

Family Conferencing: Responsibility at Grassroots Level – A Comparative Analysis between the Netherlands and South Africa

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Online ISSN
1727-3781

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Date Submission

12 December 2020

Date Revised

15 April 2021

Date Accepted

15 April 2021

Date published

22 April 2021

Editor Prof O Fuo

How to cite this article

Spijker GHA & De Jong M "Family Conferencing: Responsibility at Grassroots Level – A Comparative Analysis between the Netherlands and South Africa" *PER / PELJ* 2021(24) - DOI <http://dx.doi.org/10.17159/1727-3781/2021/v24i0a9325>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2021/v24i0a9325>

Abstract

As family group conferencing is gaining world-wide recognition as an alternative dispute resolution process, this article aims to outline the origin and relevance of this process, which promotes solution-finding to family problems by the family themselves and/or the social network and usually results in a plan or agreement that will be implemented collaboratively by the people involved. Although it was originally used in child protection matters, the process is now used for a wide range of problems pertaining to families and individual family members, including divorce matters, the illness or death of a family member, the care of the elderly, family financial problems, bullying, addiction cases, domestic violence and child justice matters. The process is also suitable for application in problems concerning any group, neighbourhood or school. Next, the application of family group conferencing in both the Netherlands and South Africa is first examined and then briefly compared. It appears that family group conferencing through *Eigen Kracht* in the Netherlands is an established practice which consists of a relatively simple and quick process and yields positive results for families/communities experiencing problems. Recently the Dutch *Youth Act* of 2015 (*Jeugdwet*) made legislative provision *inter alia* for a family group plan to be drafted by parents, in conjunction with next-of-kin or others who are part of the social environment of a youth/juvenile person. On the other hand, although extensive legislative provision is made for family group conferencing by the *Children's Act* 38 of 2005 in children's court proceedings and by the *Child Justice Act* 75 of 2008 in the child justice system in South Africa, the process has not yet reached its potential in terms of the implementation of the concept. Lastly, some recommendations are made which mainly aim to contribute to the implementation of the concept in South Africa, in that the model will eventually be fully developed and utilised for the benefit of individuals, children, their families and/or social network.

Keywords

Family group conference; family group plan; children's court proceedings; child justice system; child protection; care of the elderly; family problems; divorce; domestic violence; bullying; addiction; neighbourhood problems; social network; problem-solving; mediation; restorative justice; independent coordinator/facilitator; mediator.

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1 Introduction

In the past two decades the concept of family group conferencing has become widely known and seems to be gaining ground world-wide.¹ It is a decision-making process which promotes solution-finding by the family and/or social network, usually resulting in a plan which initiates a process of collaboration between the people involved.² Moreover, the concept assists in building a bridge between two distinct groups, one of which consists of the family and/or social network and the other of the social services professionals and their organisations. Ideally, there should be an independent facilitator who does not belong to either group and can be typified as a "bridge-builder", allowing the network to take ownership of the process and outcome, as assisted by social services professionals where necessary.³ Some countries have incorporated the concept of family conferencing into their national legislation, as South Africa has,⁴ but elsewhere it has mainly been developed into a best practice, as in the Netherlands. Although these two countries are historically connected⁵ and largely share the same legal foundation, namely Roman (Dutch) law,⁶ the approach pertaining to family conferencing differs significantly. Whereas in South Africa the development of family conferencing is still in the implementation stage and struggling to get acceptance in practice, in the Netherlands it is an established practice with a high success rate.⁷ In the Netherlands family group conferencing has only recently been legislated for in a limited manner, whereas in South Africa family conferencing has been legislated for more extensively for some time now. However, both countries

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¹ Clarijs and Malmberg *Quiet Revolution* 19 and further.

² Van Beek *et al De Kleine Gids* 19.

³ Van Beek *et al De Kleine Gids* 38-39.

⁴ In the *Children's Act* 38 of 2005 and the *Child Justice Act* 75 of 2008.

⁵ For an overview of the early years of European settlement, see Giliomee and Mabenga *New History of South Africa* 40 and further. Nowadays South Africa and the Netherlands are partners in terms of socio-economic development, which includes trade and investment, agriculture, water, transport and logistics, and culture.

⁶ The arrival of the Dutch in 1652 had a profound effect on the development of the common law in South Africa. Du Bois Wille's *Principles of South African Law* 64 and further.

⁷ See paras 3, 4 and 5 below.

have one significant standard in common, namely the best interests of the child, which is of paramount importance in every matter concerning the child.⁸ Therefore, the process of family conferencing should by implication be child-inclusive, whenever children are involved in a dispute. This is important, because children have the right to participate in all matters which affect them.⁹

This article aims to outline the origin and relevance of the concept of family conferencing, after which its application in the Netherlands and South Africa, respectively, will be examined and then briefly compared. Lastly, some recommendations will be made which aim mainly to contribute to the implementation of the concept in South Africa, in that the model will eventually be fully developed and utilised for the benefit of individuals, children, their families and/or social networks.

2 The origin of family conferencing

The concept of family conferencing developed in the 1980s in New Zealand¹⁰ as a result of a dysfunctional social welfare system and an acknowledgement by the government that their practices pertaining to children and families were not culturally appropriate: in cases where families were encountering problems due to the economic crisis, the authorities were quick to remove children from the family environment, especially children of Maori descent and those from the Polynesian Islands.¹¹ It was found that new legislation needed to be enacted which would draw on the indigenous knowledge and customs of the original inhabitants of New Zealand and simultaneously ensure the protection of the rights of families.¹² This culminated in the development of the concept of family conferencing, where families themselves find a solution to their problems, thus forestalling state intervention.¹³ Routinely providing families with an opportunity to deal with matters internally before further action is taken enables families "at risk" to come up with a plan for solving their problems. In 1989 the concept was included in the *Children, Young Persons and their Families Act, 1989*. The

⁸ This standard is also provided for in art 3(1) of the *Convention on the Rights of the Child* (1989) (the CRC), which was ratified by the Netherlands on 6 February 1995 and by South Africa on 16 June 1995.

⁹ Article 12 of the CRC states that "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."

¹⁰ Burford and Hudson *Family Group Conferencing* 11.

¹¹ Burford and Hudson *Family Group Conferencing* 24.

¹² Van Beek *et al De Kleine Gids* 57.

¹³ E.g. the removal of a child from the family environment.

inclusion of the concept in national legislation, combined with its practical implementation countrywide, has had a tremendously positive impact on youth care in New Zealand, in the sense that far fewer state interventions have been necessary.¹⁴ Indigenous groups in other parts of the world, who had voiced similar sentiments to those of the New Zealand Maori, took notice: state interventions into matters having to do with children and young people need to be understood and developed within a context of family, community, and culture.¹⁵ In addition, news that family conferences were also to be used with majority culture families in New Zealand aroused considerable attention within and outside the country. The experiences in New Zealand were therefore soon transferred to other parts of the world, including Australia, the United States of America, the United Kingdom, Sweden, South Africa and the Netherlands.

3 Relevance and application of family group conferencing

Family group conferencing can be viewed as an alternative approach to problem-solving. It is a decision-making model which requires the mobilisation of the social network with the aim of finding a solution to a problem, culminating in a plan or agreement to be implemented by the people involved through a collaborative effort. It therefore appeals not only to communal thinking by the participants towards finding a solution but also to the practical involvement of the participants, which would be required for the successful implementation of the plan. The strength of this approach lies in the fact that the family and/or social network are taking responsibility for their own problems and simultaneously being empowered to find a viable solution, which might even avoid state intervention.¹⁶ The latter even applies in the case of complicated issues or difficult circumstances.¹⁷ Family conferencing has been typified as "the wonder that brings an end to the so-called lifebuoy tragedy". Where previously the social worker thought that the members of a family needed a lifebuoy in order to prevent them from drowning, family conferencing encourages people to swim instead of grabbing a lifebuoy provided by the professional concerned.¹⁸ In other words, the tables have been turned: whereas in the past people used to turn to professionals in order to get help, now the family or social network takes

¹⁴ Wijnen-Lunenburg *et al De Familie Aan Zet* 13.

¹⁵ Burford and Hudson *Family Group Conferencing* 23-24.

¹⁶ See the research done by Schuurman and Mulder *Eigen Kracht-conferenties bij Gezinnen* 23, 29.

¹⁷ Van der Weide-van der Helm *Krachten en Kansen* 44-62.

¹⁸ Interview with Pieter Hilhorst, DVD of *Eigen Kracht*, the Netherlands.

the first step towards solving the matter at hand.¹⁹ Family conferencing widens the circle of persons involved, in the sense that the support and care provided by people's own social circles increases social cohesion. Family conferencing makes the family central; it becomes the point of departure and remains the focal point in problem-solving. In addition, the psychological effects should not be underestimated, since family conferencing allows all participants, including children, to become involved, to express their feelings and ideas and to be part of the solution.²⁰ They come to realise that the family or network does have resources to rely on and that the family is able to regain control, which empowers the family and/or network. Moreover, family conferencing makes use of available resources, namely the extended network surrounding the individual or family concerned. To ensure that the family or network remains in control of both process and outcome, the conference is organised by a specifically trained, independent coordinator or facilitator.²¹

Family group conferences are, however, not restricted to child protection matters; they could be utilised in a wide range of problems pertaining to families and individual family members, such as divorce matters, the illness or death of a family member, or addiction cases. Family group conferencing can also be useful in the case of financial problems (such as debts or threatened eviction from the family home), as well as after wrongdoing and crime, as in cases involving (child) offenders, or even in cases of domestic violence.²² Other applications include cases of public mental health care²³ or the care of frail older persons. In fact, family conferencing is suitable in problems concerning any group, the neighbourhood, or problems that arise at schools, such as learning problems, substance abuse, bunking, dropping out or bullying.²⁴

A move away from adversarial approaches to family group conferencing could surely result in better options for families experiencing problems such as those referred to.

¹⁹ Van Beek *et al De Kleine Gids* 35, 123-134.

²⁰ Bosma *Een Plan van Allemaal* 52-53. Also see Van Beek *et al De Kleine Gids* 24.

²¹ Van Beek *et al De Kleine Gids* 35-36.

²² Burford and Hudson *Family Group Conferencing* 231-245.

²³ For a detailed discussion on family conferencing and research findings in the public mental health context, see De Jong *Family Group Conferencing*.

²⁴ Eigen Kracht Centrale 2011 https://www.eigen-kracht.nl/assets/uploads/2016/02/2011_Eigen-Kracht-coordinator-lets-voor-U-digifolder.pdf 2.

4 Family group conferences in the Netherlands

4.1 Eigen Kracht *initiative*

In the late 1990s the organisation *Op kleine Schaal*, which specialised in youth care matters, together with a bureau for social market research took the initiative in introducing and developing family conferencing in the Netherlands. Based on the experiences gained during a pilot study in four areas, a structure was developed which would ensure that this form of solution-finding was accessible to a wide range of organisations and the general public.²⁵ Their efforts culminated in the founding of the civic organisation, *Eigen Kracht*, in 2002. The literal meaning of the name of this organisation is "Own Strength", which is the point of departure of the approach. The central office, called the *Eigen Kracht Centrale*,²⁶ is situated in Zwolle and has proven pivotal in the realisation and implementation of family conferencing countrywide. Staff members from this central office offer training in conducting family group conferences in line with the vision of *Eigen Kracht*, and also hold workshops and presentations. The topics for the workshops include youth care and protection, health care, education, bullying, care for the elderly, poverty and debt, home evictions, neighbourhood problems and domestic violence. The statutes of *Eigen Kracht* embody the following aims: to strengthen the social structure by encouraging the people involved to take charge of their lives; to guard and safeguard the integrity of the Dutch model of family conferencing, which is called the *Eigen Kracht Conferentie*;²⁷ to promote the quality and implementation of family conferences; to organise family conferences; and to provide the necessary support.

The process of family group conferencing is facilitated by an independent coordinator, who is required to have certain competencies and life experience.²⁸ The coordinator works on a freelance basis for the *Eigen Kracht Centrale* and must have undergone the necessary six days' *Eigen Kracht* training.²⁹ The training consists of two parts – part 1 consisting of theory and practice and part 2 of practice and evaluation – followed by

²⁵ Van Beek *et al* *De Kleine Gids* 43-44.

²⁶ As a foundation (*Stichting*) the *Eigen Kracht Centrale* is a non-profit organisation.

²⁷ Usually referred to in the Netherlands as EK-c.

²⁸ For more information, see *Eigen Kracht Centrale* 2020 <https://www.eigen-kracht.nl/>. From the start of the conference until the presentation of the plan, the independent coordinator is offered support by the *Eigen Kracht Centrale*.

²⁹ *Eigen Kracht Centrale* 2011 https://www.eigen-kracht.nl/assets/uploads/2016/02/2011_Eigen-Kracht-coordinator-lets-voor-U-digifolder.pdf 7.

continuous training and coaching by regional managers.³⁰ The coordinator has no interest in the outcome of the plan and no influence on its contents. The focus falls solely on preparing and organising the family group conference in conjunction with the family and/or network concerned.³¹ The preparatory phase before the commencement of the family group conference is of the utmost importance and can be time consuming. The independent coordinator visits all the (potential) participants in order to explain the concept, to inform them about the specific situation for which the family group conference will be held and to prepare them for the event. During such visits each person identified will be invited to attend the conference and asked what is needed to ensure his or her presence. In addition, the independent coordinator will enquire what the participant would like to contribute to the discussion at the family group conference and ask the (potential) participant to assist in identifying others to be invited to the family group conference.³²

Where members of a family experience problems due to divorce, domestic violence, substance abuse or the illness of a family member, it has been recognised that they could benefit from the support and assistance of those who form part of their social network. The process of family group conferencing as developed in the Netherlands therefore ensures the mobilisation of that social network, which includes family, friends (including the friends of the children involved), acquaintances, neighbours, colleagues, (sports) coaches or teachers. Since 2001 approximately 13 000 family group conferences have taken place under the auspices of the organisation *Eigen Kracht*.

The *Eigen Kracht Centrale* envisages a society in which people maintain or regain control over their own lives, by enabling them to draft a plan in collaboration with their social network, even in complicated matters. Experience shows that the individuals involved are generally prepared to take responsibility when there is a prospect that the quality of their lives might improve and that this usually results in finding a solution that is considered safe, efficient, creative and sustainable.³³ However, the intention of a family group conference is not that the people involved are expected to solve all aspects surrounding the problem themselves without any professional input or assistance. Professionals regularly provide the necessary information before and during the family group conference.

³⁰ Van Beek *et al De Kleine Gids* 45.

³¹ Van Beek *et al De Kleine Gids* 20-21, 113-118.

³² Van Beek *et al De Kleine Gids* 65.

³³ Van Beek *et al De Kleine Gids* 35.

Moreover, in many instances they have an important function pertaining to the implementation of the plan, for example, in child protection cases. In such an instance the children's court may have issued a supervision order to ensure the well-being of the child concerned. Although the family and its network has the opportunity to draft a plan, a social worker will need to report back to the children's court on the well-being of the child. No court approval of the plan *per se* is necessary and no feedback on the implementation of the plan needs to be given to the court. Research has shown that supervision orders and removal orders have been prevented via family group conferencing.³⁴

As will be seen next, the process of family group conferencing is relatively simple and quick.

4.2 Drafting a plan from start to finish (and beyond)

Where a problem which lends itself to resolution through a family group conference arises, a person may request a family group conference by contacting the central office, *Eigen Kracht Centrale*, or a regional manager,³⁵ after which an application form must be completed.³⁶ Potential applicants are (1) the person or persons who encounter the problem, (2) a member of the applicant's or applicants' circle, such as a family member, friend, neighbour or colleague, or (3) a professional, such as a social worker, general practitioner, teacher or psychologist. Children from the age of 12 years upwards³⁷ can request a family group conference independently. The regional manager will attempt to find an independent coordinator, in line with the wishes of the applicant(s), which would include wishes pertaining to gender, language, religion or cultural background.³⁸ Within a few working days the independent coordinator contacts the applicant(s).³⁹ At the first meeting the central problem or question is

³⁴ Schuurman and Mulder *Eigen Kracht-conferenties bij Gezinnen* 23, 29.

³⁵ This can be done via the website (*Eigen Kracht Centrale* 2020 <https://www.eigenkracht.nl/>) or telephonically.

³⁶ The required form consists of one A-4 page and contains six short questions to be answered by the applicant(s).

³⁷ Also see art 809(1) of the *Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering)*, which compels a judge to give a child over the age of 12 the opportunity to make his or her views known before any decision is taken in matters concerning him or her, and arts 1:251a-4 and 1:377a-3c of the *Dutch Civil Code (Burgerlijk Wetboek)*, which allow children older than 12 years to participate in parenting matters after a divorce or family separation.

³⁸ Van Beek *et al De Kleine Gids* 120.

³⁹ Due to an increasing pool of independent coordinators in all provinces, there are no waiting lists. In 2013 there were over 750 freelance coordinators with a wide variety of cultural backgrounds, collectively speaking over 100 languages and dialects.

formulated and information on the process of family group conferencing is provided. In addition, a list of (potential) invitees is compiled. It is interesting that while according to the applicant(s) the social network usually seems limited at first, with the assistance of the independent coordinator the circle is (usually) widened.⁴⁰

The applicant(s) or the family decides on the place and time where the family group conference will be held and the participants are invited by the independent coordinator, as directed by the family, which includes the child(ren) involved. On average the group would consist of between 10 and 16 people.⁴¹

The family group conference itself consists of the following three phases:⁴²

4.2.1 Phase 1: Information sharing

The independent coordinator makes the necessary introductions and ensures that the proceedings take place on the basis of equality and according to the "rules of order" as determined by the participants at the beginning of the meeting.

Some family group conferences are attended by a social worker or other professional, for example a psychologist or a probation officer. This applies especially in cases where the family concerned is already receiving professional assistance or in the case of possible or pending government interference. In such cases the professional concerned outlines the main problem and stipulates specific conditions to be included in the plan to ensure the approval thereof. In cases where no professional assistance is involved or where such assistance is provided on a voluntary basis, the participants involved have free reign to find a solution to the problem, which will be outlined by the independent coordinator at the beginning of the family group conference.

⁴⁰ Questions which may come to the fore are, "who is/are involved in the matter" or "who is/are affected by the matter in any way". Van Beek *et al De Kleine Gids* 121.

⁴¹ The smallest conference held in 2011-2012 consisted of 3 participants and the largest of 50 participants. Van Beek *et al De Kleine Gids* 66.

⁴² Van Pagée "Eerste Ervaringen en Resultaten" 41-48.

4.2.2 Phase 2: Private family deliberations and decision-making (family and/or network only)

This phase constitutes the family's private meeting: all professionals and the independent coordinator leave the venue.⁴³ The independent coordinator does, however, need to ensure that all relevant information is presented and that all members of the family or the community can participate in a safe environment.⁴⁴ The family discusses the problem with the aim of drafting a workable plan that outlines the responsibilities of various participants and possible time frames.

A family group conference may be adjourned and resume later that day or the following day, at a time to be agreed upon by the participants. There is no time-limit. The independent coordinator remains on stand-by in case the family requires guidance. In the case of conflict, the coordinator will remind the persons concerned of the importance of focussing on the common goal(s), namely solution-finding for an identified problem.

4.2.3 Phase 3: Presentation and acceptance of the plan

One of the participants presents the plan in writing to the independent coordinator and professional(s), if applicable. The plan outlines who will take responsibility for what, linked with a time-frame, and stipulates who will monitor the overall implementation (and re-evaluation) of the plan. In the case of possible or pending government interference, the professional concerned is obliged to verify whether the plan is safe and lawful, in which case the plan will be accepted.⁴⁵

Within two working days all participants should have received the plan in writing. This is important, since the implementation of the plan usually begins with immediate effect, possibly even while the conference is taking place.⁴⁶ It is submitted that the "hands-on" approach regarding the process, which acknowledges the strengths of the participants, and the speedy

⁴³ It is crucial that all "outsiders" leave the conference to allow the family or social network to deliberate freely.

⁴⁴ In this regard, the importance of the preparatory phase before a family group conference takes place cannot be overemphasised.

⁴⁵ The plan will usually be accepted unless it is unsafe or against the law. For example, if the court has issued a supervision order pertaining to a child (*ondertoezichtstelling*), this needs to be considered while drafting the plan. If the plan has not been accepted, the family or social network needs to (re)adjust the plan in order to meet the stipulated requirement(s).

⁴⁶ Van Beek *et al De Kleine Gids* 20.

implementation of the plan are the forces behind the success of this concept.

4.3 Recent legislative developments

The positive results accomplished by the numerous successful family group conferences organised via *Eigen Kracht*, combined with the necessary (political) lobbying, have resulted in an amendment to the legislation on child protection.⁴⁷ On 1 January 2015 the *Youth Act (Jeugdwet)* replaced the *Youth Care Act of 2004 (Wet op de Jeugdzorg)* and *inter alia* made legislative provision for family group plans. As from this date, the Youth Care Bureau has a duty to first allow the social network surrounding a family to draft a plan (or course of action) or to adjust an existing plan via a family group conference. The *Youth Act* does not contain any prescriptions as to how and when a family group plan should be drafted and, accordingly, it is said that the drafting of such a plan does not require a prescribed form (or format).⁴⁸

The Act mentions a family group plan in several articles:

In terms of article 1.1, a family group plan is defined as a (social assistance) plan of action drafted by the parents, in conjunction with the next-of-kin or others who are part of the social environment of the youth/juvenile person.

According to article 2.1, the municipal policy concerning prevention, youth care, child protection measures, juvenile rehabilitation and the implementation of youth care focusses on the creation and implementation of family group plans, and the provision of assistance on the basis of such plans, for the execution of article 4.1.2. Article 4.1.2 then provides that in the case of early signs of difficulties with upbringing, or educational and psychological problems and disorders, the youth care provider/worker from the certified institution must first offer the parents and the child the opportunity to draft a family group plan, within a reasonable time. The youth care provider/worker can deviate from this only if the parents have indicated to him or her that they do not wish to make use of this opportunity, and where concrete threats are present in the development of the child or where the interests of the child are being harmed in some other way.

⁴⁷ The so-called *Amendement Voordewind* of the *Tweede Kamer der Staten-Generaal*, 2010-2011.

⁴⁸ Nederlands Jeugdinstituut 2017 https://vng.nl/sites/default/files/201607_factsheet_familiegroepsplan_vng_nji_vws_venj2_0.pdf.

In terms of article 6.1.10(2), before authorisation or conditional authorisation (for placement in a closed setting) is granted, the juvenile court offers the parents and the child the opportunity of drafting a family group plan. The juvenile court can deviate from this only if the parents have indicated to the court that they do not wish to make use of this opportunity, where concrete threats are present in the development of the child, or where the interests of the child are being harmed in some other way.

The *Youth Act* contains the following exceptions where the parents and the child/juvenile are not given the option to first draft a family group plan, namely when:

- a certified institution has implemented/executed a youth rehabilitation/probation order, (because this is based on a judgment of a (juvenile) criminal court);
- a certified institution exercises custody after the termination of the authority of the parents (because custody is no longer being exercised by the parents);
- a certified institution concludes in the light of a supervision order or a youth care provider/worker observes that concrete threats are present in the development of the child or where the interests of the child are harmed otherwise.

It appears that the *Eigen Kracht* process of family group conferencing is applicable to the drafting of family group plans in terms of the *Youth Act*.⁴⁹ With the assistance of an independent third party (the independent coordinator), the family and social network will be given an opportunity to make its own plan without interference in the decision-making process by such a third party. It further appears that care and welfare services and measures are being implemented at a local (municipal) level, close to the people. In other words, the family, including the child, and the social network will be given an opportunity to address the problem(s) and produce a plan before the imposition of a supervision order or during the implementation of an existing child protection measure. Through the mobilisation of the social network the participants will explore the possibility of finding a solution to the problem(s), thereby empowering all involved and ensuring the safety and well-being of the child(ren).

⁴⁹ Nederlands Jeugdinstituut 2017 https://vng.nl/sites/default/files/201607_factsheet_familiegroepsplan_vng_nji_vws_venj2_0.pdf.

5 Family group conferences in South Africa

5.1 Provision for family group conferences in the Children's Act 38 of 2005

The *Children's Act* provides for various family-friendly ways of finding solutions to problems pertaining to children. These include mediation, family group conferences, pre-litigation conferences and lay forum hearings. This is in line with the general principle in section 6(4)(a) of the Act, which states that in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.

Family group conferences are explicitly referred to in various sections of the Act. First, section 46(1)(h)(iii) provides that a children's court may make a child protection order, which includes an order 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. Here, family group conferencing is mentioned specifically in relation to child protection matters. It also appears that parties can be ordered to participate in a family group conference against their will. This specific aspect of section 46(1)(h)(iii) has been criticised by Zaal,⁵⁰ who points out that "[i]t has been generally accepted internationally that ADR should not be forced on unwilling participants." However, this viewpoint can no longer be accepted as participation in alternative dispute resolution processes is increasingly being forced on parties.⁵¹ In terms of the South African Law Reform Commission's draft Family Dispute Resolution Bill of 2020,⁵² for example, the parties to any family law dispute must attend mediation before any court proceedings may commence.⁵³ Nevertheless, although participation in the process may be mandatory or strongly encouraged, the reaching of a plan or an agreement in the course of the process is not.⁵⁴

Secondly, section 49(1) grants the children's court a discretion to order a lay forum hearing in an attempt to settle a matter or an issue in a matter out of court. A lay forum hearing may include mediation or a family group

⁵⁰ Zaal 2010 *THRHR* 357.

⁵¹ De Jong 2019 *CILSA* 315; De Jong 2010 *TSAR* 523-528.

⁵² The Bill appears at the end of the South African Law Reform Commission's Discussion Paper 148 on Project 100D *Alternative Dispute Resolution in Family Matters* (SALRC Discussion Paper 148).

⁵³ Clause 17(1) of the Bill (SALRC Discussion Paper 148).

⁵⁴ De Jong "Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce" 583; Dewdney 2009 *ADRJ* 17-18.

conference as contemplated in section 70. In terms of section 70(1) the children's court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children's court, including any other family members of the child, in order to find solutions to any problem involving the child. Here, too, it appears that a family group conference may be mandatory in the discretion of the court.⁵⁵ It is further apparent that the discretion of the court to order family group conferences is not limited to child protection matters as stipulated in section 46(1)(h)(iii), but extends to any problem involving a child, including private law matters such as care and contact disputes between the co-holders of parental responsibilities and rights in respect of a child or between a holder of parental responsibilities and rights in respect of the child and other relevant persons.⁵⁶ According to Leppan and Gallinetti,⁵⁷ section 70 introduced a wholly new use for family group conferencing in South African law, which had previously only been piloted in criminal law, especially in child justice matters. These authors further stress the usefulness of family group conferences in the children's court setting by stating that

[t]hey represent a unique opportunity to bring together all the parties in a dispute in order to resolve issues, promote healing and plan a way forward.⁵⁸

The use of family group conferencing in private law matters is fully supported. It is foreseen that a contact dispute between the father of a child and the child's maternal grandparents upon the untimely death of the child's mother due to COVID-19, for example, would be dealt with much better at a family group conference by family members than in the children's court by a presiding officer. It is therefore to be hoped that presiding officers in the children's courts will start utilising their authority in terms of section 70(1) of the Act to set up family group conferences in appropriate circumstances.

Notably, family group conferences are limited to the parties involved in a matter, including other family members of the child. Zaal laments this limitation and indicates firstly that

[t]he whole point of FGCs is that the wider family, including persons who may *not* be parties in the legal sense, might be needed as attendees.⁵⁹

⁵⁵ De Jong 2008 *THRHR* 633-634; Zaal 2010 *THRHR* 356.

⁵⁶ Leppan and Gallinetti "Increased Jurisdiction of the Children's Courts" 168, 172.

⁵⁷ Leppan and Gallinetti "Increased Jurisdiction of the Children's Courts" 170.

⁵⁸ Leppan and Gallinetti "Increased Jurisdiction of the Children's Courts" 172.

⁵⁹ Zaal 2010 *THRHR* 361.

He further argues that the restriction to family members is inappropriate because family group conferences sometimes need to involve "significant non-family members such as godparents and neighbours".⁶⁰

Although nothing is said specifically about child participation in the family group conference, section 10 of the *Children's Act*, which provides that 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, should find application.⁶¹

Section 70(2) and the regulations under the Act⁶² contain more prescriptions for the family group conferencing process. In terms of section 70(2), the court must appoint a suitably qualified person or organisation to facilitate at the family group conference; prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and consider the report on the conference when the matter is heard. Regulation 13(1) firstly confirms that a family group conference may be mandatory in the discretion of the court. It provides that

[i]f a court orders that the matter *must* be referred to a family group conference as provided for in section 70 of the Act for *mediation*, the presiding officer of the court must appoint a person or organisation as provided for in subregulation (2), as facilitator of the family group conference [our emphasis].

Secondly, it appears that a facilitator must facilitate at the family group conference through mediation and act as a mediator. This is further supported by regulation 13(7), which provides that

[t]he facilitator must confer with the parties and endeavour to obtain an agreement or settlement in respect of the matter.

In terms of regulation 13(2), the facilitator of a family group conference may be any suitably qualified person, including but not limited to a family advocate, a social worker, a social service professional or a traditional leader.

⁶⁰ Zaal 2010 *THRHR* 361.

⁶¹ Also see *B v B* 2012 ZASCA 151 (28 September 2012) para 18, where it was found that s 10 is a general principle of the *Children's Act* 38 of 2005 and will have to be implemented and respected in all matters concerning a child (including a maintenance matter *in casu*). Also see *HG v CG* 2010 3 SA 352 (ECP) paras 17-23, where the court *inter alia* stressed the fact that children have a right to participate in terms of s 10.

⁶² The Regulations Relating to Children's Courts and International Child Abduction (GN R250 in GG 33067 of 31 March 2010).

Regulation 13(3) makes provision for the referral of a matter to a facilitator by the clerk of the court upon receipt of an order to the effect that a matter must be referred to a family group conference for mediation. Interestingly, it provides *inter alia* that the clerk must submit all certified copies of all the relevant documentation relating to the matter to the facilitator.⁶³ As no decision can be made on a family law issue in the mediation process if all of the relevant information and documentation is not put on the negotiating table,⁶⁴ such provision for a type of discovery procedure at the outset of the mediation process is to be welcomed.

After a facilitator has received the relevant documentation in a matter, he or she must convene a family group conference within 10 to 15 days in terms of regulation 13(4). The facilitator must also take steps to ensure that all persons entitled to attend the conference are notified, within a reasonable time, of the time, date and place of the conference. The onus is therefore on the facilitator to determine who all the relevant role players at the family group conference would be.

As regards the confidentiality of the family group conference process, regulation 13(8) gives the parties in a matter the choice to decide whether the facilitator is to file a full report on the conference, including anything that the facilitator considers to be relevant to the matter, or a report that merely sets out any agreement reached by the parties or notes that the parties did not reach agreement on the matter. Even though confidentiality is usually a fundamental feature of the mediation process to ensure that parties can candidly disclose any facts or information without being afraid that any statements or concessions made could later be used against them in litigation that might follow an unsuccessful mediation attempt,⁶⁵ there are examples in foreign jurisdictions where parties may choose between "open" or "closed" mediation, where open mediation signifies that the parties waive their rights as to confidentiality and closed mediation implies that confidentiality is critical.⁶⁶ Mention is also made of a compromise model developed for child protection mediation in Ontario, where parties agree not to request the mediator to testify in or provide a report to the court, but where they are free to use any information from the mediation process in any

⁶³ Regulation 13(3)(b).

⁶⁴ De Jong "Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce" 600-601.

⁶⁵ De Jong "Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce" 584.

⁶⁶ Payne and Payne *Canadian Family Law* 151.

subsequent litigation.⁶⁷ However, the parties' choice in terms of regulation 13(8) is subject to any directions given by the presiding officer or the court. It is therefore foreseen that where child protection matters are at stake the court might impose less stringent confidentiality requirements.

Lastly, subregulations 13(9), (10) and (11) make provision for the facilitator's report to be submitted to the court within 15 days after the conclusion of the family group conference. If an agreement or settlement was reached at the family group conference, it must also be submitted to the court within the specified timeframe to be made an order of the court. If no agreement or settlement was reached and, supposedly, even where an agreement or settlement was reached, the facilitator may refer the matter back to the court for a hearing. The referral must be in writing on the prescribed form,⁶⁸ stating the reasons why the matter was so referred. It would therefore appear that the facilitator might be able to refer an agreement or settlement back to the court if he or she deems it not to be in the best interests of a child. This possible evaluative role of the facilitator could be problematic as it might compromise his or her independence. However, it is submitted that this responsibility of the facilitator could be used by him or her to remind the parties and the concerned family members of their obligation to put the best interests of the child first and to meaningfully engage in the process.

5.2 Provision for family group conferences in the Child Justice Act 75 of 2008

In addition, family group conferencing is provided for in public law. In terms of section 61(1)(a) of the *Child Justice Act 75 of 2008*, a family group conference is an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons. A plan is developed at a family conference on how the child will redress the effects of the offence. In terms of section 61(3)(a), the family group conference must be facilitated by a facilitator, who may be a probation officer or a diversion service provider referred to in section 56(1).⁶⁹

⁶⁷ Zaal 2010 *THRHR* 364-365 with reference to Savoury, Beals and Parks 1995 *Child Welfare* 760.

⁶⁸ Part B of Form 5 of the Annexure in the Regulations Relating to Children's Courts and International Child Abduction (GN R250 in GG 33067 of 31 March 2010).

⁶⁹ Section 56(1) of the *Child Justice Act 75 of 2008* refers to a diversion service provider that has been accredited in terms of the section and has a valid certificate of accreditation.

Although no mention is made of the use of a specific alternative dispute resolution process by the facilitator, as in the case of family conferences in terms of the *Children's Act*, it is believed that restorative justice will play an important and relevant role in family conferences in terms of the *Child Justice Act*. In terms of this Act, restorative justice means an approach to justice that aims to involve the child offender, the victim, the families concerned and community members in collectively identifying and addressing harms, needs and obligations by accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.⁷⁰ Furthermore, in terms of section 2, the objects of the Act are *inter alia* to promote the spirit of *ubuntu* in the child justice system through supporting reconciliation by means of a restorative justice response and involving parents, families, victims and, where appropriate, other members of the community affected by the crime in order to encourage the reintegration of children.⁷¹ Louw and Spijker⁷² specifically state that

ubuntu both demonstrates and instructs us toward restorative justice as exemplified by family conferencing.

Unlike family conferencing in private law in terms of section 70 of the *Children's Act*, a public law family group conference cannot be forced on the child and the victim as both of them have to consent to such a conference in terms of section 61(1)(b) of the *Child Justice Act*. Furthermore, it is not the facilitator's responsibility to convene the family conference, but rather that of a probation officer appointed by a magistrate, an enquiry magistrate or a child justice court.⁷³ It also appears that attendance at the family group conference is not limited to the family members of, respectively, the child and the victim. Section 61(3)(b) provides that the family group conference may be attended by the child and his or her parent, an appropriate adult or a guardian; any person requested by the child; the victim of the alleged offence, his or her parent, an appropriate adult or a guardian, where applicable, and any other support person of the victim's choice; the probation officer; the prosecutor; any police official; a member of the community in which the child normally resides; and any person authorised by the family group conference facilitator to attend the conference.

⁷⁰ Section 1 of the *Child Justice Act 75* of 2008.

⁷¹ Sections 2(b)(iii) and (iv) of the *Child Justice Act 75* of 2008.

⁷² Louw and Spijker 2007 *Obiter* 107-109.

⁷³ Section 61(2) of the *Child Justice Act 75* of 2008.

Attendance at family group conferences in public law is therefore much broader than attendance at such conferences in private law.

Section 61(5) contains detailed prescriptions for the plan in respect of the child, to which the participants in a family group conference may agree. The plan may *inter alia* include the application of a diversion option and must specify the objectives for the child and the period within which they are to be achieved; contain details of the services and assistance to be provided to the child and a parent; specify the persons or organisations to provide the required services and assistance; state the responsibilities of the child and of the child's parent(s); state personal objectives for the child and for the child's parent(s); include any other matters relating to the education, employment, recreation and welfare of the child which are relevant; and include a mechanism to monitor the plan. Although family group conferencing is an informal procedure, it is clear that there are many prescriptions for its outcome in public law, namely the plan.

In terms of section 61(7)(a), the facilitator must record the details of and reasons for any plan agreed to at the family group conference and furnish a copy thereof to the child and the relevant probation officer. Section 61(8) further provides that if the participants in a family group conference cannot agree on a plan, the conference must be closed and the probation officer must refer the matter back to the magistrate or child justice court for consideration of another diversion option.

As regards the confidentiality of the family group conference process, section 61(9) provides that no information furnished by the child at a family group conference may be used in any subsequent criminal proceedings arising from the same facts.

5.3 Uptake of family group conferencing in South Africa

Despite the detailed provision for family group conferencing in South Africa, the process does not yet appear to have reached its potential in terms of the implementation of the concept – neither in children's court proceedings nor in the child justice system. An endeavour to obtain statistics from the Deputy Information Officer of the Department of Justice and Constitutional Development in terms of the provisions of the *Promotion of Access to Information Act 2* of 2000 revealed that no record of any family group conferences having taken place exists at the offices of the regional heads for the various provinces of South Africa.

Even before the *Children's Act* 38 of 2005 and the *Child Justice Act* 75 of 2008 came into operation, Zaal⁷⁴ pointed out that a number of serious problems, which detract from the usefulness of family group conferencing in South Africa, had come to light. Such problems include the fact that family group conferencing appears to be a resource-intensive process, the unfavourable cost implications, the complexity of the matters to be dealt with, and the power dynamics within families. Another problem pointed out by Zaal⁷⁵ is the possibility that after a family group conference, children might be exposed to further harm or neglect due to reduced involvement by social workers in child-protection matters. Beside these problems, Boniface⁷⁶ points out that language difficulties may emerge during the process. In addition, Leppan and Gallinetti⁷⁷ caution that because the process of family group conferencing is time-intensive and costly it should not be resorted to lightly but should preferably be reserved for serious matters. It appears, however, that the baby has been thrown out with the bathwater.

Another possible explanation for the unsatisfactory uptake of family group conferencing in South Africa is the different roles of a facilitator at a family group conference in children's court proceedings and a facilitator at a family group conference in the child justice system as well as the dissimilar end products of a family group conference in these two settings, which may have caused confusion and made judicial officers reluctant to order or consider family group conferencing in appropriate circumstances.

In the next section a comparative synthesis is undertaken between family group conferencing in the Netherlands and South Africa to determine how the process could be streamlined and more effectively utilised in South Africa.

6 Comparative synthesis between family group conferencing in the Netherlands and South Africa

When comparing the established practice of family group conferencing in the Netherlands with the legislative provision for family group conferencing in South Africa, some similarities and quite a number of differences come to the fore.

⁷⁴ Zaal *Court Services for the Child in Need of Alternative Care* 96-97.

⁷⁵ Zaal *Court Services for the Child in Need of Alternative Care* 215.

⁷⁶ Boniface 2012 *PELJ* 390.

⁷⁷ Leppan and Gallinetti "Increased Jurisdiction of the Children's Courts" 171.

In the Netherlands, family group conferencing had its origin in the late 1990s in the activities of the civic organisation, *Eigen Kracht*, which covered a broad range of problems pertaining to families and individual family members. It was only in 2015 that legislation, the *Youth Act (Jeugdwet)*, was enacted to regulate the end product of family group conferences in a very specific field, namely child protection matters. On the other hand, family group conferencing in South Africa has been regulated from the outset by two pieces of legislation, namely the *Children's Act 38* of 2005 in respect of various children's court matters and the *Child Justice Act 75* of 2008 for child justice matters. In South Africa family group conferencing is therefore more extensively regulated and covers only problems pertaining to children.

In the Netherlands, a family group conference can be requested by anybody who feels that a family plan or action by a family group is needed for a particular family problem. Any interested party, including a child who is 12 years of age or older, or a relevant professional may approach *Eigen Kracht*, which will appoint an appropriate facilitator to set up a family group conference.⁷⁸ Furthermore, in terms of the *Jeugdwet*, a family group plan is offered as the first option or solution for child protection matters before a matter goes to court. In contrast, it appears that in South Africa a family group conference can originate only in a court. It can either be ordered by the children's court or proposed by the child justice court. Although it is possible that a party to proceedings or a professional involved in proceedings may request the court to consider ordering or proposing a family group conference, the fact of the matter is that the court is the starting point for a family group conference in South Africa.

In both countries an independent coordinator or facilitator plays a prominent role in the family conferencing process. In the Netherlands, the coordinator is someone who has life experience and an interest in the community and who has completed the six days *Eigen Kracht* training.⁷⁹ In South Africa it appears that a facilitator in children's court matters must be a suitably qualified person with mediation training and a facilitator in child justice matters must be a probation officer or a diversion service provider with restorative justice training.⁸⁰ Currently, according to our knowledge, no specific family group conferencing training such as that available through *Eigen Kracht* in the Netherlands is offered in South Africa.

⁷⁸ Eigen Kracht Centrale 2011 https://www.eigen-kracht.nl/assets/uploads/2016/02/2011_Eigen-Kracht-coordinator-lets-voor-U-digifolder.pdf 3.

⁷⁹ See para 4.1 above.

⁸⁰ See paras 5.1 and 5.2 above.

In the Netherlands the role of the coordinator is to convene the family group conference, which includes identifying who the attendees at the conference should be (in conjunction with the family concerned), providing all participants with information on the procedure of family group conferencing and ensuring that all relevant information is presented and that there is sufficient support for vulnerable parties. However, because the family or network should resolve the problem themselves, the coordinator is not present during phase 2 of the process, when the family or network meets privately.⁸¹ In South Africa, however, the fact that facilitators are explicitly required to use mediation and indirectly encouraged to use restorative justice at family group conferences⁸² implies that they will be present throughout the family group conferencing process to facilitate the participants' negotiations and discussions and ensure that all participants are given an equal opportunity to voice their concerns and provide their input. The facilitator also has a duty to record the plan and/or file a report on the conference to the court and appears to play an evaluative role in determining whether any agreement reached or plan decided upon is in the best interests of the child concerned.⁸³ The facilitator's role in South Africa is therefore more extensive and far-reaching than in the Netherlands. Nonetheless, the agreement or plan needs to be the family's agreement or plan and not that of the facilitator.

It is further clear that attendance at family group conferences in the Netherlands is not restricted to family members, as is the case in South Africa in respect of family group conferences in terms of the *Children's Act*, and anyone who has some connection with the family or a family member in respect of whom a family conference is to be organised may be invited.⁸⁴ In both countries, provision is made for children to participate in matters concerning them, which would, of course, include family group conferences.

In both countries family group conferencing is regarded as an informal process. Although mediation and restorative justice are designated for family group conferencing in South Africa, both of these processes are regarded as informal processes. Furthermore, in South Africa the parties themselves may make a decision about the confidentiality of the family group conference process in terms of section 70 of the *Children's Act*. Nonetheless, the process seems to be more regulated in South Africa than in the Netherlands. The parties' choice regarding confidentiality is subject to

⁸¹ See para 4.2 above.

⁸² See paras 5.1 and 5.2 above.

⁸³ See paras 5.1 and 5.2 above.

⁸⁴ See paras 4.1, 5.1 and 5.2 above.

any directions given by the court.⁸⁵ In terms of regulation 13(4) under the *Children's Act*, the facilitator needs to convene a family group conference within 10 to 15 days after the clerk of the court has referred the matter and submitted all relevant documentation to the facilitator. Furthermore, detailed prescriptions are stipulated for a plan in terms of section 61(5) of the *Child Justice Act*. As alluded to above, facilitators in South Africa must also record the plan and/or file a report on the conference to the court and appear to play an evaluative role in determining whether any agreement reached or plan decided upon is in the best interests of the child concerned. In direct contrast hereto, no prescriptions are stipulated for a family group plan in the *Jeugdwet* in the Netherlands and the drafting of a family group plan is described as *vormvrij* (without a prescribed form).⁸⁶

Another distinctive difference between the practice of family group conferencing in the Netherlands and that in South Africa lies in the approval and implementation of the agreement or plan. In the Netherlands the plan is presented to the coordinator and to professionals, if applicable, and the plan is usually implemented with immediate effect, possibly even while the conference is taking place.⁸⁷ On the other hand, in South Africa a formulated agreement or plan needs to be presented to the court for confirmation within 14 days, which makes such a court-approved agreement or plan a powerful tool, albeit a time-intensive process.

A last important difference is the fact that family group conferencing is in widespread use in the Netherlands whereas it is completely underutilised in South Africa.

7 Conclusion and recommendations

Despite the problems with and poor implementation of family group conferencing in South Africa, it appears that the process can do much to relieve the workload on the Department of Social Development and social service agencies and reduce the huge backlog that currently exists in our courts.⁸⁸ Family group conferencing is also culturally appropriate for South Africa, since in the African culture dispute resolution involves families as

⁸⁵ Regulation 13(8) under the *Children's Act* 38 of 2005.

⁸⁶ See para 4.3 above.

⁸⁷ See para 4.1 above.

⁸⁸ On 11 September 2020, the Department of Justice and Constitutional Development published new *Directions to Address, Prevent and Combat the Spread of COVID-19 in all Courts*. The new Directions include the steps to be taken to reduce the huge case backlogs in our courts: GN 992 in GG 43709 of 11 September 2020.

well as neighbours and the elders participating in a reconciliatory negotiation process.⁸⁹ It is said that

family group conferencing is designed to draw on and be shaped by the cultural patterns and resources of the family and community involved, as understood by the family members themselves.⁹⁰

Furthermore, as family group conferencing makes use of resources available in the community, it should not prove too costly in the current financial climate in South Africa.⁹¹ It is therefore imperative to address all the problems associated with family conferencing in South Africa to ensure the proper utilisation and consistent implementation thereof, to the benefit of individuals, children, their families and/or their social network.

In the first place, we need to consider broadening the scope of the problems that can be referred to family group conferencing as has been done in the Netherlands. It is not only children who could benefit from this process, but also the elderly and other family members struggling with problems related to housing, addiction or family violence – all of which seem to have been aggravated by the current Covid-19 pandemic.

Secondly, the court should not be the only starting point for a family group conference. As in the Netherlands, the process should be available as a first option for family problems which lend themselves to resolution through family group conferencing. Potential applicants should be the family member(s) encountering the problem, a person in the circle of people surrounding the family member(s), such as friends, neighbours or colleagues, or a professional, such as a social worker, general practitioner, teacher or psychologist. Such an approach would ensure the resolution of family problems at an early stage.

Family group conferences should further not be limited to family members only, as is the case in family group conferences in terms of the *Children's Act* 38 of 2005, as opposed to the position in terms of the *Child Justice Act* 75 of 2008 and the position in the Netherlands. Participants should include significant non-family members such as godparents, neighbours, colleagues, friends and acquaintances from a (sports) club or church,

⁸⁹ Boniface 2012 *PELJ* 383.

⁹⁰ Chandler and Giovannucci *Fam Ct Rev* 219.

⁹¹ Facilities at non-governmental organisations, non-profit organisations and religious institutions can be utilised for family group conferences.

etcetera. There should be a consistent approach regarding who may attend a family group conference in terms of both private and public law.

The fact that family group conferencing is more regulated in South Africa than in the Netherlands should not be regarded as a negative. Definite prescriptions on how the family group conferencing process is to be conducted are indeed necessary to ensure that an informal process such as family group conferencing does not compromise social justice. Such prescriptions should include the application of the best interests of the child standard, meaningful participation by all participants, mandatory discovery procedures at the outset of the process and the use of specialised methods for cases involving family violence and/or child abuse. The presence of the facilitator in all the different stages of the family group conferencing process, as is the case in South Africa, is therefore advisable. The facilitator needs to ensure that all prescriptions are adhered to by the family and/or social network.

As regards firm regulation of the process, it is advised that exclusions from family group conferencing should be included in the relevant legislation in South Africa. Because child safety should be the foremost consideration in any conference model, and other constitutional rights of interested parties, such as gender equality, should always be observed, there should be no discrimination on the grounds of sex, gender or age. As a result, some cases may not be appropriate for family group conferencing. Examples of such cases would include those where the family does not have a support network, those where the dominant culture of patriarchy in the community may cause a child or other participant further humiliation and degradation and, as in the Netherlands, cases where there is a chance that the interests of a child may be in jeopardy. The *Children's Act* and the *Child Justice Act* should therefore be amended to make provision for exceptions along the lines of the *Youth Act* of the Netherlands⁹² where family group conferences should not be considered or convened.

Furthermore, the prescription of stricter timeframes or turn-around times is something that needs to be considered to speed up the family group conferencing process in South Africa, where it is currently seen as a time-consuming process. Consideration could also be given to the fact that in the Netherlands a family group plan has immediate effect and need not be approved by the court. However, it is submitted that court approval of the plan would give it more impact and authority, thereby making it a more

⁹² See para 4.3 above.

powerful tool. It is therefore not advisable to do away with this prescription and perhaps this is something that the legislature in the Netherlands could take cognisance of.

Another important aspect that needs to be dealt with is the training of independent facilitators as well as the other professionals involved, including magistrates/judges, legal representatives, social workers and psychologists. As the facilitators' role in the process is more extensive in South Africa than in the Netherlands, it is imperative that specific family group conferencing training should be developed⁹³ and be provided for mediators and restorative justice practitioners who have a great deal of life experience and a desire to get involved in their communities. In this regard the *Eigen Kracht* training programme merits special attention.⁹⁴ Specific attention also needs to be paid to cultural and ethical issues that are likely to affect the family group conferencing process and the participants. A facilitator needs to be sufficiently conversant with the culture of the family or social network and deliver ethnically sensitive services to the families.⁹⁵ In South Africa care should be taken to ensure that

traditional decision-making processes are not repackaged by white professionals and presented to families as an innovative new practice, only serving to reinforce experiences of colonial superiority.⁹⁶

As regards other professionals involved in the family group conferencing process, it needs to be reiterated that the process requires a change in frame of reference in the sense that professionals are required to refrain from influencing the outcome and imposing a solution. The family or social network must take the lead. Until such time as family group conferencing is available as a first option for families in South Africa, a philosophical shift among magistrates is necessary. They need to be proactive in identifying circumstances in which family group conferencing would be appropriate and in ordering or proposing the process more readily.

In addition, families and communities should be made aware of the benefits of family group conferencing. Information pamphlets about the process and its advantages need to be distributed at schools, primary health care clinics

⁹³ This could be a task for Justice College, the *State Academy* that is located in the Department of Justice and Correctional Services.

⁹⁴ See para 4.1 above.

⁹⁵ Jackson 1998 *Howard J Crim Justice* 43-44.

⁹⁶ Jackson 1998 *Howard J Crim Justice* 44.

and other community centres. This simultaneously brings us to the important points of the cost of the process and funding issues.

To reduce the cost of the family group conferencing process, it is suggested that community-based resources, formal and informal, should be utilised in the process to find creative and home-grown solutions for families.⁹⁷ In addition, it is critical that government funding be obtained to develop and present training programmes, organise public awareness campaigns and set up family group conferences. Although family group conferencing has been labelled as an expensive process – something which the government at this stage cannot really afford – it should be borne in mind that in comparison with court proceedings, the cost of family group conferences is relatively low if they succeed in diverting from the court system those problems that lend themselves to resolution in that manner.⁹⁸ Lack of government funding or underfunding for family group conferences would undoubtedly be a short-sighted approach to the current situation in South Africa.

On a practical note, and to get the ball rolling, the following is recommended: first, that a committee be appointed with a mandate to identify relevant stakeholders, for example the judiciary, civic organisations, government, child-law experts and the public, including children and the elderly. The next step would be to organise a seminar that included these stakeholders in order to develop a plan of action to take the concept further – practically and financially, ideally on a national level, as in the Netherlands. Ongoing research is also necessary to compare the short-term and longer-term costs and outcomes of those cases that had the benefit of a family group conference with those that did not.

The aim of all the aforementioned measures is to work towards a consistent implementation process throughout the Republic of South Africa, through which families or social networks will take responsibility for both the problem and the solution, thereby empowering all the individuals involved, including children, the elderly and others in the family or social network experiencing problems. It would indeed be beneficial to our country if family group conferencing were in widespread use, as it is in the Netherlands.

⁹⁷ Chandler and Giovannucci 2004 *Fam Ct Rev* 219.

⁹⁸ Jackson 1998 *Howard J Crim Justice* 47-48. Also see Skelton "Family Group Conferencing in the Proposed Child Justice Bill" 183.

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List of Abbreviations

ADRJ	Australasian Dispute Resolution Journal
CILSA	Comparative and International Law Journal of Southern Africa
CRC	Convention on the Rights of the Child
EK-c	<i>Eigen Kracht Centrale</i>
Fam Ct Rev	Family Court Review
Howard J Crim Justice	Howard Journal of Crime and Justice
PELJ	Potchefstroom Electronic Law Journal
SALRC	South African Law Reform Commission
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg