ASKS WILLIAM BIRD**

Previously, when media wanted to report on a divorce case, they were in the peculiar situation of being able to report on who was getting divorced and naming the children involved, but they were not permitted to provide the details of the divorce, such as settlement or custody of children.

In 2007, the *Sunday Times* was prevented from publishing a "paternity fraud" story in which they named all the parties – including the children. In this case, they had used the more personal details included in the court papers. The parties involved sought to prevent the *Sunday Times* from publishing the story by relying on Section 12 of the Divorce Act. The newspaper was forced to pull the story after a late-night gagging order.

Then, in February last year, the Johannesburg High Court declared Section 12 to be overbroad and inconsistent with the right to freedom of expression enshrined in the Constitution. As a result, Section 12 was declared unconstitutional – and the *Sunday Times* went ahead and published the story.

The matter was referred to the Constitutional Court, which heard an application to confirm the constitutional invalidity of Section 12 in May. MMA, represented by the Centre for Child Law, was admitted as an amicus curiae. MMA raised the vital issue of the importance of protecting children's rights to dignity and privacy in divorce matters.

In our heads of argument we argued:

"Divorce can have a traumatic effect on children which is both profound and lasting. This is even more so in cases where the conflict and acrimony between the parties escalates to matrimonial warfare where the child is used as a weapon. The effects of divorce on various age groups range from acute depressive reactions to sadness, fears of abandonment and anger. It is clear that the effects of divorce will inevitably be exacerbated should all the private details of the divorce, including disputed paternity, become public knowledge."

Acting Constitutional Court Judge Jafta, said: "... another way to protect children... would, in my view, be to prohibit publication of the identity of the parties and of the children. If that were to be done, the publication of the evidence would not

harm the privacy and dignity interests of the parties or the children, provided that the publication of any evidence that would tend to reveal the identity of any of the parties or any of the children is also prohibited.

The purpose could be better achieved by less restrictive means."

The Constitutional Court then confirmed the High Court's ruling that Section 12 was unconstitutional and ordered that, unless authorised by a court in exceptional circumstances, "the publication of the identity of, and any information that may reveal the identity of, any party or child in any divorce proceeding before any court is prohibited. The order made by the Constitutional Court does not unduly favour either the media or the litigant and its impact is that media can now freely report on divorce matters and reveal as much detail as necessary for their stories."

The limitation placed on the media is around naming or identifying the people involved. The effect of the judgement is that in all cases children's names and identities, as well as those of their parents and any other people involved cannot be revealed to the public.

While on the surface this appears to be in line

with what MMA had sought, the ruling went much further than expected.

The ruling, in fact, may have gone too far. Unless there are exceptional circumstances and the media successfully applies for an order to publish the names and identities of those involved, any story on divorce proceedings that does so will amount to contempt of court.

The order of the court has resulted in a situation which is the reverse of Section 12 – the media can now report all the detail they wish, as a means of informing and educating the public about divorce matters, but unless there are exceptional circumstances, they may not name or identify the people involved.

Where there is a clear public interest in a particular case, the media could apply for an order enabling them to name the parties involved. Such cases may include, for example, public figures or public officials. The key would be to ensure that there is a clear and genuine public interest in naming and or identifying the people involved.

Not only does the ruling highlight the importance of media freedom and children's rights, but it also has the effect of requiring greater legal and ethical adherence to reporting not only on children but also, more broadly, on areas that are normally private and personal by nature.

Given recent debates around the right to privacy versus public right to know, it seems clear that the court has ruled that in personal matters of divorce there is a greater emphasis on the right to privacy.

It is important to note that the protection afforded to children in future divorce actions through this Constitutional Court judgement is consistent with the special protection afforded to children under the Constitution, the Children's Act and the Criminal Procedure Act, to name but a few.

While the victory addresses a relatively small area of media coverage of children, it serves to emphasise the importance of children's rights, especially to dignity and privacy.

For the media, the challenge is to find creative ways of reporting divorce matters, and adhering to higher ethical standards in reporting on matters in which children are involved.

Two guides have been compiled to help journalists negotiate the terrain of children and the law: *A Media Guide to the Children's Act 38 of 2005* and *A Media Guide to the Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007)*. They can be found at [www.childlawsa.com](http://www.childlawsa.com)