

**A LEGAL DISCUSSION OF THE DEVELOPMENT OF FAMILY LAW
MEDIATION IN SOUTH AFRICAN LAW, WITH COMPARISONS DRAWN
MAINLY WITH THE AUSTRALIAN FAMILY LAW SYSTEM.**

By **HELGA SCHULTZ**

Submitted in accordance with the requirements for the degree of

MASTER OF LAWS

in the subject

FAMILY LAW

at

UNIVERSITY OF KWAZULU-NATAL

November 2011

Supervisor: Prof M Carnelley

DECLARATION

I declare that the whole dissertation, unless specifically indicated to the contrary in the text, is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references. It is submitted as the whole research dissertation which counts 100% of the requirement for the degree of Master of Laws in the Faculty of Law, University of KwaZulu-Natal.

Helga Schultz

Date

Contents

| | Page |
|--|-----------|
| Chapter 1: Introduction | 1 |
| 1. Introduction | 1 |
| 2. Australian Comparative Study | 9 |
| 3. Concept of Mediation | 11 |
| 4. Advantages and Disadvantages of Mediation | 15 |
| 4.1. Advantages | 15 |
| 4.2. Disadvantages | 19 |
| 5. Family Violence and Mediation | 24 |
| 6. International family law mediation | 27 |
| 7. Outline of subsequent Chapters | 29 |
| 8. Research Methodology | 30 |
| | |
| Chapter 2: South African Family Law | 31 |
| 1. Introduction/Background | 31 |
| 2. The Courts | 38 |
| 2.1. <i>Van den Berg v Le Roux</i> | 39 |
| 2.2. <i>Townsend-Turner v Morrow</i> | 40 |
| 2.3. <i>MB v NB</i> | 42 |
| 3. Legislative Framework | 48 |
| 3.1. Family Advocate | 49 |
| 3.2. The Children's Act | 52 |
| 3.2.1. Introduction/Background | 52 |
| 3.2.2. General Principles in terms of the Children's Act | 53 |
| 3.2.3. Child Participation, Mediation and the Children's Act | 55 |
| 3.3. Compulsory Mediation | 63 |
| 3.3.1. Section 21 | 64 |
| 3.3.2. Section 33 | 70 |
| 3.4. Court-Compelled Mediation | 72 |
| 3.4.1. Lay Forum Hearings | 72 |
| 3.4.1.1. Section 49 | 72 |
| 3.4.1.2. Section 70 | 73 |
| 3.4.1.3. Section 71 | 74 |

| | |
|---|------------|
| 3.4.2. Pre-hearings: Section 69 | 74 |
| 3.4.3. Child in Need of Care and Protection: Section 155(8) | 76 |
| 3.5. Sanctions for not Attending Compulsory Mediation or Court Compelled Mediation | 76 |
| 3.6. Discretionary Mediation at the instance of a Social Worker | 77 |
| 3.6.1. Section 150(3) | 78 |
| 3.6.2. Section 155(4)(a) | 78 |
| 3.7. Implied Mediation | 79 |
| 3.8. The Hague Convention on the Civil Aspects of Child Abduction | 81 |
| 4. Judicial Framework | 82 |
| 5. The Best Interests of the Child | 83 |
| 6. Domestic Partnerships | 86 |
| 7. Customary and Islamic Marriages | 87 |
| 7.1. Customary Marriages | 87 |
| 7.2. Muslim Marriages | 90 |
| 8. Mediation Services Offered in South Africa Today | 93 |
| 9. Conclusion | 99 |
| | |
| 3. Chapter 3: Australian Family Law | 101 |
| 1. Introduction | 101 |
| 2. Legislative Framework | 104 |
| 2.1. Introduction/Background | 104 |
| 2.1.1. Family Law Act 53 of 1975 | 105 |
| 2.1.2. Federal Magistrates Act 193 of 1999 | 107 |
| 2.1.3. The Family Law Rules 2004 | 107 |
| 2.1.4. The Family Law Regulations | 110 |
| 2.2. Independent Lawyer | 111 |
| 2.3. Family Dispute Resolution Practitioners | 113 |
| 2.4. Compulsory Mediation | 115 |
| 2.4.1. Exceptions to the Requirement of Compulsory Mediation | 119 |
| 2.5. Court-Compelled Mediation | 123 |
| 2.6. Sanctions for not Attending Compulsory or Court Compelled Mediation | 125 |

| | |
|---|------------|
| 2.7. Child in Need of Care – Discretionary Mediation | 126 |
| 2.8. Obligation on Legal Practitioners to Inform Clients of Mediation | 127 |
| 2.9. The Hague Convention on the Civil Aspects of Child Abduction | 130 |
| 3. The Courts | 131 |
| 3.1. <i>Jakiemiec & Buckingham</i> | 131 |
| 3.2. <i>Naczek & Dowler</i> | 132 |
| 3.3. <i>Department of Community Services & Raddison</i> | 133 |
| 3.4. <i>Robertson & Robertson</i> | 133 |
| 3.5. <i>Weldon & Sultar</i> | 134 |
| 3.6. <i>Sidrov & Sidrov</i> | 134 |
| 3.7. <i>State Central Authority & Brume</i> | 134 |
| 3.8. <i>State Central Authority & Camden</i> | 135 |
| 3.9. <i>Strahan & Strahan</i> | 135 |
| 4. Judicial Review | 136 |
| 5. The Best Interests of the Child/Paramountcy Principle | 137 |
| 6. Domestic Partnerships | 140 |
| 7. Aboriginal or Torres Strait Islander Families | 141 |
| 8. Mediation Services Offered in Australia Today | 148 |
| 8.1. Family Relationship Centres | 150 |
| 8.2. ATSI-FAM Program | 155 |
| 9. Conclusion | 158 |
| | |
| 4. Chapter 4: Comparative Study | 160 |
| 1. Introduction | 160 |
| 2. Legislative Framework | 161 |
| 2.1. Family Advocate/Independent Lawyer | 161 |
| 2.2. Compulsory Mediation | 162 |
| 2.2.1. Exceptions to the Rule of Attending Compulsory Mediation | 163 |
| 2.2.2. Critique regarding Compulsory Mediation | 164 |
| 2.2.3. Recommendations | 164 |
| 2.3. Court Compelled Mediation | 165 |
| 2.4. Sanctions for not Attending Compulsory or Court Compelled Mediation | 166 |

| | |
|---|------------|
| 2.5. Discretionary Mediation with a Social Worker | 167 |
| 2.6. Implied Mediation | 168 |
| 2.7. The Hague Convention on the Civil Aspects of Child Abduction | 168 |
| 3. Judicial Review | 169 |
| 4. The Best Interests of the Child/Paramountcy Principle | 169 |
| 5. Domestic Partnerships | 170 |
| 6. Customary/Islamic/Aboriginal Families | 171 |
| 7. Mediation Services Offered in South Africa and Australia Today | 172 |
| 8. Conclusion | 174 |
| | |
| 5. Chapter 5: Conclusion | 176 |
| | |
| 6. List of Works Cited | 180 |
| Bibliography | 180 |
| Table of Cases | 189 |
| Table of Statutes | 192 |

Chapter 1: Introduction

1 Introduction

‘Marriage is, typically, born out of such love and solemnised with such hope that its termination by divorce cannot but be tragic. But the death of this marriage, or at least the manner in which the last rites have been pronounced over it, represents a tragedy of an especially painful sort.’¹

Brassey AJ in the case of *MB v NB*² strongly supported the use of alternative dispute resolution, or more specifically mediation, where parties are contemplating divorce proceedings:³

‘Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.’⁴

Mediation is only one of the forms that alternative dispute resolution may take.⁵ It has been suggested that mediation is the exact opposite of formal court adjudication.⁶ Sinclair and Bonthuys describe mediation ‘as the voluntary relinquishing of legal rights in favour of reaching a compromise’,⁷ in other words, as will be explained later in this chapter,⁸ mediation favours settlement or agreement by the parties, rather than the adjudication over a matter by a third party (or adjudicator). The aim of the mediation process is to settle the dispute between the parties.⁹ Sinclair and Bonthuys describe the formal court system as ‘justice and thus opine

¹ Brassey AJ in *MB v NB* 2010 (3) SA 220 (GSJ) at para [1].

² *MB v NB* (n1)

³ *MB v NB* (n1) at paras [49] – [60]. The case will be discussed in more detail in Chapter 2 of this study.

⁴ *MB v NB* (n1) at para [50].

⁵ This will become evident later in the study. See generally L Young & G Monahan *Family Law in Australia* (7ed) (2009) 49 – 61.

⁶ J Sinclair & E Bonthuys ‘The Law of Persons and Family Law’ (2003) *Annual Survey of South African Law* 144 203; C Bridge ‘Family mediation and the legal process: an unresolved dilemma’ (1997) 17 *New Zealand Universities LR* 231 244; JG Mowatt ‘The family court and divorce mediation’ (1991) 20(2) *TSAR* 289 293. Mowatt states that the parties must accept the decision imposed by the court, whether they agree or not.

⁷ Sinclair & Bonthuys (n6) 203.

⁸ See ‘Concept of mediation’.

⁹ Bridge (n6) 235; J Brand ‘Table of arbitration, court adjudication and mediation characteristics’ in *Dispute Resolution* P Pretorius (ed) (1993) 100.

that mediation is premised on the opposite of justice;¹⁰ it is presented as an alternative to the court process (this argument is discussed later in the study).¹¹

Alternative dispute resolution is used in a wide variety of fields in the South African legal system. Although alternative dispute resolution is predominately encountered in Labour Law,¹² this study will focus on the use thereof in the area of Family Law.

There are various forms which alternative dispute resolution may take, for example counselling, conciliation, arbitration, and mediation. In order to understand the differences between them a definition of each of these concepts is explained in the following paragraphs:

‘Counselling’ may be described as an informal mode of dispute resolution.¹³ Couple counselling is where people deal with personal and interpersonal matters with a trained neutral party. In the instance of family law these matters include marriage, separation, and divorce; these can include matters that concern children.¹⁴ Counselling could be used to smooth out the animosities of a family breakdown.¹⁵ It is thus more therapeutic and it is submitted that the main aim is not to resolve a particular dispute between the divorcing, or separating parties, (as is the case in mediation) it is merely a tool to help repair the relationships between the parties by deciphering the underlying tensions and conflicts.¹⁶

‘Conciliation’ may be defined as

‘a process in which the participants, with the assistance of the dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will provide advice on matters in dispute and/or options for resolution, but will not make a determination. A conciliator may have professional expertise in the subject matter in dispute.’¹⁷

As can be seen from the definition, a conciliator, unlike a counsellor, will assist the parties to reach some form of agreement.¹⁸ Conciliation differs from mediation in that a conciliator will

¹⁰ Sinclair & Bonthuys (n6) 203.

¹¹ See M De Jong ‘A pragmatic look at mediation as an alternative to divorce litigation’ (2010) 3 *TSAR* 515 522 where she states that mediation ‘fits neatly into the legal process as a whole’.

¹² See generally P Pretorius *Dispute Resolution* (1993).

¹³ Young & Monahan (n5) 59.

¹⁴ Section 10B(a) of the Family Law Act 53 of 1975; Young & Monahan (n5) 60 and 304.

¹⁵ Young & Monahan (n5) 304.

¹⁶ Young & Monahan (n5) 60 and 304.

¹⁷ Young & Monahan (n5) 51.

¹⁸ Young & Monahan (n5) 51.

advise the parties on the best possible option to take, whereas the mediator does not advise the parties, but allows them to choose what they may consider is the best option for their needs.

‘Arbitration’ may be defined as ‘the intervention by a third party into a dispute, with the agreement of the disputants, whereby the third party hears the disputants and then makes a decision which is intended to resolve the dispute.’¹⁹ It is important to note that during an arbitration the parties will present evidence to the third person, known as the arbitrator, on which he/she will make a determination in order to resolve the dispute.²⁰ The decision derived by the arbitrator, after considering the evidence of the parties, is final.²¹ As such, an arbitrator may be compared to a judge in court – the judge’s decision at the end of a matter is considered to be final. In the context of family law, this would mean that an arbitrator would have the power to decide on property disputes and custody issues. In comparison to mediation, the mediator does not have the power to decide on or adjudicate the matter being mediated. Currently in South Africa, matrimonial matters may not be subjected to the arbitration process.²²

Briefly, ‘mediation’ is where a neutral party assists the disputing parties on reaching some form of agreement. The focus of this study is on the concept of mediation as it is used in the context of family law and will thus be defined in more detail later in this chapter. Unlike the conciliator who will give advice on the matters to be resolved,²³ the mediator will not advise the parties,²⁴ but will allow them to decide for themselves what the best option to take is.²⁵ The mediator merely encourages the parties to settle the matter between them.²⁶ The parties decide on how to settle the agreement, unlike in arbitration where the arbitrator adjudicates or decides on the issues before him/her in order to resolve the dispute.

¹⁹ J Brand ‘The nature of the arbitration process’ in *Dispute Resolution* P Pretorius (ed) (1993) 93 – 94.

²⁰ Section 10L(1) of the Family Law Act 1975 (Australia); Young & Monahan (n5) 51; Brand (n9) 100.

²¹ D Scott-MacNab ‘Mediation in the family context’ (1988) 105(4) *SALJ* 709 716.

²² Section 2 of the Arbitration Act 42 of 1965.

²³ Young & Monahan (n5) 51.

²⁴ The only type of ‘advice’ provided by the mediator is that he or she will advise disputing parties to see an attorney in order to obtain information regarding legal matters that are connected to the dispute. A mediator will not provide the disputing parties with advice on any other aspect regarding the matters raised during the mediation. (See footnote 25 for sources.)

²⁵ Scott-MacNab (n21) 715; CH Cohen ‘Divorce mediation’ in *Dispute Resolution* P Pretorius (ed) (1993) 75; L van Zyl ‘Family Mediation’ in *Introduction to Child Law in South Africa* CJ Davel (ed) (2000) 91; A Skelton & M Carnelley (eds) *Family Law in South Africa* (2010) 345.

²⁶ Scott-MacNab (n21) 715; Cohen (n25) 75; Van Zyl (n25) 91; Skelton & Carnelley (n25) 345.

Mediation, by comparison to the aforementioned three concepts of counselling, conciliation and arbitration, is predominately a multi-disciplinary process, which De Jong describes as a 'co-operative relationship between psychology and law'.²⁷ De Jong describes this further as follows:²⁸

'mediation is a clear intention to synthesise behavioural sciences and law to improve the psychological functioning of separating couples in ways that promote their own and their children's best interests. Because mediators are schooled in disciplines such as the social and behavioural sciences, they know what techniques and strategies to use in order to lessen conflict between parties and bridge communication gaps. As such, mediation reduces the emotional costs associated with divorce.'

It is also important that mediators advise the disputing parties to seek professional help (for example) from attorneys or psychologists where this is necessary.²⁹ For this reason, mediation has been described as operating within the shadow of the law,³⁰ because one of the duties of the mediator is to give the disputing parties legal information. De Jong suggests that the parties should preferably be advised to obtain independent legal advice from attorneys.³¹ Mediation does not necessarily side-step attorneys; they still do play a role, although it often is a less adversarial role.³² It has been submitted that attorneys should be open-minded when reviewing mediated agreements and should in general look at less adversarial ways of practising family law as opposed to taking the matter to court as the first port of call.³³

The aim of this study will be to focus on mediation in the field of Family Law and the concept will be defined in greater detail later on in this chapter. The study will also focus on how mediation has been developed and implemented in South African family law³⁴ The reasons for this focus are as follows:

First, the reason for focusing on mediation and not on arbitration (or any of the other forms of alternative dispute resolution) is, as mentioned above, that matrimonial matters and matters

²⁷ M De Jong (n1) 519.

²⁸ De Jong (n1) 519.

²⁹ De Jong (n1) 519.

³⁰ B Clark 'No holy cow – some legal caveats on family mediation' (1993) *THRHR* 454 459; CH Cohen 'Mediation: terminology is important (1993) *De Rebus* 221 222; De Jong (n1) 521.

³¹ De Jong (n1) 521.

³² De Jong (n1) 521.

³³ *S v J* [2011] 2 All SA 299 (SCA) at para [54] (*S v J* is also cited as *FS v JJ* 2011 (3) SA 126 (SCA)); De Jong (n1) 521.

³⁴ See Chapter 2 of this study. Chapter 3 of this study will discuss the development and implementation of mediation in Australian Family Law.

incidental thereto may not be subjected to the arbitration process.³⁵ It is submitted that most disputed matters in family law are of a matrimonial nature resulting from divorce and/or separation and/or matters concerning children.³⁶

Secondly, the courts, the legislature,³⁷ and various academic writers³⁸ have suggested that families should rather mediate instead of applying to the courts where issues arise out of divorce and/or separation. In this regard reference is made to the cases of *Van den Berg v Le Roux*³⁹ and *Townsend-Turner v Morrow*⁴⁰ where the judges instructed the families to seek the assistance of professional mediators with regards to dealing with their respective family law problems.⁴¹ Significantly, in *MB v NB*,⁴² the court illuminated the benefits of mediation. This is discussed in greater detail in the Chapter 2 of this study.

Thirdly, section 6 of the Children's Act⁴³ requires the parties to choose a process that is less confrontational and more problem-solving where children are concerned, as this would be in the best interests of the minor child.⁴⁴ A possible process that is more akin to problem-solving would be mediation.⁴⁵ This would seem best for example where the parents of a child are involved in a divorce, which is an emotional time for a child, and a relatively stress free manner of solving the issues surrounding the interests of the child is required.⁴⁶

³⁵ Section 2 of the Arbitration Act 42 of 1965 states as follows: Matters not subject to arbitration. – A reference to arbitration shall not be permissible in respect of – (a) any matrimonial cause and any matter incidental to such cause; or (b) any matter relating to status. J Heaton *South African Family Law* (3ed) (2010) 187 – 188; DSP Cronjé & J Heaton *South African Family Law* (2ed) (2004) 184 – 185.

³⁶ For example arbitration is frequently used in labour matters.

³⁷ The Children's Act 38 of 2005 provides for ample opportunity for mediation. See also the Mediation in Certain Divorce Matters Act 24 of 1987.

³⁸ See for example M De Jong 'Giving children a voice in family separation issues: a case for mediation' (2008) 4 *TSAR* 785; M De Jong 'An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation' (2005) 18(1) *TSAR* 33; Mowatt (n6) 289; Scott-MacNab (n21) 709 to name a few.

³⁹ *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC); Sinclair & Bonthuys (n6) 202 – 208.

⁴⁰ *Townsend-Turner v Morrow* [2004] 1 All SA 235 (C), 2004 (2) SA 32 (C); Sinclair & Bonthuys (n6) 152 – 153.

⁴¹ A discussion of these cases shall be dealt with in greater detail in the study; see also Heaton (n35) 187; Cronjé & Heaton (n35) 184.

⁴² *MB v NB* (n1) (GJS).

⁴³ Section 6(1)(a) of the Children's Act 38 of 2005.

⁴⁴ Section 6(4)(a) of the Children's Act 38 of 2005. Section 6(4)(b) stipulates that a delay in any action where a child is involved must be avoided as far as possible. *S v J* [2011] (n33) at para [54]; JA Robinson *et al Introduction to South African Family Law* (4ed) (2009) 213.

⁴⁵ C Schneider 'Mediation in the Children's Act 38 of 2005, and mediation in family law' in *Trials & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds) (2008) 146.

⁴⁶ Robinson (n44) 213.

The Children's Act also recognises the importance of the family structure in a minor child's life.⁴⁷ Therefore, where this is in the best interests of the child, the child's family may voice their views during divorce proceedings (within a mediation session)⁴⁸ on matters concerning the child – such as which parent will have care (custody) of the child and which parent will have contact (access).⁴⁹

Furthermore, section 6 of the Children's Act requires that a number of principles need to be applied where there are children involved in a divorce or separation.⁵⁰ These principles are found in section 7.⁵¹ In other words, where the provisions of the Mediation in Certain Divorce Matters Act⁵² and the Divorce Act⁵³ are being implemented, they need to be implemented in terms of section 7 in order to serve the best needs of the minor child or children.⁵⁴ Section 7 also requires the parties to use a process that has minimal legal or administrative action.⁵⁵ Mediation is one way in which the parties are able to minimise the use of a legal action.⁵⁶

The Children's Act states that, 'with due regard to their age, maturity and stage of development,' children must be informed of any decisions that significantly affect them.⁵⁷ For example, children should be informed of any decision regarding care and contact⁵⁸ and, bearing section 10⁵⁹ in mind, the child should be able to say with whom he or she wishes to live, etc.⁶⁰ De Jong argues that mediation is the ideal forum in which to allow children to air their opinions.⁶¹

⁴⁷ Section 6(3) of the Children's Act 38 of 2005.

⁴⁸ See sections 49, 69, 70 and 71 of the Children's Act 38 of 2005.

⁴⁹ Robinson (n44) 212.

⁵⁰ Robinson (n44) 212.

⁵¹ Children's Act 38 of 2005.

⁵² Mediation in Certain Divorce Matters Act 24 of 1987.

⁵³ Divorce Act 70 of 1979.

⁵⁴ Robinson (n44) 212; any organ of state that is dealing with a matter where minor children are involved is expected to implement the principles in terms of section 6(1)(b) of the Children's Act 38 of 2005.

⁵⁵ Section 7(n) of the Children's Act 38 of 2005.

⁵⁶ See the discussion titled 'The best interests of the child' in Chapter 2 of the study.

⁵⁷ Section 5 of the Children's Act 38 of 2005.

⁵⁸ Previously custody and access.

⁵⁹ Section 10 of the Children's Act is headed 'Child participation' and reads as follows: '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.'

⁶⁰ Robinson (n44) 213.

⁶¹ See generally De Jong (n38) 785.

Various other provisions in the Children's Act⁶² prescribe mediation. An example is section 21 which requires that where there is a dispute regarding the parental responsibilities and rights of a father over the paternity of a child born of unmarried parents, the dispute must be referred to the family advocate, social worker, social service professional or other suitably qualified person for mediation.⁶³

A closer look at the impact of the Children's Act on family law mediation will be set out in the study in Chapter 2.

The fourth reason for choosing family law mediation is that there are cultural concerns with regards to the present divorce system in South Africa.⁶⁴ It has been argued that the formal adversarial system of litigation seems to be foreign to people of 'Afrocentric backgrounds' who turn to more traditional methods of dispute resolution (like mediation), despite the provisions of the Recognition of Customary Marriages Act,⁶⁵ due to the cultural value systems with which they have been raised.⁶⁶

Fifthly, at present there is also the possibility of reform with regards to Muslim marriages.⁶⁷ In this regard the Draft Muslim Marriages Bill⁶⁸ suggests that such marriages may be dissolved with the use of a 'formal' mediation process.⁶⁹

Sixthly, South Africa has, through the Divorce Act,⁷⁰ implemented the principle of no-fault divorce.⁷¹ As a result, the courts and the divorcing parties (whether in court or in a mediation session) should not concentrate on moral or legal blameworthiness during a divorce proceeding, but should mainly focus on deciding how to divide the joint estate and finding a solution that would be best for the minor children, however the case may be.⁷² Furthermore,

⁶² Children's Act 38 of 2005.

⁶³ Section 21(3)(a) of the Children's Act 38 of 2005; Heaton (n35) 70. It is submitted that the suggestion made by various writers to have the services of the family advocate extended to include mediation services starts to be fulfilled with the requirements set out in the Children's Act 38 of 2005.

⁶⁴ De Jong (n38) 34 – 35; S Moodley 'Mediation – the increasing necessity of incorporating cultural values and systems of empowerment' (1994) 27(1) *CILSA* 44 46 – 48.

⁶⁵ Section 8 of the Recognition of Customary Marriages Act 120 of 1998.

⁶⁶ De Jong (n38) 34 – 35; Moodley (n64) 46 – 48.

⁶⁷ Cronjé & Heaton (n35) 218

⁶⁸ Draft Muslim Marriages Bill 2011.

⁶⁹ Article 12 of the Draft Muslim Marriages Bill 2011.

⁷⁰ Divorce Act 70 of 1979.

⁷¹ Section 4(1) of the Divorce Act 70 of 1979.

⁷² Mowatt (n6) 289.

the number of separating (or divorcing) couples (or families breaking up) is unlikely to decrease.⁷³ It is therefore important to start exploring alternative ways in which to deal with the growing problems that arise out of divorce and/or separation.

Furthermore, mediation has been a subject of debate in the South African legal system for quite some time,⁷⁴ with the Mediation in Certain Divorce Matters Act⁷⁵ having ‘a pro mediation sounding name.’⁷⁶ It was however only with the recent introduction of the Children’s Act⁷⁷ that mediation ‘became a reality’ within the South African family law system.⁷⁸ The aim of the Mediation in Certain Divorce Matters Act⁷⁹ was to combine the principles of the legal protection of the interests of minor children, with that of a mediatory approach to divorces where such children are involved.⁸⁰ It was seen as South Africa’s pioneering step into including mediation procedures into divorce or family matters.⁸¹ This step brought about the office of the Family Advocate. The Family Advocate has the power to institute an enquiry, so as to enable him or her to provide a report containing recommendations to the court with regards to any matter concerning the minor child or children of the divorcing parties.⁸² Furthermore the court may, if this has not already been attended to, order the parties to approach the family advocate, where it is deemed necessary in obtaining a report regarding the best interests of the minor child.⁸³ The family advocate may approach the court where it is deemed necessary and request that an enquiry be held where one has not been requested.⁸⁴ Such intervention by the family advocate was envisaged to constitute a form of mediation.⁸⁵

⁷³ De Jong (n38) 33.

⁷⁴ Skelton & Carnelley (n25) 346.

⁷⁵ Mediation in Certain Divorce Matters Act 24 of 1987. This Act is discussed more fully in the South African Law Chapter (Chapter 2) of this study. It has been argued that the approach take by the legislator in the Mediation in Certain Divorce Matters Act is closer to conciliation and alternative dispute resolution than actual mediation. (See Skelton & Carnelley (n25) 346; Heaton (n34) 186; Cronjé & Heaton (n35) 183.)

⁷⁶ Skelton & Carnelley (n25) 346.

⁷⁷ Children’s Act 38 of 2005.

⁷⁸ Skelton & Carnelley (n25) 346. There are various sections that require compulsory mediation (sections 21 and 33), others give the court the ‘power’ to order the parties to attend mediation (sections 49, 69, 70 and 71), others have discretionary mediation (section 155(8)) and then there are sections where mediation may be implied (sections 22, 30(3), 234(1) and 292): see generally M De Jong ‘Opportunities for mediation in the New Children’s Act 38 of 2005’ (2008) 71 *THRHR* 630. For a discussion of these sections see the South African Family Law Chapter (Chapter 3) of this study.

⁷⁹ Mediation in Certain Divorce Matters Act 24 of 1987. The Act commenced on 1 October 1990.

⁸⁰ N Grobler ‘The Mediation in Certain Divorce Matters Act, 1987’ (1990) October 3(2) *Consultus* 133.

⁸¹ Grobler (n80) 133; De Jong (n38) 44.

⁸² Section 4(1) and 4(2) of the Mediation in Certain Divorce Matters Act 24 of 1987; Robinson (n44) 210.

⁸³ Mediation in Certain Divorce Matters Act 24 of 1987 s 4(3).

⁸⁴ Mediation in Certain Divorce Matters Act 24 of 1987 s 4(3); *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T).

⁸⁵ Long title of the Mediation in Certain Divorce Matters Act 24 of 1987; Grobler (n80) 133.

Finally, '[m]ediation fits neatly into the legal process as a whole'.⁸⁶ Although mediation encourages parties to settle their disputes out of court, there is still an acceptance that the high court is the upper guardian of all minor children and that any decisions made that involve minor children need to be endorsed by the high court before such agreement becomes valid.⁸⁷ As De Jong states, '[p]arties are merely given an opportunity to try to sort out and solve their own private and intimate problems before going to court.'⁸⁸ Mediation is often compared to and presented as an alternative to the court or adversarial process.⁸⁹

Family law in South Africa has undergone significant change in recent years with an increasing emphasis being placed on mediation. Parties to a matrimonial dispute are being encouraged to mediate and settle the matter out of court, with the court being the final port of call; especially where minor children are involved.⁹⁰ This emphasis on mediation is not only being made in South Africa, but also in other countries around the world.⁹¹ These changes form the rationale of the study.

2 Australian Comparative Study

This study will not merely focus on the South African position with regards to mediation but will also focus on the Australian law. There are a number of reasons for undertaking this comparison:

The first of these is because South Africa's family law system has been compared to Australia's by a number of writers and researchers: The Hoexter Commission in its recommendation of a family court for South Africa made numerous references to the Australian Family Court System and was of the opinion that if South Africa were to

⁸⁶ De Jong (n11) 522.

⁸⁷ De Jong (n11) 521.

⁸⁸ De Jong (n11) 522.

⁸⁹ Sinclair & Bonthuys (n6) 203; Skelton & Carnelley (n25) 345.

⁹⁰ *Van den Berg v Le Roux* (n39); *Townsend-Turner v Morrow* (n40) and *MB v NB* (n1). See also JG Mowatt 'The Mediation in Certain Divorce Matters Act 1987: new, but nothing new' 1987 *De Rebus* 611 612; D Scott-MacNab 'Mediation – the procedure of the future' 1989 *De Rebus* 211 213; M de Jong 'Divorce Mediation in Australia – valuable lessons for family law reform in South Africa' (2007) 40 *CILSA* 280.

⁹¹ See De Jong (n11) 523 – 526. Places like Australia, New Zealand, the United States of America, Austria, Belgium, Norway, the Netherlands, Japan, China, Benin in West Africa, the Republic of the Congo and Kenya have all either mandated their legislatures or have enacted legislation that makes mediation compulsory or that sets out to encourage the population to attend mediation where they are dealing with a family law matter.

incorporate such a family law court system, it should be based on the Australian model.⁹² Academic writers, such as De Jong and Scott-MacNab, have also used Australian law as a point of comparison against the South African legal system,⁹³ especially in their discussions of family law mediation.

A further reason is that both countries have similar problems: inter alia where Indigenous or Customary communities are involved, both South Africa and Australia do not have enough trained personnel that are able to speak the traditional languages so as to conduct the mediation sessions in these languages.⁹⁴

Furthermore, Australia and South Africa's legal systems have undergone similar changes. When Australia implemented the Family Law Act,⁹⁵ their family law system went from a multiple fault-based divorce system to a single no-fault divorce system, i.e. the ground for divorce is the irretrievable breakdown of the marriage.⁹⁶ South Africa has a similar provision in its Divorce Act.⁹⁷ Another significant change, on the Australian legal landscape, was the introduction of the Family Courts, these being on the same level as their State Courts.⁹⁸ In South Africa during 2010 the old divorce court system⁹⁹ was changed in that Regional Divisions of the Magistrates Courts acquired jurisdiction to adjudicate on divorce cases. These courts operate in addition to the High Courts.¹⁰⁰ A further significant change was the introduction in Australia of the best interests of the child standard or the 'paramountcy

⁹² De Jong (n90) 280.

⁹³ See generally De Jong (n90) 280; D Scott-MacNab 'Mediation and family violence' (1992) 109(2) *SALJ* 282. In his article on 'Mediation and family violence' Scott-MacNab extensively quotes Astor, an Australian writer.

⁹⁴ See generally C Cunneen, J Luff, K Menzies and N Ralph 'Indigenous Family Mediation: The New South Wales ATSI/FAM Program' (2005) 9(1) *Australian Indigenous Law Reporter* 1 and S Ralph 'Family dispute resolution services for Aboriginal and Torres Strait Islander families: Closing the gap?' (2010) 17 *Family Relationships Quarterly* 15; Moodley (n64) 44; De Jong (n38) 33.

⁹⁵ Family Law Act 53 of 1975.

⁹⁶ Section 48(2) of the Family Law Act 53 of 1975; Young & Monahan (n5) 31; De Jong (n90) 281 – 282.

⁹⁷ Section 4 of the Divorce Act 70 of 1979. The no-fault divorce system also changed the South African legal landscape.

⁹⁸ Young & Monahan (n5) 31; De Jong (n90) 281 – 282.

⁹⁹ Administration Amendment Act 9 of 1929. This court was on the Regional Court level.

¹⁰⁰ The Jurisdiction of Regional Courts Amendment Act 31 of 2008 and this amendment took effect on 9 August 2010; K Hawkey 'New Act means increased efficiency for civil matters' *The Sunday Times* 15 August 2010 available at <http://www.timeslive.co.za/sundaytimes/article/602049.ece/New-act-means-increased-efficiency-for-civil-matters> accessed on 2 February 2010; I Oellermann 'New civil courts roll-out' *The Witness* 4 September 2010 available at [http://www.witness.co.za/index.php?showcontent &global\[_id\]=46887](http://www.witness.co.za/index.php?showcontent &global[_id]=46887) accessed on 3 November 2010.

principle'.¹⁰¹ South Africa introduced this principle into all fields of law with the introduction of its Constitution;¹⁰² however it is trite that the high courts have always maintained this principle in the context of family law as they are the upper guardian of all minor children.

The fourth reason is the need, in Australia, to assist the Indigenous communities. Although provision has been made to focus on their well-being in mediation sessions, Indigenous families have different needs in comparison to non-Indigenous families.¹⁰³ Similarly in South Africa, the customary communities have a different view or stance with respect to mediation.¹⁰⁴

It should be noted that South Africa and Australia both provide for the use of mediation and have a similar definition thereof. The main difference that has occurred is the name; in South Africa, it is referred to as 'mediation', whereas in Australia it is often referred to as 'family dispute resolution'.¹⁰⁵

3 Concept of Mediation

A general definition of mediation is as follows: 'a voluntary process where the disputing parties, with the assistance of a third, neutral party (the mediator), resolve the dispute between them in order to bring about agreement or settlement'.¹⁰⁶

As this study focuses on family law mediation, it is important to place this definition in the family law context. In the family law context, during the mediation sessions, the focus will often be on what led to the breakdown of the relationship between the parties and how to resolve the issues between them.¹⁰⁷ Cunneen *et al* describe family mediation as follows: 'Family mediation is a way of helping family members to work out problems they are having

¹⁰¹ Section 60B of the Family Law Act; Young & Monahan (n5) 45 – 46, 257; De Jong (n90) 283. For a general discussion see J Crowe & L Toohey 'From good intentions to ethical outcomes: the paramountcy of children's interests in the Family Law Act' (2009) 33 *Melbourne University Law Review* 391.

¹⁰² Section 28(2) of the Constitution of the Republic of South Africa, 1996.

¹⁰³ See generally Cunneen, Luff, Menzies and Ralph (n94) 1 and Ralph (n94) 15.

¹⁰⁴ Moodley (n64) 47; De Jong (n38) 34 – 35.

¹⁰⁵ See the respective chapters for further explanation of this point.

¹⁰⁶ D Scott MacNab (n21) 715; Cohen (n25) 75; Van Zyl (n25) 91; Skelton & Carnelley (n25) 345; De Jong (n11) 517 – 518.

¹⁰⁷ Mowatt (n6) 297.

in their families.’¹⁰⁸ They further state that a mediator ‘is someone who listens to family members, helps them to listen to each other, and does not get personally involved.’¹⁰⁹

The third neutral party or mediator does not make any decisions on the matter regarding settlement, as he or she acts as facilitator between the two disputing parties.¹¹⁰ It is worth remembering that the ‘power to agree’ on any given point remains with the parties to the dispute and not with the mediator.¹¹¹ The mediator needs to provide a framework within which the parties may operate.¹¹² The mediator merely assists the parties to reach a settlement, even though he or she may set out certain parameters within which the mediation sessions will be conducted.¹¹³ In South Africa, mediators are able to structure the process itself.¹¹⁴

De Jong suggests that the mediator will assist the parties to reach some form of agreement by using specific techniques. These include ‘emphatic listening, power balancing or equalising, rephrasing or reframing, refocusing, summarising, clarifying, prioritising, mutualising, hypothesising, role reversal, option generation, and reality testing’.¹¹⁵ An important feature regarding the mediator is that throughout the process he or she must remain neutral, i.e. he or she may not take sides or favour one of the disputing party’s position to the disadvantage of the other.¹¹⁶ De Jong suggests that this will include that the mediator will need to redress any power imbalances between the disputing parties. Where the power imbalance is impossible to redress, the mediator will need to terminate the mediation process so that the matter will go directly to the courts.¹¹⁷

Mediation is reliant on compromise.¹¹⁸ Any settlement reached between the parties will often depend on how far the parties themselves are prepared to compromise in any given

¹⁰⁸ Cunneen, Luff, Menzies & Ralph (n94) 3.

¹⁰⁹ Cunneen, Luff, Menzies & Ralph (n94) 3.

¹¹⁰ Mowatt (n6) 297; Bridge (n6) 234; S Folb ‘Mediating in different contexts: Divorce and Family’ 1998 17(1) *Track Two* 25; Scott-MacNab (n21) 715; Young & Monahan (n5) 51; Skelton & Carnelley (n25) 345.

¹¹¹ JG Mowatt ‘Some thoughts on mediation’ (1988) 105(4) *SALJ* 727 729; Mowatt (n6) 297; Moodley (n64) 45; Bridge (n6) 234; Van Zyl (n25) 91; Skelton & Carnelley (n25) 345.

¹¹² Mowatt (n111) 730 & 733; Mowatt (n6) 297; Cohen (n25) 75; Bridge (n6) 232; Van Zyl (n25) 93; Skelton & Carnelley (n25) 345.

¹¹³ Mowatt (n111) 730 & 733; Mowatt (n6) 297; Cohen (n25) 75; Bridge (n6) 232.

¹¹⁴ Sinclair & Bonthuys (n6) 204.

¹¹⁵ De Jong (n11) 517 – 518.

¹¹⁶ De Jong (n11) 518.

¹¹⁷ De Jong (n11) 518 and 522.

¹¹⁸ Mowatt (n111) 730.

situation.¹¹⁹ It can be said that mediation is intended to assist people to resolve their own differences in an environment that suits their needs.¹²⁰ Mediation is thus a flexible and informal process,¹²¹ giving the disputing parties the opportunity to sort out their differences¹²² and to come to an agreement.¹²³ De Jong suggests the following as ‘types of mediation’ that the mediator may use during the mediation sessions with the parties:¹²⁴

‘(i) facilitative or non-directive mediation, where mediators merely facilitate the negotiations or communication between parties; (ii) evaluative or directive mediation, where the mediator plays a more active role in the decision-making process; (iii) transformative mediation, where the emphasis is on changing the dispute from a negative or destructive one into a more positive and growth-oriented approach; (iv) activist mediation, which attempts to ensure that parties are protected in the case of unbalanced power relationships or in the presence of domestic violence; (v) multi-generational mediation, which entails mediation with the extended family; (vi) the settlement model of mediation, where the parties are encouraged to reach agreement within an anticipated range of likely court outcomes as determined by the mediator, who will usually be an expert in family law.’

The mediator will assist the parties in defining the issues to be dealt with using one of the above methods.¹²⁵

A distinction is made between compulsory mediation and voluntary mediation. Compulsory mediation may be referred to as court mediation as it often entails that before a matter may proceed to court, the commanding legislative instrument requires that the divorcing and/or separating parties are required to attend mediation in order to find solutions to all the issues that exist between them.¹²⁶ The idea behind this is that the court need only then deal with the remaining unresolved issues, where the parties themselves are unable to come to an agreement.¹²⁷ Thus the courts would then provide family and marriage counselling in order to assist families pre- and post-separation or divorce.¹²⁸ Many academics¹²⁹ support the idea of compulsory mediation, giving emphasis to the number of benefits that it provides. These are mentioned elsewhere in this chapter. Most notably Bridge and De Jong support compulsory

¹¹⁹ Bridge (n6) 235; Young & Monahan (n5) 51; Mowatt (n111) 729.

¹²⁰ Bridge (n6) 234; Young & Monahan (n5) 51.

¹²¹ Mowatt (n6) 299; J Brand (n9) 100.

¹²² Bridge (n6) 234; Young & Monahan (n5) 51.

¹²³ Mowatt (n111) 729; Bridge (n6) 235; Young & Monahan (n5) 51.

¹²⁴ De Jong (n11) 520.

¹²⁵ Sinclair & Bonthuys (n6) 204.

¹²⁶ Scott-MacNab (n21) 709 – 726 723 – 724; Bridge (n6) 235; De Jong (n38) 33 – 47 38.

¹²⁷ M de Jong (n38) 33 – 38.

¹²⁸ Scott-MacNab (n21) 709 – 726 723 – 724.

¹²⁹ Such as De Jong, Mowatt and Goldberg in South Africa and Klug in Australia. See generally De Jong (n38) 33; M Klug ‘ADR: trends and directions in commercial disputes’ (1997) 8(3) *Australasian Dispute Resolution Journal* 172; V Goldberg ‘Family courts in South Africa and the implication of divorce mediation (1995) *THRHR* 276; Mowatt (n6) 289.

mediation due to the therapeutic benefits that it offers, especially where the mediation is state-funded and also compulsory.¹³⁰ These benefits are used to point out why mediation should be the first port of call for divorcing and/or separating families.¹³¹

There are three main criticisms against compulsory mediation: The first is that despite being required by the commanding legislative instrument, to make a ‘genuine effort’ the parties may simply just go through the motions of partaking in the mediation.¹³² Secondly, compulsory mediation does not address power imbalances within a marriage,¹³³ and thirdly, mediation is in essence voluntary, thus it amounts to a contradiction in terms.¹³⁴ These criticisms are set out later in the study¹³⁵ and in the next section of this chapter.

On the other hand, voluntary mediation is where the parties attend mediation of their own accord and reach or form an agreement between them. This could have resulted from an arrangement made between the parties.

De Jong and Goldberg suggest that mediation may be divided into a series of possible stages. They define the stages of mediation as follows:¹³⁶

‘(i) the orientation and introductory stage, where the parties are engaged in the mediation process, certain ground rules are laid down, and each party gets an opportunity to put his or her case to the mediator; (ii) the information-analysis or definition stage, where all relevant information is put on the negotiating table, the parties systematically isolate the issues in dispute and an agenda on all issues in dispute is drawn up; (iii) the negotiation stage, where the parties, with the assistance of the mediator, generate different options for the resolution of all the issues on the agenda; (iv) the settlement or agreement stage, where all proposals are summarised and clarified, all options are evaluated and reviewed and both parties are expected to make compromises; and (v) the contracting stage, where the

¹³⁰ Bridge (n6) 237; De Jong (n38) 37 – 39.

¹³¹ See generally De Jong (n38) 33 – 47 38; Klug (129) 174; Goldberg (n129) 277. Mowatt (n65) 289 – 300 agrees that there are matters that are better suited to mediation than to litigation.

¹³² H Astor ‘Making a “genuine effort” in family dispute resolution: what does it mean?’ in *Australian Family Law in Context: Commentary & Materials* 4ed P Parkinson (ed) (2009) 234.

¹³³ R Manjoo ‘Making rights real: facing the challenges of recognising Muslim marriages in South Africa’ in *Trials & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds) (2008) 126. This imbalance may be caused by various factors, such as personal wealth of each party to the mediation (especially spouses), perhaps there was abuse within the marriage or between the parties to name a few.

¹³⁴ Manjoo (n133) 126; Bridge in her article (n6) at page 239 points out that forcing the unwilling to mediate may bring about more problems than actually finding a solution between the parties. See the definition set out in this section of the chapter.

¹³⁵ See the Comparative Study: Chapter 4.

¹³⁶ V Goldberg ‘Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular’ (1998) *TSAR* 748; De Jong (n11) 518.

results of the negotiation and settlement phases are put in writing and the parties sign the settlement agreement.’

Mediation is not without controversy. The arguments for and against mediation are briefly discussed. Some of these arguments may be repeated (in brief) in the main body of the study where this is applicable to the relevant section under discussion.

It is important to remember, however, that despite the fact that the disputing parties will not require the formal court forum to establish their agreement, they will be required to make an application to court to ratify their agreement, especially where there are children involved.¹³⁷

The following section discusses some of the advantages and disadvantages of the mediation process.

4 Advantages and disadvantages of mediation

Mediation has its advantages and disadvantages. Several of them have been mentioned above.¹³⁸ Further advantages and disadvantages will be discussed in the paragraphs that follow. After the section discussing the disadvantages, possible solutions aimed at addressing the mentioned disadvantages will also be discussed.

4.1 Advantages

One of the advantages of mediation for the disputing parties is that it is an informal and non-legal process with governing norms set out by the parties themselves or the norms that are set out by the mediator to which the parties have agreed.¹³⁹ Thus mediation is a far more interactive process for the disputing parties. Couples resolve their own differences in a way that does not require the court’s intervention and without the dictates and norms of the legal process.¹⁴⁰ It means that divorcing and/or separating couples are able to come to an agreement without the rigid procedures of the legal process, allowing them to express their needs in the best possible way or in such a manner that suits them best.¹⁴¹

¹³⁷ Section 72 of the Children’s Act 38 of 2005.

¹³⁸ Some of the advantages and disadvantages mentioned include the criticism of compulsory mediation, that mediation is flexible and informal, and that the disputing parties remain in control of the outcome of the mediation.

¹³⁹ Bridge (n6) 231; Brand (n9) 100 & 101.

¹⁴⁰ Bridge (n6) 234.

¹⁴¹ Brand (n9) 100; Skelton & Carnelley (n25) 364.

It is trite that the courts are an established forum with specific or formal rules that need to be followed regarding the manner in which matters are presented before them. The judge and the parties are unable to structure the process as they please. In other words, there is already a structure in place. This is not so in the mediation process where, as described above, the mediator is able to set out a framework in order to assist the disputing parties to solve the issues between them.¹⁴² Mediation can thus be seen as an informal process, i.e. it does not contain such strict formalities that accompany the court system.¹⁴³ De Jong suggests that mediation is more accommodating in that it is able to encompass various customs, as well as religious and cultural concerns, where this is appropriate.¹⁴⁴

The disputing parties often feel that the court system is very impersonal and as such it is not suited to dealing with the emotional trauma of family separation issues. The legal participants, i.e. the judges and legal representatives, exercise control over the direction in which the case is to go,¹⁴⁵ whereas in mediation the parties take control over the process.¹⁴⁶

Family mediation, as Bridge claims, is a far better mechanism for recognising marriages that can be saved.¹⁴⁷ The court process is not designed to deal with the emotions that the disputing parties are faced with. The court system is viewed as a hostile environment, parties are dealing with each other through attorneys (in other words, at 'arm's length'¹⁴⁸), relationships are often broken, and many divorced couples find it difficult to communicate with one another once the court has granted its order.¹⁴⁹ Mediators, on the other hand, may be able to encourage couples to seek counselling where this is necessary.¹⁵⁰ Mediation is designed to have a therapeutic effect on the warring parties and to improve communication between them, thereby providing them with the opportunity to voice their feelings. In other words, they have a chance to be heard. Bridge claims that mediation acts like a balm over injured

¹⁴² Sinclair & Bonthuys (n6) 204; Mowatt (n111) 730 & 733; Mowatt (n6) 297; Cohen (n25) 75; Bridge (n6) 232; Van Zyl (n25) 93; Skelton & Carnelley (n25) 345.

¹⁴³ De Jong (n11) 519.

¹⁴⁴ De Jong (n11) 519.

¹⁴⁵ Scott-MacNab (n21) 718.

¹⁴⁶ R Field 'Using the feminist critique to explore 'the good, the bad and the ugly': implications for women of the introduction of mandatory family dispute resolution in Australia' in *Australian Family Law in Context: Commentary & Materials* P Parkinson (ed) 2009 237 – 238.

¹⁴⁷ Bridge (n6) 237.

¹⁴⁸ Bridge (n6) 237.

¹⁴⁹ Brand (n9) 100; Bridge (n6) 234 & 237; De Jong (n11) 516.

¹⁵⁰ Bridge (n6) 237.

feelings, reducing the animosity between the parties.¹⁵¹ In other words, the views and feelings of each of the parties are expressed.¹⁵² In this regard it assists in allowing for ongoing relationships to remain intact, something which is especially necessary where there are minor children involved, as parenting continues notwithstanding the divorce.¹⁵³ In this respect Scott-MacNab argues that mediation is able to avoid all unnecessary formalities and ‘complex procedures and is able to place a greater emphasis on human relationships, personal values and a cohesive society, than on society’s norms and government fiats’.¹⁵⁴ In cases where there has been family violence, mediation is able to reduce the threat of further violence.¹⁵⁵ Mediation may be able to close the road to divorce or to curb complete conflict in the actual divorce where the issues are dealt with in an amicable environment.¹⁵⁶ To increase the efficacy of mediation, a period of counselling for both parties may be useful. It is possible that a solution will be that the abuser attends some form of rehabilitation before the mediation process is completed.¹⁵⁷

Court proceedings are held in the public view in an established forum¹⁵⁸ and as such may not be ideally suited for the personal issues that may need to be presented in court before the public; in such instances the disputing parties may prefer a private forum.¹⁵⁹ Disputing parties loath court appearances because they ‘feel like criminals’ before sentence is pronounced.¹⁶⁰ Mediations (as mentioned above) are held out of the public view in private forums in a relaxed environment.¹⁶¹

An important feature of mediation is that it is confidential, i.e. it is not held in the public view.¹⁶² That means that all the information related in the mediation sessions is not broadcast or used against the parties during litigation proceedings.¹⁶³

¹⁵¹ Bridge (n6) 237; Moodley (n64) 47; Brand (n9) 101; Mowatt (n6) 290; Folb (n110) 25.

¹⁵² Skelton & Carnelley (n25) 346.

¹⁵³ Cohen (n25) 74; Folb (n110) 25.

¹⁵⁴ Scott-MacNab (n21) 716.

¹⁵⁵ Scott-MacNab (n93) 288. See the later discussion of family violence and mediation in the chapter.

¹⁵⁶ Scott-MacNab (n93) 288.

¹⁵⁷ Scott-MacNab (n93) 290.

¹⁵⁸ Brand (n9) 100.

¹⁵⁹ Scott-MacNab (n93) 718; De Jong (n11) 519 – 520.

¹⁶⁰ Scott-MacNab (n21) 718.

¹⁶¹ Brand (n9) 100 & 101; Scott-MacNab (n93) 288. In the case of *Johncom Media Investments Ltd v M* 2009 (4) SA 7 (CC), the parties may choose not to be identified and court proceedings may be held *in camera*.

¹⁶² De Jong (n11) 520.

¹⁶³ De Jong (n11) 520.

Furthermore, mediation is designed to allow the parties to reach a solution that best suits the interests of their child(ren). Due to the fact that the parties reach an agreement together, the agreement will have a longer-lasting effect.¹⁶⁴ This is based on the assumption that parents will know what is best for their minor child or children.¹⁶⁵ Unlike judges, mediators do not impose a solution on the parties but they rather let the parties come to a decision between themselves, in other words the mediator merely facilitates or assists or directs the parties to reach an agreement.¹⁶⁶ Judges, on the other hand, make an order in terms of the facts or evidence of the case before them, based on precedent, public norms, the remedies available to them, and the principles of law that need to be applied (such as the principle of the best interests of the child).¹⁶⁷ This does not allow the parties freedom to form a solution best suited to their needs, hence mediation is a better forum to allow the parties to reach their own conclusions on the matter, including their future needs.¹⁶⁸

Furthermore, where circumstances change after the divorce, parties are able, through mediation, to work out a new agreement or long-term solution and act in terms of the agreement or solution. This is mainly the case where there are minor children involved.¹⁶⁹ The process is also seen as being fair.¹⁷⁰ De Jong mentions that mediation may be viewed as being ‘future-oriented’.¹⁷¹ Although a court order is enforceable, it is felt that the parties do not often comply with the terms of such an order,¹⁷² despite the fact that non-compliance will result in a charge of contempt of court against the noncompliant party.¹⁷³ Even if the court order is made by consent between the parties, it is often believed that the courts have taken control over the matter.¹⁷⁴

Mediation is also a quicker process in comparison to litigation, where there are often delays.¹⁷⁵

¹⁶⁴ Bridge (n6) 237; Brand (n9) 100; Folb (110) 25.

¹⁶⁵ Folb (n1110) 25; D Scott-MacNab and JG Mowatt ‘Mediation and arbitration as alternative procedures in maintenance and custody disputes in the event of divorce’ 1986 *De Jure* 313, 322, 324; CH Cohen ‘Mediation: giving law a human face’ (1992) *De Rebus* 126; De Jong (n11) 517.

¹⁶⁶ Sinclair & Bonthuys (n6) 203; Brand (n9) 100.

¹⁶⁷ Brand (n9) 100.

¹⁶⁸ Folb (n110) 25.

¹⁶⁹ Folb (n110) 25.

¹⁷⁰ Scott-MacNab (n93) 288.

¹⁷¹ De Jong (n11) 521.

¹⁷² Mowatt (n111) 737; Brand (n9) 100.

¹⁷³ Mowatt (n111) 737.

¹⁷⁴ Mowatt (n111) 737.

¹⁷⁵ *MB v NB* (n1) at para [58].

A further advantage of mediation over the normal court procedure is that it is seen as being more cost effective than working through the court systems and with attorneys.¹⁷⁶ Parties are no longer negotiating at 'arm's length through two separate lawyers'.¹⁷⁷

In accordance with the feminist critique, as summarised by Field,¹⁷⁸ mediation creates an environment that is constructive, positive and collaborative, allowing women to realise their self-determination in order to bring their needs, wishes, and views to the fore.¹⁷⁹ Mediation, in accordance with the feminist view, does away with the 'hierarchical manifestations that are based on gender'.¹⁸⁰ In other words, the parties retain their autonomy with respect to the decision making process.¹⁸¹

Research in Australia has generally established that both men and women were satisfied with the process and with the outcomes of the mediated agreement.¹⁸² As both parties are usually satisfied with the mediated agreement, there is a possibility that the mediated agreement lasts longer.¹⁸³

There are a few disadvantages of mediation which entail that it may not be the ideal forum in every circumstance. These will be explored in the next section.

4.2 Disadvantages

Although mediation may be more cost effective than litigation proceedings, unless it is made compulsory the benefits thereof will not be experienced by the majority of society.¹⁸⁴ On the other hand where mediation is made compulsory, a problem still arises in that there may not be suitably trained personnel to deal with, or attend to and assist couples to mediate their

¹⁷⁶ Bridge (n6) 237; Cohen (n25) 74; Brand (n9) 101; Mowatt (n111) 727; Van Zyl (n25) 95; Skelton & Carnelley (n25) 346.

¹⁷⁷ Bridge (n6) 237; Brand (n9) 101.

¹⁷⁸ Field (n146) 237 – 239.

¹⁷⁹ Field (n146) 237 – 238; De Jong (n11) 519.

¹⁸⁰ Field (n146) 237.

¹⁸¹ De Jong (n11) 519.

¹⁸² H Astor & C Chinkin 'Dispute Resolution in Australia' in *Australian Family Law in Context: Commentary & Materials* P Parkinson (ed) (2009) 240; Van Zyl (n25) 95.

¹⁸³ Van Zyl (n25) 95.

¹⁸⁴ Bridge (n6) 237; Mowatt (n111) 731.

disputes.¹⁸⁵ Furthermore, if parties are unable to resolve the dispute between them, this then may lead to even more costs and further delays.¹⁸⁶

A further problem relates to the need for confidentiality during the mediation sessions. In countries like Australia and South Africa, confidentiality is considered an important feature of the mediation process, as it allows people to speak openly and freely about the issues that are to be mediated on. But where there is the possibility of child abuse or family violence, or some other form of criminal behaviour, it may be expected of the mediator to terminate the mediation proceedings and report this to the relevant authorities.¹⁸⁷ This may include matters where there is alcohol and drugs involved or where one of the parties has a mental health problem.¹⁸⁸ In such an instance it would be advisable to have the matter go before the courts.¹⁸⁹

Mediations are generally held in private forums and are dependant on the private funding of the parties.¹⁹⁰ This may mean that within these private forums notes may not be kept and no formal process may be followed. This is unlike a court system where there is a formal structured procedure that is followed in respect of every matter¹⁹¹ and where the judge and the litigants are unable to structure the process. Disputing parties will always know that their matter will receive uniform treatment.¹⁹² During the mediation process the mediator may thus 'take charge'.¹⁹³ As mentioned above, in South Africa, mediators are able to define and clarify the issues of the mediation, and they are able to structure the process itself, in other words they leave little or no room for the parties to set out how they wish to attempt to mediate the disputes between them.¹⁹⁴ Mediation does not adhere to public norms and precedents, in other words it is unregulated in comparison to the courts where norms and precedents are followed.¹⁹⁵ There is a strong possibility that in the 'private setting' where there are no procedural mechanisms in place such as reviews or appeals, as there are in the

¹⁸⁵ Bridge (n6) 238; Mowatt (n111) 731.

¹⁸⁶ Skelton & Carnelley (n27) 347.

¹⁸⁷ Van Zyl (n25) 99; De Jong (n11) 520 & 522.

¹⁸⁸ De Jong (n11) 522.

¹⁸⁹ De Jong (n11) 522.

¹⁹⁰ Brand (n9) 100 & 101.

¹⁹¹ Mowatt (n111) 733.

¹⁹² Sinclair & Bonthuys (n6) 204; Mowatt (n111) 730 & 733; Mowatt (n6) 297; Cohen (n25) 75; Bridge (n6) 232; Van Zyl (n25) 93; Skelton & Carnelley (n25) 345.

¹⁹³ Mowatt (111) 731

¹⁹⁴ Sinclair & Bonthuys (n6) 204.

¹⁹⁵ Brand (n9) 100.

court system, and where no legal representation is allowed, weaker parties may be coerced into settlements that are more advantageous to the stronger party.¹⁹⁶ There should be a set of minimum standards in place to combat this problem – perhaps set out through legislative mechanisms.¹⁹⁷

As an outflow of the preceding paragraph, mediators may exercise power over the disputing parties, but this could be more covert and unregulated.¹⁹⁸ Mediators themselves may then abuse the process. This may be the case where the mediator is also a trained legal professional or social worker. Depending on their rank the parties may associate the mediator with a certain amount of power. Thus the disputing parties may associate these individuals with a certain amount of authority, allowing the mediator to persuade reluctant parties to settle where necessary.¹⁹⁹ The ability to persuade a weaker party into a settlement has no effect in the court system.²⁰⁰ There is a possibility that the disputing parties are simply searching for the assistance of a third, neutral person in order to help them settle the dispute between them. Keeping this in mind, it may amount to the parties losing some of the control or autonomy they had over the dispute. In this manner the mediator may have a direct effect over the outcome of the dispute.²⁰¹ In such an instance De Jong suggests that there should be a complaint and disciplinary procedure in place in order to report mediators.²⁰² She further suggests that a charter should be drafted, clearly specifying the rights and responsibilities of mediators.²⁰³

Another reason for retaining the court system is because the disputing parties prefer obtaining a court order because any settlement reached via mediation (and where this has not been incorporated into a court order), this mediated agreement is viewed as a contract between the parties thereto and the remedies for breach of contract are only available where one party does not comply with the terms thereof.²⁰⁴ The parties may in such an instance prefer to have

¹⁹⁶ Sinclair & Bonthuys (n6) 204; Bridge (n6) 240; Brand (n9) 100; Mowatt (n111) 732 & 733; Skelton & Carnelley (n25) 347.

¹⁹⁷ De Jong (n11) 530 – 531.

¹⁹⁸ Bridge (n6) 232; Brand (n9) 100.

¹⁹⁹ Sinclair & Bonthuys (n6) 203 – 204; Brand (n9) 100.

²⁰⁰ Brand (n9) 100.

²⁰¹ Mowatt (n111) 734; Van Zyl (n25) 95

²⁰² De Jong (n11) 531.

²⁰³ De Jong (n11) 531.

²⁰⁴ Mowatt (n111) 737.

the court make the mediated settlement an order of court, so as to have more protection where one party fails to act in terms of the mediated settlement (or consent order).²⁰⁵

One of the major disadvantages of mediation comes to the fore in instances where there are power imbalances between the parties. There are many factors that influence the power imbalance between the parties, and these may include for example, physical weakness, financial dependency, lack of bargaining skills, and influence over the other party, ignorance, and emotional power.²⁰⁶ This can be the case where parties are forced to attend mediation in order to settle disputes and the so-called self-determined or autonomous settlement is in reality the outcome of unequal bargaining, third party pressure to settle, untested evidence or the parties themselves feeling that there is a strong moral imperative to reach some sought of agreement that is in the best interests of the minor child. Where this is the case there may be a denial and/or compromise of certain legal rights and entitlements.²⁰⁷ Mediators may be unable to redress the power imbalances that occur between the disputing parties.²⁰⁸ Mediation (or rather mediators) seem(s) to work from the (wrong) assumption that the parties are evenly matched.²⁰⁹ In these exceptional circumstances, De Jong, Bridge and other writers agree that it is in the best interests of the divorcing and/or separating parties to bypass mediation and to proceed directly to court to have the matter adjudicated on.²¹⁰

Another factor that may or may not redress the power imbalance between the parties is the status of the mediator as viewed by the disputing parties (for example, the mediator's position in society, knowledge of the law, experience as a mediator, or any other positions he holds or his actual profession, etc).²¹¹ A further factor is the personality of the mediator, more precisely, his or her dominance or lack thereof during the mediation proceedings. In other words the mediator may exercise some form of control over the proceedings and assist the parties during the proceedings.²¹² Where he or she does not show any sort of dominance, then one of the parties, usually the stronger party (physically or emotionally, etc) will take control of the proceedings and any settlement agreement will be made in their favour. Where the

²⁰⁵ Mowatt (n111) 737.

²⁰⁶ Mowatt (n111) 733.

²⁰⁷ Bridge (n6) 221; Manjoo (n133) 126.

²⁰⁸ De Jong (n38) 44 at footnote 64; Mowatt (n111) 733; De Jong (n11) 522.

²⁰⁹ Mowatt (n111) 732; Field (n145) 238 – 239.

²¹⁰ De Jong (n11) 522; De Jong (n38) 44 at footnote 64; Bridge (n6) 235; Mowatt (n6) 289; Cohen (n25) 78.

²¹¹ Mowatt (n111) 735.

²¹² Mowatt (n111) 735.

mediator has a dominant character, the mediation proceedings and settlement agreement will be under his or her control, i.e. the mediator may just decide what the important topics will be and what may be included in the settlement agreement.

Furthermore, in accordance with the views of the feminist critique, as summarised by Field, mediation only empowers the already powerful husband and thereby supports gender-based inequality. In this way, mediation aggravates the economic vulnerability of women, which may already exist in the marriage relationship. These types of vulnerabilities impact greatly on the self-determination of women where they are negotiating in their own interests. In these instances, such vulnerabilities may lead to coerced agreements, thus blurring the line between what is a coerced and consensual agreement, leading to women feeling that they did not receive sufficient support from the mediator.²¹³ Field does point out, however, that most of the weaknesses that mediation brings forward arise out of individual cases and may not be the norm.²¹⁴

Another disadvantage is that there are instances where the parties feel that it is incorrect for them to decide on their own fate during the mediation sessions, i.e. the parties feel that they should have their legal representatives with them in order to make the various decisions regarding settlement. Furthermore, attorneys may be seen as the people best suited to deciding on the possible route the disputing parties should take and thus parties feel it is not safe to move without the advice of a legal professional.²¹⁵

Another disadvantage is where there are language barriers (international family law – see the section below and where the parties are from an indigenous or customary background).²¹⁶

Mowatt suggests that a possible solution to addressing some of the disadvantages may include the introduction of certain ‘norms’ by the legislature, or relevant mediation umbrella body or an association,²¹⁷ that the mediator may be able to apply in order to balance out the parties where power imbalances exist.²¹⁸

²¹³ Field (n146) 238 – 239; Astor & Chinkin (n182) 240; Mowatt (n111) 733; Van Zyl (n25) 97, 98.

²¹⁴ Field (n146) 238 – 239.

²¹⁵ Scott-MacNab (n21) 717.

²¹⁶ See Cunneen, Luff, Menzies and Ralph (n94) 1; T Kruger *International Child Abduction: The Inadequacies of the Law* (2011) 157.

²¹⁷ FAMAC (Family Mediator’s Association of the Cape) available at <http://www.famac.co.za/> accessed on 16 November 2010; SAAM (South African Association of Mediators) available at <http://www.saam.org.za/>

A further problem or disadvantage is that there are instances in which it will, due to the circumstances of their specific matter, be unsuitable for the parties to mediate, for example family violence or abuse.²¹⁹ In this regard there is still a need for retaining the court system as it is at present. The courts are the forum in which our jurisprudence is developed in all aspects of the law, including family and divorce law. In other words, our courts lay down precedents and clarify the grey areas of the law, thus bringing about certainty and uniformity in the application of the law.²²⁰ It is submitted that this is not the case in mediation where legal principles need not be applied in the same manner in every circumstance. As such, where the matter is mediated, this means that a solution unique to that specific circumstance is found.²²¹ De Jong suggests further reasons for proceeding directly to court adjudication, namely where there are large estates involved and there needs to be a full disclosure of all the documents that are of cardinal importance; where there are complicated legal issues; where the case has the possibility of being a high-level conflict case due to the nature of the issues involved (i.e. where there are allegations of parental unfitness) and also where the parties are completely unassertive or unwilling to make a proper or 'genuine' effort to resolve the matter before them.²²²

Although the following discussion on 'family violence and mediation' could be included in the above discussion on disadvantages of the mediation process, it is discussed separately because of the expansive arguments on this point.

5 Family violence and mediation

Violence in the familial set up is very difficult to deal with and may remain unknown to the mediator if he or she does not have the skill to detect it. At this point it should be noted that mediators can be categorised into two distinct groups when it comes to mediation where there is family violence and abuse: The first group argue that mediating in matters where there has been family violence and/or abuse is inappropriate and that mediators should not get

accessed on 16 November 2010. The various family centres have made mention of SANCOM on their web pages.

²¹⁸ Mowatt (n111) 734

²¹⁹ See however, the section that follows as academics are in two minds as to whether, where there is an allegation of family violence, the dispute should be mediated on or not.

²²⁰ Mowatt (n6) 290.

²²¹ Skelton & Carnelley (n25) 364.

²²² De Jong (n11) 522; H Astor 'Genuine effort in family dispute resolution' (201) 16 *Family Relationships Quarterly* 3 – 6.

involved. The second group maintain that, as a holistic approach to mediation should be offered, mediators should be prepared to get involved where there has been family violence and/or abuse.²²³

In the first group, academics such as Scott-MacNab and Astor and Chinkin argue that there are instances, as set out in this study, where the only option will be to proceed straight to court to address the issues between the divorcing and/or separating parties.²²⁴ One such instance – as mentioned in the preceding paragraph – is where there is a form of family violence.²²⁵ This group provides a number of reasons for non-involvement in such instances. In mediation a fundamental premise is that of being able to speak freely and openly. Where an act of violence has been directed against (for argument's sake) the 'weaker' party (or the target of the violence) by the other 'stronger' party in the familial environment, the 'weaker' party may not feel encouraged to speak as freely as when there was no violence within the marriage or family, i.e. there is a certain amount of fear involved, and the mediator may be met with silence from the target of the violence and such information may remain hidden from the mediator.²²⁶ Furthermore, the traditional view is that violence, whether found in the family setting or otherwise, should be dealt with in the criminal justice system and the perpetrator should be sanctioned.²²⁷ (On this point Scott-MacNab argues that 'domestic violence is a crime rather than a breakdown in interpersonal relationships.')²²⁸

Another reason provided against mediation in cases where there is abuse is that there will be an obvious power imbalance that the mediator will be unable to overcome.²²⁹ The stronger spouse will be able to negotiate an agreement that places the victim of the violence or the weaker spouse at a disadvantage, merely by placing the victim's behaviour, etc as the reason for the initial battering, or dispute between them.²³⁰ However, where there is repeated physical abuse, such a matter should not be mediated on in the first instance.²³¹ Any possible

²²³ Scott-MacNab (n93) 283; see generally Astor & Chinkin (n182) 224 – 226; H Astor 'Domestic violence and mediation' (1990) 1 *Australian Dispute Resolution Journal* 143 144.

²²⁴ Scott (n93) 282 – 290; Astor & Chinkin (n182) 224 – 226.

²²⁵ Skelton & Carnelley (n25) 347.

²²⁶ Scott-MacNab (n93) 284 and 288; Astor & Chinkin (n182) 224 & 225.

²²⁷ Scott-MacNab (n93) 285.

²²⁸ Scott-MacNab (n93) 289.

²²⁹ As mentioned above, the power imbalance may result from any of the following factors physical weakness, financial dependency, lack of bargaining skills, and influence over the other party, ignorance, and emotional power (Mowatt (n111) 733).

²³⁰ Astor & Chinkin (n182) 224 & 225; Scott-MacNab (n93) 286.

²³¹ Scott-MacNab (n93) 288; Astor & Chinkin (n182) 225.

agreement reached from the mediation, may be compromised or not even followed by the stronger spouse, in other words the victim or target of the violence may also agree to terms that are unfair merely to end the violence.²³²

In a situation where the mediator does attempt to mediate a spousal abuse case, the power imbalance between the parties needs to be continually equalised by the mediator. The mediator needs to achieve this without seeming to become biased or unfair towards any one of the parties. An attempt to achieve this is where the mediator approaches the parties separately at first.²³³

The second group disagrees with the above – they argue that mediation does have a role to play where there has been family violence, as it is able to expose the root cause of the violence, i.e. the problems that have been festering for a long time.²³⁴ Mediation is able to unearth the suppressed history of violence. This suppression is able to give an indication as to the degree of violence.²³⁵ Further, in countries like Australia, mediation is being used in family violence cases.²³⁶ But it is important to note that where there is family violence, much patience is required in order to find a solution.²³⁷

Where domestic violence has occurred, many women rather wish to mediate a matter and have a chance to be heard, than to proceed to a criminal trial.²³⁸ Mediation may be used in the pre-trial stage as a type of diversion to postpone formal criminal proceedings.²³⁹ Mediation is used to try to diffuse an already tense situation. In other words, it encourages reconciliation and an attempt is made to keep the family unit intact. It is believed that many spouses avoid laying criminal charges against the abusive spouse out of fear and to avoid society's condescension against the family, especially where there are children.²⁴⁰

²³² Astor & Chinkin (n181) 224 & 225; Field (n146) 237.

²³³ Scott-MacNab (n93) 287; Astor & Chinkin (n182) 225

²³⁴ Scott-MacNab (n93) 285 & 288; Astor & Chinkin (n182) 225.

²³⁵ Scott-MacNab (n93) 288; Astor & Chinkin (n182) 225.

²³⁶ Scott-MacNab (n93) 285; see generally Astor & Chinkin (n182) 224 – 226; Cunneen, Luff, Menzies and Ralph (n94) 7.

²³⁷ Scott-MacNab (n91) 288 & 289; Astor & Chinkin (n182) 225 – 226.

²³⁸ K Moulton 'Providing a sense of justice: Informal mechanisms for dealing with domestic violence' (2005) 12 *SA Crime Quarterly* 19 21.

²³⁹ Moulton (n238) 22 – 23; Scott-MacNab (n932) 285 & 286.

²⁴⁰ Scott-MacNab (n93) 285 & 286. As Scott-MacNab points out that a pre-trial diversion programme does not only involve mediation, it may be necessary for the parties to attend counselling, etc.

Scott-MacNab argues that the implementation of a pre-trial diversion programme may become problematic, where there have been acts of domestic violence, in South Africa. The first reason that he raises is that there is often a lack of skilled manpower that is able to detect the domestic violence, and secondly, there needs to be a change in the attitude of the criminal justice system in order to support such a notion.²⁴¹

Chinkin and Astor state that in order to attempt a mediation process where there has been a case of family violence, the first step is for the spouse to recognise that his or her abuse amounts to serious criminal behaviour. The second step is for the battered spouse to realise that not every charge laid or reported will lead to a criminal trial. This may make reporting matters easier for the 'weaker' spouse. However, the target of the violence may not wish for the status of 'victim' to be conferred on him or her.²⁴²

Thirdly, Scott-MacNab points out that cases that would have remained unreported may enter into some kind of structured rehabilitative process from which all will benefit.²⁴³ Moulton opines that perhaps attending an informal process may help with the above.²⁴⁴

Where a mediator needs to decide whether mediation will be used to solve the dispute where there has been an occurrence of family violence, he or she will need to look at each individual case, focusing on the following factors, namely, the degree of violence, the frequency of the abuse, the fear shown by the abused spouse towards the abusing spouse, the nature of the family relationship, the history of the offence or violence and the possibility of an experienced mediator investigating the underlying causes of the violence, etc.²⁴⁵ It is important to note that the violence is often a result of the dispute and not the dispute itself.²⁴⁶

The next section in this study gives an exposition of the use of mediation in an international family law context.

6 International family law mediation

²⁴¹ Scott-MacNab (n93) 287; see generally Moulton (n238) 19. This point shall not be discussed further as it is not the focus of this study.

²⁴² Astor & Chinkin (n182) 225 – 226.

²⁴³ Scott-MacNab (n93) 286.

²⁴⁴ Moulton (n238) 22 – 23.

²⁴⁵ Scott-MacNab (n93) 287, 288 & 290; Astor & Chinkin (n182) 225 – 226; Astor (n223) 148.

²⁴⁶ D Scott-MacNab (n94) 290.

Mediation is not limited to the national family law, and it is worth noting that even in terms of international family law matters, where there are children involved, such as in child abduction matters in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980, there are provisions that emphasise the importance of mediation and finding a resolution to the dispute between the disputing parents.²⁴⁷ The central authority that deals with international child abduction matters in each respective country is obliged to try to find an amicable solution before continuing with court proceedings.²⁴⁸

South Africa and Australia are both signatories²⁴⁹ to the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (hereinafter referred to as ‘the Hague Convention’).²⁵⁰ The Conclusions and Recommendations of the Hague Conferences Fifth Special Commission to review the operations of the Hague Convention encourages the parties to use mediation in order to find an amicable solution before proceeding to court. It was noted that this method should only be used where it will not result in an unnecessary delay in bringing the action.²⁵¹

Kruger points out that despite using an amicable solution in order to obtain some sort of relief, there are many risks and problems that are involved where the parties resort to mediation in these cases.²⁵² These will be set out briefly. The time frames are shorter,²⁵³ and despite the fact that mediation is generally a cheaper option than litigation, in terms of the international legal realm it may be more expensive.²⁵⁴ Also there are obvious language barriers that need to be overcome, and the mediator needs to be particularly sensitive to international particularities.²⁵⁵ There needs to be a willingness from both parties to mediate

²⁴⁷ Kruger (n216) 113.

²⁴⁸ Kruger (n216) 114.

²⁴⁹ South Africa: JMT Labuschagne ‘International parental abduction of children: Remarks on the overriding status of the best interests of the child in international law’ (2000) 33 *CILSA* 334; Australia: KM Bowie ‘International application and interpretation of the Convention on the Civil Aspects of International Child Abduction’ (March 2001) [1980] *FamCA Federal Judicial Scholarship* 2, available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedJSchol/1980/1.html?stem=0&synonym s=0&query=International child abduction>, accessed on 3rd October 2011.

²⁵⁰ The Hague Convention on the Civil Aspects of International Child Abduction, 1980, is available at <http://www.unhcr.org/refworld/docid/3ae6b3951c.html>, accessed 13 October 2011.

²⁵¹ Kruger (n216) 113 – 114.

²⁵² Kruger (n216) 156 – 161.

²⁵³ Kruger (n216) 157; 159.

²⁵⁴ Kruger (n216) 159. This is due to the possibility of the use of video conferencing and other modes of visual communication that would need to be attempted in order for the parties to be ‘face-to-face’ during the mediation sessions (at page 161).

²⁵⁵ Kruger (n216) 157.

the matter, otherwise there will be unnecessary delays and further costs.²⁵⁶ Kruger pointed out that in such instances mediation would not have a fair chance of success due to the problems as pointed out in this paragraph.²⁵⁷ Mediators are not always well versed in the various legal systems and many may or may not speak several languages. Such proficiencies are required not only to overcome any language barrier, but also because these agreements will need to have effect in both countries.²⁵⁸

Although mediation may be particularly problematic in terms of international law, it has many benefits for the parties where it is used in terms of national legislation.²⁵⁹

South Africa and Australia have not only ratified the Hague Convention but these countries have also ratified the United Nations Convention on the Rights of the Child.²⁶⁰ South Africa has also ratified the African Charter on the Rights and Welfare of the Child.²⁶¹ With regards to both these documents, a child should be allowed to participate in a suitable forum. This may include mediation.²⁶² These documents are discussed further within the respective chapters looking at child participation.

The afore going was a mere overview of the general topic of mediation within the family law system. The following section will give an overview as to how the topic of this study will be structured.

7 Outline of subsequent chapters

The remainder of the study has been divided into the following chapters: South African Law, Australian Law, the Comparative Study (this includes any recommendations and/or critiques) and a Conclusion.

The South African and Australian Law Chapters will discuss the manner in which the respective legislatures have incorporated family law mediation and where they have provided for opportunities to allow families to mediate within the legal framework. They will also set

²⁵⁶ Kruger (n216) 158.

²⁵⁷ Kruger (n216) 158.

²⁵⁸ Kruger (n216) 161.

²⁵⁹ The benefits were set out in the section discussing 'Advantages and Disadvantages' in this chapter.

²⁶⁰ South Africa ratified on 16 June 1995 and Australia did so in December 1990.

²⁶¹ Ratified 7 January 2000.

²⁶² Look at the section entitled 'legislative Framework' in both Chapter 2 and Chapter 3.

out how these countries have dealt with their respective 'indigenous' communities. These two chapters will use examples from case law where applicable. The South African and Australian Law Chapters have a similar structure so as to make the comparison between them possible. They both set out the legislative framework in which they discuss the use of compulsory mediation and court compelled mediation. There is also a discussion regarding the need or use of judicial review of the mediated agreements and a brief outline of the best interests of the child in so far as it pertains to the topic of family law mediation.

The Comparative Study Chapter will compare, critique and make recommendations in respect of the two legal systems, specifically focussing on the areas of discussion as outlined above.

8 Research methodology

Legal journal articles and textbooks have been used and obtained from the law library and through inter-library loan. Where relevant, textbooks and journals from other disciplines were also used. From these textbooks and journals, other sources, such as statutes and cases were highlighted in order to provide for a holistic view of the current situation in both South Africa and Australia. Furthermore the internet was used in order to obtain any additional information regarding the topic from government web pages and other academic sources, such as online journals and in order to find case decisions (especially for Australia).

In light of the above, the South African Law shall now be discussed in the next chapter.

Chapter 2: South African Family Law

1 Introduction/Background

In South Africa, family law matters are dealt with in a variety of court settings. Divorces and all matters relating thereto are mainly dealt with in the High Court, presided over by judges.¹ Maintenance matters and matters relating to domestic violence are dealt with in the Maintenance² and Magistrates³ Courts respectively, both these courts are lower courts, presided over by magistrates.⁴ A recent development in this area was the granting of civil jurisdiction to Regional Courts. In other words, the jurisdiction of the Regional Courts now includes divorce and other matters relating to family disputes amongst others.⁵ This inclusion of family matters into the Regional Court jurisdiction means that divorces are now more accessible and cheaper for the general public.⁶

As argued in the first chapter, mediation may be a better alternative to the adversarial system due to the reason that it is able to deal with the emotional matters that arise out of the dispute and the parties are able to discuss matters, resolve problems and find solutions that suit their individual needs with a view to the future – should circumstances change.⁷

1. The original 'Divorce Courts' that were set up in terms section 10 of the Administration Amendment Act 9 of 1929 have been incorporated within the newly created Civil Regional Courts, that were formed in terms of the Jurisdiction of Regional Courts Amendment Act 31 of 2008. These courts are not on a High Court level but are able to deal with family matters, including divorce. The fact that these courts are on this level means that they are more cost effective in comparison to the High Courts.

² Section 3 of the Maintenance Act 99 of 1998.

³ Section 1 of the Domestic Violence Act 116 of 1998 (i.e. the definition of court is as follows: 'any magistrate's court for a district contemplated in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944)').

⁴ Section 2 of the Magistrates' Court Act 32 of 1944.

⁵ Jurisdiction of Regional Courts Amendment Act 31 of 2008; 'Regional Courts to get Powers to deal with Civil Cases' Department of Justice and Constitutional Development, available at http://www.justice.gov.za/docs/articles/20100810_reg-courts_dailysun_ad.html, accessed 2 February 2011.

⁶ The Jurisdiction of Regional Courts Amendment Act 31 of 2008; V Goldberg 'Family courts in South Africa and the implication for divorce mediation' (1995) 58 *THRHR* 276 279; K Hawkey 'New Act means increased efficiency for civil matters' *The Sunday Times* 15 August 2010 available at <http://www.timeslive.co.za/sundaytimes/article/602049.ece/New-act-means-increased-efficiency-for-civil-matters> accessed on 2 February 2010; I Oellermann 'New civil courts roll-out' *The Witness* 4 September 2010 available at [http://www.witness.co.za/index.php?showcontent&global\[_id\]=46887](http://www.witness.co.za/index.php?showcontent&global[_id]=46887) accessed on 3 November 2010.

⁷ C Bridge 'Family mediation and the legal process: an unresolved dilemma' (1997) 17 *New Zealand Universities LR* 231 237; J Brand 'Table of arbitration, court adjudication and mediation characteristics' in *Dispute Resolution P* Pretorius (ed) 1993 100; A Skelton & M Carnelley (eds) *Family Law in South Africa* (2010) 364; S Folb 'Mediation in different contexts: Divorce and family' (1998) 17(1) *Track Two* 25.

A definition of ‘family’ that is both supported by Roman-Dutch law and African customary law is that family arises out of a marriage relationship.⁸ However, this traditional view has changed over the years – this can be seen with the increasing reference to life-partnerships in various pieces of legislation.⁹ Furthermore, since the Constitutional Court decision of *J and Another v the Director General, Department of Home Affairs, and Others*¹⁰ the definition of family has widened to include same-sex or opposite-sex couples (known as ‘domestic partners’ or ‘life-partners’) with their children¹¹ as well as those who have entered into a union in terms of the Civil Union Act.¹²

The adversarial or accusatorial procedure is currently applicable in all divorce matters. It has been argued that this is an inappropriate method when dealing with family matters.¹³ It has been suggested that there are other more suitable methods when dealing with family law matters.¹⁴ Alternative dispute resolution methods, especially mediation, have started to receive increasing support from the courts, the legislature, and various academic writers, as appropriate methods for dealing with family law disputes.¹⁵

This chapter will focus on how South Africa has implemented family law mediation within its legal system. The chapter will also discuss some of the comments made by the courts,

⁸ S Moodley ‘Mediation – increasing necessity of incorporating cultural values and systems of empowerment’ (1994) 27(1) *CILSA* 44 46.

⁹ For example the Children’s Act 38 of 2005 is one of the pieces of legislation that mentions this.

¹⁰ *J and Another v the Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC). See also *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) (in respect of same-sex marriages).

¹¹ The merits of this argument goes beyond the scope of this work. See generally the arguments set out in the case of *J and Another v the Director General, Department of Home Affairs* (n10); E Ellis ‘Same-sex parents can raise family, says court’ *The Star* 27 February 2003, sourced from Sabinet.

¹² Civil Union Act 17 of 2006.

¹³ J Heaton *South African Family Law* (3ed) (2010) 185; DSP Cronjé & J Heaton *South African Family Law* (2ed) (2004) 183.

¹⁴ Heaton (n13) 185; Cronjé & Heaton (n13) 183.

¹⁵ See generally *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC); *Townsend-Turner v Morrow* 2004 (2) SA 32 (C); *MB v NB* 2010 (3) SA 220 (GSJ); M De Jong ‘Giving children a voice in family separation issues: a case for mediation’ (2008) 4 *TSAR* 785; M De Jong ‘An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation’ (2005) 18(1) *TSAR* 33; JG Mowatt ‘The family court and divorce mediation’ (1991) 20(2) *TSAR* 289.

specifically the views of Brassey AJ in the judgment of *MB v NB*¹⁶ regarding family law mediation.¹⁷

At present the main authoritative body that deals with family law mediation, especially where children are involved, is the family advocate.¹⁸ In this chapter the role of the family advocate is discussed in terms of the Mediation in Certain Divorce Matters Act¹⁹ as well as its role as mediator within the framework of that Act.

Furthermore, mediation in terms of the Children's Act²⁰ is discussed as well as any sanctions that the courts may impose where the parties either do not attend compulsory mediation as prescribed by that Act,²¹ or that which is compelled by the courts.²² There is also a section which permits the Children's Court to order a pre-hearing conference to be held in order to mediate, settle disputes and to clarify or resolve any outstanding matters before the court proceedings begin.²³ The discussion includes the sections where mediation is at the instance of a social worker²⁴ and also where family mediation may possibly be implied.²⁵

During a mediation session, the best interests of the child must be considered.²⁶ The effect this has is that the mediation turns to a more child-focused approach, where the best interests of the child are the paramount focus of the mediation process.²⁷ This is discussed in more detail in this chapter, with reference to South African law.

¹⁶ *MB v NB* (n15).

¹⁷ Also the cases of *Van den Berg v Le Roux* (n15) and *Townsend-Turner v Morrow* (n15) made mention of mediation in family matters, but here the judges instructed the parties to mediate their disputes before the courts could be re-approached. Brassey AJ in *MB v NB* (n15) discussed the benefits of family law mediation at great lengths.

¹⁸ Preamble to the Mediation in Certain Divorce Matters Act 24 of 1987.

¹⁹ Mediation in Certain Divorce Matters Act 24 of 1987.

²⁰ Children's Act 38 of 2005.

²¹ As prescribed by sections 21 and 33 of the Children's Act 38 of 2005.

²² As prescribed by sections 49, 70, 71 and 155(8) of the Children's Act 38 of 2005.

²³ Section 69 of the Children's Act 38 of 2005.

²⁴ Sections 150(3) and 155(4)(a) of the Children's Act 38 of 2005.

²⁵ Sections 22, 30(3), 234(1) and 292 of the Children's Act 38 of 2005. These distinctions have been based on the following article: M De Jong 'Opportunities for mediation in the new Children's Act 38 of 2005' (2008) 71 *THRHR* 630.

²⁶ Section 9 of the Children's Act 38 of 2005.

²⁷ D Scott-MacNab 'Mediation in the family law context' (1988) 105(4) *SALJ* 709 718 – 719.

There will also be a brief mention of how mediation will affect a domestic relationship. It must be noted that there is no legislation in place regarding domestic partnerships at present within the South African legal system. Proposed legislation is however in the pipeline.²⁸ Pending the enactment hereof, the children born of these domestic partnerships are treated as children born of unmarried parents.²⁹ This entails that, while the mother of the child automatically has full parental responsibilities and rights, the child's father must comply with section 21 of the Children's Act in order to acquire the same.

Furthermore, mediation and its use within customary marriages will be discussed, as well as the proposed Muslim Marriages Bill³⁰ and the possible incorporation of mediation on separation or divorce.

There will also be a discussion on the current mediation services offered in South Africa. Mention will be made of any private, as well as public services offered ('public' including non-government based as well as any government based services or lack thereof).

During divorce proceedings, the courts do not merely focus on matters that were mentioned in the previous chapter of this study,³¹ when granting a divorce and deciding upon a settlement, namely, vast estates where the exchange of documents regarding the wealth of either spouse becomes of vital importance during the proceedings; or matters where child abuse or domestic violence has occurred; or where there is drug and alcohol abuse, or where there are mental health problems; or where there is a tremendous power imbalance.³² The courts currently deal with the all maintenance issues relating to divorced and/or separated couples or families (including where an order has already been made); custody (care), access (contact) and residence issues of the minor child or children;³³ but also the future 'welfare of the child' by looking at the possible

²⁸ Domestic Partnership Bill *Government Gazette* No 30663 of 14 January 2008; P De Vos 'Still out in the cold? The Domestic Partnership Bill and the (non)protection of marginalised woman' in *Trials & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds.) (2008) 130.

²⁹ Section 21 of the Children's Act 38 of 2005.

³⁰ Draft Muslim Marriages Bill 2011.

³¹ These were mentioned previously in the introductory chapter, namely Chapter 1.

³² De Jong (n15) 44 at footnote 64; Bridge (n7) 235; Mowatt (n15) 289.

³³ In terms of the Children's Act 38 of 2005, the terminology has changed; 'custody' is referred to as 'care', 'access' is referred to as 'contact'. These changes have come about to show the shift in the parent-child relationship in South

future earning capacity of the parents (and the child), the stability of the new home environment, the educational needs of the child (including religious and moral instruction), amongst others, however the case may be.³⁴

It is submitted that a more appropriate forum to deal with these issues would be mediation. In many respects a mediator is able to encourage the parties to find an amicable solution in respect of the above matters, especially those involving care and contact for the minor child or children.³⁵ Still, some of the issues, mentioned in the previous paragraph, are best suited to be dealt with by the court system.³⁶

At this stage it would be worth pointing out that in terms of the South African law matrimonial matters and matters incidental thereto may not be subjected to the arbitration process.³⁷ It is submitted that most family law matters are of a matrimonial nature, arising out of the bond between spouses, as they result from divorce and/or separation; i.e. maintenance matters and domestic abuse etc.³⁸ Hence, the matters as set out previously (i.e. in the previous paragraphs) may not be decided upon by an arbitrator. It is submitted that in this instance reference is mainly made to civil marriages, civil unions, and customary marriages, in other words ‘marriages’ and partnerships concluded in terms of South African law.³⁹

African law, see generally A Boniface ‘Revolutionary changes to the parent-child relationship in South Africa’ in *Trials & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds.) (2008) 151.

³⁴ JG Mowatt (n15) 289.

³⁵ *MB v NB* (n15) at para [50]; *S v J* [2011] 2 All SA 299 (SCA) at para [54] (*S v J* is also cited as *FS v JJ* 2011 (3) SA 126 (SCA)).

³⁶ De Jong (n15) 44 at footnote 64; Bridge (n7) 235; JG Mowatt (n15) 289; CH Cohen ‘Divorce Mediation’ in *Dispute Resolution* P Pretorius (ed) (1993) 78.

³⁷ Section 2 of the Arbitration Act 42 of 1965 states as follows: ‘Matters not subject to arbitration. – A reference to arbitration shall not be permissible in respect of – (a) any matrimonial cause and any matter incidental to such cause; or (b) any matter relating to status’; *Ressell v Ressel* 1976 (1) SA 289 (W) at 292; Heaton (n13) 187 – 188; Cronjé & Heaton (n13) 184 – 185; Scott-MacNab (n27) 723.

³⁸ The definition of divorce action as found in the Divorce Act 70 of 1979 in section 1 is ‘an action by which a decree of divorce or other relief in connection therewith is applied for, and includes- (a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application’.

³⁹ Marriages in terms of the Marriage Act 25 of 1961, civil unions in terms of the Civil Union Act 17 of 2006, customary marriages in terms of the Recognition of Customary Marriages Act 120 of 1998. There is also the Domestic Partnerships Bill *Government Gazette* No 30663 of 14 January 2008, which aims to regulate the family situation where the parties choose not to marry, in other words cohabit with one another where the matters between them is domestically arranged. To enable parties to receive protection in terms of the Bill, the partnership

As mentioned in the Introduction to this study,⁴⁰ South Africa has ratified various international documents that require it to move towards mediation (this is in terms of international trends) where families are about to embark on the divorce process.⁴¹ Notably, two of these documents concern themselves with children's rights and the best interests of the child, namely the United Nations Convention on the Rights and Welfare of the Child and the African Charter on the Rights and Welfare of the Child.⁴² South Africa ratified the United Nations Convention on the Rights of the Child on 16 June 1995⁴³ and the African Charter on the Rights and Welfare of the Child on 7 January 2000.⁴⁴ In both the United Nations Convention on the Rights and Welfare of the Child and the African Charter on the Rights and Welfare of the Child there are articles that specifically require that the child be heard, where this is appropriate.⁴⁵ As will be discussed later in this chapter, this may include a forum such as mediation.⁴⁶ This to some extent affects family law mediation in that the interests of the child must be considered first before all else.

Furthermore, the Constitution of the Republic of South Africa, 1996 guarantees that the best interests of the child are paramount in all matters concerning him or her.⁴⁷ The implications that this has is that the best interests of the child must be taken into account in any matter that concerns the child. Thus during mediation the child's interests must be considered as they are of paramount importance.⁴⁸ This will be discussed later in this study under the heading 'The best interests of the child'.

needs to be registered, subject to various conditions set out in the Bill. There will be a short discussion later on the Domestic Partnerships Bill in terms of family law mediation.

⁴⁰ Chapter 1 in the section entitled 'International family law mediation'.

⁴¹ De Jong (n15) 786.

⁴² De Jong (n15) 786.

⁴³ De Jong (n15) 786

⁴⁴ List of Countries which have Signed, Ratified/Acceded to the African Union Convention on the African Charter on the Rights and Welfare of the Child available at http://www.achpr.org/english/ratifications/ratification_child%20rights.pdf accessed on 3 November 2010; De Jong (n15) 786.

⁴⁵ Article 12 of the United Nations Convention on the Rights and Welfare of the Child; Article 4 of the African Charter on the Rights and Welfare of the Child.

⁴⁶ This will be discussed under the section dealing with the Legislative Framework.

⁴⁷ Section 28 of the Constitution of the Republic of South Africa, 1996.

⁴⁸ See generally GN Barrie 'The best interests of the child: Lessons from the first decade of the new millennium' (2011) 1 *TSAR* 126; L van Zyl 'Chapter 4: Family Mediation' in *Introduction to Child Law in South Africa* CJ Davel (ed) (2000) 87.

There is a tendency to move towards mediation in the South African context. The Hoexter Commission in the 1980s was set up in order to investigate the possibility of including mediation and other forms of alternative dispute resolution methods into South Africa's family law system. The result was a series of reports.⁴⁹ The reports showed a strong support for the use of mediation and the creation of a family court.⁵⁰ Mention of the reports and to the specific clauses found therein will be made where applicable to the topic of family law mediation, mainly under the section discussing the family advocate later in the study.

In South Africa, not only are academic writers and the litigating or disputing parties showing more support for mediation services to be made more widely available to the public; the courts are also beginning to show their support for mediation to be used between warring parties in family law matters.

Cronjé and Heaton make mention that some non-government based organisations offer free mediation services. The only problem is that they can only offer these services to a limited number of people.⁵¹

Furthermore, there are also community-based mediation services offered by street forums, community courts, community-based advice centres and traditional leaders. These are often known to the community in which they operate. Suggestions have been made to include these informal services into the formal justice system.⁵² The reason for this is that they are already respected and known by the members of the community and are more accessible to the community than the court system. Furthermore, integrating existing forums will mean that they will be regulated in a more formal manner.⁵³

⁴⁹ SA Law Commission *Commission of Inquiry into the Structure and Functioning of the Courts* (RP78/1983) and *Commission of Inquiry into the Rationalisation of Provincial and Local Divisions of the Supreme Court* (RP200/1997).

⁵⁰ SA Law Commission (n 49) (RP78/1983) vol III part 7; M De Jong 'Divorce Mediation in Australia – valuable lessons for family law reform in South Africa' (2007) 40 *CILSA* 280 280; N Glasser 'Taking children's rights seriously' (2002) December 35(2) *De Jure* 223 225; D Scott-MacNab (n27) 719.

⁵¹ Cronjé & Heaton (n13) 184 at footnote 17 and page 183 at footnote 14.

⁵² De Jong (n15) 42.

⁵³ De Jong (n15) 42.

Another aspect to note is that most divorces heard in court are uncontested or undefended. This is due to the fact that the majority of parties have circumvented the court system and have made prior arrangements between themselves through negotiation and/or mediation, with or without the assistance of an attorney. These arrangements may include care of and contact with (previously custody and access)⁵⁴ the minor child or children of the marriage relationship, and/or the financial and property matters between the parties.⁵⁵

In this chapter, South Africa's law and its current approach to mediation will be discussed, setting out the various legislative instruments, as well as the support shown by the courts. Specifically the cases of *Van den Berg v Le Roux*,⁵⁶ *Townsend-Turner v Morrow*⁵⁷ and *MB v NB*⁵⁸ shall be discussed in this regard. In the cases of *Van den Berg v Le Roux* and *Townsend-Turner v Morrow*, the court went as far as to order the disputing parties to attend mediation in respect of any future dispute between them, and if the matters were still unresolved, only then may they approach the court.⁵⁹ These three cases will be discussed in the following section. Furthermore, there shall be a discussion on customary law and Islamic law, as well as a discussion on the best interests of the child. The reasons for the last three points will be discussed under their headings.

2 The Courts

There is evidence of support of mediation by the courts. The following cases stand out, namely the cases of *Van den Berg v Le Roux*⁶⁰ and *Townsend-Turner v Morrow*.⁶¹ These cases were decided by our courts before the Children's Act 38 of 2005 came into operation and each will be discussed in turn. The case of *MB v NB*⁶² was decided after the Children's Act came into operation, but there was no issue that required the court to take a closer look at the mediation

⁵⁴ This change of terminology is discussed later in the study.

⁵⁵ Mowatt (n15) 290.

⁵⁶ *Van den Berg v Le Roux* (n15).

⁵⁷ *Townsend-Turner v Morrow* (n15).

⁵⁸ *MB v NB* (n15).

⁵⁹ *Van den Berg v Le Roux* (n15); *Townsend-Turner v Morrow* (n15); Heaton (n13) 187; Cronjé & Heaton (n13) 184.

⁶⁰ *Van den Berg v Le Roux* (n15).

⁶¹ *Townsend-Turner v Morrow* (n15).

⁶² *MB v NB* (n15).

sections from the Children's Act, however the judge did discuss the importance of mediation.⁶³ Another case that will be noted is that of *S v J*⁶⁴ (also reported as *FS v JJ*⁶⁵). In this case the Supreme Court of Appeal supported the views made by Brassey AJ in *MB v NB*.⁶⁶ *S v J*⁶⁷ was decided after the Children's Act came into operation.

2.1 Van den Berg v Le Roux

The case of *Van den Berg v Le Roux*⁶⁸ involved a dispute between divorced parents over the custody of their legitimate minor child.⁶⁹

In this matter various expert witnesses were called by the parties to testify (psychologist and/or clinical psychologist – not completely clear from the case who the expert witnesses were). The court stated that the parties should use their expert witnesses to assist to mediate any further disputes between them. If the mediation failed, then the expert witnesses were to nominate a psychologist and/or clinical psychologist or other suitably qualified person to make a decision concerning the dispute. The parties could only approach the court once they have completed the mediation process.⁷⁰ A further order was made with regards to the costs of mediation – this was

⁶³ *MB v NB* (n15) at paras [49] – [60].

⁶⁴ *S v J* (n35).

⁶⁵ *S v J* (35).

⁶⁶ *MB v NB* (15).

⁶⁷ *S v J* (35).

⁶⁸ *Van den Berg v Le Roux* (15).

⁶⁹ *Van den Berg v Le Roux* (15). As this case was decided prior to the enactment of the Children's Act, the terminology in use at the time will be repeated. Briefly and as a short background, the facts (drastically summarized) were that the mother, Ms van den Berg, had moved to Caledon with her so-called coloured partner due to the ill will that the relationship had caused in Upington, where they had originally resided. Ms van den Berg took the child with her, as she had been awarded custody (now care) during the divorce proceedings. During a vacation, where the father (Mr Le Roux) had access to (now contact with) the child, the father failed to return her and instead brought an application for variation of the original custody award. By agreement the matter was postponed and custody was given to the father and his new family, pending the hearing. The family advocate was ordered to investigate and make recommendations regarding a suitable custody order. The family advocate's report filed with the court recommended that custody be awarded to the father (para [9] – [16]). At the main hearing a request was made by the mother that the family advocate recuses herself. The reason provided was that the family advocate was allegedly biased due to statements that she had made to the mother when she explained the reason for her findings. Both counsel agreed that it would be best if the family advocate does not cross-examine the witnesses due to the allegation of bias (at para [17] – [28]). The court held that the onus of proving that a variation of a custody order is in the interests of the child rests on the party making the allegations (para [36]).

⁷⁰ Heaton (n13) 187; Cronjé & Heaton (n13) 184; J Sinclair & E Bonthuys 'Law of Persons and Family Law' (2003) *Annual Survey of South African Law* 144 202; De Jong (n15) 43; M De Jong 'Judicial stamp of approval for divorce and family mediation in South Africa' (2005) 68 *THRHR* 95; M De Jong 'International trends in family mediation – are we still on track?' (2008) 71 *THRHR* 454 470; Skelton & Carnelley (n7) 346; M De Jong 'A pragmatic look at mediation as an alternative to divorce litigation' (2010) 3 *TSAR* 515 528.

to be split between the parties unless the mediator determined otherwise.⁷¹ There was not a long discussion regarding mediation in this case, however it was the first case that expressly encouraged the parties to turn to mediation in order to sort out all future disputes before they could again approach the court.

The court discussed the functions of the family advocate, including the use of the mediation process.⁷² This will be set out in the section discussing the family advocate later in this chapter.

2.2 *Townsend-Turner v Morrow*

In *Townsend-Turner v Morrow*⁷³ the court ordered the parties firstly to mediate and resolve the issues between them, namely the relationship between the applicants (a maternal grandparent and a former husband of hers who resided with her) and the respondent (the father) which had deteriorated after the death of the child's mother; alternatively to decide on an appropriate method of dealing with those conflicts before they could mediate on the main dispute, namely access by the applicants to the child. Only once the mediators and the parties agreed that the issues had been 'sufficiently resolved' were the parties able to concentrate on the main dispute.⁷⁴ The reason for this decision was because the conflict between the father and the applicants had a negative impact on the minor child. The family advocate was ordered to provide a list of names of private mediators from which the parties were to choose two to mediate between them.⁷⁵

⁷¹ Heaton (n13) 187; Cronjé & Heaton (n13) 184; Sinclair & Bonthuys (n70) 202; Skelton & Carnelley (n7) 346.

⁷² *Van den Berg v Le Roux* (n15) at para [22]; GJ van Zyl 'The family advocate: 10 years later' (2000) 21(2) *Obiter* 372 377 – 378.

⁷³ As this case was decided prior to the enactment of the Children's Act, the terminology in use at the time will be repeated. *Townsend-Turner v Morrow* (n15).

⁷⁴ Heaton (n13) 187; Cronjé & Heaton (n13) 184.

⁷⁵ *Townsend-Turner v Morrow* (n15) 256F – H; De Jong (n15) 43; De Jong (n70) 95; Skelton & Carnelley (n7) 346. The facts of *Townsend-Turner v Morrow* (n15), as a brief background to understand the court's order, were as follows: the relationship between the applicants (a maternal grandmother and a former husband of hers who resided with her) and the father of the minor child deteriorated once the father took over the family trust and his wife's business after her death. The grandmother seemed to also have a problem with the father's new partner with whom he was cohabitating and who had a good relationship with the child. For further information on grandparents' visiting rights see V Goldberg 'Family mediation is alive and well in the United States of America: A survey of recent trends and developments' 1996 *TSAR* 358 365 (this is not discussed in any detail as it has no effect on the main discussion of this study, namely family law mediation, furthermore, the article refers to American Law and this study is comparing South African and Australian law); Van Zyl (n48) 87. What is of interest in this matter is how the court deals with the issue around parental rights. (The court focused on a lot of cases that dealt with the rights of unmarried fathers in respect of children born to unmarried parents, where the discussion revolves around an emphasis being placed on the rights of the child, replacing parental rights as the focus on what is best for the child: *Townsend-Turner v Morrow* (n15) 42C – D, I – J; *B v S* 1995 (3) SA 571 (A) 582A – B; *T v M* 1997 (1) SA 54 (A)

The court refused the applicants further access to the child until such time as the issues between the parties were resolved by way of mediation. This decision was not viewed as contentious.⁷⁶ An important discussion in the case was that of parental rights, but as this is not the focus of this study, it shall not be discussed any further.⁷⁷ This matter was decided before the Children's Act⁷⁸ came into operation.⁷⁹

What is important to note is that the court during the hearing had tried to encourage the parties to attend mediation proceedings in order to resolve some of the issues between them.⁸⁰ The court remarked that '[t]he adversarial nature of Court actions and their cost tend to deepen the divide.'⁸¹ There was an attempt by counsel for the parties to settle and counsel at the hearing stated that both parties were prepared to attend mediation. The parties had requested that there be a postponement, and during this time the family advocate would re-evaluate the matter and the applicant would attend counselling and mediation sessions would be scheduled to take place.⁸² The court remarked later in the judgment that had the parties attended mediation, there was a possibility that many of the misunderstandings and the launching of the present application may have not been necessary.⁸³ In his final order, Knoll J, in addition to ordering the parties attend mediation, further set out various time limits and constraints in order to assist the parties and

57H – J; *Wicks v Fisher* 1999 (2) SA 504 (N) 508B – C & 509 E – G; *Sincalir & Bonthuys* (n70) 152 – 153. That said, the court did conclude that grandparents do play an important role in the lives of the minor children – this was certainly the case where there is a good relationship between the grandparents and the parents of the child: *Townsend-Turner v Morrow* (n15) 43B – E; *S v J* (n35) para [52].)

⁷⁶ *Sinclair & Bonthuys* (n70) 152.

⁷⁷ Save to say that the court in this matter did not relinquish the concept of parental rights. *Townsend-Turner v Morrow* (n15) 42C – D; I – J; *Sinclair & Bonthuys* (n70) 153. The court will not likely interfere where parents choose with whom their child will socially associate, thus the courts do not completely relinquish the concept of parental rights. The courts protect the nuclear family, no matter its composition. Where there is a positive relationship between the father's new partner and the child, as in this matter, the court concluded that the father, his partner and the child had 'the right to get on with their lives and to build strong family relationships in their nuclear family.' (*Townsend-Turner v Morrow* (n15) 48E – F; *Sinclair & Bonthuys* (n70) 153.) It is submitted that the court is still prepared to give the nuclear family legal privilege but this has been extended to include an unmarried partner to the parent of the child. (*Sinclair & Bonthuys* (n70) 153.) It is submitted that it is important to note the court's view in this regard, as it has an impact on the way mediation is treated.

⁷⁸ Children's Act 38 of 2005.

⁷⁹ Some of the sentiments expressed by the judge can be seen found in the Children's Act, see for example section 7 which sets out the various factors that need to be considered where one is dealing with the best interests of the child, and section 21 which now deals with the parental responsibilities and rights of unmarried fathers.

⁸⁰ *Townsend-Turner v Morrow* (n15) 40H.

⁸¹ *Townsend-Turner v Morrow* (n15) 48B.

⁸² *Townsend-Turner v Morrow* (n15) 40H – 41B.

⁸³ *Townsend-Turner v Morrow* (n15) 53D – E.

encourage them to attend mediation. Further, the costs of the mediation were to be shared by the parties.⁸⁴ If mediation failed (after four sessions or three months), the mediators were to file a certificate to this effect.⁸⁵ Only once the mediation had been completed (or where it failed) would the parties be able to attend court.

Once again there was not a long discussion regarding the benefits of mediation. This case was however important because it was aligned with the approach taken by *Van den Berg v Le Roux* (it should be noted that the court in *Townsend-Turner v Morrow* did not make express mention of *Van den Berg v Le Roux*) in that the parties are required to attend mediation in order to sort out all future disputes before they may begin litigation proceedings.

2.3 MB v NB

In the case of *MB v NB*⁸⁶ Brassey AJ expressly endorsed the use of mediation in family matters. Briefly, the facts are as follows: the plaintiff and the defendant were married on 24 October 1998.⁸⁷ The plaintiff had a son from her previous marriage. In the early years of the marriage, the commitment between the plaintiff and the defendant was so strong that the defendant agreed to adopt the boy. The adoption process was never pursued, as the parties were under the impression that a change of name would suffice. During September 2000, the boy took on the defendant's surname and an official entry was made in terms of the Births and Deaths Registration Act 51 of 1992.⁸⁸

On sending the boy to a private boarding school during his high school years, the defendant signed as the father of the boy while the plaintiff signed as the mother. The application to the school was successful.⁸⁹

⁸⁴ *Townsend-Turner v Morrow* (n15) 55B – G; *De Jong* (n70) 528.

⁸⁵ *Townsend-Turner v Morrow* (n15) 55E.

⁸⁶ *MB v NB* (n15).

⁸⁷ A girl was born during March 2002 of the marriage between the plaintiff and the defendant (*MB v NB* (n15) para [5]). At present she is a day scholar in a public school and she lives with the plaintiff. This arrangement seems to suit the parties. This and other matters form a part of the agreement between the plaintiff and defendant (*MB v NB* (n15) para [6]).

⁸⁸ *MB v NB* (n15) para [3].

⁸⁹ *MB v NB* (n15) para [4].

It was not long after the birth of a daughter that the plaintiff became suspicious of the defendant's private liaisons (he also began to drink more copiously at this time). On confirmation of his adulterous relationships, the plaintiff wasted no time in bringing the divorce proceedings to court.⁹⁰

Much of the dispute between the parties revolved around claims for maintenance for the plaintiff and for school fees (as a species of maintenance) to be paid by the defendant in respect of the boy. The boy was never formally adopted.⁹¹ In respect of the claim for school fees, the plaintiff argued that as a result of the representation made by the defendant, the first point was that the defendant encouraged the boy to use his surname, secondly, there was the official entry made in terms of the Births and Deaths Registration Act⁹² for the boy to use the defendant's surname, and thirdly, to the school as the boy's father for the purposes of payment of school fees, etc that the defendant was thus so liable as claimed.⁹³

Keeping the above arguments and facts in mind, the judge turned to make various remarks in support of mediation, based on these facts and arguments.

The judge remarked that mediation is able to provide remarkable results where there are difficult matters that need to be negotiated between divorcing parties, especially where it is conducted with a trained professional.⁹⁴ This remark was made after discovering that the plaintiff had not been informed by her legal representative on the possibility of attending mediation to negotiate the issues between her and the defendant.⁹⁵ Brassey AJ remarked that the success of mediation lies in the fact that it is conducted with the assistance of a neutral third party, who is able, under conditions of strictest confidentiality, to identify and isolate the various issues between the

⁹⁰ *MB v NB* (n15) para [7] and [8].

⁹¹ *MB v NB* (n15) para [13].

⁹² Births and Deaths Registration Act 51 of 1992.

⁹³ *MB v NB* (n15) para [13] to [31]. Furthermore, other issues included the payment of money which the plaintiff lent to the defendant's mother, with the inclusion of mora interest (*MB v NB* (n15) para [9]). The plaintiff is also claiming a rather large amount under the accrual (*MB v NB* (n15) para [11] and [32] – [47]). Furthermore, there are further issues to be resolved in respect of the girl born of the plaintiff and defendant (*MB v NB* (n15) para [31]). The last issue that the court had to deal with was the issue of costs (*MB v NB* (n15) para [12] and [48] – [61]). It is also worth noting that a step-father has not in the past been responsible for the non-adoptive children.

⁹⁴ *MB v NB* (n15) para [50].

⁹⁵ *MB v NB* (n15) para [50].

parties, and use the information received from the parties as well as his or her own knowledge, to evaluate the prospects of success and practical consequences of litigation.⁹⁶

Furthermore, the court noted that mediation is able to reduce the possible costs that the parties may incur in drawn out divorce litigation.⁹⁷ In other words it is a relatively cheaper option in comparison to the court process. The exception to this is that where the mediation fails and the parties are then still required to attend court proceedings, they will have to pay for the cost of litigation as well as the failed mediation proceedings.

Brassey AJ went on to quote (with approval) a section from an English commercial law case⁹⁸ in which the English judge (Lord Justice Ward) showed his support for mediation,

'What I have found profoundly unsatisfactory, and made my views clear in the course of argument, is the fact that the parties have between them spent in the region of £100,000 arguing over a claim which is worth about £6,000. In the florid language of the argument, I regarded them, one or other, if not both, of them, as completely cuckoo to have engaged in such expensive litigation with so little at stake. At the time of writing this judgment I rightly do not know whether any, or if so what, attempts have been made to settle this case and the remarks that follow are of general application. I raise that matter again in this judgment to make the point, as firmly as I can, that this is a paradigm case which, if it could not have been settled by the parties themselves, customer and dealer, then it behoved both solicitors to take the firmest grip on the case from the first moment of instruction. That, I appreciate, may not always be easy, but perhaps a copy of this judgment can, at the first meeting, be handed to the client, bristling with righteous indignation, in this case the customer who has paid a small fortune for a motor car which does not meet his satisfaction, and the dealer anxious to preserve the reputation of his prestige product. This case cries out for mediation, should be the advice given to both the claimant and the defendant. Why? Because it is perfectly obvious what can happen. Feelings are running high, early positions are taken, positions become entrenched, the litigation bandwagon will roll on, experts are inevitably involved, and, before one knows it, there will be two/three day trial and even, heaven help them, an appeal. It is on the cards a wholly disproportionate sum, £100,000, will be to fight over a tiny claim, £6,000. And what benefit can mediation bring? It brings an air of reality to negotiations that, I accept, may well have taken place in this case, though, for obvious reasons, we have not sought to enquire further into that at this stage. Mediation can do more for the parties than negotiation.

⁹⁶ *MB v NB* (n15) para [50]. See generally in this regard JG Mowatt (n15) 727; Bridge (n7) 231; L Young & G Monahan *Family Law in Australia* 7ed. (2009) 51ff; also see the Introductory Chapter of this study (Chapter no 1)

⁹⁷ *MB v NB* (n15) para [50] & [55]. See the Introductory Chapter of this study (Chapter no 1); see also Bridge (n7) 237; CH Cohen 'Divorce Mediation' in *Dispute Resolution* P Pretorius (ed.) (1993) 74; Brand (n7) 101; Mowatt (n15) 727.

⁹⁸ *MB v NB* (n15) para [51]; *Egan v Motor Services (Bath)* [2007] EWCA Civ 1002 (also cited as [2008] 1 All ER 1156).

In this case the sheer commercial folly could have been amply demonstrated to both parties sitting at the same table but hearing it come from somebody who is independent. At the time this dispute crystallised, the car was practically brand new. It would not have been vastly different from any demonstration car. The commercial possibilities are endless for finding an acceptable solution which would enable the parties to emerge, one with some satisfaction, perhaps a replacement vehicle and the other with its and Audi's good name intact and probably enhanced, but perhaps with each of them just a little less wealthy. The cost of such a mediation would be paltry by comparison with the costs that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often.⁹⁹

Brassey AJ further noted that in terms of the English law, mediation is 'all but obligatory' and that 'recourse to mediation has profoundly improved the process of dispute- resolution'.¹⁰⁰ Since this study is comparing Australian and South African Law, no further comments shall be made regarding English law and mediation, apart from that the judge noted that as a result of making mediation compulsory, '[p]arties resolve their problems so much more cheaply ... and the burden on the court rolls has been considerably lightened'.¹⁰¹

Based on the above, Brassey AJ pointed out that if mediation is appropriate in commercial law matters, how much more so in family law matters. In this instance the court was referring to the fact that emotions run high during litigation, especially in divorce litigation. Moreover, the costs of the litigation (as well as the mediation sessions, where this is chosen) often come out of the 'common pot' i.e. the common assets of the marriage.¹⁰²

The court was of the opinion that in this instance based on the facts, mediation was the appropriate forum in which to deal with the separation of the parties. A specific example that was given by the court was the issue that dealt with the boy's education and specifically the payments to be made towards same by each of the parties (these facts and arguments had been

⁹⁹ *Egan v Motor Services (Bath)* (n98) at para [53]; *MB v NB* (n15) para [51]; see also the article by J Brand & C Todd 'The swiftest, easiest (and cheapest) way to go' (2008) *March Without Prejudice* 37 for a brief discussion on mediation within the commercial field in English law and its possible application in South Africa.

¹⁰⁰ *MB v NB* (n15) para [50].

¹⁰¹ *MB v NB* (n15) para [50].

¹⁰² *MB v NB* (n15) para [52].

set out at the beginning of this section).¹⁰³ The court pointed out that this was a practical consideration that needed a practical solution. Brassey AJ further stressed the point by stating that it was not an argument that was based on principle that required the judging of rights and duties.¹⁰⁴ Had the decision been reached via mediation, the parties would have been far more prepared to accept such a suggestion; because they would have reached same via consensus.¹⁰⁵ Brassey AJ said the following in his judgment regarding this point:

‘[I]t will be observed, [that this was] an issue of principle, entailing a consideration, through the process of judging, of rights and duties; now it was a practical problem with an eminently practical solution that, emerging out of potential consensus, placed a premium on the dignity of the parties as autonomous adults, and provided an affirmation, symbolically important, of the bond that in happier times developed between the defendant and his putative son. How much richer would this solution have been had it emerged out of a consensus-seeking process, rather than in adversarial proceedings in which positions were taken up that gave every appearance of callousness and cruelty.’¹⁰⁶

The court felt that had the parties used mediation that (with the assistance of a facilitative intermediary) there would have been the possibility of a settlement between the parties regarding the issues between them, especially the monetary issues. Furthermore, the court felt that this would have saved time and there would have been no need for the parties to appear in chambers to settle the matter and then proceed to trial to be interrogated over their income and expenses.¹⁰⁷

This was expressed as follows by Brassey AJ:¹⁰⁸

‘This is but an instance of what mediation might have achieved. In fact, the benefits go well beyond it. In the process of mediation the parties would have had ample scope for an informed, but informal, debate on the levels of their estates, the amount of their incomes and the extent of their living costs. Nudged by a facilitative intermediary, I have little doubt that they would have been able to solve most of the monetary disputes that stood between them. The saving in time and legal costs would have been significant and, once a few breakthroughs had been made, I have every reason to believe that an overall solution would have been reached. Everyone would, in the process, have been spared the burden of two wasted days trying to settle in judge's chambers, and four further days in which the minutiae of assets and liabilities, and income and expenses, were interrogated.’

¹⁰³ *MB v NB* (n15) para [56].

¹⁰⁴ *MB v NB* (n15) para [57].

¹⁰⁵ *MB v NB* (n15) para [57].

¹⁰⁶ *MB v NB* (n15) para [57].

¹⁰⁷ *MB v NB* (n15) para [58].

¹⁰⁸ *MB v NB* (n15) para [58].

In conclusion, the court felt that mediation would have been the best way forward in this matter and that this should have been attempted.¹⁰⁹ The court had earlier pointed out that it is up to the parties' legal representatives to counsel their clients fully by pointing out the various options open to them in order to decide how it would be best to proceed.¹¹⁰ Brassey AJ had gone as far as asking the applicant during the trial whether her legal representative had actually mentioned the possibility of using mediation to sort out the issues between herself and the respondent.¹¹¹ The court concluded that the legal representatives had not mentioned the possibility of mediation and thereby had not discussed with their clients the possible positive effects that mediation has on divorce proceedings.¹¹² For this failure, the courts capped the possible fees that the attorneys were able to collect from their clients for services rendered.¹¹³

It is submitted that the court with the capping of fees was sending out a warning to attorneys to remember to advise clients on the possibility of using mediation in family matters, where it may be considered appropriate, and not merely chase after fees and proceed directly to court to the detriment of the parties and to an already overburdened court roll.¹¹⁴

This case was decided after the Children's Act was enacted. No reference was made to the Children's Act, as none of the issues required an analysis of any of the sections found within the Act. The court did send out a warning that if mediation is not used, a negative cost order could be handed down to the unwilling party (or parties – depending on the circumstances of the case).

In this regard the Supreme Court of Appeal in the case of *S v J*¹¹⁵ endorsed the views of Brassey AJ in *MB v NB*,¹¹⁶ encouraging lawyers to use mediation instead of the courts as the first port of call in family matters. The Supreme Court of Appeal also warned attorneys to take heed of the provisions in the Children's Act.¹¹⁷

¹⁰⁹ *MB v NB* (n15) para [59].

¹¹⁰ *MB v NB* (n15) para [50]; [53] – [55]; [59].

¹¹¹ *MB v NB* (n15) para [50].

¹¹² *MB v NB* (n15) para [59] – [60].

¹¹³ *MB v NB* (n15) para [60]. The possible fees that the attorneys may claim were capped to the party and party scale.

¹¹⁴ *MB v NB* (n15) para [50] and [60]. See H Schulze 'Obligation to contribute to schooling of step child' in 'The law reports' (2010) July *De Rebus* 28. See further the case of *S v J* (n35) at para [54].

¹¹⁵ *S v J* (n35). See the discussion of this case in section discussing 'Section 21' under 'Compulsory mediation'.

¹¹⁶ *MB v NB* (n15).

¹¹⁷ See section 6(4) of the Children's Act 38 of 2005.

It is also submitted that, although the courts are beginning to show more and more support for separating and/or divorcing parties to attend mediation; mediation will only be effective where the parties are informed thereof.¹¹⁸

Despite the fact that the courts may be showing their support for a move towards mediation, the court system can still not simply be done away with. It is only the High Courts and Children's Courts that are able to make a decision regarding who may receive the guardianship of the minor child or children. The main reason as to why the courts should be retained is that they are essential in the development of the creation of the jurisprudence in divorce law.¹¹⁹ Furthermore, the courts are essential in the adjudication of matters that the parties themselves cannot decide on and where society has failed to provide the much needed structure to deal with post-divorce relationships.¹²⁰

It is not only the court system that has shown its support for mediation and is trying to encourage divorcing or separating parties to attend mediation sessions in order to resolve their disputes, but the legislature has also made provision for mediation services. In the section that follows the legislative framework containing provisions the South African legislature has enacted regarding mediation will be discussed. It will set out a brief description of the main pieces of legislation (i.e. the Mediation in Certain Divorce Matters Act¹²¹ and the Children's Act). The Mediation in Certain Divorce Matters Act is included in the discussion of the Family Advocate, where, as under the discussion of the Children's Act, each of the 'different types' of mediation will be dealt with separately, such as compulsory mediation, court compelled mediation etc.¹²² Furthermore, there is also a discussion regarding judicial review of settled agreements, the best interests of the child, customary marriages and Muslim marriages and the study also sets out the current position regarding mediation in South Africa.

3 Legislative Framework

¹¹⁸ *MB v NB* (n15) para [50]; [53] – [55]; [59].

¹¹⁹ JG Mowatt (n15) 290.

¹²⁰ JG Mowatt (n15) 290.

¹²¹ Mediation in Certain Divorce Matters Act 24 of 1987.

¹²² M De Jong (n25) 630.

Mediation formally entered South Africa's legal system based on the recommendations in the Hoexter Commission's reports.¹²³ This resulted in the creation of the Office of the Family Advocate.¹²⁴ The first section under this heading discusses the family advocate and the Mediation in Certain Divorce Matters Act.

3.1 The Family Advocate

In answer to the Hoexter Commissions recommendations in its report¹²⁵ that mediation be incorporated into the South African legal system, the Mediation in Certain Divorce Matters Act was promulgated.¹²⁶

The Mediation in Certain Divorce Matters Act was to be South Africa's pioneering step into settling divorces by means of a mediatory approach.¹²⁷ It also meant that mediation began to gain partial recognition from the South African state.¹²⁸ The aim of the Mediation in Certain Divorce Matters Act was to combine the principles of the legal protection of the interests of the minor children, with that of a court-like mediatory approach to divorce where such children are involved.¹²⁹ In other words, the family advocate monitors and possibly controls the outcomes of the settlements pertaining to custody, in the interests of the minor child, through a mediatory approach to the negotiations.¹³⁰

¹²³ SA Law Commission (n49) (RP78/1983) vol III part 7; De Jong (n50) 280; Glasser (n50) 225; Scott-MacNab (n27) 719.

¹²⁴ Scott-MacNab (n27) 724 – 725.

¹²⁵ SA Law Commission (n49) (RP78/1983) vol III part 7; De Jong (n50) 280; Glasser (n50) 225; Scott-MacNab (n27) 719; Goldberg (n6) 277. The Hoexter Commission suggested that an independent social agency be established that would be termed "the children's friend" and that this independent social agency would "see to the proper protection of the rights of minor or dependant children." The agency has instead been termed the Family Advocate.

¹²⁶ It came into operation on 1 October 1990. For further reading see n127. JG Mowatt 'Divorce mediation – the Mediation in Certain Divorce Matters Act 1987' (1988) *TSAR* 47; B Clark 'No holy cow – some caveats on family mediation' 1993 *THRHR* 454.

¹²⁷ N Grobler 'The Mediation in Certain Divorce Matters Act, 1987' (1990) October 3(2) *Consultus* 133.

¹²⁸ Mowatt (n15) 728. By partial recognition it is meant that the approach of the family advocate is closer to conciliation and alternative dispute resolution but this does not amount to true mediation. (Heaton (n13) 186; Cronjé & Heaton (n13) 183; Grobler (n127) 133; Cohen (n36) 73 at footnote 3; Scott-MacNab (n27) 719.)

¹²⁹ Preamble to the Mediation in Certain Divorce Matters Act 24 of 1987; Grobler (n127) 133; De Jong (n15) 33; Heaton (n13) 166; Cronjé & Heaton (n13) 183; Mowatt (n15) 290; R Robinson 'Children and Divorce' in *Introduction to Child Law in South Africa* CJ Davel (ed) (2000) 66; M De Jong 'Child-focused Mediation' in *Child Law in South Africa* T Boezaart (ed.) (2009) 119.

¹³⁰ Sinclair & Bonthuys (n70) 204.

The family advocate has the power to institute an enquiry, so as to enable him or her to provide a report containing recommendations to the court with regards to any matter concerning the minor child or children born of the divorcing parties.¹³¹ It is during these enquiries that the family advocate mediates between the parties.¹³² These enquiries are held in terms of section 4 of the Mediation in Certain Divorce Matters Act.¹³³ The family advocate's enquiries mainly focus on 'issues relating to custody (now care) of, guardianship over and access to (now contact with) the child'.¹³⁴

Kgomo JP in the case of *Van den Berg v Le Roux*¹³⁵ described the functions of the family advocate as follows; that firstly, the family advocate must monitor proceedings that involve the welfare of the minor child, secondly, the family advocate must compile a report with recommendations to the court on the matters of access and custody where the parties cannot agree, and thirdly, the family advocate needs to mediate between the parties or parents of the minor child with regards to issues of access and custody (now contact and care).¹³⁶

On this last point the judge refers to an article by Van Zyl¹³⁷ where the main focus in the article is regarding the family advocate. The article makes a brief reference to mediation with the family advocate.¹³⁸ The court quoted with approval the following passage:

¹³¹ *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T); Sections 4(1) & 4(2) of the Mediation in Certain Divorce Matters Act 24 of 1987; JA Robinson *Introduction to South African Family Law* 4ed. (2009) 210; Heaton (n13) 166 – 167; Cronjé & Heaton (n13) 161; Robinson (n131) 210; Scott-MacNab (n27) 719; Robinson (n129) 66, 67 – 68; De Jong (n70) 468 – 469; De Jong (n129) 118 – 119.

¹³² *Van den Berg v Le Roux* (n15) para 22; Sinclair & Bonthuys (n70) 203. Furthermore duties of the family advocate are as follows: the court may order the divorcing couples that have minor children, to approach the family advocate in order to obtain a report, where this is deemed necessary with regards to the best interests of the minor children (Section 4(3) of the Mediation in Certain Divorce Matters Act 24 of 1987; Cronjé & Heaton (n13) 161; Robinson (n131) 210; Scott-MacNab (n27) 719; De Jong (n129) 118 – 119; Heaton (n13) 166). The family advocate on the other hand may also approach the court where it is deemed necessary and request that an enquiry be held where the parties themselves have not requested one (Section 4(3) of the Mediation in Certain Divorce Matters Act 24 of 1987; *Van Vuuren v Van Vuuren* (n131); Cronjé & Heaton (n13) 161; Glasser (n50) 228; Scott-MacNab (n27) 719; De Jong (n129) 118 – 119). The family advocate may furthermore appear at the trial and cross-examine witnesses, either by request of the court or after approaching the court to do so (Section 4(3) of the Mediation in Certain Divorce Matters Act 24 of 1987; Cronjé & Heaton (n13) 161; Robinson (n131) 211; Sinclair & Bonthuys (n70) 203; Heaton (n13) 166).

¹³³ De Jong (n70) 527.

¹³⁴ De Jong (n70) 527.

¹³⁵ *Van den Berg v Le Roux* (n15).

¹³⁶ *Van den Berg v Le Roux* (n15) para [22]; Sinclair & Bonthuys (n70) 203; Cohen (n36) 73 at footnote 3. See also, *Van Vuuren v Van Vuuren* (n131); Heaton (n13) 166 – 167.

¹³⁷ Van Zyl (n72) 372.

‘mediation being a dynamic process whereby the Family Advocate in an atmosphere where conflict is reduced to a minimum, actively encourages the parties to participate in a discussion seeking a mutually acceptable solution in regard to matters pertaining to the children.’¹³⁹

During the enquiry at the Office of the Family Advocate, the family advocate is assisted by family counsellors (these are trained psychologists, social workers, or religious workers).¹⁴⁰ The reason for this multi-disciplinary approach, as Glasser points out, is because family relationships fall within the scope of the social sciences and the family advocate is primarily trained in the legal field.¹⁴¹ It was thus the aim of the legislator to bridge the deficit and to allow the court to obtain a well-rounded report including both the legal as well as the social science aspects of the problem and the motivated solution in both areas.¹⁴² This gives the judge a broader understanding of the problems within the divorce proceedings.¹⁴³

Although the approach adopted by the Mediation in Certain Divorce Matters Act is somewhat closer to conciliation and alternative dispute resolution than the adversarial approach, it does not amount to true mediation.¹⁴⁴

The case of *Van den Berg v Le Roux*¹⁴⁵ highlighted the tensions between the family advocate’s functions as counsel and as expert witness.¹⁴⁶ Furthermore there are tensions where the family advocate acts as mediator between the parties. These tensions are most noticeable where the family advocate acts as mediator and facilitator of compromise on the one hand, and as expert witness in the welfare of the minor child on the other. Mediation is understood to occur in confidence.¹⁴⁷ It is submitted that such confidence could be compromised where the family advocate is required to appear in court as the expert witness to testify as to what are in the child’s

¹³⁸ Van Zyl (n72) 377 – 378.

¹³⁹ *Van den Berg v Le Roux* (n15) para [22]; Van Zyl (n72) 377 – 378.

¹⁴⁰ Cronjé & Heaton (n13) 161; Grobler (n127) 133; Robinson (n129) 66 – 67.

¹⁴¹ Glasser (n50) 226.

¹⁴² Glasser (n50) 226.

¹⁴³ Glasser (n50) 226.

¹⁴⁴ Heaton (n13) 186; Cronjé & Heaton (n13) 183; Grobler (n127) 133; Cohen (n36) 73 at footnote 3; Scott-MacNab (n27) 719; Van Zyl (n48) 94 – 95; Skelton & Carnelley (n7) 346.

¹⁴⁵ *Van den Berg v Le Roux* (n15); Sinclair & Bonthuys (n70) 203; it’s not necessary to discuss fully the tensions of the various functions of the family advocate – mention is only made on that that pertains to mediation.

¹⁴⁶ Heaton (n13) 167.

¹⁴⁷ See generally in this regard Mowatt (n15) 727; Bridge (n7) 231; Young & Monahan (n96) 51ff.

best interests. The impact on the mediation sessions would amount to the parties not being open and honest, in fear that very personal information may be revealed in court, in respect of the family advocate's reporting function to the court.¹⁴⁸ It is worth remembering that it is trite that all court documents are open to the public for study.

The family advocate is expected to deal with matters that require mediation (as stated in the aforementioned discussion). In the new Children's Act there are sections that require the parties to a possible divorce or separation to attend compulsory mediation.¹⁴⁹ A problem that arises in this regard is that the family advocate at present has a shortage of resources. Despite the good intentions of staff members in dealing with the matters that occur, they are often unable to cope with the extra workload.¹⁵⁰

3.2 The Children's Act

3.2.1 Introduction and Background

During 2007 and 2010 the provisions of the Children's Act¹⁵¹ commenced.¹⁵² It would be worth pointing out at this point that the Children's Act has implemented some significant changes that have an impact on mediation in terms of the Act, namely the following:

First, there has been a change of terminology. This has inter alia affected the use of the words 'custody' and 'access' which are now 'care' and 'contact' respectively.¹⁵³ The reasoning behind this seems to be to place a greater emphasis on the wellbeing of the minor child. The Children's Act is moving away from the idea that parents have a kind of 'parental power' over their minor child or children and the focus is now on the responsibilities the parents must show towards their

¹⁴⁸ Sinclair & Bonthuys (n70) 204.

¹⁴⁹ Sections 21 and 33 of the Children's Act 38 of 2005.

¹⁵⁰ De Jong (n70) 469; Glasser (n50) 84 – 86; De Jong (n70) 529.

¹⁵¹ Children's Act 38 of 2005.

¹⁵² See the specific sections of the Children's Act to see which sections commenced on which date in this regard.

The sections that deal with the topic of family law mediation will be focused on, but sections 6, 7, 9, 10 and 14 are also of relevance. Robinson (n131) 210. Part of the Children's Act commenced on 1 July 2007; GG 30030 of 29 June 2007, the balance on 1 April 2010, GG 33076 of 1 April 2010; i.e. the Act is now fully operational.

¹⁵³ See section 1 of the Children's Act 38 of 2005; also see generally A Boniface 'Revolutionary changes to the parent-child relationship in South Africa' in *Trial & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds) (2008) 151 – 163 where the author discusses the changes in terminology and the impact this has on the way the law is now viewed; Heaton (n13) 169 – 170 where the author sets out the support shown by the courts to use the new terminology.

minor child or children.¹⁵⁴ In other words, there is a greater focus on the child's or children's rights – this is beyond the scope of this study, but where necessary reference will be made to the greater emphasis placed on children's rights¹⁵⁵ as set out in the Constitution of the Republic of South Africa, 1996¹⁵⁶ and the Children's Act. It is submitted that the change in terminology may affect mediation in that it may make the mediation sessions more child-focused, rather than parent-focused.

Second, the Children's Act has changed the age of majority to 18 years.¹⁵⁷ Previously, the age of majority was 21 years.¹⁵⁸ This is important to note because as will be described later in the study, children are expected to participate where there are decisions being made regarding them. This would no longer affect a child that is 18 years or older as they are no longer minors.¹⁵⁹

3.2.2 General principles in terms of the Children's Act

Where legislation applicable to the minor child is being implemented,¹⁶⁰ section 6 of the Children's Act¹⁶¹ requires that a number of principles must also be considered. These principles or guidelines are found in section 7 (this section deals with the best interests of the child).¹⁶² In other words, where (for example) the provisions of the Mediation in Certain Divorce Matters Act and the Divorce Act¹⁶³ are being implemented, they need to be considered in terms of section 7 in order to serve the best interests of the minor child or children, as the case may be.¹⁶⁴ This includes any organ of state that is dealing with a matter where a minor child is involved; such organ of state is expected to implement the principles set out in section 6 of the Children's

¹⁵⁴ Boniface (n153) 151.

¹⁵⁵ See generally Boniface (n153) 151 for a full and more in depth discussion on the matter.

¹⁵⁶ Section 28 of the Constitution of the Republic of South Africa, 1996.

¹⁵⁷ Section 17 of the Children's Act 38 of 2005.

¹⁵⁸ Age of Majority Act 57 of 1972, repealed by the Children's Act 38 of 2005 on 1 July 2007, GG 30030 dated 29 June 2007; section 17 of the Children's Act 38 of 2005.

¹⁵⁹ This is perhaps not so significant for the specific topic of family law mediation, but its safe to this that the change in the age of majority affects mediation on the ground that children may need to attend to mediation or negotiate with their parents at an earlier stage where this is applicable in divorce or separation issues for things such as maintenance.

¹⁶⁰ Robinson (n131) 212.

¹⁶¹ Section 6(1)(a) of the Children's Act 38 of 2005.

¹⁶² Section 7(1) of the Children's Act 38 of 2005.

¹⁶³ Divorce Act 70 of 1979.

¹⁶⁴ In terms of the best interests of the child, section 9 of the Children's Act 28 of 2005; Robinson (n131) 212.

Act.¹⁶⁵ The relevant parts of section 7 of the Children's Act will be set out later in the study in regards to a very brief discussion on the best interests of the child. These guidelines will also need to be considered where the parties are attending mediation.¹⁶⁶

The Children's Act also recognises the importance of the family structure in a minor child's life.¹⁶⁷ Hence where this would be in the best interests of the minor child, the child's family may voice their concerns or views during the divorce proceedings on matters concerning the minor child's wellbeing – such as which parent will have care and which parent will have contact.¹⁶⁸ It is submitted that this may be done in a mediation session, as envisaged in terms of section 70 of the Children's Act.¹⁶⁹

Some of these provisions require that where the parties are in dispute over an aspect of the child's well-being or some other matter concerning the child, the court may require that they attend mediation to have the matter settled.¹⁷⁰ Some of the sections state that mediation is voluntary, but preferable.¹⁷¹ Other sections make mediation a compulsory first step before the parties may attend court.¹⁷² These sections of the Children's Act will be discussed in more detail later in the study.

Section 6 also requires that an approach that is more conducive to mediation and/or conciliation and/or problem-solving be used rather than one that is more confrontational or adversarial, as this would be in the best interests of the minor child.¹⁷³ Section 6(4)(b) stipulates that a delay in any action where a minor child is involved must be avoided as far as possible. This would be

¹⁶⁵ Section 6(1)(a) of the Children's Act 38 of 2005; Robinson (n131) 212.

¹⁶⁶ De Jong (n15) 790. See also T Davel 'Chapter 2: General Principles' in *Commentary on the Children's Act* (Looseleaf edition) CJ Davel & AM Skelton (eds) (2007) 2-4 – 2-8 for a comprehensive discussion on these principles.

¹⁶⁷ Section 6(3) of the Children's Act 38 of 2005.

¹⁶⁸ Robinson (n131) 212.

¹⁶⁹ Section 70 of the Children's Act 38 of 2005 deals with family group conferences. This will be discussed later on in the study.

¹⁷⁰ Sections 49, 70 and 71 of the Children's Act 38 of 2005.

¹⁷¹ Sections 22, 30(3), 234(1) and 292 of the Children's Act 38 of 2005. In this regard mediation is implied (De Jong (n25) 639).

¹⁷² Sections 21 and 33 of the Children's Act 38 of 2005.

¹⁷³ Section 6(4)(a) of the Children's Act 38 of 2005; Robinson (n131) 213; C Schneider 'Mediation in the Children's Act 38 of 2005, and mediation in family law' in *Trials & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds) (2008) 145 146; Davel (n166) 2-4.

best heeded where parents are involved in divorce proceedings, which become an emotional time for a child, and a relatively stress-free manner of solving the financial, property and matters concerning the minor child is required.¹⁷⁴ As mentioned under the section discussing the case of *MB v NB*,¹⁷⁵ the Supreme Court of Appeal in the judgment of *S v J*¹⁷⁶ endorsed the views made by Brassey AJ in *MB v NB*.¹⁷⁷ The Supreme Court of Appeal said the following

‘[M]ediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be a first resort. Legal practitioners should heed section 6(4) of the Children’s Act which provides that in matters concerning children an approach “conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided.”’¹⁷⁸

Furthermore, section 6(5)¹⁷⁹ requires that a minor child be informed of any matter or decision that significantly affects him or her. An example of this would be the issue of care and contact,¹⁸⁰ i.e. with whom does the child want to live etc.

3.2.3 *Child Participation, Mediation and the Children’s Act*

The participation of the minor child, in all matters concerning him or her, is one of the core themes within the Children’s Act.¹⁸¹ Section 10 of the Children’s Act stipulates, in no uncertain terms, that a child has the right to participate in all decisions concerning him or her.¹⁸² This right to participate is qualified by the child’s age, maturity, and stage of development.¹⁸³ In theory, this means that children should be involved in all decisions regarding care and contact¹⁸⁴ whether in court or during the mediation process.¹⁸⁵ It is submitted that potentially mediation is also more

¹⁷⁴ *MB v NB* (n15) para [52]; Robinson (n131) 213; Davel (n166) 2-4.

¹⁷⁵ *MB v NB* (n15).

¹⁷⁶ *S v J* (n35).

¹⁷⁷ *MB v NB* (n15).

¹⁷⁸ *S v J* (n35) at para [54].

¹⁷⁹ Section 6(5) of the Children’s Act 38 of 2005.

¹⁸⁰ Previously custody and access.

¹⁸¹ C Du Toit ‘Legal Representation of Children’ in *Child Law in South Africa* T Boezaart (ed) (2009) 98.

¹⁸² Section 10 of the Children’s Act 38 of 2005; Robinson (n131) 214; Heaton (n13) 168; Skelton & Carnelley (n7) 346.

¹⁸³ Robinson (n131) 214; Skelton & Carnelley (n7) 346.

¹⁸⁴ Previously custody and access. *McCall v McCall* 1994 (4) SA 201 (C) 207; s 10 of the Children’s Act 38 of 2005 (see also section 14, 30 & 31 of the Children’s Act which also further entrench the child’s right of participation); Robinson (n131) 214.

¹⁸⁵ De Jong (n15) 786; Du Toit (n181) 98 – 99; Skelton & Carnelley (n7) 346.

convenient to ensure child participation. The court system is generally not conducive to such participation.¹⁸⁶

This falls in line with Article 12 of the United Nations Convention on the Rights of the Child,¹⁸⁷ and Article 4 of the African Charter on the Rights and Welfare of the Child.¹⁸⁸

The United Nations Convention on the Rights of the Child provides the child with the right to participate in any decision regarding him or her, namely

- ‘1. States Parties shall ensure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.¹⁸⁹
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’¹⁹⁰

As can be seen by the wording of Article 12 of the United Nations Convention on the Rights of the Child, there is an obligation on the states to provide the child with the opportunity to express his or her views, should he or she want to or there be a need for the child to participate.¹⁹¹ The child should be allowed to participate even where this is in legal proceedings.¹⁹² Furthermore Article 12 has been identified as one of the four core articles in the United Nations Convention on the Rights of the Child.¹⁹³

The African Charter on the Rights and Welfare of the Child states as follows:

¹⁸⁶ See generally M Carnelley ‘The right to legal representation at state expense for children in care and contact disputes – A discussion of the South African legal position with lessons from Australia’ (2010) *Obiter* 638.

¹⁸⁷ Ratified by South Africa in December 1995; Robinson (n131) 210 & 214.

¹⁸⁸ Ratified by South Africa on 7 January 2000; List of Countries which have Signed, Ratified/Acceded to the African Union Convention on the African Charter on the Rights and Welfare of the Child available at http://www.achpr.org/english/ratifications/ratification_child%20rights.pdf accessed on 3 November 2010; De Jong (n15) 786.

¹⁸⁹ Article 12(1) of the United Nations Convention on the Rights of the Child.

¹⁹⁰ Article 12(2) of the United Nations Convention on the Rights of the Child.

¹⁹¹ Article 12(1) and article 12(2) of the United Nations Convention on the Rights of the Child; Du Toit (181) 94.

¹⁹² Article 12(2) of the United Nations Convention on the Rights of the Child; section 10 of the Children’s Act 38 of 2005; Du Toit (n181) 94.

¹⁹³ Davel (n166) 2-12. As this is not the main focus of this study see Davel (n166) 2-12 – 2-14 for a comprehensive discussion on this point.

'In all judicial and administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with provisions of appropriate law.'¹⁹⁴

As can be seen from the wording of the African Charter on the Rights and Welfare of the Child the idea of allowing the child to view his or her concerns or opinions is entrenched within the international legal system, even during judicial proceedings.¹⁹⁵ This is in line with Article 12 of the United Nations Convention on the Rights and Welfare of the Child.

If a court is satisfied that a child has the requisite intellectual and emotional maturity to express an opinion over a decision, this should be seriously taken into account.¹⁹⁶ The only problem is that judges use their subjective views to decide whether a child has the intellectual or emotional maturity to express an opinion over a decision that concerns him or her.¹⁹⁷ As such, due to the Mediation in Certain Divorce Matters Act family advocates are in a better position to make a decision of whether children should be involved in the decision-making process or not.¹⁹⁸ What is important to note is that physical age is not a defining factor in deciding whether or not a child has the intellectual or emotional maturity to be involved in the decision-making process.¹⁹⁹ It is

¹⁹⁴ Article 4(2) of the African Charter on the Rights and Welfare of the Child.

¹⁹⁵ Du Toit (n181) 94.

¹⁹⁶ Robinson (n131) 215.

¹⁹⁷ Robinson (n131) 215; B van Heerden 'Chapter 18: Judicial Interference with the Parental Power: The Protection of the Child' in *Boberg's Law of Persons and the Family* 2ed. B van Heerden, A Cockrell & R Keightley (eds.) (1999) 541.

¹⁹⁸ Robinson (n131) 215 at footnote 73.

¹⁹⁹ Robinson (n131) 215; Van Heerden (n197) 542. In this regard, the cases show that there is not true consensus as to what criteria should be considered when dealing with the question of whether the child is of the intellectual or emotional maturity in order to be involved in the decision-making process. (Van Heerden (n197) 541 – 542.) In the case of *French v French* 1971 (4) SA 298 (W) at 299H, the judge stated that the child's view will only be taken into account when all other relevant factors had been considered. In the cases of *Märtens v Märtens* 1991 (4) SA 287 (T) and *McCall v McCall* (n184) the judges personally interviewed the children involved in order to obtain their views regarding who should obtain custody (care). In *Märtens* the children were 11-year-old twin girls and in *McCall* it was a 12-year-old boy. In *Greenshields v Wylie* 1989 (4) SA 898 (W) the judge did not place any weight on the preferences of the children, two girls aged 12 and 14. The reason given was that the court felt that the emotional preferences of children change over time as they grow up, i.e. their needs will change, and their perspectives will change, thus there is no need to place much weight upon their preferences (at 899F – G). The court was of a similar view in the case of *Stock v Stock* 1981 (3) SA 1280 (A) the court at 1297A gave no great weight to the views or opinions of the children aged 17 and 14 years. It is submitted that due to the age of majority being 18, in this instance, the views of a 17-year-old child would today be taken more seriously. In the unreported case of *Fitschen v Fitschen* [2007] JOL 1612 (C) the court did not make an order according to the wishes of either of the two children (aged 14 and 12) despite there being evidence that the older child was an intelligent and serious child.

submitted that where a divorcing couple have a child and they are attempting to mediate the issues between them, that if possible, the child's input as to care and contact, etc., is also obtained as this is an important way of obtaining the child's view. Children should be involved where they meet the criteria of being intellectually and emotionally mature enough to form an opinion.²⁰⁰

It is submitted that this is one of the ways in which the legislature has ensured that the best interests of the child are attained and are considered by the courts (and it is a good possibility that when dealing with the needs of the children during mediation sessions, that these will also be the criteria that need to be considered to allow them the possibility of expressing their views²⁰¹). The best interests of the child are briefly discussed later in the study.²⁰²

The discussion that follows briefly looks at the instances where a child's opinion, wishes, and views are to be obtained in any matter regarding him or her, as required in the Children's Act. The reason for doing so is to be able to provide examples of where the legislature regarded the need for the child's opinion, views, or wishes to be attained. In this regard, there are sections in the Children's Act where mediation is mandated which may also require that the child's opinion, views, and wishes may be obtained and must be considered by the parties before a settlement agreement is drafted in terms of the compromises or settlement reached. Regarding mediation, it is a forum where children may be heard due to its non-adversarial approach. It is less formal than the court system, and also leads to less stress for the participants.²⁰³

One such section is section 31(1) of the Children's Act, which requires that where a person holding parental responsibilities and rights in respect of a child is contemplating a decision regarding the wellbeing of the child; the child's contact with the co-holder of the parental rights and responsibilities in respect of the child; any administrative or legal matter regarding the child; the reassignment of guardianship or care in respect of the child; must at first obtain and consider

²⁰⁰ Also see section 6(2), 6(3) and 6(4) of the Divorce Act 70 of 1979, which also sets out various procedures and criteria to be considered where the child's view is to be taken into account; De Jong (n129) 125 – 126.

²⁰¹ See discussion on the best interests of the child later in this chapter.

²⁰² Section the discussion under 'The best interests of the child' in this chapter of the study.

²⁰³ This was discussed in greater detail in the Introductory Chapter.

the views and wishes expressed by the child, having regard to the child's age, maturity and stage of development.²⁰⁴

In terms of section 61(1)(a) of the Children's Act, the presiding officer must take into account the child's views or preferences where he or she finds that, given the child's age, maturity or stage of development and/or any special needs that the child may have (as the case may be), the child is able to participate in the proceedings, where the child has expressed the wish to partake in the proceedings.²⁰⁵

However, where there are pre-hearing conferences held in terms of section 69 of the Children's Act, the child may attend the pre-hearing conference and air his or her preferences, unless the court orders otherwise.²⁰⁶

It must be remembered that where a child is to be included in the process, as stated above, the approach used must be more conducive to conciliation and problem-solving, than confrontational.²⁰⁷ Thus it would be unlikely that the adversarial system would be the appropriate forum in which a child should be heard. This should only be used as a last resort.²⁰⁸ There are cases where the child was interviewed by the presiding judge in chambers without the presence of lawyers in order to obtain the child's views and preferences.²⁰⁹ It may be better to allow children to express their preferences to a third person, such as a psychologist or counsellor, depending on the circumstances of the case.²¹⁰ Since the commencement of the Mediation in Certain Divorce Matters Act, the child has been able to express his or her views to the family advocate or family counsellor in terms of section 4(1) enquiries.²¹¹

²⁰⁴ De Jong (n15) 786; Du Toit (n181) 98.

²⁰⁵ De Jong (n15) 786; Du Toit (n181) 98 – 99.

²⁰⁶ De Jong (n15) 786 – 787.

²⁰⁷ Section 6(4)(a) of the Children's Act 38 of 2005.

²⁰⁸ *Meyer v Gerber* 1999 (3) SA 650 (O); De Jong (n15) 787.

²⁰⁹ *Märtens v Märtens* (n199); *Chodree v Vally* 1996 (2) SA 28 (W); De Jong (n15) 787.

²¹⁰ *French v French* (n199); *Manning v Manning* 1975 (4) SA 659 (T); *Märtens v Märtens* (n199); *Meyer v Gerber* (n208); *Lubbe v Du Plessis* 2001 (4) SA 57 (C); De Jong (n15) 787.

²¹¹ *Meyer v Gerber* (n208); *Lubbe v Du Plessis* (n210); *Märtens v Märtens* (n199); De Jong (n15) 787.

Apart from the sections mentioned above, the Children's Act provides ample opportunity for mediation and thereby the possibility for child participation – where this is possible in terms of the circumstances of each matter. There are sections that require compulsory mediation, others include court-compelled mediation, or discretionary mediation (i.e. this is at the discretion of a court) and still others *imply* mediation.²¹²

It may not be necessary or desirable for the minor child to appear at every mediation session, but at some point, depending on the child's maturity, the child may need to appear before the mediator in order to express his or her views on the matter.²¹³ Their views and opinions may only need to be considered at the end of the process and included in the final settlement,²¹⁴ as the parents will be able to determine their needs (with the help of other family members) and structure an agreement with the best interests of the child in mind.²¹⁵

The following sets out briefly the reasons why mediation is a process that complies with the requirements as set out in section 6(4)(a) of the Children's Act.²¹⁶ One of the basic requirements in mediation is that the parties are seeking the assistance of a neutral third person in the negotiation process, i.e. the mediator.²¹⁷ The mediator is able to assist the parties to systematically isolate the various issues that need to be dealt with and then to encourage the parties to work out a solution. Hence the mediator is able to isolate those issues that require that the views and preferences of the child be obtained. In this way the best interests of the child will be paramount in the decisions that need to be made concerning the child.²¹⁸ This approach supports the view expressed by the legislature in section 28 of the Constitution of the Republic of South Africa, 1996, where in subsection 2 it is required that the best interests of the child are of paramount importance in all matters concerning him or her.²¹⁹

²¹² See generally De Jong (n25) 630.

²¹³ De Jong (n15) 791.

²¹⁴ De Jong (n15) 791.

²¹⁵ De Jong (n15) 787 – 788.

²¹⁶ Section 6(4)(a) is as follows: '(4) In any matter concerning a child- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.'

²¹⁷ De Jong (n15) 787 – 788.

²¹⁸ This is in line with section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 and section 6 of the Divorce Act 70 of 1979, which require that the best interests of the child are a paramount consideration in all matters concerning the child.

²¹⁹ De Jong (n15) 788.

Furthermore, mediation has an informal and unstructured nature and as a result mediation is able to adapt to different circumstances, including cultural or religious value systems. Therefore the flexibility of the process allows for the parties thereto to express their emotions. Within the mediation sessions children are able to vent how they feel. Where children are easily able to express their emotions, it allows the mediator and the parties to the mediation to identify and understand what the child needs, thereby catering for what would be best for the child in the circumstances.²²⁰

Various factors have been suggested in order to decide whether a child is able to participate in mediation and express his or her own views and preferences or not. Generally, the legislature makes it clear that children of an age, maturity, and stage of development that allows them to form a well-informed own opinion, would be the qualifying factors to allow for child-participation.²²¹ Especially where this has been requested by the child or children themselves, they should be allowed to participate in the process and thereby express their views to the mediator. As a basic rule the idea is that teenagers should be allowed to join in the process, but that children under the age of seven years should not be included. The important thing to note is that the mediator should always look at the circumstances of each individual matter before making a decision as to whether the child should participate or not.²²²

There are circumstances where the inclusion of the child should in general not be allowed, and this includes where the parents have already agreed what is best for their children and ‘share developmentally appropriate views’ on the children’s developmental needs; where there has been domestic violence or some form of sexual abuse within the family structure, or abuse of alcohol and drugs; where a child is too anxious; there are cases of depression; the parents will not take the child’s view into account; where there is a likelihood that one or both parents are suffering from a mental illness or have a sociological character flaw; and where there is manipulation that

²²⁰ De Jong (n15) 788 – 789.

²²¹ Section 10 of the Children’s Act 38 of 2005.

²²² De Jong (n15) 789 – 792.

causes the child great stress.²²³ It must be understood that it all depends on the circumstances of each individual case if the child is included or not in the mediation.

De Jong suggests that another reason why children should not be included is where they are very young, i.e. under the age of 7. It is felt however that teenagers should be included. But once again it depends on the circumstances of every individual case.²²⁴

Furthermore, De Jong argues that children should be included into the mediation process where there is a refusal to spend time with one of the parents, where this has been requested by both the parents, where the child requests to participate, where there are discussions regarding certain arrangements in respect of spending time with parents, etc., where the child is struggling to accept the changes that have occasioned in the life of one of the parents (or both), where it is clear that the child shows signs of being unfriendly towards one parent and as such the relationship with that parent is suffering, where the child is under great stress due to the hostility of the parents towards each other, and where there is a need for clarification of any problems that exist in the parent-child relationship.²²⁵

It is submitted that the lists as set out above, are not closed and that the decision to include the minor child in the mediation process will depend upon the circumstances of each individual case.

Where children are involved in the mediation process it must be set out from the start that the children will not be a part of the decision-making process.²²⁶ Parents will need to be aware of the fact that they will need to focus on the best interests of the child when making decisions. This means that the mediatory sessions become child-inclusive – the children are involved in order to express their views but are not required to carry the burden of reaching agreement and making decisions regarding family separation issues.²²⁷

²²³ De Jong (n15) 790.

²²⁴ De Jong (n15) 789 – 790.

²²⁵ De Jong (n15) 790.

²²⁶ De Jong (n15) 791.

²²⁷ De Jong (n15) 791 – 792.

De Jong points out that there is another side to the coin where children are included in the mediatory sessions. Despite the fact that such child-inclusive mediation is beneficial and therapeutic for the whole family, as this reduces conflict etc, parents (it must be said) need to understand and deal with any of the views or preferences as voiced by the child – especially any that are negative.²²⁸

Section 6(4)²²⁹ also requires that the parties avoid delays as far as possible.²³⁰ Mediation is generally an efficient and quicker method (in comparison to the court process),²³¹ and in some instances may be dealt with in a matter of weeks or months (depending on the complexity of the issues).²³²

The mediation process does not circumvent the need for the parties to appear in court completely. They will be required to present any settlement agreement to the court (where there are children involved) for review in terms of section 72.²³³

Having made mention of compulsory mediation in previous paragraphs, the discussion that follows focuses on the provisions that make mediation a compulsory (or mandatory) first step within South African law. At this point the distinctions that are used where the various forms of mediation are discussed are based on the distinctions made by De Jong in her article entitled ‘Opportunities for mediation in the new Children’s Act 38 of 2005’.²³⁴

3.3 Compulsory Mediation

The following are the sections in the Children’s Act that make mediation a compulsory first step before the parties may attend court.²³⁵ There are other sections that make mediation optional, and yet in other sections, mediation is implied.²³⁶ The sections that make mediation compulsory or

²²⁸ De Jong (n15) 791 & 793.

²²⁹ Section 6(4)(b) of the Children’s Act 38 of 2005.

²³⁰ Davel (n166) 2-4.

²³¹ *MB v NB* (n15) at para [58].

²³² *Townsend-Turner v Morrow* (n15) 55A – G, see paragraph [4] of the court order which may give an indication of possible time limits when mediating a family dispute matter.

²³³ Children’s Act 38 of 2008.

²³⁴ De Jong (n25) 630.

²³⁵ De Jong (n70) 527.

²³⁶ See generally De Jong (n25) 630.

mandatory will be discussed first. The first section in the Children's Act that makes mediation compulsory for the parties to attend is section 21.²³⁷ The next section is section 33.²³⁸ Both of these sections either deal with the rights and responsibilities of unmarried parents (mainly those of unmarried fathers) or parental responsibilities and rights agreements, i.e. section 21 and 33 respectively.

3.3.1 Section 21

The relevant part of section 21 of the Children's Act that pertains to family law mediation states the following:

'Parental responsibilities of unmarried fathers

- (3) (a) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.
- (b) Any party to the mediation may have the outcome of the mediation reviewed by a court.
- (4) This section applies regardless of whether the child was born before or after the commencement of this Act.'

In terms of this section, the unmarried biological father of the child may automatically acquire rights and responsibilities over the child, where he and the mother are living in a permanent life partnership. Unlike the current section 21 where unmarried biological fathers in some instances are afforded automatic rights and responsibilities regarding their children, the Natural Fathers of Children Born out of Wedlock Act²³⁹ did not afford unmarried fathers any automatic rights at all.²⁴⁰ This is however not the basis of this discussion but was merely mentioned to show how the law has changed.²⁴¹

²³⁷ Children's Act 38 of 2005.

²³⁸ Children's Act 38 of 2005.

²³⁹ Natural Fathers of Children Born out of Wedlock Act 86 of 1997; J Heaton 'Parental Responsibilities and Rights' in *Commentary on the Children's Act* (Looseleaf edition) CJ Davel & AM Skelton (eds) (2007) 3-9.

²⁴⁰ Heaton (n239) 3-9 – 3-10.

²⁴¹ For a discussion on this point and on the entire section 21 see Heaton (n239) 3-9 – 3-13. The remainder of section 21 is as follows: '(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child – (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or (b) if he, regardless of whether he has ever lived with the mother = (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law; (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and (iii) contributes or has attempted in

As can be seen in the wording of the section, specifically subsection 21(3), it is one of the sections within the Children's Act where mediation is made compulsory. The reason for making mediation compulsory is due to the many advantages it offers.²⁴² Looking at the above circumstances, the biological father of a child born of unmarried parents acquires the exact same parental rights and responsibilities as the mother, regardless of whether the child was born before or after the coming into operation of the Children's Act.²⁴³ Where a dispute over the parental responsibilities and rights of the unmarried father of a child born of unmarried parents arises, then the dispute must be referred to the family advocate, social worker, social service professional or other suitably qualified person for mediation.²⁴⁴

There are three main criticisms against compulsory mediation: The first criticism is that despite being required by the commanding legislative instrument to make a 'genuine effort', the parties may simply just go through the motions of the partaking in the mediation,²⁴⁵ in other words, the parties may simply try to work through the process as quick as possible to attend court and just get the process over and done with.²⁴⁶ The second criticism is that compulsory mediation does not address power imbalances within a marriage.²⁴⁷ The third criticism is that mediation is in

good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
(2) This section does not affect the duty of a father to contribute towards the maintenance of the child.'

²⁴² De Jong (n129) 119.

²⁴³ The courts have held that in terms of section 21, a father can be made liable to pay the school fees for his child even if the child is not in his care (custody) (*Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C); A Skelton 'Chapter 3: Parental Responsibilities and Rights' in *Child Law in South Africa* T Boezaart (ed) (2009) 79). In this instance the school had relied on section 21(4) of the Children's Act, arguing that despite the fact that section 21 only came into effect after the case commenced, it was still applicable in this instance as the father had rights and responsibilities in respect of the child. The court held that in this instance section 31 does not apply. Section 21 is 'not a declaration of retrospectivity'. What the court meant was that it does not matter when the child was born, i.e. before or after the commencement of the Children's Act, the fathers rights and responsibilities do not arise earlier than when section 21 commenced (*Fish Hoek Primary School v Welcome*; Skelton 79).

²⁴⁴ Section 21(3)(a) of the Children's Act 38 of 2005; Heaton (n13) 70; Skelton (n244) 77 – 78; De Jong (n129) 119; De Jong (n70) 527.

²⁴⁵ H Astor 'Making a "genuine effort" in family dispute resolution: what does it mean?' in *Australian Family Law in Context: Commentary & Materials* 4ed P Parkinson (ed) (2009) 234.

²⁴⁶ N Holtring *Mandatory Mediation in Australian Family Law* (Paper submitted for postgraduate degree in dispute resolution to the Law Faculty of UTS June 2007) 5, available at <http://www.leadr.com.au/articles/Mandatory%20Family%20Dispute%20Resolution.pdf>, accessed on 22 July 2011.

²⁴⁷ R Manjoo 'Making rights real: facing the challenges of recognising Muslim marriages in South Africa' in *Trials & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds) (2008) 126. This imbalance may be caused by various factors, such as personal wealth of each party to the mediation (especially spouses), perhaps there was abuse within the marriage or between the parties to name a few.

essence voluntary, thus compulsory mediation amounts to a contradiction in terms.²⁴⁸ As described in chapter one of the study, mediation is by definition a voluntary process where a third, neutral person assists the disputing parties to resolve the dispute between them in order to bring about agreement or settlement.²⁴⁹ Any party to the mediation may have the agreement reviewed in court.²⁵⁰

Where the mediation fails then the father will be able to approach the courts to grant him paternity. With regards to the first part of section 21(1)(b)(ii),²⁵¹ the application is made in terms of section 26(1),²⁵² where the father applies to the court in order to confirm his paternity.²⁵³ Section 26(2),²⁵⁴ however excludes anyone from claiming paternity where he is only biologically related to the child by reason of being the donor of a gamete for the purpose of artificial fertilization.²⁵⁵ This is not the topic of this study and is merely mentioned in so far as to state that (it is submitted) in terms of section 26(1)²⁵⁶ that such application may be brought by consent, where the parties have successfully mediated and agreed on the issue of recognising the man should receive parental responsibilities and rights in terms of the minor child's biological father between them in terms of section 21(1).²⁵⁷

Thus with regards to the above discussion, in terms of section 21,²⁵⁸ a mother may be forced to undergo DNA testing in order to determine whether the 'as-by-her-named' father has rights and responsibilities in respect of the child. The courts are prepared to encourage this where this is in the best interests of the child.²⁵⁹ The Supreme Court of Appeal has stated that the use of scientific paternity testing should not be considered where paternity has been proven on a

²⁴⁸ Manjoo (n247) 126; Bridge in her article (n7) at page 239 points out that forcing the unwilling to mediate may bring about more problems than actually finding a solution between the parties. See the definition set out in this section of the chapter.

²⁴⁹ Scott-MacNab (n27) 715; Cohen (n36) 75; Van Zyl (n48) 91; Skelton & Carnelley (n7) 345.

²⁵⁰ Section 21(3)(b) of the Children's Act 38 of 2005; De Jong (n129) 120.

²⁵¹ Section 21(1) of the Children's Act 38 of 2005; Heaton (n13) 71.

²⁵² Section 26(1) of the Children's Act 38 of 2005.

²⁵³ Heaton (n13) 71; Skelton (n244) 78.

²⁵⁴ Section 26(2) of the Children's Act 38 of 2005; Heaton (n13) 71.

²⁵⁵ Section 1(1) of the Children's Act 38 of 2005 defines a parent by excluding any one who is biologically connected to the minor child only by way of donating a gamete for artificial fertilization.

²⁵⁶ Children's Act 38 of 2005.

²⁵⁷ Children's Act 38 of 2005.

²⁵⁸ Children's Act 38 of 2005.

²⁵⁹ *LB v YD* 2009 5 SA 463 (T); Skelton (n243) 79.

balance of probabilities. This shall not be discussed further as this is not the focus of this study.²⁶⁰

Before 1 April 2010,²⁶¹ there was much debate regarding the ambit of section 21 between mediators, legal practitioners, and social workers.²⁶² The Children's Act only made provisions for disputes around the parental responsibilities and rights of the biological father's contributions towards the minor child's upbringing.²⁶³ It was argued that most disputes did not focus on this, but dealt with contact to, and the responsibility for, the minor child.²⁶⁴ A strict interpretation of section 21²⁶⁵ did not (and does not) require that these issues be resolved through mediation.²⁶⁶ However, section 22 of the Children's Act²⁶⁷ allows the parties to set up a parental responsibilities and rights agreement, where the parties are able to work out an agreement that allows for the biological father to obtain contact to, and responsibility for, the minor child.²⁶⁸ The section 22²⁶⁹ parental responsibilities and rights agreements relate to all children whether they are born of married or unmarried parents.²⁷⁰

Thus the unmarried biological father may acquire rights and responsibilities in respect of his child if he does not receive them automatically²⁷¹ or if there is no court order in place granting

²⁶⁰ *YM v LB* 2010 (6) SA 338 (SCA); see generally E Bonthuys 'What you don't know can't hurt you: The Supreme Court of Appeal and the presumptions of paternity' (2011) 128(3) *SALJ* 427 – 436.

²⁶¹ The commencement date of the rest of the Children's Act 38 of 2005; see *GG* 33076 dated 1 April 2010.

²⁶² Section 21 of the Children's Act 38 of 2005; Schneider (n173) 145.

²⁶³ Schneider (n173) 145.

²⁶⁴ Schneider (n173) 145.

²⁶⁵ Children's Act 38 of 2005.

²⁶⁶ Schneider (n173) 145.

²⁶⁷ Section 22 came into operation on 1 April 2010, see *GG* 33076; Du Toit (n181) 98.

²⁶⁸ The rest of the Children's Act 38 of 2005 came into operation on 1 April 2010, *GG* 33076. Schneider (n173) 145, presents the situation as it was before the coming into operation of the rest of the Children's Act 38 of 2005 and points out that issues surrounding contact to, and responsibility for, the minor child were unable to be mediated on in terms of section 21, as they fell beyond its scope. Part of the argument was that the Children's Act 38 of 2005 would still give the Family Advocate the necessary jurisdiction to deal with these issues; Schneider disagreed with this approach and explained what he and his colleagues at FAMAC did to resolve this problem. They told the parties that where paternity was not in dispute, the matter was resolved in terms of section 21, and this was recorded. They further enquired from the parties whether they wished to set up, using mediation, a parental responsibilities and rights agreement, and most participants agreed. It was pointed out that once the agreement had been made and set up that the parties needed to make the agreement an order of court so as to protect their rights; De Jong (n25) 639.

²⁶⁹ Children's Act 38 of 2005.

²⁷⁰ Section 22(1) of the Children's Act 38 of 2005; see below for a further discussion on section 22 of the Children's Act 38 of 2005.

²⁷¹ In terms of section 21 of the Children's Act 38 of 2005; Skelton (n243) 78.

such rights and responsibilities.²⁷² It is envisaged that these agreements will be the result of mediation regarding the responsibilities and rights received by the unmarried biological father in such agreements.²⁷³ It must be noted that on a successful mediation, the unmarried father merely acquires the rights and responsibilities, the extent to which he can exercise these rights and responsibilities will need to be determined in terms of what is in the best interests of the child.²⁷⁴

Recently in the (now reported) case of *S v J*,²⁷⁵ the Supreme Court of Appeal applied section 21 of the Children's Act. One of the major issues in this regard revolved around the rights of an unmarried father in terms of section 21 of the Children's Act 38 of 2005 and the best interests of the minor child. The court noted that between the start of the first application for the care (as it was called then 'custody') and guardianship application for the minor child to the present, the law had changed.²⁷⁶ The Natural Fathers of Children Born out of Wedlock Act 86 of 1997 had been in operation at the time of minor child's birth. It did not grant automatic custody (care) and guardianship rights to the father of a minor child on the death or incapacity of the mother. Furthermore, in the absence of a will stating otherwise, grandparents did not obtain these rights automatically either. In both cases the court (as the upper guardian of all minor children) conferred these rights on the father or grandparents after an application had been brought.²⁷⁷

The basic facts of *S v J*²⁷⁸ are as follows: An unmarried father (S) and minor child's mother (Ms R) had been residing together, with the view to getting married, at the time of minor child's (C) birth.²⁷⁹ Soon after the death of Ms R, Ms R's mother (Mrs J) confronted S with an application

²⁷² Du Toit (n181) 98.

²⁷³ Section 22 of the Children's Act 38 of 2005.

²⁷⁴ *S v J* (n35); Skelton (n243) 78.

²⁷⁵ *S v J* (n35). The basic facts of the case are that the maternal grandmother (Mrs J) of the minor child (C) wished to have full parental rights and responsibilities in terms of the Children's Act 38 of 2005. The father (S) argued against the proposed action of the grandmother. C's mother (Ms R) had passed away not long after C's birth. About 1 year before C's birth, S and Ms R had been living together and had planned that they would marry after C was born. At the time of Ms R's death, Mrs J was living with Ms R and S in order to assist with them with the minor child. After the death but before the funeral Mrs J took C with her to her home on a farm in Keimoes. Since then the parties have literally been locked in a battle for the care and guardianship of C. At the time of the application C was living with S and his family in Paarl.

²⁷⁶ During the course of these disputes, the Children's Act 38 of 2005 came into operation, in part during 2007 (on 1 July 2007, GG 30030 of 29 June 2007), the balance during 2010 (on 1 April 2010, GG 33076 of 1 April 2010; i.e. the Act is now fully operational). This is important to reiterate as will be discussed in the next few paragraphs.

²⁷⁷ *S v J* (n35) at para [23].

²⁷⁸ *S v J* (n35).

²⁷⁹ *S v J* (n35) at para [1].

for the care (custody) of the child and took the child with her.²⁸⁰ After a series of court battles, the matter came before the Supreme Court of Appeal, where it was decided that as a result of the circumstances of the matter, it was in the best interests of C that S be given care and that the grandmother (Mrs J) be given contact (access).²⁸¹ One of the reasons for this was that C had formed a strong bond with S's current wife, A, and her half brother.²⁸²

Had the matter occurred after the commencement of the Children's Act, S would have automatically acquired the parental rights and responsibilities when section 21 came into operation, namely on 1 July 2007.²⁸³

Due to the fact that the matter had commenced before the Children's Act came into operation, there was no requirement that the parties attend compulsory mediation. This case also shows the types of considerations that the courts will take into account when looking at what would be in the best interests for a minor child.²⁸⁴ The Supreme Court of Appeal noted that the litigation of this matter had not been in the best interests of the parties, especially for the minor child, C.²⁸⁵ The parties by the end of this matter had been involved in a five year legal battle regarding the residency of C.²⁸⁶ Lewis JA was of the opinion that had the parties attempted to talk and discuss what would be in the best interests of the minor child, a great emotional as well as financial burden would have been spared.²⁸⁷ Lewis JA further endorsed the views 'expressed by Brassey AJ in *MB v NB*'.²⁸⁸ Lewis JA agreed that the courts should not be the first port of call where family matters are concerned and that 'legal practitioners should heed section 6(4) of the Children's Act which provides that in matters concerning children an approach "conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided."' ²⁸⁹

²⁸⁰ *S v J* (n35) at para [2].

²⁸¹ *S v J* (n35) at para [55].

²⁸² *S v J* (n35) at para [49]. There was further confirmation that Ms R wanted S to have the minor child because of what had been written in her diary. See para [28].

²⁸³ *S v J* (n35) at para [25].

²⁸⁴ See the section dealing with the best interests of the minor child later in this chapter.

²⁸⁵ *S v J* (n35) at para [54].

²⁸⁶ *S v J* (n35) at para [54].

²⁸⁷ *S v J* (n35) at para [54].

²⁸⁸ *MB v NB* (n15) at paras [49] – [60]; *S v J* (n35) at para [54].

²⁸⁹ *S v J* (n35) at para [54].

Apart from section 21,²⁹⁰ section 33 of the Children's Act²⁹¹ also requires the parties to attend compulsory mediation.

3.3.2 Section 33

Section 33²⁹² deals with the contents of parenting plans.²⁹³ Specifically subsection 33(2) read with subsection 33(5) of the Children's Act, requires that where co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising those rights and responsibilities they must, before approaching the courts for assistance, set up a parenting plan that defines the rights and responsibilities in respect of the said child.²⁹⁴

Subsection 33(2) and subsection 33(5)²⁹⁵ read as follows:

- '(2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
- ...
- (5) In preparing a parenting plan as contemplated in subsection (2) the parties must seek-
 - (a) the assistance of a family advocate, social worker or psychologist; or
 - (b) mediation through a social worker or other suitably qualified person.'

As can be seen by the wording of subsection 33(2) of the Children's Act, the parties must seek assistance to mediate between them where they are experiencing 'difficulties in exercising their parental responsibilities and rights' in terms of their agreements (if there is one).²⁹⁶ Where co-holders are not experiencing any difficulties but merely wish to enter into an agreement to regulate how they exercise their parental responsibilities and rights, they need not seek assistance by way of mediation but may set up an agreement according to their needs.²⁹⁷ They will need to only seek assistance where they are entering into an agreement in terms of section 33(2) of the Children's Act.²⁹⁸

²⁹⁰ Children's Act 38 of 2005.

²⁹¹ Children's Act 38 of 2005.

²⁹² Children's Act 38 of 2005.

²⁹³ In the Australian Family Law Act 53 of 1975, this is dealt with in section 60I and requires the parties to attend compulsory family dispute resolution when dealing with parenting plans. See the Australian Law Chapter (Chapter No 3) of this study.

²⁹⁴ Subsection 33(2) of the Children's Act 38 of 2005; De Jong (n129) 120.

²⁹⁵ Subsection 33(2) and subsection 33(5) of the Children's Act 38 of 2005.

²⁹⁶ J Heaton (n239) 3-33.

²⁹⁷ Heaton (n239) 3-33.

²⁹⁸ Heaton (n239) 3-33; De Jong (n70) 527.

According to subsection 33(5) of the Children's Act, where the parents are attempting to set up the parenting plan, they must either seek the assistance of a family advocate, social worker, or psychologist;²⁹⁹ or they must attend mediation with a qualified social worker or other suitably qualified individual.³⁰⁰

Even where the mediation is successful, the agreement reached between the parties may be subjected to judicial approval in terms of subsection 34(1)(b) of the Children's Act. Subsection 34(3)³⁰¹ requires that where a parenting plan is to be incorporated into a court order, the application must be in the prescribed format,³⁰² and attached thereto must also be a copy of the parenting plan and a statement by a family advocate, social worker, or psychologist, that the plan was prepared after a consultation with such family advocate, social worker, or psychologist.³⁰³ Alternatively, attached must be a copy of a statement from either a social worker or appropriate person that the plan was as a result of mediation by such social worker or appropriate person.³⁰⁴

Although not entirely relevant to the discussion on compulsory mediation, but relevant in terms of parenting plans, is to include adult dependant children within the parenting plans where the parents are divorcing or separating. De Jong suggests that the possible procedure to follow is the one set out in terms of section 33 of Children's Act (i.e. section 33(2) read with section 33(5)). De Jong suggests that this is a far more practical route to take, than to either include the adult dependant child as a party to the divorce proceedings or forcing the child to make an application for maintenance to the Maintenance Courts. De Jong feels that including the adult dependant child within a parenting plan or setting up a mediated agreement that is similar to a parenting plan in terms of the Children's Act, (during the divorce proceedings – especially where there are no minor children involved) is a possible solution to the dilemma that adult dependant children face where their parents are divorcing.³⁰⁵

²⁹⁹ Subsection 33(5)(a) of the Children's Act 38 of 2005.

³⁰⁰ Subsection 33(5)(b) of the Children's Act 38 of 2005; De Jong (n25) 632.

³⁰¹ Children's Act 38 of 2005.

³⁰² Subsection 34(3)(a) of the Children's Act 38 of 2005.

³⁰³ Subsection 34(3)(b)(ii)(aa) of the Children's Act 38 of 2005; De Jong (n129) 120.

³⁰⁴ Subsection 34(3)(b)(ii)(bb) of the Children's Act 38 of 2005; De Jong (n25) 632.

³⁰⁵ M De Jong 'Relief for dependant adult children upon divorce' presented at the Family Law Colloquium held at Stellenbosch University on 22 to 23 September 2011.

Compulsory mediation is not the only way in which the parties are required to attend mediation. The legislature has also allowed the courts to compel the parties to attend mediation. The next section deals with how the courts are able to compel the parties to attend mediation.

3.4 Court-Compelled Mediation

In terms of sections that will be dealt with under this section from the Children's Act 38 of 2005 the court is given a discretion to order the disputing parties to attend mediation.³⁰⁶ This will occur before the court makes its final decision.³⁰⁷ De Jong suggests that there are three instances where mandatory mediation is at the court's discretion, and they are as follows:

1. The first are lay-forum hearings,³⁰⁸
2. The second of these involves pre-hearing conferences,³⁰⁹ and
3. The third is the situation where a designated social worker has caused a child to be brought before the Children's Court as a child in need of care and protection, but the court has not agreed with this finding.³¹⁰

There are instances where mandatory mediation may be in the discretion of a designated social worker, who works with children.³¹¹ The intention of the legislator in these instances is that all outstanding matters be mediated on before the courts have a final say.³¹² In the following paragraphs, each of these options, as set out above will be discussed.

3.4.1 Lay forum hearings

3.4.1.1 Section 49

Lay-forums are dealt with in sections 49, 70 and 71 of the Children's Act. According to section 49(1) of the Children's Act,³¹³ the Children's Court may order, in an attempt to reach a settlement, that the parties attend a lay-forum hearing before the court decides on the matter or on an issue within the matter. This may include:

³⁰⁶ M De Jong (n25) 633; De Jong (n129) 121; De Jong (n70) 527.

³⁰⁷ Skelton & Carnelley (n7) 346.

³⁰⁸ In terms of sections 49, 70 and 71 of the Children's Act 38 of 2005; De Jong (n25) 633 – 634.

³⁰⁹ In terms of section 69 of the Children's Act 38 of 2005; De Jong (n25) 633 & 634 – 635.

³¹⁰ In terms of section 155(8) of the Children's Act 38 of 2005; De Jong (n25) 633 & 635 – 636.

³¹¹ De Jong (n25) 636.

³¹² De Jong (n70) 527.

³¹³ De Jong (n129) 121.

- (a) mediation by a family advocate, social worker, social service professional or other suitably qualified person;
- (b) a family group conference as contemplated in section 70; or
- (c) mediation contemplated in section 71.³¹⁴

Although it is not clearly stated within the Children's Act, it is submitted that in section 49(1)(b)³¹⁵ and section 70³¹⁶ mediation is what the legislator may have considered to occur during these family group conferences.³¹⁷

3.4.1.2 Section 70

Section 70 of the Children's Act states that the Children's Court may order that a family group conference be set up, with the parties before trial, and/or with any other members of the child's family, so as to find solutions in respect of problems involving the child³¹⁸ this is depending on the papers as received from the clerk of court when the application is filed in terms of section 53 of the Children's Act.³¹⁹ Where the court orders a family group conference to be established, it must appoint a suitably qualified person to facilitate the conference.³²⁰ The reason put forward as to why mediation would work in a family group conference is because it is merely facilitated negotiation.³²¹ Furthermore, multi-generational mediation is at present a widely used method of facilitating negotiations at present.³²² In a section 70³²³ family group conference the court may further prescribe how any agreement between the parties or any fact emerging from the conference of which the court must be notified is to be recorded and kept.³²⁴ In this respect the court is guided by regulation 13 of the Regulations Relating to Children's Courts and

³¹⁴ Subsection 49(1) of the Children's Act 38 of 2005; De Jong (n129) 121.

³¹⁵ Children's Act 38 of 2005.

³¹⁶ Children's Act 38 of 2005.

³¹⁷ M De Jong (n25) 634; De Jong (n129) 121. See also J Gallinetti 'The Children's Court' in *Commentary on the Children's Act* (Looseleaf edition) CJ Davel & AM Skelton (eds) (2007) 4-16 – 4-17.

³¹⁸ Subsection 70(1) of the Children's Act 38 of 2005; D Leppan & J Gallinetti 'The increased jurisdiction of the children's courts and implications for family law practice in light of new mechanisms that promote alternative dispute resolution' in *Trials & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds) (2008) 172.

³¹⁹ Regulation 6 of Part 1 of Chapter 3 the Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010.

³²⁰ Subsection 70(2)(a) of the Children's Act 38 of 2005; sub-regulation 6(2)(a)(i) of Part 1 of Chapter 3 of the Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010; Regulation Gazette No 250; De Jong (n129) 121; Leppan & Gallinetti (n318).

³²¹ See the Chapter 1 for a definition of mediation above; De Jong (n25) 634 & 635. See also Gallinetti (n318) 4-18.

³²² De Jong (n129) 121.

³²³ Children's Act 38 of 2005.

³²⁴ Subsection 70(2) of the Children's Act 38 of 2005.

International Child Abduction.³²⁵ Regulation 13³²⁶ does not only set out the procedures and the role of each of the parties concerned, but also provides for what can be done where a family group conference fails.

3.4.1.3 Section 71

Section 71 of the Children's Act provides that where circumstances permit, the Children's Court may order that the parties attend an appropriate lay-forum, which may include a traditional authority, in order to mediate the matter between the parties.³²⁷ There is one circumstance where the court may not order that a matter goes to a lay-forum for mediation, and that is where it is alleged that there is child abuse or sexual abuse of a child.³²⁸ The court still retains some control over the process by prescribing the manner and format of how any record should be kept of the mediation (and of any fact emerging from the conference of which the court must be notified) and in that it may be subject to judicial review.³²⁹ This section recognises that traditional leaders and street communities still play an important role in solving family disputes in this present day and age.³³⁰ Regulation 14³³¹ sets out the procedures to be followed in respect of lay-forums. Regulation 14³³² further sets out the role of the chairperson of such forum. Also see regulation 6, which requires the presiding officer, based on the papers before him or her to refer the disputing parties to mediation.³³³

3.4.2 Pre-hearing conferences: Section 69

³²⁵ As published in *Government Gazette* No 33067 dated 31 March 2010; Regulation Gazette No 250.

³²⁶ Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010; Regulation Gazette No 250.

³²⁷ Subsection 71(1) of the Children's Act 38 of 2005; sub-regulation 6(2)(a)(ii) of Part of Chapter 3 of the Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010; Regulation Gazette No 250; Leppan & Gallinetti (n318)172; De Jong (n129) 121.

³²⁸ Subsection 71(2) of the Children's Act 38 of 2005; De Jong (n25) 634 & 635.

³²⁹ Subsection 71(3) of the Children's Act 38 of 2005.

³³⁰ De Jong (n129) 121; Gallinetti (n318) 4-35.

³³¹ Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010; Regulation Gazette No 250.

³³² Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010; Regulation Gazette No 250.

³³³ Sub-regulation 6(2)(b) of Part 1 of Chapter 3 the Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010.

As stated above, the second form of mediation where the court may require the parties to attend mandatory mediation are pre-hearing conferences, as dealt with in section 69 of the Children's Act. Section 69³³⁴ states as follows:

- (1) If a matter brought to or referred to a children's court is contested, the court may order that a pre-hearing conference be held with the parties involved in the matter in order to –
 - (a) mediate between the parties;
 - (b) settle disputes between the parties to the extent possible; and
 - (c) define the issues to be heard by the court.
- (2) Pre-hearing conferences may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.
- (3) The child involved in the matter may attend and may participate in the conference unless the children's court decides otherwise.
- (4) The court may –
 - (a) prescribe how and by whom the conference should be set up, conducted and by whom it should be attended;
 - (b) 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
 - (c) consider the report on the conference when the matter is heard.'

The intention of the legislature is that in the pre-hearing conferences, the outstanding disputes are mediated on and if not resolved at least defined.³³⁵ Regulation 6 requires that a presiding officer must refer the matter to either mediation or a pre-hearing conference (in terms of section 69) based on the papers received with the application.³³⁶ Once again, the legislator has ensured that the Children's Court does retain some control over the proceedings by way of setting out how the conference is to be held and who by whom it may be led, how the settlement between the parties is to be recorded, etc., and if needs be, must be presented in court for judicial review.³³⁷ Furthermore, regulation 12 in the Regulations Relating to Children's Courts and

³³⁴ Children's Act 38 of 2005.

³³⁵ Subsection 69(1) of the Children's Act 38 of 2005; sub-regulation 6(2)(b) of Part 1 of Chapter 3 the Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010; Regulation Gazette No 250; De Jong (n129) 122; Gallinetti (n318) 4-34; Leppan & Gallinetti (n318) 169.

³³⁶ Sub-regulation 6(2)(b) of Part 1 of Chapter 3 the Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010.

³³⁷ Subsection 69(4) of the Children's Act 38 of 2005; De Jong (n129)122.

International Child Abduction³³⁸ sets out further guidelines that need to be followed for pre-hearing conferences and, for example, sets out the role of the chairperson of such conferences. As with section 71, where there are allegations of child abuse or sexual abuse with respect to the child, a pre-hearing conference shall not be held.³³⁹ Leppan and Gallinetti surmise that pre-hearing conferences may also ‘facilitate the identification of matters that are ready for mediation or settlement’ and that these may then be referred to one of the other forums, i.e. family group conferences and lay-forums.³⁴⁰

3.4.3 Child in need of care and protection: Section 155(8)

The third instance where De Jong argues that mediation may be mandatory is where a child has been brought before the children’s court after a designated social worker has investigated the matter, and based on his or her findings is of the opinion that the child is in need of care and protection, but the court does not agree.³⁴¹ ‘Under these circumstances the children’s court may, in terms of section 155(8)(b), make an order for early intervention services in terms of the [Children’s] Act.’³⁴² It has been submitted that the drafters of the Children’s Act had mediation in mind to be included as an early intervention service.³⁴³

Despite the above, there are exceptions to the rule of compulsory (as discussed elsewhere in this thesis, for example child or family abuse matters) and court-compelled mediation, there are also sanctions that may be imposed by the courts against those parties who do not attend. The reason for this is that in terms of sections 21 and 33,³⁴⁴ and sections 49, 69, 70, 71, and 155(8)³⁴⁵ the parties are failing to obey either legislative requirements or a court order. These sanctions are discussed in the next section that follows.

3.5 Sanctions for not attending Compulsory Mediation or Court-Compelled Mediation

³³⁸ As published in *Government Gazette* No 33067 dated 31 March 2010; *Regulation Gazette* No 250.

³³⁹ Subsection 69(2) of the Children’s Act 38 of 2005; De Jong (n25) 634 – 635; De Jong (n129) 122.

³⁴⁰ Leppan & Gallinetti (n318).

³⁴¹ Section 155(8) of the Children’s Act 38 of 2005.

³⁴² De Jong (n25) 636.

³⁴³ De Jong (n25) 636.

³⁴⁴ Children’s Act 38 of 2005.

³⁴⁵ Children’s Act 38 of 2005.

Even if the parties do not wish to attend mediation but are ordered to do so by the court, they should continue to act ethically. With this in mind it is worth discussing the sanctions that the court may use to ‘punish’ an unwilling party where they act unethically. There are three sanctions that the court may use to ‘punish’ the unwilling party or parties with. De Jong suggests that these sanctions include the following:³⁴⁶

1. Where an unwilling party resists or acts unethically in the mediation sessions, section 48(1)(d)³⁴⁷ empowers the Children’s Court to make an appropriate costs order against the unwilling party.³⁴⁸
2. Where the court has ordered the parties to attend mediation, as is the case in sections 49, 69, 70, 71, and 155(8),³⁴⁹ and where the parties do not attend mediation they may be held in contempt of court. It must be noted that this would not work for sections 21 and 33 where the Act requires that mediation proceedings must have been instituted before the parties go to court.³⁵⁰
3. Section 64(1)³⁵¹ allows the Children’s Court to adjourn a matter for up to 30 days, where the court feels that this would be necessary. It is submitted that this may be used where the court has ordered mediation to occur and the resisting party has refused to participate. The court may then suspend the court proceedings until the mediation process has occurred.³⁵²

Compulsory mediation or court-compelled mediation is not the only form of mediation that the parties, depending on the circumstances of the matter, will need to attend. The matter may be such that they will be required to attend mediation at the instance of and with a social worker.

3.6 Discretionary Mediation at the instance of a Social Worker

As stated above, there are instances where mediation will not necessary be at the discretion of the court, but will be at the discretion of a social worker. This is the case in terms of sections 150(3) and 155(4)(b) of the Children’s Act.

³⁴⁶ De Jong (n25) 636.

³⁴⁷ Children’s Act 38 of 2005.

³⁴⁸ De Jong (n25) 636 – 367.

³⁴⁹ Children’s Act 38 of 2005.

³⁵⁰ De Jong (n25) 637.

³⁵¹ Children’s Act 38 of 2005.

³⁵² De Jong (n25) 637.

3.6.1 Section 150(3)

In terms of section 150(3) of the Children's Act, a social worker, if after investigating a matter finds that a child as referred to in subsection 150(2)³⁵³ is not in need of care and protection, as set out in subsection 150(1),³⁵⁴ must take the necessary measures in order to assist the child and his or her family, as the case may be. This may include counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.³⁵⁵

3.6.2 Section 155(4)(a)

In terms of section 155(4)(a)³⁵⁶ the designated social worker, after an investigation in terms of section 155(2)³⁵⁷ must set up a report giving reasons as to why a child is not in need of care and protection, which must be submitted for review by the Children's Court. Section 155(4)(b)³⁵⁸ prescribes that in this report the social worker must indicate, where necessary, measures which he or she thinks will assist the family and these may include counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to a suitably qualified person or organisation.³⁵⁹ Section 157(1)³⁶⁰ prevents the court from merely removing the child and placing him or her in the care of another person in terms of section 156,³⁶¹ unless the report of the social worker indicates that this drastic step would benefit the child.³⁶² Regulation 53³⁶³ supplements section 157 by setting out the aspects which must be covered by the social worker in his or her care and protection report. Regulation 53 requires that the social worker covers the history of the case and the child's developmental and therapeutic needs. Further, the report must set out any family preservation

³⁵³ Children's Act 38 of 2005.

³⁵⁴ Children's Act 38 of 2005.

³⁵⁵ De Jong (n25) 636.

³⁵⁶ Children's Act 38 of 2005.

³⁵⁷ Children's Act 38 of 2005.

³⁵⁸ Children's Act 38 of 2005;

³⁵⁹ De Jong (n25) 636; C Matthias & N Zaal 'The child in need of care and protection' in *Child Law in South Africa* T Boezaart (ed) (2009) 171; N Zaal & C Matthias 'The Child in Need of Alternative Care' in *Introduction to Child Law in South Africa* CJ Davel (ed) (2000) 130.

³⁶⁰ Children's Act 38 of 2005.

³⁶¹ Children's Act 38 of 2005.

³⁶² Matthias & Zaal (n359) 171.

³⁶³ Chapter 11 of the Consolidated Regulations Pertaining to the Children's Act, 2005 as published in Part 1 of 2 of the *Government Gazette* No 33076 dated 1 April 2010; Regulation Gazette No 9256.

services considered or attempted. Finally, the report must include a ‘documented permanency plan’. The plan must set out proposals regarding the child’s future care and must set out the child’s developmental and therapeutic needs. The main aim of the report is to set out the best possible solution for achieving stability and security in the child’s life.³⁶⁴

It is submitted that the report will assist parties where the court has ordered the parties to attend mediation; as it will have narrowed down many of the issues that need to be dealt with. Furthermore, where mediation has been ordered before the report has been established, the issues that are in debate will have been crystallised and the social worker can set them out in the report.

There is also the possibility that mediation is not merely compulsory, compelled by the courts or discretionary, but that it may also be implied in terms of certain sections of the Children’s Act.

3.7 Implied Mediation

De Jong argues that there are sections where mediation is implied in terms of the Children’s Act.³⁶⁵ These will be considered briefly.

Section 22 (also mentioned above) of the Children’s Act deals with parental responsibilities and rights agreements. The child’s biological father (where he is not married to the mother), or any other interested person, may enter into such an agreement for the acquisition of rights and responsibilities, with the mother of the child.³⁶⁶ The agreement, it is submitted, may be a settlement reached through mediation³⁶⁷. A reason for this submission is that, although section 22 is ‘open’ for married and unmarried parties (or any other parties who have an interest in the upbringing of the child), it will often be used in conjunction with section 21. Section 21 instructs the unmarried parties to attend mediation in order to sort out the issues between them in respect of the parental responsibilities and rights for the child. If the father does not comply with the requirements set in section 21, parental responsibilities and rights may be conferred on him in

³⁶⁴ Matthias & Zaal (n359) 172; Zaal & Matthias (n359) 130.

³⁶⁵ De Jong (n25) 639ff; De Jong (n70) 527.

³⁶⁶ Subsection 22(1) of the Children’s Act 38 of 2005; De Jong (n25) 639; De Jong (n129) 123. See Heaton (n239) 3-13 – 3-16 for a discussion on how section 22 operates within the confines of the law, other than what was discussed here.

³⁶⁷ De Jong (n129) 124.

terms of section 22.³⁶⁸ As mentioned above, section 22 relates to all children, whether they are born of married or unmarried parents. Furthermore, regulations 7 and 8 in Chapter 3 of the Consolidated Regulations Pertaining to the Children's Act, 2005³⁶⁹ set out various requirements that must be fulfilled in respect of parental responsibilities and rights agreements.³⁷⁰ Regulation 7 includes how the agreement is to be set out, that it is to be registered and where the agreement deals with guardianship, the approval of the High Court is required – to name a few. Regulation 8 deals with mediation and the participation of a child during the negotiations of the agreement. In respect of mediation, there are various forms as prescribed by the regulations, which the parties and the family advocate sign to certify the outcome of the mediation and to verify non-attendance of the mediation.³⁷¹ Sub-regulations 3 and 4³⁷² respectively set out the requirements that need to be considered in respect of the child's participation in the mediation process and the procedures where the child is not satisfied with the outcome of the mediation.

Further sections where mediation is implied are as follows:

1. Section 30(3)³⁷³ states that co-holders of parental responsibilities and rights in respect of a child may not transfer or surrender such responsibilities or rights to another co-holder of the same child. They may, however, enter into an agreement allowing another co-holder or person to exercise any or all of those responsibilities and rights on such co-holder's behalf.³⁷⁴
2. Furthermore, section 234(1)³⁷⁵ allows the parents or guardian of a child to enter into a post-adoption agreement with the prospective adoptive parent or parents, before an application for adoption is made in terms of section 239 of the Children's Act.³⁷⁶ The idea was that the adoption process would be 'open and honest' for all the parties concerned. This agreement can set out aspects relating to communication and visitation

³⁶⁸ Heaton (n239) 3-14.

³⁶⁹ As published in Part 1 of 2 of the *Government Gazette* No 33076 dated 1 April 2010; Regulation Gazette No 9256.

³⁷⁰ In terms of section 22 of the Children's Act 38 of 2005.

³⁷¹ Sub-regulations 8(1) and (2) of the Consolidated Regulations Pertaining to the Children's Act, 2005.

³⁷² Consolidated Regulations Pertaining to the Children's Act, 2005.

³⁷³ Children's Act 39 of 2005.

³⁷⁴ De Jong (n25) 639; De Jong (n129) 123.

³⁷⁵ Children's Act 38 of 2005; Heaton (n239) 3-27 – 3-28.

³⁷⁶ De Jong (n25) 639; De Jong (n129) 123.

and can regulate the provision of substantial information regarding the child to the adoptive parents.³⁷⁷

3. Finally, section 292³⁷⁸ read with sections 293 and 295³⁷⁹ allow for the surrogate mother and her husband or life partner (as the case may be), and the commissioning parent (or parents), if married or in a permanent life partnership, with his or her spouse or partner (as the case may be), to enter into a surrogate motherhood agreement to regulate matters that are not dealt with in the Children's Act.³⁸⁰ It is worth noting that these agreements are only valid when concluded within South Africa, but there may be good reasons to justify otherwise (depending on the circumstances of each case).³⁸¹ As this is not the focus of this study this shall not be discussed further, however see Louw in Davel and Skelton's *Commentary on the Children's Act* for all the requirements that need to be met in terms of the Children's Act as well as what may be set out in the agreement.³⁸²

In all these above matters, the negotiations, it is submitted, may be facilitated via mediation and the settlements reached may be included within the prescribed agreements, as prescribed. The Children's Act, it seems, is aimed at promoting mediation and as such it would be in the interest of all parties concerned in respect of any of the matters mentioned above, to obtain the assistance of a mediator in order to facilitate negotiations that may lead to a settlement.³⁸³

3.8 The Hague Convention on the Civil Aspects of International Child Abduction

The courts have described the aim of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (hereinafter referred to as 'the Hague Convention') as follows:

'the primary object of the [Hague] Convention is to secure the swift return of children wrongfully removed to or retained in any contracting state, to restore the status quo ante the wrongful removal or retention as

³⁷⁷ T Mosikatsana & J Loffell 'Chapter 15: Adoption' in *Commentary on the Children's Act* (Looseleaf edition) CJ Davel & AM Skelton (eds) (2007) 15-13 – 15-14.

³⁷⁸ Children's Act 38 of 2005.

³⁷⁹ Children's Act 38 of 2005.

³⁸⁰ De Jong (n25) 639; De Jong (n129) 123 – 124; A Louw 'Chapter 19: Surrogate Motherhood' in *Commentary on the Children's Act* (Looseleaf edition) CJ Davel & AM Skelton (eds) (2007) 19-7.

³⁸¹ Louw (n380) 19-8.

³⁸² Louw (n380) 19-1 – 19-31.

³⁸³ De Jong (n25) 639.

expeditiously as possible so that custody and similar issues in respect of the child can be adjudicated upon by the courts of the country from which the child was removed'.³⁸⁴

In terms of the South African law, the Hague Convention is found in Chapter 17 of the Children's Act.³⁸⁵ The Hague Convention does not make mention of the use of mediation in its text,³⁸⁶ however in accordance with the international community, parties that are signatories to the convention are encouraged to use mediation in order to find an amicable solution before proceeding with the matter to court.³⁸⁷ One of the main reasons for not attempting to mediate in matters that involve the Hague Convention is due to the limited time frames that the Hague Convention sets out in which to bring such a matter to court.³⁸⁸ The Regulations Relating to Children's Courts and International Child Abduction³⁸⁹ do not contain a provision that requires the parties to find an amicable solution in respect of the issues that arise from a child abduction matter.

Irrespective of whether the parties attend compulsory mediation, are compelled by the courts to mediate, enter into mediation at the discretion of a social worker or mediate in terms of one of the sections that may imply mediation, all settlement agreements reached in terms of the Children's Act are required to be judicially reviewed by an appropriate court. This is will now be discussed.

4 Judicial Review

An important section to note with regard to settling a matter out of court is section 72 of the Children's Act. According to section 72(1), where a settlement has been reached out of court, the agreement between the parties must be submitted to the clerk of the Children's Court to have it judicially reviewed. In such an instance, the court may either confirm the settlement reached by the parties and make it an order of court, refer the settlement back to the parties for

³⁸⁴ *Central Authority v H* 2008 (1) SA 49 (SCA) at para [28].

³⁸⁵ Skelton & Carnelley (n7) 274.

³⁸⁶ See the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

³⁸⁷ T Kruger *International Child Abduction: The Inadequacies of the Law* (2011) 113 – 114.

³⁸⁸ T Kruger (n387) 157; 159.

³⁸⁹ As published in *Government Gazette* No 33067 dated 31 March 2010; Regulation Gazette No 250.

reconsideration on any specific points, or alternatively reject the agreement.³⁹⁰ The court order ‘provides greater certainty and protection for the child.’³⁹¹

As can be seen from the preceding discussion, the Children’s Act³⁹² provides ample opportunity for mediation in the various situations that may occur between parties to a divorce or separation.

The following discussion will focus on a central aspect of the Children’s Act, namely the paramountcy of the best interests of the child.³⁹³ The reason for this specific focus is due to the fact that in all matters concerning the child, including where the parties are mediating on the way forward, and where the court judicially reviews any agreement reached, this standard is to be applied.³⁹⁴

5 The best interests of the child

Much emphasis is placed on the best interests of the child,³⁹⁵ as will be seen from the following short discussion. Only that which is essential to the topic has been mentioned. Also the reason for setting out the brief discussion on the best interests of the child is its relevance with respect to family law mediation.

As mentioned earlier, in all matters concerning the minor child or children where the parents are divorcing and/or separating, the best interests of the child are of paramount importance.³⁹⁶ Furthermore, South Africa ratified the United Nations Convention on the Rights of the Child on 16 June 1995. Article 3(1) requires that where a child is concerned his/her interests are of paramount importance.³⁹⁷

³⁹⁰ Subsection 72(2) of the Children’s Act 38 of 2005; De Jong (n25) 640; De Jong (n129) 124.

³⁹¹ Gallinetti (n318) 4-35.

³⁹² Children’s Act 38 of 2005.

³⁹³ Section 9 of the Children’s Act 38 of 2005.

³⁹⁴ Section 28(2) of the Constitution of the Republic of South Africa, 1996; sections 9 and 72 of the Children’s Act 38 of 2005.

³⁹⁵ It is sometimes referred to as the ‘welfare principle’: Van Zyl (n48) 87.

³⁹⁶ Section 28(2) of the Constitution of the Republic of South Africa, 1996; Section 9 of the Children’s Act 38 of 2005; Barrie (n48) 126.

³⁹⁷ Article 3(1) of the United Nations Convention on the Rights of the Child requires the following: In all actions concerning the child, whether undertaken by private or social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; Barrie (n48) 127; Davel (n166) 2-6.

Much the same can be said regarding the African Charter on the Rights and Welfare of the Child. Article 4(1) of the Charter requires that the children's best interests be treated as paramount in all matters concerning him or her.³⁹⁸

Section 28(2) of the Constitution of the Republic of South Africa, 1996 guarantees that the rights of the child will be of paramount importance.³⁹⁹

In answer to all of the above, South Africa drafted section 9 of the Children's Act, and this states as follows:

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

It follows that where there are children within the marriage, and during the divorce proceedings, where a matter is either being mediated on or adjudicated, the best interests of the child are of paramount importance and must be considered.⁴⁰⁰

Section 7 of the Children's Act⁴⁰¹ sets out the factors that must be considered when applying the best interests of the child standard.⁴⁰² The factor in section 7 that is relevant in respect of family law mediation is the following:

Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely–

...

(n) which action or decision would best avoid or minimise further legal or administrative proceedings in relation to the child.

³⁹⁸ Article 4(1) of the African Charter on the Rights and Welfare of the Child (as stated above, it was ratified by South Africa on 7 January 2000) states as follows: In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration; Barrie (n48) 127; Davel (n166) 2-6.

³⁹⁹ Section 28(2) of the Constitution of the Republic of South Africa, 1996 states as follows '[a] child's best interests are of paramount importance in all matters concerning the child.' See generally Barrie (n48) 126; Van Zyl (n48) 87.

⁴⁰⁰ De Jong (n70) 521 – 522.

⁴⁰¹ Barrie (n48) 127.

⁴⁰² Section 7 of the Children's Act 38 of 2005. See Davel (n166) 2-4 – 2-8 for a comprehensive discussion on the best interests of the child standard. Only that which pertains to mediation is discussed in this study.

It is submitted that with the wording of subsection 7(n)⁴⁰³ it is likely that the legislature included the idea of mediation, as it is generally quicker, and reduces stress where there are children involved.⁴⁰⁴

There has been a strong emphasis on the paramountcy of the child's best interests for a long time in our law.⁴⁰⁵ It is trite law within the South African legal system that the High Court is the upper guardian of all minor children and as such will always see to it that the child's needs are looked into and appropriately cared for. Furthermore, this has been entrenched within the Constitution, section 28(2) of which requires that the best interests of the child are of paramount importance in all matters concerning him or her.⁴⁰⁶ It is submitted that in such an instance, mediation would be the ideal platform to discuss the needs of the child (or children) and look into what would be the best for the child (or children) where the parents are separating and/or divorcing.⁴⁰⁷ De Jong provides the following as a reason for mediation being a better forum in which to give effect to the best interests of children: 'mediation enables those who know the children best, namely their parents, and not some third party or institution, to make decisions about their welfare.'⁴⁰⁸ De Jong further supports this view by stating that studies have proven that 'the interests of children are far more advantageous under mediated settlement agreements than under agreements or orders made in terms of the adversarial system.'⁴⁰⁹ It is likely that mediation may assist the relationship of both parents by teaching them how to get along better with each other after the divorce. Mediation may assist children in maintaining 'a meaningful relationship with both parents after the divorce' and thereby it limits any psychological harm that may be caused during a divorce.⁴¹⁰

⁴⁰³ Children's Act 38 of 2005.

⁴⁰⁴ Cohen (n36) 78 – 79; Brand (n7) 100; Bridge (n7) 242 – 243. It would be agreed that the best solution would be for an intact and harmonious family situation but as this is not the case in divorce, mediation is able to ensure a certain amount of harmony despite the divorce - Scott-MacNab (n27) 718 – 719; Skelton & Carnelley (n7) 346.

⁴⁰⁵ *S v J* (n35) para [49] – [54]; Scott-MacNab (n27) 718 – 719; See generally Barrie (n48) 126; Davel (n166) 2-9 -2-12.

⁴⁰⁶ Davel (n166) 2-10.

⁴⁰⁷ Scott-MacNab (n27) 718 – 719.

⁴⁰⁸ De Jong (n70) 521.

⁴⁰⁹ De Jong (n70) 522.

⁴¹⁰ De Jong (n70) 522.

The following brief discussion is on domestic partnerships. As the rights of unmarried fathers was discussed in the section dealing with compulsory mediation above, this will only be briefly mentioned again in this section for the sake of completeness.

6 Domestic Partnerships

Domestic partnerships or, as they have also been known, ‘common law marriages’ do not enjoy much protection in terms of the South African legal system.⁴¹¹ In this regard, the latest development in South Africa was the introduction of the draft Domestic Partnerships Bill⁴¹² in early 2008.⁴¹³ In respect of the study, the draft Bill⁴¹⁴ does not make mention of mediation in any of its provisions. There are, however certain provisions that need to be adhered to where the parties wish to register their domestic partnership.⁴¹⁵ In this respect, it is submitted, that where necessary, the parties may use mediation in order to reach a compromise where this is required.

Pending the enactment of the Bill, where there are children involved, section 21 of the Children’s Act will apply. Section 21⁴¹⁶ deals with the rights and responsibilities of unmarried fathers. As stated earlier, section 21⁴¹⁷ requires the parties to attend mediation before making an application to the court, where these parental responsibilities and rights are concerned is in dispute.⁴¹⁸ Where paternity is not in dispute, the unmarried father (where he is the domestic partner to the child’s mother) will automatically obtain parental responsibilities and rights in respect of the child.⁴¹⁹ It is submitted that this will apply where the parties have not entered into a registered domestic partnership. In terms of Article 17 of the Domestic Partnerships Bill, where a child is born of

⁴¹¹ The various courts have shown some recognition to domestic partnerships, whether they have been heterosexual or same-sex partnerships, see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); *Du Toit v Minister of Population and Welfare Development* 2003 (2) SA 198 (CC); *J and Another v Director-General, Department of Home Affairs and Others* (n10); *Gory v Kolver NO* 2007 (4) SA 97 (CC). See generally De Vos (n27) 129; Skelton & Carnelley (n7) 219ff.

⁴¹² Domestic Partnership Bill *Government Gazette* No 30663 of 14 January 2008.

⁴¹³ De Vos (n27) 130.

⁴¹⁴ Domestic Partnership Bill *Government Gazette* No 30663 of 14 January 2008.

⁴¹⁵ Section 4 and section 6 of the Domestic Partnership Bill (*Government Gazette* No 30663 of 14 January 2008).

⁴¹⁶ Children’s Act 38 of 2005.

⁴¹⁷ Children’s Act 38 of 2005.

⁴¹⁸ Section 21(3) of the Children’s Act 38 of 2005.

⁴¹⁹ Skelton & Carnelley (n7) 224. Note section 40 of the Children’s Act 38 of 2005 deals with the status of a child that is born as a result of artificial fertilisation. This will not be discussed in this study as it is beyond the scope of this work.

opposite sex parents in a registered domestic partnership, the father of the child will have parental responsibilities and rights conferred upon him as though he were married to the mother, as he will be deemed to be the biological fathers of the child.⁴²⁰

Mediation is not only encountered in statutory instruments. It may be found within the realms of particular cultures and value systems.⁴²¹ The following section deals with customary and religious marriages and gives a brief description of how mediation is used within these relationships.

7 Customary and Islamic Marriages

As customary marriages and Islamic marriages have different needs (this will be seen in the discussions that follow), they will be discussed under this heading but in separate sections.

It should be noted at this point that Muslim Marriages are not as yet recognised within the South African legal landscape, whereas customary marriages are.

7.1 Customary Marriages

De Jong suggests that the present formal adversarial system of divorce used in South Africa is, generally speaking, foreign to people of ‘Afrocentric’ backgrounds.⁴²² For the most part of the twentieth century, the majority of people in South Africa, namely the black population, did not have their marriages recognised in terms of South African civil law.⁴²³ (This excludes the fact that some black people were married in terms of a civil marriage as prescribed in South African law.)⁴²⁴ Most were often married in terms of their cultural value systems and as such these types of religious marriages or other cohabitation unions fell outside the ambit of South African law.⁴²⁵

⁴²⁰ Skelton & Carnelley (n7) 224; BS Smith ‘The interplay between registered and unregistered domestic partnerships under the draft Domestic Partnerships Bill, 2008 and the potential role of the putative marriage doctrine’ (2011) 128(3) *SALJ* 560 583, 584.

⁴²¹ Moodley (n8) 47.

⁴²² De Jong (n15) 34 – 35.

⁴²³ De Jong (n15) 34.

⁴²⁴ That is the marriages were concluded in terms of the Marriage Act 25 of 1961.

⁴²⁵ De Jong (n15) 34; Moodley (n8) 45.

The traditional family set up of those of Afrocentric backgrounds involves them living with the extended family, meaning that there would be the basic unit or nuclear family (i.e. comprising of the ‘married’ spouses and their children), together with parents, brothers, and sisters (married, unmarried, or widowed, with or without children) and grandparents.⁴²⁶ In other words there is a collective or communal aspect to the marriage, placing a higher value on the non-individualistic nature of a marriage and a greater value on the family as a whole.⁴²⁷ Thus where a dispute arises between spouses or the nuclear family, the entire extended family will also be involved in seeking a solution.⁴²⁸

The Recognition of Customary Marriages Act⁴²⁹ gives full recognition to customary marriages of blacks or people of an ‘Afrocentric’ background.⁴³⁰

Although the provisions of the Recognition of Customary Marriages Act⁴³¹ provide for the dissolution of customary marriages, most people turn to traditional, informal dispute resolution procedures that are found at community level where there is a breakdown in the family, rather than the formal family law system that has developed out of the Western culture.⁴³² These traditional forms of dispute resolution are not recognised by the South African legal system.⁴³³ Therefore marriages concluded in terms of the Recognition of Customary Marriages Act must be dissolved by a decree of divorce.⁴³⁴ In terms of the Recognition of Customary Marriages Act, the meaning of ‘court’ is a High Court or Civil Regional Magistrates’ Court.⁴³⁵ Furthermore, this

⁴²⁶ Moodley (n8) 46.

⁴²⁷ Moodley (n8) 46, 47; TR Nhlapo ‘The African family and women’s rights: friends or foes’ 1991 *SALJ* 135.

⁴²⁸ Moodley (n8) 47.

⁴²⁹ Recognition of Customary Marriages Act 120 of 1998. The Recognition of Customary Marriages Act is discussed under this section and not in connection with the legislative framework for the following reasons: (1) for completeness of the section and (2) for easier reference in respect of the ‘Comparative Study’ Chapter.

⁴³⁰ Section 1 of the Recognition of Customary Marriages Act 120 of 1998; De Jong (n15) 34.

⁴³¹ See generally MS Navsa ‘Muslim personal law – an update’ in *Trial & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds) (2008) 113 for a general discussion regarding recognition as this is beyond the main focus of this study. The Recognition of Customary Marriages Act is discussed in this section and not under the section dealing with the legislative framework for completion in respect of customary marriages. The main reason being that where the parties have their customary marriage recognised in terms of the Recognition of Customary Marriages, they will have to go through the civil law process in order to have their marriage dissolved.

⁴³² De Jong (n15) 35.

⁴³³ TW Bennett *Customary Law in South Africa* (2004) 271.

⁴³⁴ Bennett (n433) 271.

⁴³⁵ Section 1(i) of the Recognition of Customary Marriages Act 120 of 1998. Soon after the promulgation of the Act on 15 November 2000, the family courts were established in all major centres across South Africa and regularly go on circuit. TW Bennett (n433) 275 – 276.

formalism of the law which is rooted in the Western culture is unacceptable, inapplicable, and inaccessible to the majority of the population, due to the impoverishment of black persons during the apartheid era and also due to the breakdown of traditional, indigenous family structures.⁴³⁶ The problem today is that the average South African cannot afford to pay for legal representation and expensive court litigation due to socio-economic and political circumstances.⁴³⁷

The Recognition of Customary Marriages Act does provide or allow for mediation to take place, recognising that this has an important emphasis in customary law.⁴³⁸ In so doing the Recognition of Customary Marriages Act recognises the important role of the traditional leader within the society, allowing him to mediate the matrimonial dispute before dissolution of the marriage is pronounced by a court.⁴³⁹ The only criticism is that this provision only works where the parties mediate at an early stage in the breakdown, and that they live in a homogenous society that will encourage them to abide by the settlement.⁴⁴⁰

It is important to note that where a customary marriage is recognised by our law in terms of the Recognition of Customary Marriages Act, on dissolution of the marriage, the Family Advocate will have to make recommendations in terms of the Mediation in Certain Divorce Matters Act and section 6 of the Divorce Act, where there are minor children born of the marriage.⁴⁴¹ This will mean that the parties may need to mediate their settlement agreement, where applicable, in terms of the Children's Act.

The Children's Act allows the children's court, where circumstances permit, to refer a matter brought before it to a traditional authority.⁴⁴² It is submitted that the aim of the legislature was to recognise the natural support systems that are in place within traditional communities.⁴⁴³ These support systems are seen as mechanisms that are able to protect and determine what the best

⁴³⁶ De Jong (n15) 35.

⁴³⁷ De Jong (n15) 35.

⁴³⁸ Section 8(5) of the Recognition of Customary Marriages Act 120 of 1998.

⁴³⁹ CRM Dlamini 'Family Law' in *Introduction to Legal Pluralism in South Africa: Part I* JC Bekker *et al* (2002) 35-48.

⁴⁴⁰ Bennett (n433) 276 – 277.

⁴⁴¹ Dlamini (n439) 48.

⁴⁴² Section 71 of the Children's Act 38 of 2005.

⁴⁴³ Gallinetti (n317) 4-35.

interests of the child are in the given circumstances of the divorce,⁴⁴⁴ as they play an active role in the lives of the majority of the South African population.⁴⁴⁵ The mediators may not be trained as such, but are able to provide an important service to those people who are married in terms of customary law.⁴⁴⁶

Within the South African context customary marriages are not the only type of marriage other than a civil marriage or civil union that the legislature needs to concern itself with where the parties are separating or divorcing, but there are also Muslim marriages. Whereas customary marriages have been fully recognised in terms of the South African law, Muslim marriages still need to gain the same recognition. The next section sets out the current position surrounding Muslim marriages.

7.2 Muslim Marriages

It is often the women in Muslim marriages that find it difficult to enforce their rights.⁴⁴⁷ The section that follows discusses how the South African Government is trying to recognise and enforce the rights of women in a Muslim marriage, a process that was started by the courts in various cases,⁴⁴⁸ in the context of the topic of family law mediation.

It is submitted that the legislature in this instance is attempting to codify and thereby fully recognise what the courts have started in the cases of *Ryland v Edros*,⁴⁴⁹ *Amod v Multilateral Vehicle Accident Fund*,⁴⁵⁰ *Daniels v Campbell*⁴⁵¹ and *Hassam v Jacobs NO*⁴⁵² by providing for ‘the extension of legal consequences and protection to partners in Muslim marriages’.⁴⁵³ At present, in accordance with religious law, couples married in terms of Muslim law are able to

⁴⁴⁴ Gallinetti (n317) 4-35.

⁴⁴⁵ De Jong (n25) 634.

⁴⁴⁶ De Jong (n25) 634.

⁴⁴⁷ Navsa (n431)115.

⁴⁴⁸ *Ryland v Edros* 1997 (2) SA 690 (C); *Amod v Multilateral Vehicle Accident Fund* 1999 (4) SA 1319 (SCA); *Daniels v Campbell* 2004 (5) SA 331 (CC).

⁴⁴⁹ *Ryland v Edros* (n448).

⁴⁵⁰ *Amod v Multilateral Vehicle Accident Fund* (n448).

⁴⁵¹ *Daniels v Campbell* (n448) (this case dealt with the recognition of a monogamous marriage).

⁴⁵² *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) (this case dealt with the recognition of a polygamous marriage).

⁴⁵³ Boniface (n153) 157. On the drafting process and the main reasons why this Bill has come about see generally Navsa (n431) 113 as this is beyond the focus of this study.

end their marriages by mutual agreement; however in practice the husband is permitted to do so unilaterally (however that discussion is beyond the focus of this study).⁴⁵⁴

Apart from the reform that is brought about by the Children's Act further reform by way of mediation has been suggested for Muslim Marriages. The draft Muslim Marriages Bill⁴⁵⁵ will apply to all Muslim marriages concluded before the promulgation of the proposed legislation unless the parties specifically agree to exclude the same within 36 months of the enactment of the proposed legislation.⁴⁵⁶ The provisions will apply to parties married after the promulgation of the proposed legislation if they specifically agree to same.⁴⁵⁷

According to the proposed legislation, if the provisions apply then the marriage will be recognised by South African law. If the provisions are not applicable, the marriage will then only be recognised in terms of Islamic law.⁴⁵⁸ The reason for mentioning this is that any provisions dealing with mediation or alternate dispute resolution in the Muslim Marriages Bill 2011 will only apply to the marriage where it is recognised in terms of South African law.⁴⁵⁹

Where the Muslim marriage is recognised in terms of South African law, and there is a dispute within the marriage, the draft Bill provides that the couple must attend compulsory mediation.⁴⁶⁰ The dispute must be referred to the Mediation Council before or after instituting the action but before the matter is adjudicated by a court.⁴⁶¹ Where the mediation is successful, the mediation agreement must be submitted to the high court, family court, or divorce court within 45 days of

⁴⁵⁴ N Moosa 'Divorce' in Chapter 3 of *Introduction to Legal Pluralism in South Africa: Part 2* C Rautenbach & NMI Goolam (eds) (2002) 39 70 – 71. Generally, Muslim marriages are ended where the husband proclaims the *talaq* over the wife three times – with or without the wife's consent.

⁴⁵⁵ Draft Muslim Marriages Bill 2011.

⁴⁵⁶ Clause 2(2) South African Law Reform Commission *Project 106 Islamic Marriages and Related Matters Report* 2003; Cronjé & Heaton (n13) 218; Manjoo (n247) 122 – 123. In respect of this section, see generally the chapter on Muslim Marriages in Heaton (n13) 231.

⁴⁵⁷ Clause 2(1) South African Law Reform Commission *Project 106 Islamic Marriages and Related Matters Report* 2003; Cronjé & Heaton (n13) 218; Manjoo (n247) 122 – 123.

⁴⁵⁸ Clauses 2(3) & (5) South African Law Reform Commission *Project 106 Islamic Marriages and Related Matters Report* 2003; Cronjé & Heaton (n13) 218.

⁴⁵⁹ These requirements are mainly found in Clause 5 of the Draft Muslim Marriages Bill 2011; however clauses 6 & 7 contain further provisions. Clauses 1, 3, 4, 8, 9, 10, 11, 12, 13 & 15 provide for the consequences of such a marriage and dissolution of the marriage; Clause 14 makes provision for any regulations, clause 16 deals with the recognition of foreign Muslim marriages; Manjoo (n247) 122 – 125.

⁴⁶⁰ Clause 12 of the Draft Muslim Marriages Bill 2011.

⁴⁶¹ Clause 12(1) of the Draft Muslim Marriages Bill 2011.

finalisation of the mediation.⁴⁶² Where the court is satisfied that such mediation agreement protects the rights or interests of the minor children born of such marriage, then the mediation agreement will be confirmed. Where such mediation is unsuccessful, the matter will be adjudicated on by the court.⁴⁶³

In the 2003 draft Muslim Marriages Bill, the possibility was put forward that a dispute could be subjected to the arbitration process, where the spouses agree, i.e. arbitration is thereby a voluntary process.⁴⁶⁴ This provision would not have applied to civil marriages in terms of the Arbitration Act.⁴⁶⁵ This provision is not found in the draft Muslim Marriages Bill of 2011.

The idea of compulsory mediation may become problematic. Although these arguments have been discussed elsewhere in this study, it is worth repeating the sentiments already expressed.⁴⁶⁶ Firstly, it does not address the problem of unequal power relations that are often present in marriage relationships, i.e. the one spouse is weaker, whether it is financially or other than the other spouse.⁴⁶⁷ Secondly, compulsory mediation is a contradiction in terms, mediation is a voluntary process where the parties agree to relinquish their rights in favour of a settlement and the parties are able to choose their mediator. By making the mediation compulsory the parties are forced to relinquish their rights in favour of a settlement.⁴⁶⁸

⁴⁶² Clause 12(3) of the Draft Muslim Marriages Bill 2011.

⁴⁶³ Clause 12(4) of the Draft Muslim Marriages Bill 2011; Cronjé & Heaton (n13) 221; Manjoo (n247) 125.

⁴⁶⁴ Clause 14 South African Law Reform Commission *Project 106 Islamic Marriages and Related Matters Report* 2003; Manjoo (n247) 125; Cronjé & Heaton (n13) 221. The arbitration award from the arbitrator would have been binding on the spouses and there would have been no need for review by the court, in so far as it does not affect the rights of minor children and/or a person's status. Where children and/or a person's status were affected, the award would not be binding unless it had been confirmed by the high court, family court, or divorce court. Furthermore, the court has the power of review in respect of any award made that involves property disputes, that affects the rights or interests of minor children and/or a person's status. Clauses 14(1) & 14(3) – (5) South African Law Reform Commission *Project 106 Islamic Marriages and Related Matters Report* 2003; Cronjé & Heaton (n13) 221.

⁴⁶⁵ Section 2 of the Arbitration Act 42 of 1965; also discussed earlier in the Definitions Chapter of the study. It is submitted that this would have been a radical step in that it would have begun to allow matrimonial matters to be arbitrated on.

⁴⁶⁶ These sentiments were discussed in the Introduction to the thesis, under the 'Concept of mediation'.

⁴⁶⁷ Manjoo (n247) 126.

⁴⁶⁸ Manjoo (n247) 126. In contrast De Jong (n15) at page 37 suggests that all parties considering a divorce should attend compulsory mediation. The reason given is for the many beneficial effects that mediation has between the parties – as was discussed in the Definitions chapter. See also Bridge (n7) 239.

A further problem with the draft Bill is that it deals with persons involved this form of marriage differently (in terms of the proprietary consequences of the marriage, divorce rules and procedures, maintenance of spouses and custody of children) than to spouses in civil marriages. (An example is that civil law marriages are automatically in-community of property and Muslim marriages subjected to the draft Bill are automatically out-of-community of property. This works to the disadvantage of a spouse who does not work outside of the home.)⁴⁶⁹

Another possible problem with compulsory mediation is that people or institutions that are not necessarily sympathetic to the problems faced by Muslim women, may be put in place to deal with the mediation between the divorcing couple.⁴⁷⁰

The legislature, in the new draft Muslim Marriages Bill 2011, envisages that mediation is a compulsory first step where the marriage relationship has broken down. It is submitted that if the legislature sets out the possibility of one type of marriage being subjected to the mediation process, should it not consider allowing all types of marriage (civil, customary, or other) also to be subjected to a similar process? Alternatively, bring about legislation that encourages mediation to be more widely available – whether it be compulsory or voluntarily – where a marriage breaks down.⁴⁷¹

A few of the positives and negatives regarding service delivery of family dispute resolution have already been outlined in the previous sections of this chapter. The following section discusses mediation as it is catered for in South Africa at present. This section will discuss private as well as community-based mediation services that are currently offered to the public.

8 Mediation services offered in South Africa today

The following section will look at the mediation services offered in South Africa at present. There are various types of organisations that offer mediation services, i.e. private mediation

⁴⁶⁹ Manjoo (n247) 126.

⁴⁷⁰ Navsa (n431) 117.

⁴⁷¹ The legislature, in respect of the Children's Act 38 of 2005 has encouraged that mediation be used in respect of matters concerning children. These matters do not necessarily only come about at the breakdown of a marriage. Provisions need to be made that deal specifically with the breakdown of a marriage where there are only the spouses involved.

services right through to community-based organisations and government organisations, such as the family advocate. The family advocate has been offering mediation services in terms of the Mediation in Certain Divorce Matters Act. These mediation sessions ‘focus on certain children’s issues.’⁴⁷²

It is important to note, as is often mentioned in the Children’s Act and as can be seen from the aforementioned, that certain matters are to be mediated by the family advocate, a social worker, a social service professional, or other suitably qualified person or organisation, a lay-forum, which includes a traditional authority.⁴⁷³

The Children’s Act further mentions that a suitably qualified person must be the mediator. What needs to be set out is: who is a suitably qualified person? It is likely that the legislature is referring to someone other than a family advocate who has obtained a suitable degree, diploma, or other qualification from a university, college for advanced education or other tertiary institution.⁴⁷⁴ De Jong suggests that a suitably qualified person is someone who has a degree, diploma or other qualification from an institution offering higher education (i.e. a university or technical college). This may further include someone who has undergone mediation training.⁴⁷⁵ A suitably qualified person may be a lawyer or an attorney or a psychologist or social worker who has undergone the requisite training that is endorsed by one of the mediation organisations such as SAAM (the South African Association of Mediators in Divorce and Family Matters – based in Gauteng), MISA (the Mediation Institute of South Africa – based in KwaZulu-Natal), FAMAC (the Family Mediators Association of the Cape – based in the Western Cape) or a programme from the umbrella body SANCOM (South African National Council of Mediators).⁴⁷⁶ They may be affiliated to one of these associations, but that is not a requirement.⁴⁷⁷ The mediators will either charge professional fees for their services rendered, ‘individually or as an interdisciplinary team.’⁴⁷⁸

⁴⁷² De Jong (n70) 528.

⁴⁷³ Sections 49, 70 and 71 of the Children’s Act 38 of 2005; De Jong (n25) 638.

⁴⁷⁴ De Jong (n25) 638.

⁴⁷⁵ De Jong (n25) 638.

⁴⁷⁶ De Jong (n25) 638; De Jong (n70) 528.

⁴⁷⁷ De Jong (n70) 528.

⁴⁷⁸ De Jong (n70) 528.

As part of their training, mediators are required (before joining an organisation as a professional mediator) to have obtained 40 classroom hours of mediation experience. It has been suggested that these training courses should focus on the fundamental aspects of family mediation, the different forms that family mediation may take, and the actual process which includes the different techniques and strategies that may be employed by the mediator under the various circumstances.⁴⁷⁹ De Jong further suggests that the issues of multiculturalism and family violence should be focussed on during the training sessions.⁴⁸⁰ De Jong cautions that it is impossible to cover all the topics in one 40 hour training session and so suggests that the participants should return for annual training in order to further develop their skills in the field of family mediation.⁴⁸¹

It is submitted, based on the above, that the family advocate is not the only suitably qualified person that offers mediation services in respect of family matters.⁴⁸² A mediator may be a person trained as an attorney or advocate or psychologist who has undergone the requisite training, as discussed above.⁴⁸³

As mentioned above, where the Children's Act states that a traditional authority may be used to mediate the dispute between the parties, this may include community-based and non-governmental organisations or institutions such as legal aid advice centres of non-government organisations,⁴⁸⁴ street committees, community courts, community-based advice centres (such as

⁴⁷⁹ De Jong (n25) 638 – 639; De Jong (n70) 528.

⁴⁸⁰ De Jong (n25) 639; Moodley (n8) 51.

⁴⁸¹ De Jong (n25) 639.

⁴⁸² See generally Glasser (n50) 74.

⁴⁸³ On the webpage of the Family Mediator's Association of the Cape (or FAMAC), there is a link to a list of mediators which will then show a person where there are possible mediator's in their area. These lists also show the profession that each mediator has chosen (i.e. attorney, social worker etc) and provides telephone numbers. It also allows a person to click on the mediator's name and he/she will be able to receive a full list of details and the possibility to contact the mediator via the webpage by downloading the mediator's information as a 'vCard'. (See <http://www.famac.co.za/>, accessed 6 September 2011.) There is a similar link on the South African Association of Mediators webpage (see <http://www.saam.org.za/>, accessed 6 September 2011). On the Ad Idem webpage the disputing parties will need to contact the offices in order to receive the details of a mediator to deal with their issue (see <http://www.adidem.co.za/home/> and <http://www.adidem.co.za/home/index.php?ipkContentID=13>, accessed on 6 September 2011).

⁴⁸⁴ Families South Africa (or FAMSA) is a non-government based organisation that offers a holistic approach in respect of the family, i.e. it offers pre-marriage counselling, as well as counselling for those couples who are starting a family over and above the divorce mediation services that it offers (see <http://www.famsa.org.za/services.asp>, accessed 6 September 2011). In this instance conflicting parties wishing to use these services will need to contact

the access-to-justice initiative such as the People's Family Law Centre in Cape Town), and traditional leaders.⁴⁸⁵ An example of a community-based organisation is FAMSA (Families South Africa) and Family Life. These non-government organisations either offer mediation services free of charge, or may require the parties to limited fee for such services.⁴⁸⁶ The idea is to assist the 'indigenous or poorer' members of society.⁴⁸⁷ Families may receive limited assistance from the Legal Aid Board and legal aid clinics at universities regarding the options available in the form of mediation and alternatives to the divorce process.⁴⁸⁸ De Jong points out that these services are popular with the majority of South Africans because they are 'accessible and responsive to community concerns'.⁴⁸⁹

Mediation may be offered in both the private and public sectors.⁴⁹⁰ Each organisation generally gives an indication on their website of what qualifications people need to meet in order to work as a family mediator.

De Jong suggests that although mediation should be offered in the private and public spheres, and that a comprehensive approach should be developed, where such an approach is taken, all mediators should be accredited by a national regulatory body. She suggests that such a task could be taken over by SANCOM. De Jong sets out the following requirements for accreditation:⁴⁹¹

'(i) basic training in family mediation of at least forty hours; (ii) sufficient experience in family mediation, or in lieu thereof, mentoring and supervised opportunities to be arranged for less experienced mediators; (iii) ongoing training, which should include refresher and more advanced courses; and (iv) regular engagement in self-assessment and participation in programmes of peer consultation.'

De Jong further makes suggestions as to what the basic family mediation training course should include.⁴⁹²

their local office to find out who they will be able to approach, alternatively who will be assigned to their matter (see <http://www.famsa.org.za/contact.asp>, accessed 6 September 2011).

⁴⁸⁵ De Jong (n25) 638; Heaton (n13) 188 at fn 35; Cronjé & Heaton (n13) 183 at fn 14 and 184 at fn 17.

⁴⁸⁶ De Jong (n70) 528.

⁴⁸⁷ De Jong (n70) 528.

⁴⁸⁸ Cronjé & Heaton (n13) 183 at footnote 14 and 184 at footnote 17.

⁴⁸⁹ De Jong (n70) 528.

⁴⁹⁰ De Jong (n25) 638.

⁴⁹¹ De Jong (n70) 529.

⁴⁹² De Jong (n70) 530.

‘(i) family and child development; (ii) the impact of family conflict on parents, children and other participants; (iii) family law and divorce procedures; (iv) the fundamental aspects of family mediation; (v) the mediation process, with specific reference to the techniques and strategies to be used by mediators; (vi) the ways in which the suitability of family disputes for mediation can be assessed; (vii) family finances and community resources; (viii) issues like multiculturalism and family violence or abuse.’

She warns that the accreditation and requirements for mediators should not be too stringent, so as not to exclude those who do not possess a diploma or degree in law or human sciences. The reason is that there would be a loss of possible mediators who speak the indigenous languages.⁴⁹³

A problem in respect of private mediation services is that very few people actually know about them and only those who can afford these services actually make use thereof.⁴⁹⁴ Although these services are offered on a small scale, they have proven to deliver excellent results.

The recommendation by the Hoexter Commission that a fully functional family court be established that uses a more inquisitorial approach, and that this should court offer mediation services, never went beyond the drawing board due to financial and other constraints.⁴⁹⁵ Mediation, as envisaged by the Hoexter Commission, is only reserved for those who can afford to attend private mediation.⁴⁹⁶

A problem with private mediation services is that they are unregulated by the state.⁴⁹⁷ To curb this problem the state will need to regulate private mediation, by including it into the formal legal system.

De Jong argues that South Africa is often classed as a third world country and as such does not have the resources to provide state-funded mediation for the entire populace.⁴⁹⁸ In this respect it is submitted that where the parties must attend mandatory mediation sessions in terms of the

⁴⁹³ De Jong (n70) 530.

⁴⁹⁴ De Jong (n70) 469 – 470; De Jong (n70) 529.

⁴⁹⁵ Heaton (n13) 184; Cronjé & Heaton (n13) 182.

⁴⁹⁶ Heaton (n13) 186; Cronjé & Heaton (n13) 184; De Jong (n15) 43. See the comments made regarding the family advocate in sub-heading 3.1 above.

⁴⁹⁷ De Jong (n15) 43.

⁴⁹⁸ De Jong (n25) 638.

Children's Act,⁴⁹⁹ this may be done by private and community-based mediation organisations or institutions. This would offer the government a relatively cheap option in providing mediation services country-wide. But, where necessary, due to the financial constraints of the parties or the language barriers, there should be state-funded mediation service available for the parties to use.⁵⁰⁰

Another problem faced by family advocates in South Africa today, as mentioned in the section discussing the family advocate, is that the family advocate simply does not have enough resources in order to deal with the extra workload that is created by the Children's Act's various provisions that require mediation.⁵⁰¹ Furthermore, community-based services are also understaffed and do not have enough funds to carry out their functions.⁵⁰² De Jong further warns that South Africa must be careful so as not to allow two competing mediation systems to develop.⁵⁰³

Most mediation services provide services in order to mediate around the issue of marriage (i.e. whether it is a divorce, or it is a civil or religious marriage), customary unions, a partnership agreement governing a personal relationship, or where the parties are cohabiting together.⁵⁰⁴

To make people more aware of the availability of mediation services, it has been suggested that attorneys should inform their clients of what is available.⁵⁰⁵ In *S v J*, Lewis JA gave a stern warning to attorneys and legal practitioners that where children are concerned, an approach more conducive to conciliation and problem solving in terms of section 6(4) of the Children's Act should be used, instead of litigation.⁵⁰⁶ In this regard, it is submitted that legal practitioners will

⁴⁹⁹ For example mediation is compulsory and must be attended to before approaching the court in terms of sections 21 and 33 of the Children's Act 38 of 2005.

⁵⁰⁰ De Jong (n25) 638.

⁵⁰¹ De Jong (n70) 469; Glasser (n50) 84 – 86; De Jong (n70) 529.

⁵⁰² De Jong (n70) 529.

⁵⁰³ De Jong (n70) 529.

⁵⁰⁴ Divorce Mediation available at <http://www.divorcemediations.co.za/> accessed on 16 November 2010; FAMSA (Families South Africa) available at <http://www.famsa.org.za/> accessed on 16 November 2010; Family Life Centre: Johannesburg available at <http://familylife.co.za/> accessed on 16 November 2010; FAMAC (Family Mediator's Association of the Cape) available at <http://www.famac.co.za/> accessed on 16 November 2010; SAAM (South African Association of Mediators) available at <http://www.saam.org.za/> accessed on 16 November 2010.

⁵⁰⁵ Goldberg (n6) 287. Also see the warning provided by the court in *S v J* (n35) at para [54].

⁵⁰⁶ *S v J* (n35) at para [54].

need to take it upon themselves to inform their clients of the option of mediation.⁵⁰⁷ Furthermore, various awareness campaigns could be started to educate the public about mediation and the benefits it offers.⁵⁰⁸

9 Conclusion

Divorce involves a change of status and as such is associated with the courts. Currently, most divorces are undefended or uncontested, meaning only one person appears in court on the day of the divorce and confirms that the parties have come to an agreement or rather a settlement between them and this often forms the basis of the court order.⁵⁰⁹ The agreement or settlement will include matters concerning the property and financial arrangements between the parties as well as the arrangements regarding the minor child or children. Parties are still required to appear in court because the high court is the upper guardian of children and for this reason will want to know what the arrangements are in respect of the minor child or children.⁵¹⁰ This makes divorce mediation, rightly or wrongly, associated with the legal or judicial process.⁵¹¹ Thus individuals considering the use of divorce mediation as a means of proceeding to settle the issues between them may not wish to proceed without an attorney.⁵¹² It can be summed up that there are writers who see mediation as the corollary of no-fault divorce.⁵¹³

South Africa has made provision for the incorporation of family or divorce mediation within its legal framework. There are sections within the Children's Act that require the parties to attend mediation as the first compulsory step before either of them is able to apply to the courts for certain of relief.⁵¹⁴ There are also sections which give the courts the discretion to compel the parties to attend mediation.⁵¹⁵ In addition, there are sections that merely encourage the parties to attend mediation.⁵¹⁶ In terms of the Hague Convention and the views of the international community, an amicable solution should be found with regards to the matters that arise out of

⁵⁰⁷ *MB v NB* (n15) para [59] – [60].

⁵⁰⁸ *De Jong* (n70) 531.

⁵⁰⁹ *Mowatt* (n15) 290.

⁵¹⁰ Section 6(1) of the Divorce Act 70 of 1979; *Mowatt* (n15) 297.

⁵¹¹ *Mowatt* (n15) 297.

⁵¹² *Mowatt* (n15) 297; *Scott-MacNab* (n27) 717.

⁵¹³ *Scott-MacNab* (n27) 713.

⁵¹⁴ Sections 21 and 33 of the Children's Act 38 of 2005.

⁵¹⁵ Sections 49, 70, 71 and 155(8) of the Children's Act 38 of 2005.

⁵¹⁶ Sections 22, 30(3), 234(1) and 292 of the Children's Act 38 of 2005.

child abduction,⁵¹⁷ but, as pointed out, South Africa has no specific legislative instrument requiring that such a measure be taken.⁵¹⁸ South Africa also has organisations that offer mediation services. There are private forums as well as public forums such as street communities and non-government organisations that offer mediation services to the general public. There is also the Office of the Family Advocate, who is also able to mediate between disputing parties, specifically with respect to matters involving children.⁵¹⁹

Currently the parties have been warned that they will be expected to take heed of section 6(4) of the Children's Act, in that they must choose a process that is not adversarial in nature, but rather akin to problem-solving in order to come to a solution.⁵²⁰ It is the ideal forum for allowing child participation, as required by the Children's Act with regards to matters that concern the child and to ensure that the best interests of the child are of paramount importance in all matters concerning him or her.⁵²¹

⁵¹⁷ T Kruger (n387) 113 – 114.

⁵¹⁸ The Regulations Relating to Children's Courts and International Child Abduction as published in *Government Gazette* No 33067 dated 31 March 2010; Regulation Gazette No 250.

⁵¹⁹ Glasser (n50) 74.

⁵²⁰ *S v J* (n35) at para [54].

⁵²¹ Section 10 of the Children's Act 38 of 2005.

Chapter 3: Australian Family Law

1 Introduction

On 5 January 1976, the Family Law Act¹ replaced the Matrimonial Causes Act.² This was a major step in Australian Family Law, as it included several significant changes, and they are broadly in line with the developments that have taken place in South Africa:

1. The first of these changes involved changing from a multiple fault-based divorce system to a single no-fault divorce system, i.e. the ground for divorce was the irretrievable breakdown of the marriage.³
2. The second change involved the establishment of the Australian Family Courts on 5 January 1976.⁴ It was decided that there needed to be a separate specialist court as the existing state courts were deemed to be unsuitable for hearing family matters. Furthermore, there was much demand for a more ‘user-friendly’ environment for family matters and a need for specialist social science experts, such as psychologists, social workers, and counsellors, to assist divorcing couples and families.⁵

The family court was created to be a superior court of record and consists of a Chief Justice, Deputy Chief Justice and other justices.⁶ The family courts were initially established in all the states, except in Western Australia.⁷ The family courts have a

¹ Family Law Act 53 of 1975 (Cth).

² Matrimonial Causes Act 32 of 1959 (Cth).

³ Section 48(1) of the Family Law Act 53 of 1975. In order to prove the ground of irretrievable breakdown, the divorcing parties must have lived apart for at least a continuous period of twelve months (Section 48(2) of the Family Law Act 53 of 1975; L Young & G Monahan *Family Law in Australia* (7ed) (2009) 30; M De Jong ‘Divorce Mediation in Australia – valuable lessons for family law reform in South Africa’ (2007) 40 *CILSA* 280 281 – 282). Furthermore the Family Law Act provides that fault is no longer a consideration with regards to the financial consequences and the welfare of the children (Sections 68, 72 and 80 of the Family Law Act 53 of 1975; M De Jong ‘Divorce Mediation in Australia – valuable lessons for family law reform in South Africa’ (2007) 40 *CILSA* 280 281 – 282). It is submitted that as fault is no longer a ground to prove a divorce, this is not focused on in mediation sessions.

⁴ Section 21(1) of the Family Law Act 53 of 1975.

⁵ Young & Monahan (n3) 31; De Jong (n3) 281 – 282.

⁶ Sections 20 and 21 of the Family Law Act 53 of 1975; Young & Monahan (n3) 32; M De Jong (n3) 282.

⁷ Young & Monahan (n3) 33; De Jong (n3) 282. Western Australia has its own family court system which has jurisdiction under the Family Law Act 53 of 1975; the reason for this is that, unlike the other states, Western Australia has not referred all its powers to the Commonwealth of Australia.

General Division and an Appeal Division; these include an original as well as appellate jurisdiction.⁸

The family court places an emphasis on reconciliation and counselling, as it offers counselling and mediation services in conjunction with the normal court procedures.⁹ In this regard counselling and welfare staff as well as family consultants assist the divorcing and/or separating parties and judges.¹⁰ The court procedures were reduced and undue formalities were done away with.¹¹ An example of this is that judges and counsel were not expected to robe for court.¹²

3. The Family Law Act placed an emphasis on the needs and interests of minor children before all other considerations in divorce and family disputes, namely, before the needs and interests of the parents.¹³ This is known as the ‘paramourty principle’.¹⁴ The impact that this has had on mediation is that it has become more child focused – depending on whether the separating or divorcing parties have children.¹⁵

Furthermore, during December 1990, Australia ratified the United Nations Convention on the Rights and Welfare of the Child.¹⁶ In Australia, the ratification of the Convention impacted on the minor child’s rights to be heard in terms of matters in Part VII of the Family Law Act.¹⁷ This means that the child has a right to be heard during mediation proceedings as well as during court proceedings. In Australia, this right to be heard is exercised through the use of the independent

⁸ Young & Monahan (n3) 32.

⁹ De Jong (n3) 283; Young & Monahan (n3) 33.

¹⁰ Young & Monahan (n3) 33.

¹¹ Young & Monahan (n3) 33; M De Jong (n3) 283.

¹² Section 97(1) of the Family Law Act 53 of 1975.

¹³ Sections 60B and 60CA of the Family Law Act; Young & Monahan (n3) 45 – 46, 257; De Jong (n3) 283.

¹⁴ See for a general discussion J Crowe & L Toohey ‘From good intentions to ethical outcomes: the paramountcy of children’s interests in the Family Law Act.’ (2009) 33 *Melbourne University Law Review* 391; a further discussion of the paramountcy principle will be set out later in this chapter.

¹⁵ Crowe & Toohey (n14) 404; JE McIntosh, Hon D Bryant & K Murray ‘Evidence of a different nature: the child-responsive and less adversarial initiatives of the Family Court of Australia’ in *Australian Family Law in Context: Commentary & Materials* 4ed P Parkinson (ed) (2009) 246. However, compare sections 60CA and 63D of the Family Law Act.

¹⁶ Young & Monahan (n3) 45.

¹⁷ Part VII of the Family Law Act 53 of 1975 deals specifically with children and includes aspects such as parental responsibility and parenting plans. Young & Monahan (n3) 251.

lawyer during divorce and/or separation proceedings.¹⁸ The independent lawyer is discussed under the heading ‘Legislative Framework’ further on in this study.

The focus in this chapter is on family law mediation in Australian law in the light of these changes.

This chapter will set out the legislative framework of family dispute resolution (or mediation) under the headings of compulsory mediation, court-compelled mediation, etc., so as to explain the different requirements for each. Also a discussion will follow on who may act as a dispute resolution practitioner. Furthermore, the view of the Australian Courts on the matter of family dispute resolution (or mediation) will be discussed later in this chapter and the possibility of judicial review will be considered. The obligations of the attorney to inform his or her clients about family dispute resolution will also be discussed. The concept of the best interests of the child will be discussed with respect to its impact on the mediation process. The chapter will also discuss how mediation affects domestic partnerships (referred to in the Act as ‘de facto relationships’). Furthermore, this chapter will discuss how mediation is included within Aboriginal or Torres Strait islander family matters. Finally the chapter will discuss the mediation services presently offered in Australia.

Before proceeding, it is worth setting out the definition of the family in Australian law, as this amounts to the starting point of family law mediation. Young and Monahan describe the family as follows: ‘[a family] is usually formed by a man and a woman living together and bringing into [the world] and rearing one or more children to adolescence or adulthood’.¹⁹ This definition has had to adapt to the modern Australian society, as it not only now includes families based on marriage,²⁰ but also de facto relationships,²¹ as well as same-sex marriages.²²

¹⁸ See Young & Monahan (n3) 296 – 297. See also M Carnelley ‘The right to legal representation at state expense for children in care and contact disputes – A discussion of the South African legal position with lessons from Australia’ (2010) *Obiter* 638.

¹⁹ Young & Monahan (n3) 16.

²⁰ See Young & Monahan (n3) 18 – 19.

²¹ See Young & Monahan (n3) 19 – 23.

²² See Young & Monahan (n3) 23 – 26.

The following section of this chapter contains a discussion of the legislative framework that provides for family dispute resolution and, in some cases, specifically for mediation.

2 Legislative Framework

2.1 Introduction/Background

The Australian Legislature has evinced its commitment to mediation and alternative dispute resolution in family law by providing the parties with various alternatives to the litigation process. This has been achieved with the creation of various pieces of legislation,²³ rules²⁴ and regulations²⁵ and many amendments to the existing legislation.²⁶ The Australian Legislature has not merely provided these alternatives but also encourages parties to use them. The reason for this is that Australia ratified the United Nations Convention on the Rights of the Child²⁷ in December 1990²⁸ and the Report of the Joint Committee on Certain Aspects of the Operation and Interpretation of the Family Law in 1992.²⁹ These two events led to what follows.

During 2006, the Family Law Reform Act 1995³⁰ came into operation and amended the Family Law Act 1975³¹ in two fundamental aspects.³² The first of these changes was the inclusion of what is known as ‘primary dispute resolution’ (now known as ‘family dispute resolution’). These provisions were included into and are thus found in Part III of the Family Law Act.³³ In Part IIIA there is a subdivision that places an obligation on legal representatives to advise clients of alternative methods of dispute resolution or ‘family dispute resolution’.³⁴

²³ Federal Magistrates Act 193 of 1999.

²⁴ Family Law Rules 1984, these were later replaced by the Family Law Rules 2004.

²⁵ The Family Law Regulations 1984 and the Family Law (Dispute Resolution Practitioners) Regulations 2008.

²⁶ The Family Law Reform Act 187 of 1995 and the Family Law Amendment (Shared Parental Responsibility) Act 46 of 2005 extensively amended the Family Law Act 53 of 1975. The Family Law Amendment (Parental Responsibility) Act amended the Family Law Act by making it a requirement for parents who are separating, before they take the matter to court, they are required to have entered into some sort of negotiations in order to resolve any disagreements regarding the minor children. In this way it introduced mandatory mediation for all parenting matters.

²⁷ Available at <http://www2.ohchr.org/english/law/crc.htm> accessed on 21 October 2010.

²⁸ Fourth Report under the Convention on the Rights of the Child, Australia, October 2008, 3, available at <http://www.unicef.com.au/LinkClick.aspx?fileticket=ZlYJsPEEBol=&tabid=445> accessed on 22 October 2010.

²⁹ Young & Monahan (n3) 45.

³⁰ Family Law Reform Act 187 of 1995.

³¹ Family Law Act 53 of 1975.

³² De Jong (n3) 287.

³³ Family Law Act 53 of 1975.

³⁴ Section 12E of Division IIIA of the Family Law Act 53 of 1975; M De Jong ‘International trends in family mediation – are we still on track?’ (2008) 71 *THRHR* 454 458.

The second of these changes involved an ultimate change in terminology. This in turn led to a stronger recognition of children's rights and the best interests of the child and placed an emphasis on parental responsibilities.³⁵

What follows is introductory or background information regarding the various pieces of legislation and rules that have an impact on family dispute resolution (some specifically refer to mediation). Some of the legislative instruments such as the Family Law Rules 2004 and the Family Law Regulations of 1984 and 2008 will only be discussed in this section and not under the headings of compulsory mediation or court-compelled mediation, because these legislative instruments provide further clarity to the Family Law Act. The reason for this is that the relevant sections of the legislative instruments that will be discussed shall be discussed under the headings of compulsory mediation and court compelled-mediation – similarly to the South African chapter. Before discussing the provisions made for compulsory and court-compelled mediation, there will be a discussion on the role of the independent lawyer (similar to the family advocate, this will be explained later in this chapter) and there will be a discussion of the family dispute resolution practitioners.

The first legislative instrument that shall be discussed is the Family Law Act, thereafter the Federal Magistrates Act,³⁶ followed by the Family Law Rules 2004 and the Family Law Regulations 1984 and Family Law (Dispute Resolution Practitioners) Regulations 2008.

2.1.1 Family Law Act 53 of 1975

In general, mediation in Australia may be attended by the parties to a divorce action voluntarily, in terms of a court order, or in terms of an existing contractual agreement.³⁷ In the Family Law Act,³⁸ dispute resolution is dealt with under Part II. Part II³⁹ specifically refers to 'Non-Court

³⁵ Young & Monahan (n3) 45; De Jong (n3) 287.

³⁶ Federal Magistrates Act 193 of 1999,

³⁷ Young & Monahan (n3) 51.

³⁸ Family Law Act 53 of 1975.

³⁹ Family Law Act 53 of 1975.

Based Family Services' being either family counselling or family dispute resolution.⁴⁰ Since 2006⁴¹ direct references to mediation have been removed from the Family Law Act⁴² and merely renamed 'family dispute resolution' or 'FDR'.⁴³

Mediation or FDR is used in family matters, especially where there are parenting disputes.⁴⁴ In the Family Law Act, FDR is defined as follows:

'Family Dispute Resolution is a process (other than a judicial process):

- (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- (b) in which the practitioner is independent of all the parties involved in the process.⁴⁵

The Family Law Act⁴⁶ further requires that when the parties attend the family dispute resolution sessions, they must make a 'genuine effort' in terms of section 60I(1).⁴⁷ The Family Law Act,⁴⁸ however, does not define what is meant by a 'genuine effort'.⁴⁹ A definition that has been suggested by Astor⁵⁰ is that a genuine effort comprises the following elements: (a) the parties intending to divorce have attended the family dispute resolution sessions; (b) each party must be prepared to consider options put forward for a possible solution to the dispute by either the other party or by the family dispute resolution practitioner; (c) each party must be willing to put forward options for a possible solution to the dispute; and (d) where this is necessary, the parties must show an interest on focusing on the needs and interest of the children to the best of their ability.⁵¹

⁴⁰ In Divisions 2 and 3 of the Family Law Act 53 of 1975; T Altobeli & I Seriser *Practising Family Law* 2ed (2009) 165.

⁴¹ I.e. the year in which the Family Law Reform Act 187 of 1995 came into operation.

⁴² Family Law Act 53 of 1975.

⁴³ Young & Monahan (n3) 54; T Altobeli & I Seriser (n40) 166.

⁴⁴ Young & Monahan (n3) 55.

⁴⁵ Section 10F of the Family Law Act 53 of 1975; Young & Monahan (n3) 55.

⁴⁶ Family Law Act 53 of 1975.

⁴⁷ Family Law Act 53 of 1975; see *Martin v Harding* [2007] FamCA 1040 at para [8]; H Astor 'Genuine effort in family dispute resolution' (2010) 16 *Family Relationships Quarterly* 3.

⁴⁸ Family Law Act 53 of 1975.

⁴⁹ H Astor 'Making a "genuine effort" in family dispute resolution: what does it mean?' in *Australian Family Law in Context: Commentary & Materials* 4ed P Parkinson (ed) (2009) 234.

⁵⁰ Astor (n49) 235.

⁵¹ Astor (n49) 235.

In terms of ‘willingness’ it has been suggested that the parties are not required to continually compromise their positions, but must at least show that they have thought about the points or suggestions put forward by the other party.⁵² It is important that the parties during the process and throughout the proceedings, show good faith.⁵³

2.1.2 Federal Magistrates Act 193 of 1999

Further mention of family dispute resolution (or mediation) is made in the Federal Magistrates Act 193 of 1999, which commenced on 23 December 1999. This Act created the Federal Magistrates Court or the Federal Magistrates Service,⁵⁴ which deals with less complex matters relating to divorce or the separation of parties.⁵⁵ These matters were originally heard by the family court or other federal courts in Australia.⁵⁶

The Federal Magistrates Court or Service has the jurisdiction to hear matters that include family law and child support, administrative law, bankruptcy law and consumer protection law.⁵⁷

With the enactment of the Federal Magistrates Court or Service, the Australian Government was aiming to make the process a lot less formal and less protracted, where this will reduce the waiting time, make the divorce more efficient and cost effective.⁵⁸ It is submitted that the divorce process has been simplified and has thus become a lot more ‘user friendly’.⁵⁹

2.1.3 The Family Law Rules 2004

The Family Law Rules 2004⁶⁰ came into operation on 29 March 2004.⁶¹ They are made in terms of section 123 of the Family Law Act 53 of 1975⁶² and repealed the ‘Old Rules’, namely the Family Law Rules 1984. The aim of the rules is to ensure that family law matters are dealt with

⁵² Astor (n49) 235.

⁵³ *Aiton v Transfield* [1999] NSWSC 55020 of 1999; Astor (n49) 235.

⁵⁴ Sections 4 and 8 of the Federal Magistrates Act 193 of 1999; De Jong (n3) 293.

⁵⁵ De Jong (n3) 293 – 294.

⁵⁶ De Jong (n3) 294.

⁵⁷ Section 10 of the Federal Magistrates Act 193 of 1999; De Jong (n3) 294.

⁵⁸ Section 42 of the Federal Magistrates Act 193 of 1999.

⁵⁹ De Jong (n3) 295.

⁶⁰ Statutory Rules 2003 No. 375.

⁶¹ Rule 1.02 of the Family Law Rules 2004.

⁶² Altobeli & Seriser (n40) 168.

in a just, quick, or efficient and cost-effective manner.⁶³ In other words, the Rules⁶⁴ are to provide for certainty on how the Family Law Act⁶⁵ is put into practice and the procedure to be used when dealing with matters before the Family Law Court.⁶⁶ The Rules⁶⁷ are divided into two volumes. Volume 1 contains Chapters 1 to 26 (i.e. Rule 1.01 to Rule 26.31).⁶⁸ These rules will be discussed later in the study, under the various headings such as compulsory mediation etc.⁶⁹ Volume 2 on the other hand contains Schedules 1 to 6, the Dictionary and the Notes.⁷⁰

Schedule 1 of the Family Law Rules⁷¹ sets out how to initiate a pre-action procedure in terms of a financial matter (this includes property settlement and maintenance)⁷² and parenting cases.⁷³ Pre-action procedures include mediation.⁷⁴

Both Parts 1 (financial matters) and 2 (parenting cases)⁷⁵ have similar wording and requirements in respect of compliance,⁷⁶ how to go about pre-action procedures,⁷⁷ disclosure of information and correspondence between the divorcing parties,⁷⁸ how to deal with expert witnesses⁷⁹ and the obligations of lawyers or attorneys in the entire process⁸⁰ and as such shall be dealt with together. Certain rules will be set out in what follows and others will be dealt with later on in the study under the various headings, such as compulsory mediation etc.⁸¹

⁶³ Rule 1.04 of the Family Law Rules 2004; De Jong (n3) 296.

⁶⁴ Family Law Rules 2004.

⁶⁵ Family Law Act 53 of 1975.

⁶⁶ Altobeli & Seriser (n40) 168.

⁶⁷ Family Law Rules 2004.

⁶⁸ See generally the title page of the Family Law Rules 2004.

⁶⁹ Such as Rule 1.05 which deals with compulsory mediation, Rule 1.06 requires that the court actively promotes the main purpose of the Family Law Rules 2004 and actively manage each individual case; Rules 1.04 and 1.08 require that the parties to the family dispute are required to achieve the main purpose of the Family Law Rules and set out the obligations or responsibilities that must be met in order to achieve the main purpose.

⁷⁰ See generally the title page of the Family Law Rules 2004.

⁷¹ Family Law Rules 2004.

⁷² Part 1 of Schedule 1 of the Family Law Rules 2004.

⁷³ Part 2 of Schedule 1 of the Family Law Rules 2004.

⁷⁴ Such as Rule 1.05 which deals with compulsory mediation.

⁷⁵ Schedule 1 of the Family Law Rules 2004.

⁷⁶ Rule 2 of Part 1 and Rule 2 of Part 2 of the Family Law Rules 2004.

⁷⁷ Rule 3 of Part 1 and Rule 3 of Part 2 of the Family Law Rules 2004.

⁷⁸ Rule 4 of Part 1 and Rule 4 of Part 2 of the Family Law Rules 2004.

⁷⁹ Rule 5 of Part 1 and Rule 5 of Part 2 of the Family Law Rules 2004.

⁸⁰ Rule 6 of Part 1 and Rule 5 of Part 2 of the Family Law Rules 2004.

⁸¹ For example Sub rule 1 of Rule 1 for both Part 1 and 2 of Schedule 1 of the Family Law Rules 2004 deal with compulsory mediation in respect of financial and parenting matters.

Rule 3 of Part 1 and Rule 3 of Part 2⁸² both deal with pre-action procedures. The Rules⁸³ set out how the parties are to attend to the pre-action procedures and any exemptions that may be applicable.⁸⁴

Furthermore the Family Law Rules⁸⁵ set out how correspondence is to be exchanged and deal with the disclosure of documents and information.⁸⁶ The Rule sets out the various requirements that need to be met and states which documents must be disclosed.⁸⁷ It is submitted that this has been included so that the information required by each party in order to come to an agreement is not kept 'secret' or 'hidden' from the other party. It is submitted that the idea is to make the process fair and to allow all parties to be on equal footing.

Rule 5 in both Part 1 and Part 2⁸⁸ deals with expert witnesses who may be required during a pre-action procedure to provide information for a dispute resolution practitioner to come to a decision.

Finally, Rule 6 in both Part 1 and Part 2⁸⁹ sets out how lawyers and legal practitioners are to conduct themselves during the pre-action procedures. The Rule encourages lawyers or legal practitioners to advise clients regarding family dispute resolution or pre-action procedures,⁹⁰ also stating that where lawyers or legal practitioners feel that it is advisable that the client should settle, he or she must be told to do so.⁹¹ It further sets out the lawyer's or legal practitioner's obligations to his or her client in respect of the pre-action procedures.⁹²

Some academics argue that the Family Law Rules 2004 fall short of mandating mediation as the method that must first be taken when deciding on which pre-action procedure should be

⁸² Family Law Rules 2004.

⁸³ Family Law Rules 2004.

⁸⁴ Rule 3 of Part 1 and Rule 3 of Part 2 of Schedule 1 of the Family Law Rules 2004.

⁸⁵ Family Law Rules 2004.

⁸⁶ Rule 4 of Part 1 and Rule 4 of Part 2 of Schedule 1 of the Family Law Rules 2004.

⁸⁷ Rule 4 of Part 1 and Rule 4 of Part 2 of Schedule 1 of the Family Law Rules 2004.

⁸⁸ Family Law Rules 2004.

⁸⁹ Schedule 1 of the Family Law Rules 2004.

⁹⁰ Sub rule 1 of Rule 6 of Part 1 and sub rule 1 of Rule 6 of Part 2 of Schedule 1 of the Family Law Rules 2004.

⁹¹ Sub rule 1 of Rule 6 of Part 1 and sub rule 1 of Rule 6 of Part 2 of Schedule 1 of the Family Law Rules 2004.

⁹² Sub rules 2 – 4 of Rule 6 of Part 1 and sub rules 2 – 4 of Rule 6 of Part 2 of Schedule 1 of the Family Law Rules 2004.

followed.⁹³ Others warn that attorneys and advocates must be careful when considering which method to choose, as negotiating may make matters worse in comparison to mediation, conciliation, and counselling.⁹⁴

Even if the matter is not settled during a mediation session or through another form of family dispute resolution, the costs that have been incurred will not be wasted due to the document exchange process that had to occur during the mediation.⁹⁵ The document exchange process that occurs during the pre-action procedures is exactly the same as that required by the courts. In this way statements and affidavits that are required for the divorce proceedings have already been obtained and the divorce process may continue without any further delay.⁹⁶

A further advantage of the pre-action procedures is that even if the parties may not reach some sort of settlement and the matter proceeds to court, the issues between the parties have at least been narrowed down and, further the needs and interests of all the parties concerned have been established.⁹⁷

In addition to the Family Law Rules,⁹⁸ the Family Law Act⁹⁹ and the Federal Magistrates Act,¹⁰⁰ there are two sets of regulations which have a bearing on family law mediation in Australia. They are briefly as follows:

2.1.4 The Family Law Regulations

The first of these is the Family Law Regulations 1984¹⁰¹ that are made by the Governor-General in terms of section 125 of the Family Law Act.¹⁰² They were established in order to prescribe

⁹³ See generally De Jong (n3) 296 for a full discussion.

⁹⁴ De Jong (n3) 296.

⁹⁵ Altobeli & Seriser (n40) 171.

⁹⁶ Altobeli & Seriser (n40) 171.

⁹⁷ De Jong (n3) 296 – 297.

⁹⁸ Family Law Rules 2004.

⁹⁹ Family Law Act 53 of 1975.

¹⁰⁰ Federal Magistrates Act 193 of 1999.

¹⁰¹ Statutory Rules 1984 No 426 as amended; available on <http://www.scaleplus.law.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/frameLodgmentattachments/3E6BAF72408E6BD4CA257756008092E2> accessed on 23 October 2010.

¹⁰² Family Law Act 53 of 1975.

how certain sections of the Family Law Act¹⁰³ will operate or how they will be carried out.¹⁰⁴ They have a strong focus on arbitration,¹⁰⁵ but this is beyond the scope of this study, as the discussion revolves around mediation in family law. That said, there is relevance with regard to mediation and/or family dispute resolution. The relevant regulations will be discussed later in the study under the relevant headings.

The second set of regulations is the Family Law (Dispute Resolution Practitioners) Regulations 2008.¹⁰⁶ Within this set of regulations there are 4 regulations that are of relevance to this study as they deal with mediation and mediators,¹⁰⁷ namely, regulation 25¹⁰⁸ and regulations 28 to 30.¹⁰⁹ These regulations replace the old regulations that were set out in the Family Law Regulations 1984.¹¹⁰

The following sections deal with the actual sections, rules and regulations that contain provisions that set out family dispute resolution (or mediation) in the Australian legislation. These sections have been divided into ‘categories’ or headings, such as compulsory dispute resolution, court-compelled mediation etc. The first heading briefly looks at the role of the Independent Attorney or Lawyer within the Australian legal system.

2.2 Independent Attorney

In Australia, where the needs of the child need to be protected and looked after in any matter that arises, an independent children’s lawyer is appointed on the child’s behalf by the court.¹¹¹ In

¹⁰³ Family Law Act 53 of 1975.

¹⁰⁴ Altobeli & Seriser (n40) 167.

¹⁰⁵ See generally in this regard Part 5 of the Family Law Regulations 1984, which deals with arbitration; as well as Altobeli & Seriser (n40) 167 – 168.

¹⁰⁶ Family Law (Dispute Resolution Practitioners) Regulations 2008 Select Legislative Instrument 2008 No. 183 as amended.

¹⁰⁷ Young & Monahan (n3) 55.

¹⁰⁸ Family Law (Dispute Resolution Practitioners) Regulations 2008; Young & Monahan (n3) 55. Regulation 25 sets out the factors that a dispute resolution practitioner must consider when deciding whether a matter is suited to family dispute resolution or not.

¹⁰⁹ Family Law (Dispute Resolution Practitioners) Regulations 2008; Young & Monahan (n3) 55. Regulation 28 sets out what information each of the parties must provide before the family dispute resolution proceedings start; regulation 29 sets out the general obligations that are placed on dispute resolution practitioners; and regulation 30 sets out how to deal with a conflict of interest.

¹¹⁰ Young & Monahan (n3) 55.

¹¹¹ Sections 68L – 68M of Division 10 of Part 7 of the Family Law Act 53 of 1975. See generally Carnelley (n18) 654-660.

terms of the applicable sections in the Family Law Act¹¹² the independent lawyer has similar functions to those of the family advocate in South Africa.¹¹³ The independent lawyer will set up reports and specifically look into the child's best interest where this is necessary. There are specific sections that require that an independent lawyer is appointed to protect the best interests of the child, in such a situation.¹¹⁴

The court may appoint an independent children's lawyer on its own initiative¹¹⁵ or on application by the child, an organisation concerned with the welfare of the child or any other person.¹¹⁶

The role of the independent children's lawyer is dealt with in section 68LA of the Family Law Act.¹¹⁷ It sets out the instances when it will apply.¹¹⁸ The Family Law Act also sets out the role of the independent children's lawyer and his or her specific duties.¹¹⁹ The reason for briefly setting out the above is that one of the duties of the independent children's lawyer is to facilitate an agreed resolution to the extent that the arrangement will be to the best interests of the child.¹²⁰ This would assist with mediation on behalf of the child, or where the child participates in the mediation.

Australia in this way has protected the child's right to be heard in all matters concerning him or her.¹²¹ The Family Courts in Australia have appointed an independent children's lawyer for the minor child or children where there has been child abuse, where there is an irreconcilable conflict between the parents, where the child has been isolated from one or both parents, and where a child of 'mature years' expresses strong views about an existing or planned parenting arrangement, or where a child refuses to have contact with one of his or her parents.¹²²

¹¹² Sections 68L – 68M of Division 10 of Part 7 of the Family Law Act 53 of 1975.

¹¹³ The family advocate in South Africa, appointed as such in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

¹¹⁴ For example section 60CD of the Family Law Act 53 of 1975 which sets out how the views of the child may be expressed for the court's information.

¹¹⁵ Section 68L(4)(a) of Division 10 of Part 7 of the Family Law Act 53 of 1975.

¹¹⁶ Section 68L(4)(b) of Division 10 of Part 7 of the Family Law Act 53 of 1975.

¹¹⁷ Section 68LA of Division 10 of Part 7 of the Family Law Act 53 of 1975.

¹¹⁸ Section 68LA(1) of Division 10 of part 7 of the Family Law Act 53 of 1975.

¹¹⁹ Section 68LA(2) – (5) of Division 10 of Part 7 of the Family Law Act 53 of 1975.

¹²⁰ Section 68LA(5)(e) of Division 10 of Part 7 of the Family Law Act 53 of 1975.

¹²¹ Young & Monahan (n3) 296 – 297.

¹²² Young & Monahan (n3) 296.

Provision in the Family Law Act is also made for family dispute resolution practitioners. These are the people that are trained to conduct the family dispute resolution sessions. The following section discusses family dispute resolution practitioners.

2.3 Family Dispute Resolution Practitioners

The Family Law Act sets out the persons who may qualify as a family dispute resolution practitioners.¹²³ The Family Law Act allows a person to act as a family dispute resolution practitioner, who is: accredited as a family dispute resolution practitioner under the Accreditation Rules;¹²⁴ or is acting on behalf of an organisation (an organisation so authorised by the Minister);¹²⁵ or is authorised in terms of section 38BD of the Family Law Act, alternatively under subsection 38R(1A) of the Family Law Act;¹²⁶ or is authorised in terms of section 93D of the Federal Magistrates Act 1999,¹²⁷ alternatively subsection 115(1A) of the Federal Magistrates Act 1999;¹²⁸ or someone who is authorised to act as a family dispute resolution practitioner by the Family Court of a State.¹²⁹

Furthermore, the Family Law Act states that communications made during the process are confidential and may not be disclosed,¹³⁰ but there are instances where the family dispute resolution practitioner may disclose the communications made to him or her. These instances include where the Act states that such disclosure may be required, alternatively where the Act authorises disclosure.¹³¹ Disclosure is required where it is necessary to comply with Commonwealth, State or Territory legislation, etc.¹³² On the other hand, disclosure may take place (i) where consent is given by a person over the age of 18 who made the disclosure or, where the disclosure was made by someone younger than 18, when each person who has parental

¹²³ Section 10G of the Family Law Act 53 of 1975; Young & Monahan (n3) 55.

¹²⁴ Section 10G(1)(a) of the Family Law Act 53 of 1975. These rules are found at section 10A of the Family Law Act 53 of 1975.

¹²⁵ Section 10G(1)(b) of the Family Law Act 53 of 1975.

¹²⁶ Section 10G(1)(c) of the Family Law Act 53 of 1975.

¹²⁷ Federal Magistrates Act 193 of 1999.

¹²⁸ Federal Magistrates Act 193 of 1999; Section 10G(1)(d) of the Family Law Act 53 of 1975.

¹²⁹ Section 10G(1)(e) of the Family Law Act 53 of 1975.

¹³⁰ Section 10H of the Family Law Act 53 of 1975; Young & Monahan (n3) 55; De Jong (n34) 458.

¹³¹ Section 10H(1) of the Family Law Act 53 of 1975.

¹³² Section 10H(2) of the Family Law Act 53 of 1975.

responsibility consent thereto, or where the court consents thereto;¹³³ or (ii) where there is a reasonable belief by the family dispute resolution practitioner that the disclosure of a communication will prevent the possibility of threat of violence or harm being caused to a child or party to the dispute (physically or psychologically) by a party involved in the mediation proceedings, alternatively where there is a threat of or actual damage caused to property, alternatively where such disclosure is in the best interests of the minor child or children; or disclosure may be allowed to the independent lawyer appointed in terms of section 68L¹³⁴ disclosure is permissible where it is required for research;¹³⁵ and finally where the disclosure is required for the practitioner to issue a certificate in terms of subsection 60I(8) of the Family Law Act.¹³⁶

Regulation 29¹³⁷ places general obligations on family dispute resolution practitioners and this includes that the family dispute resolution practitioner must comply with all the other regulations and store the records of the family dispute resolution sessions safely; the family dispute resolution practitioner must ensure that the process is suited to the needs of the parties involved; that the information gained may not be used for personal gain by the family dispute resolution practitioner; that the family dispute resolution sessions must be terminated where so requested by a party to the dispute or the process is no longer suited to the parties' needs; and finally the family dispute resolution practitioner may not give legal advice to the parties.¹³⁸

It must be noted in this regard that not all statements made to a family dispute resolution practitioner or person to whom the family dispute resolution practitioner has referred the parties to during the family dispute resolution process, are admissible in court, or before any person authorised to hear evidence.¹³⁹ There are exceptions to this though; these include where an adult or child has admitted to a threat of abuse, or to actual abuse.¹⁴⁰ Furthermore, this section does not apply where the family dispute resolution practitioner is required to disclose certain information

¹³³ Section 10H(3) of the Family Law Act 53 of 1975.

¹³⁴ Section 10H(4) of the Family Law Act 53 of 1975.

¹³⁵ Section 10H(5) of the Family Law Act 53 of 1975.

¹³⁶ Section 10H(6) of the Family Law Act 53 of 1975.

¹³⁷ Family Law (Dispute Resolution Practitioners) Regulations 2008.

¹³⁸ Young & Monahan (n3) 55 – 56.

¹³⁹ Section 10J(1) of the Family Law Act 53 of 1975; Young & Monahan (n3) 55.

¹⁴⁰ Section 10J(2) of the Family Law Act 53 of 1975.

so as to provide a certificate in terms of subsection 60I(8) of the Family Law Act.¹⁴¹ Finally, in terms of Division 3 of Part II of the Family Law Act, family dispute resolution practitioners are required to comply with any regulations made in terms of the Family Law Act.¹⁴²

Regulation 28 (of the Family Law (Dispute Resolution Practitioners) Regulations 2008) deals with the information that must be provided to the parties before the family dispute resolution sessions proceed. This includes references to particular aspects of the process of family dispute resolution, i.e. the confidentiality and disclosure requirements, the admissibility of any statements made during the family dispute resolution sessions, the fees, the certificates that need to be issued (in terms of section 60I of the Family Law Act 53 of 1975), etc.¹⁴³

Furthermore, regulation 30 (of the Family Law (Dispute Resolution Practitioners) Regulations 2008) deals with how any potential conflict of interest must be dealt with where this is the case.¹⁴⁴

Family dispute resolution practitioners, as stated, will be required to assist with compulsory mediation. The next section discusses the relevant provisions regarding compulsory mediation, as provided for by the legislature.

2.4 Compulsory Mediation

Compulsory mediation is where the parties are required to attend mediation as a compulsory first step before they may approach the court with the matter or application.¹⁴⁵ There are exceptions to this rule and these are also set out later under this heading.

Part VII of the Family Law Act¹⁴⁶ deals with children and all matters relating to children in terms of family law in particular. Subdivision E of Division 1 of Part VII¹⁴⁷ deals with family dispute

¹⁴¹ Section 10J(3) of the Family Law Act 53 of 1975.

¹⁴² Section 10K of the Family Law Act 53 of 1975; Young & Monahan (n3) 55.

¹⁴³ Young & Monahan (n3) 56.

¹⁴⁴ Young & Monahan (n3) 55.

¹⁴⁵ P Parkinson *Family Law and the Indissolubility of Parenthood* (2011) 190.

¹⁴⁶ Family Law Act 53 of 1975.

¹⁴⁷ Family Law Act 53 of 1975.

resolution. Section 60I¹⁴⁸ requires ‘all persons who have a dispute’ regarding a matter dealt with under Part VII to attend family dispute resolution before approaching the court for a parenting order (also known as a Part VII order).¹⁴⁹ Furthermore, section 60I(7)¹⁵⁰ stipulates that, with the exception of circumstances set out in subsection 9, an application for a Part VII order relating to a child must be accompanied by a certificate from a family dispute resolution practitioner, in terms of subsection (8).¹⁵¹

In terms of the Family Law Act,¹⁵² a parenting plan need not be a complex document, in other words it may be a simple plan, stating what is required by law.¹⁵³ In other words, the plan merely needs to include the matters that are set out in section 63C(2),¹⁵⁴ and these include with whom the child will be living and with whom the child will be spending time; who will have the parental responsibility for the child and where this is to be shared, how will decisions be made regarding the parental responsibility; maintenance, welfare, care, and development of the child; where disputes arise regarding the terms of the parenting plan, how will these disputes be solved and, if needs be, how will these be changed.¹⁵⁵

Section 63B of the Family Act further emphasises that parents are to use the courts as a last resort.¹⁵⁶ Furthermore it states that the parties are to reach agreement and take responsibility for the agreement reached in respect of their children.¹⁵⁷ It further states that in reaching agreement, the best interests of the child are to be regarded as paramount.¹⁵⁸

The family dispute resolution practitioner will issue a certificate (this was referred to earlier) at the end of the family dispute resolution sessions and this certificate will contain one of the

¹⁴⁸ Section 60I(1) of the Family Law Act 53 of 1975.

¹⁴⁹ Altobeli & Seriser (n40) 165. De Jong (n34) 459.

¹⁵⁰ Family Law Act 53 of 1975.

¹⁵¹ Section 60I(8) of the Family Law Act 53 of 1975.

¹⁵² Family Law Act 53 of 1975

¹⁵³ Section 63C(1) of the Family Law Act 53 of 1975; Altobeli & Seriser (n40) 165.

¹⁵⁴ Division 4 of Part VII of the Family Law Act 53 of 1975; Altobeli & Seriser (n40) 165.

¹⁵⁵ Section 63C(2) of the Family Law Act 53 of 1975.

¹⁵⁶ Section 63B(c) of Part VII of the Family Law Act 53 of 1975.

¹⁵⁷ Section 63B(a) and (b) of Part VII of the Family Law Act 53 of 1975.

¹⁵⁸ Section 63B(e) of Part VII of the Family Law Act 53 of 1975.

following:¹⁵⁹ that one of the disputing parties or both failed to attend and that the issue or issues dealt with in the court order were not discussed with or under the guidance of the family dispute resolution, this having been a refusal or failure to attend of one or both the parties to the divorce action.¹⁶⁰ Alternatively a certificate may state that one party did not attend the family dispute resolution procedure with the family dispute resolution practitioner and all affected persons, in respect of the issue or issues raised in the application, and that in the light of the circumstances it would not be advisable to continue with family dispute resolution procedures.¹⁶¹ Alternatively, the certificate may indicate that the parties attended the family dispute resolution and that all made a genuine effort to resolve the issue or issues as sought in the order.¹⁶² The certificate may state that the all the parties concerned attended the family dispute resolution procedure, and that one person or all concerned did not make a genuine effort to resolve the issues sought in the order.¹⁶³ Lastly, the certificate may state that the person or all the parties concerned had begun to attend family dispute resolution procedures in order to resolve the issue or issues to be sought in the order, but that in the circumstances it would not be appropriate to continue with the family dispute resolution procedures.¹⁶⁴

In terms of subsection 60I(8), the court may take into account what the certificate states when deciding to order the parties to attend or continue to attend family dispute resolution,¹⁶⁵ alternatively when making a decision on a costs order against an ‘unwilling’ party to the divorce proceedings.¹⁶⁶

It is worth noting, firstly, that the certificate merely grants the court jurisdiction to hear the matter. Secondly, where the certificate states that there has been a non-attendance, then the court has to consider in terms of section 60I(10)¹⁶⁷ whether it should order the parties to attend the family dispute resolution sessions before continuing in court.¹⁶⁸

¹⁵⁹ See generally Young & Monahan (n3) 53; Parkinson (n145) 192.

¹⁶⁰ Section 60I(8)(a) of the Family Law Act 53 of 1975; Astor (n49) 234.

¹⁶¹ Section 60I(8)(aa) of the Family Law Act 53 of 1975; Astor (n49) 234; Parkinson (n145)190.

¹⁶² Section 60I(8)(b) of the Family Law Act 53 of 1975; Astor (n49) 234.

¹⁶³ Section 60I(8)(c) of the Family Law Act 53 of 1975; Astor (n49) 234.

¹⁶⁴ Section 60I(8)(d) of the Family Law Act 53 of 1975; Astor (n49) 234.

¹⁶⁵ See section 13C of the Family Law Act 53 of 1975.

¹⁶⁶ See section 117 of the Family Law Act 53 of 1975.

¹⁶⁷ Family Law Act 53 of 1975.

¹⁶⁸ Young & Monahan (n3) 53.

It is important to note that the applicant to a Part VII parenting order must file a certificate from the family dispute resolution officer, as set out in terms of subsection 60I(8)¹⁶⁹ before the court will hear the matter.¹⁷⁰ In other words, the parties are required to attend family dispute resolution before seeking an order from the court.

Furthermore, in terms of the Family Law Rules 2004 the parties are required to attend pre-action procedures,¹⁷¹ in other words this means attending family dispute resolution in the form of counselling, conciliation, and mediation, etc. The Rules¹⁷² place an onus on the parties to attend some form of negotiation before approaching the courts.¹⁷³ According to De Jong they however fall short of making it compulsory for the parties to attend mediation.¹⁷⁴ Originally, the Rules¹⁷⁵ made reference to mediation under the term ‘dispute resolution.’¹⁷⁶ Although it has been removed from the Rules,¹⁷⁷ it does not mean that separating and/or divorcing parties may not attend mediation in order to comply with the requirement of attending to a pre-action procedure before filing an application in court.¹⁷⁸ Parties may still attend mediation, if they so wish.¹⁷⁹

Some academics and practitioners have heralded the Family Law Rules as having made a significant impact on family law in Australia.¹⁸⁰ The Rules¹⁸¹ in respect of parenting cases require that:

‘(1) Each prospective party to a case in the Family Court of Australia is required to make a genuine effort to resolve the dispute before starting a case by:

¹⁶⁹ Family Law Act 53 of 1975.

¹⁷⁰ Subsection 60I(7) of the Family Law Act 53 of 1975.

¹⁷¹ Sub rule (1) of Rule 1.05 of the Family Law Rules 2004; Altobeli & Seriser (n40) 168; Young & Monahan (n3) 52 & 54.

¹⁷² Family Law Rules 2004.

¹⁷³ De Jong (n34) 459.

¹⁷⁴ De Jong (n34) 459. Note the focus of this study is mediation in family law. The Family Law Rules 2004 make a form of negotiation compulsory and not mediation alone, in other words the parties are able to attend conciliation or arbitration etc in order to fulfil the requirement of attending compulsory dispute resolution procedures before attending court. (De Jong (n34) 459.)

¹⁷⁵ Family Law Rules 2004.

¹⁷⁶ Rule 1 of Part 1 of Schedule 1 of the Family Law Rules 2004; Altobeli & Seriser (n40) 169.

¹⁷⁷ Rule 1 of Part 1 of Schedule 1 of the Family Law Rules 2004.

¹⁷⁸ Altobeli & Seriser (n40) 169.

¹⁷⁹ Altobeli & Seriser (n40) 169.

¹⁸⁰ See generally De Jong (n3) 296.

¹⁸¹ Family Law Rules 2004.

- (a) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and
- (b) complying, as far as practicable, with the duty of disclosure.¹⁸²

In respect of financial matters they have similar requirements, if not the same.¹⁸³

Furthermore, sub rule 2¹⁸⁴ states that where there are good reasons for not complying with these rules (it is submitted that this would be the case where there is family violence, etc.) then all parties are expected to have started or have filed for a pre-action procedure; otherwise the parties may suffer adverse consequences for non-compliance.¹⁸⁵ The same would be expected where the divorcing or separating parties are contesting in financial matters.¹⁸⁶

It is worth mentioning that Parkinson¹⁸⁷ points out that one cannot compel another party to attend mediation. The certificate will then reflect that one of parties was willing to attend mediation and the other was not. This certificate will form part of the court file.¹⁸⁸

Family violence has been mentioned as an exception to the requirement of attending compulsory family dispute resolution or pre-action procedures (in line with the topic of this study regarding compulsory mediation). Further exceptions will be discussed in what follows.

2.4.1 Exceptions to the requirement of Compulsory Mediation

There are exceptions with regards to requiring the parties to first attend family dispute resolution proceedings,¹⁸⁹ and in terms of the Family Law Act,¹⁹⁰ this would be the case where:

¹⁸² Sub rule 1 of Rule 1 of Part 2 of Schedule 1 of the Family Law Rules 2004.

¹⁸³ Sub rule 1 of Rule 1 of Part 1 of Schedule 1 of the Family Law Rules 2004. The sub rule reads as follows: (1) Each prospective party to a case in the Family Court of Australia is required to make a genuine effort to resolve the dispute before starting a case by: (a) participating in dispute resolution, such as negotiation, conciliation, arbitration and counselling; (b) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and (c) complying, as far as practicable, with the duty of disclosure.

¹⁸⁴ Sub rule 2 of Rule 1 of Part 2 of Schedule 1 of the Family Law Rules 2004

¹⁸⁵ Sub rule 3 of Rule 1 of Part 2 of Schedule 1 of the Family Law Rules 2004.

¹⁸⁶ Sub rules 2 and 3 of Rule 1 of Part 1 of Schedule 1 of the Family Law Rules 2004.

¹⁸⁷ Parkinson (n145) 190.

¹⁸⁸ Parkinson (n145) 190.

¹⁸⁹ For an example of exceptions applying to the requirement of compulsory family dispute resolution (mediation) see the case of *Martin v Harding* (n47); *Young & Monahan* (n3) 53.

¹⁹⁰ Subsection 60I(9) of the Family Law Act 53 of 1975 contains the exceptions.

- there is a consent by all the parties or the one party is responding to an application by the other party;¹⁹¹
- the court has reasonable grounds to believe that there has been family abuse or violence by one of the parties to the divorce proceedings or where there is abuse against the child or children by one of the parties to the divorce proceedings,¹⁹² or there is a threat that acts of family violence will occur by one of the parties to the proceedings, or there is a threat of child abuse if the proceedings are delayed;¹⁹³
- the application made concerns the contravention of a Part VII order and the court is satisfied that there are reasonable grounds to believe that the contravening party has acted in a such way so as to show disregard for the obligations set out in the order (mainly within the past 12 months preceding the application);¹⁹⁴
- the application is urgent;¹⁹⁵
- one or more of the parties is unable effectively to participate in the family dispute resolution, whether this is due to location, or some sort of incapacity, or some other reason.¹⁹⁶

The validity of the order sought under this division is not affected, where the family dispute resolution proceedings are circumvented.¹⁹⁷

Where necessary the court may need to take prompt action where there are allegations of child abuse or family violence, depending on the circumstances of the matter.¹⁹⁸ In such instances, it is not required of the parties to attend mediation first; rather they can go straight to court in order to

¹⁹¹ Section 60I(9)(a)(i) & (ii) of the Family Law Act 53 of 1975; Young & Monahan (n3) 53; A Dickey *Family Law Sed* (2009) 77.

¹⁹² Sections 60I(9)(b)(i) & (ii) 60J(1) & (2) of the Family Law Act 53 of 1975; Young & Monahan (n3) 53.

¹⁹³ Section 60I(9)(b)(iii) & (iv) of the Family Law Act 53 of 1975; Young & Monahan (n3) 53; Dickey (n191) 77; De Jong (n34) 460.

¹⁹⁴ Section 60I(9)(c) of the Family Law Act 53 of 1975; Young & Monahan (n3) 53; Dickey (n191) 77.

¹⁹⁵ Section 60I(9)(d) of the Family Law Act 53 of 1975; *Martin v Harding* (n47) at para [10]; Young & Monahan (n3) 53.

¹⁹⁶ Section 60I(9)(e) of the Family Law Act 53 of 1975; *Martin v Harding* (n47) at para [10]; Young & Monahan (n3) 53.

¹⁹⁷ Section 60J(3) of the Family Law Act 53 of 1975; Dickey (n191) 77; Parkinson (n145) 190.

¹⁹⁸ Section 60K of the Family Law Act 53 of 1975.

obtain their order.¹⁹⁹ Especially where there are allegations of family violence, the parties ‘may be screened as unsuitable’ for mediation or where there is a possible risk of same.²⁰⁰ Parties will be screened as unsuitable in an assessment program conducted by a qualified mediator.²⁰¹

Where there is no claim of family violence, or none of the other exceptions, as stated above, apply, then the parties will be required to first attend family dispute resolution before making an application to the court for an order of divorce.²⁰² It must be noted that the parties will be required to make a genuine effort to settle the matter as far as possible during the family dispute resolution proceedings, as the objective is not simply to obtain a certificate in order to continue with divorce proceedings, but to obtain a negotiated resolution to the dispute, with the assistance of the family dispute resolution practitioner.²⁰³

An example of where the family dispute resolution proceedings were circumvented may be found in the case of *Martin v Harding* [2007] FamCA 1040, wherein the applicant/father, brought the application in terms of subsection 60I(9) of the Family Law Act.²⁰⁴ The circumstances for bringing the application were that the father was living in New Zealand and was soon to be based in Townsville and travelled widely in terms of his professional sporting career. The mother lived in Melbourne with the minor children. The court concluded that, based on the fact that the parents had been separated for many months and that there was limited oral and physical contact and time spent between the father and the children, a case of urgency in terms of subsection 60I(9)(d)²⁰⁵ had been made out. Furthermore, due to the physical distance between the parties and the schedule of the applicant/father (in respect of his sporting career) a case in terms of subsection 60(9)(e)²⁰⁶ had also been made out, despite the fact that the father regularly travelled to Melbourne on business. It was mentioned that he was not sure that there

¹⁹⁹ Rule 1.05 of the Family Law Rules 2004; see generally A Bickerdike ‘Implications for family dispute resolution practice: response from Relationships Australia (Victoria) to the “Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings Report”’ in *Australian Family Law: The Contemporary Context: Teaching Materials* B Fehlberg & J Beherns (2009) 244.

²⁰⁰ Parkinson (n145) 190.

²⁰¹ Parkinson (n145) 190.

²⁰² Young & Monahan (n3) 53; Dickey (n191) 77.

²⁰³ Young & Monahan (n3) 53.

²⁰⁴ Family Law Act 53 of 1975.

²⁰⁵ Family Law Act 53 of 1975.

²⁰⁶ Family Law Act 53 of 1975.

would be free appointments with the family dispute resolution practitioner that corresponded with the times when he was actually in Melbourne. In this matter ‘[t]he court [stated that it] clearly has a discretion in appropriate cases and having regard for the best interests of the children to grant an exemption to the obtaining of a certificate’.²⁰⁷ The court held that the parties need not attend family dispute resolution and the need for a certificate from the family dispute resolution practitioner was dispensed with in terms of subsection 60I(9) of the Family Law Act.²⁰⁸

It has been briefly mentioned earlier in this study that the Family Rules²⁰⁹ also set out exceptions to the rule where parties will not be expected to attend pre-action procedures and so may proceed straight to court.²¹⁰ These instances are set out in subrule (2)²¹¹ which reads as follows:

‘(2) Compliance with subrule (1) is not necessary if:

- (a) for a parenting case — the case involves allegations of child abuse or family violence, or the risk of child abuse or family violence;
- (b) for a property case — the case involves allegations of family violence, or the risk of family violence, or fraud;
- (c) the application is urgent;
- (d) the applicant would be unduly prejudiced;
- (e) there has been a previous application in the same cause of action in the 12 months immediately before the start of the case;
- (f) the case is an application for divorce;
- (g) the case is a child support application or appeal; or
- (h) the case involves a court’s jurisdiction in bankruptcy under section 35 or 35B of the Bankruptcy Act.’

In terms of the Family Law Regulations,²¹² regulation 25²¹³ deals with what the family dispute resolution practitioner must consider when deciding whether a matter is appropriately suited to

²⁰⁷ *Martin v Harding* (n47) at para [12] of Reasons for Judgment.

²⁰⁸ Family Law Act 53 of 1975.

²⁰⁹ The Family Rules 2004.

²¹⁰ Young & Monahan (n3) 52 & 54.

²¹¹ Rule 1.05 of the Family Law Rules 2004.

²¹² Specifically reference is made to the Family Law (Dispute Resolution Practitioners) Regulations 2008.

²¹³ Family Law (Dispute Resolution Practitioners) Regulations 2008; Young & Monahan (n3) 55.

be dealt with in family dispute resolution. Some of these include, whether there is a history of family violence and risk of child abuse, the safety of the parties, the parties' ability to bargain on equal terms, the emotional, psychological and physical health of the parties, and any other factor that will be relevant to the circumstances in deciding whether or not a matter is suited to family dispute resolution.²¹⁴

2.5 Court-Compelled Mediation

In Division 3 of Part IIIB of the Family Law Act,²¹⁵ parties may be referred to family counselling, family dispute resolution, and other family services. In terms of section 13C of the Family Law Act, a court may refer the disputing parties to family counselling, family dispute resolution or to another family service, as the case may be, at any stage in the proceedings.²¹⁶ In terms of this section, before the court may make such an order, it needs to seek the advice of a family consultant as to which non-judicial process is appropriate;²¹⁷ alternatively the parties may be sent to a family consultant to make a decision.²¹⁸ In terms of this section, the court may act out of its own initiative or in terms of an application sought by one of the parties or a representative of the minor child or children to the divorce proceedings.²¹⁹ The court may order that any party affected by the divorce (for example children, grandparents or other relatives) must also be involved in the specified family counselling or dispute resolution procedure or service as set out in the court order.²²⁰

In terms of the Family Law Rules, rule 1.06²²¹ requires that the court actively promotes the main purpose of the Rules²²² and actively manages each individual case by:

- (a) encouraging and helping parties to consider and use a dispute resolution method rather than having the case resolved by trial;
- (b) having regard to unresolved risks or other concerns about the welfare of a child involved;

²¹⁴ Young & Monahan (n3) 55.

²¹⁵ Family Law Act 53 of 1975.

²¹⁶ Section 13C(1) of the Family Law Act 53 of 1975.

²¹⁷ See section 11E of the Family Law Act 53 of 1975.

²¹⁸ See section 11F of the Family Law Act 53 of 1975.

²¹⁹ Section 13C(5) of the Family Law Act 53 of 1975.

²²⁰ Section 13C(3) of the Family Law Act 53 of 1975.

²²¹ Family Law Rules 2004.

²²² Family Law Rules 2004.

- (c) identifying the issues in dispute early in the case and separating and disposing of any issues that do not need full investigation and trial;
- (d) at an early stage, identifying and matching types of cases to the most appropriate case management procedure;
- (e) setting realistic timetables, and monitoring and controlling the progress of each case;
- (f) ensuring that parties and their lawyers comply with these Rules, any practice directions and procedural orders;
- (g) considering whether the likely benefits of taking a step justify the cost of that step;
- (h) dealing with as many aspects of the case as possible on the same occasion;
- (i) minimising the need for parties and their lawyers to attend court by, if appropriate, relying on documents; and
- (j) having regard to any barriers to a party's understanding of anything relevant to the case.'

It is submitted that this is an important function and allows the courts actively to monitor each case and see that the parties comply with (although they may not succeed) the requirements of compulsory (or court-compelled) pre-action procedures.²²³ In other words, the courts will make sure that the parties actually attend a family dispute resolution process, and encourage them to settle the matter there, before attempting to deal with the matter in trial.²²⁴

Furthermore, the Federal Magistrates Act encourages that the parties, before attending the Federal Magistrate Court or Service, are required to attend family dispute resolution proceedings.²²⁵ The relevant sections are mainly found under Part 4 of the Federal Magistrates Act.²²⁶ These family dispute resolution proceedings may include mediation, counselling, arbitration, a neutral evaluation, case appraisal, and conciliation.²²⁷

In order to encourage parties to attend one of the family dispute resolution proceedings mentioned above, the Federal Magistrates Act imposes a duty on the Federal Magistrate Service

²²³ De Jong (n3) 297.

²²⁴ De Jong (n3) 297.

²²⁵ Sections 4, 23, 24, and 25 of the Federal Magistrates Act 193 of 1999; De Jong (n3) 294.

²²⁶ Federal Magistrates Act 193 of 1999.

²²⁷ Sections 21, 26, 27, 33, 34, and 35 of the Federal Magistrates Act 193 of 1999; De Jong (n3) 294.

or Court to adjourn a matter that it is currently dealing with, in order to encourage the parties to attend family dispute resolution.²²⁸

Furthermore, in terms of the Federal Magistrates Act, the family dispute resolution that is found in Division 2 of Part 4, applies to matters other than those related to the Family Law Act²²⁹ and those related to child support.²³⁰ This means that matters arising out of the Federal Magistrates Court or Service may be sent to mediation²³¹ (or arbitration²³²) by the Federal Magistrate hearing the case. The Federal Magistrate generally uses community-based mediation services in order to fulfil the need for compulsory mediation.²³³

In terms of divorce mediation, the court,²³⁴ as has been mentioned above, may make an order and compel parties to attend mediation; either for the whole of the matter or for only certain aspects of the matter.²³⁵ Furthermore, it is submitted that in allowing for a more simplified approach to be applied, the court is able to operate more efficiently and more cost effectively in the overall, making a divorce less daunting.

2.6 Sanctions for not attending compulsory or court-compelled mediation

In respect of compliance with the Family Law Rules 2004, the court may consider what consequences the non-complying party will face where he or she has not used a pre-action procedure before filing an application at court²³⁶ or where the parties have failed to attend compulsory mediation in terms of Rule 1.05.²³⁷ The courts may make an adverse costs order

²²⁸ Section 22 of the Federal Magistrates Act 193 of 1999.

²²⁹ Section 33 of Division 2 or Part 4 of the Federal Magistrates Act 193 of 1999; see Part III of the Family Law Act 53 of 1975.

²³⁰ Section 33 of Division 2 or Part 4 of the Federal Magistrates Act 193 of 1999; see Part III of the Family Law Act 53 of 1975.

²³¹ Section 34 of the Federal Magistrates Act 193 of 1999.

²³² Section 35 of the Federal Magistrates Act 193 of 1999.

²³³ De Jong (n3) 295.

²³⁴ Here reference is made to the Federal Magistrates Courts or Service.

²³⁵ Section 34(1) of the Federal Magistrates Court Act 193 of 1999.

²³⁶ Rule 2 of Part 1 and Rule 2 of Part 2 of the Family Law Rules 2004.

²³⁷ Family Law Rules 2004.

against one or both parties in terms of Rule 1.10²³⁸ or in terms of Schedule 1, depending on the circumstances of the particular matter.²³⁹

Where a party fails to comply with an order as set out above, in terms of section 13C,²⁴⁰ the court must be furnished with a report on which it may make an order, as the court deems appropriate in the circumstances.²⁴¹ Such an order may be made on the court's own initiative or in terms of an application brought by a party to the proceedings or by an independent lawyer representing the minor child's interests.²⁴²

Apart from the above, there may be instances where it is possible that the parties are required to attend therapy, this may be in the form of mediation, where there is a child in need of care.

2.7 Child in need of care – discretionary mediation

Where there is child abuse within the family, depending on all the surrounding circumstances, the child may be removed from one or both of the parents by the states (each individual state looks into the matter of the child's need for care and protection – not the commonwealth).²⁴³ The removal of the child is seen as an action of last resort; where possible, other options are used in order to discover why there is child abuse within the family.²⁴⁴ These options include providing the family with family counselling or therapy – in appropriate circumstances, it is submitted that this may include mediation.²⁴⁵ Where the child remains with the family or specifically in the care of the abuser, there will be regular monitoring of the situation in order to identify whether there has been an incident of abuse or not.²⁴⁶ It is submitted that mediation is able to identify these issues a lot quicker and the mediator may be able to advise the parties to seek assistance where this is applicable.²⁴⁷

²³⁸ Rule 1.10 of the Family Law Rules 2004.

²³⁹ Sub rule 4 of Rule 2 of Part 1 and sub rule 4 of Rule 2 of Part 2 of Schedule 1 of the Family Law Act 2004.

²⁴⁰ Family Law Act 53 of 1975.

²⁴¹ Section 13D(1) and (2) of the Family Law Act 53 of 1975.

²⁴² Section 13D(3) of the Family Law Act 53 of 1975.

²⁴³ Young & Monahan (n3) 776; 789.

²⁴⁴ Young & Monahan (n3) 776.

²⁴⁵ Young & Monahan (n3) 789.

²⁴⁶ Young & Monahan (n3) 789.

²⁴⁷ Parkinson (n145) 187 – 188.

Furthermore, regarding the above forms of mediation, the Family Law Act places an obligation on legal practitioners to inform their clients of the various family dispute resolution services on offer in terms of the legislative framework, including mediation.²⁴⁸

2.8 Obligation on Legal Practitioners to Inform Clients of Mediation

In terms of sections 12E and 13C of the Family Law Act²⁴⁹ legal practitioners as well as the courts (respectively) have a duty to inform the parties (or their clients) about the possibility of the use of primary dispute resolution services available to them.²⁵⁰ This means that the parties are encouraged to use mediation services amongst others.²⁵¹

It is worth pointing out that in respect of parenting plans section 63DA²⁵² stipulates as follows:

- ‘(1) If an adviser gives advice or assistance to people in relation to parental responsibility for a child following the breakdown of the relationship between those people, the adviser must:
- (a) inform them that they could consider entering into a parenting plan in relation to the child; and
 - (b) inform them about where they can get further assistance to develop a parenting plan and the content of the plan.’

In other words, the Family Law Act places an obligation on legal advisers, such as lawyers and advocates, to inform people of the possibility of negotiating and entering into a parenting plan.²⁵³

The reason for mentioning parenting plans in this study is that parenting plans can be set up through negotiation or through proper mediation sessions (i.e. during family dispute resolution sessions, with a trained dispute resolution practitioner)²⁵⁴, as offered by the various community centres that deal with family law.

²⁴⁸ Section 12E of the Family Law Act 53 of 1975.

²⁴⁹ Family Law Act 53 of 1975.

²⁵⁰ De Jong (n34) 458.

²⁵¹ De Jong (n34) 458. Primary dispute resolution includes (apart from mediation) counselling, arbitration or other forms of conciliation or reconciliation in order to resolve the disputes between the parties. (Section 14 of the Family Law Act 53 of 1975)

²⁵² Section 63DA of Part VII of the Family Law Act 53 of 1975.

²⁵³ Altobeli & Seriser (n40) 165.

²⁵⁴ Young & Monahan (n3) 54; Altobeli & Seriser (n40) 166.

The Rules²⁵⁵ also place an obligation on the parties and their legal practitioners to achieve the main purpose as set out in rule 1.04,²⁵⁶ read with rule 1.08.²⁵⁷ The obligation or responsibility to achieve the main purpose is set out as follows:

- ‘(1) Each party has a responsibility to promote and achieve the main purpose, including:
- (a) ensuring that any orders sought are reasonable in the circumstances of the case and that the court has the power to make those orders;
 - (b) complying with the duty of disclosure (see rule 13.01);
 - (c) ensuring readiness for court events;
 - (d) providing realistic estimates of the length of hearings or trials;
 - (e) complying with time limits;
 - (f) giving notice, as soon as practicable, of an intention to apply for an adjournment or cancellation of a court event;
 - (g) assisting the just, timely and cost-effective disposal of cases;
 - (h) identifying the issues genuinely in dispute in a case;
 - (i) being satisfied that there is a reasonable basis for alleging, denying or not admitting a fact;
 - (j) limiting evidence, including cross-examination, to that which is relevant and necessary;
 - (k) being aware of, and abiding by, the requirements of any practice direction or guideline published by the court; and
 - (l) complying with these Rules and any orders.’²⁵⁸

Furthermore, attorneys are to assist their clients with compliance in terms of the Family Law Rules, as far as possible.²⁵⁹ It must be noted, however, that solicitors (attorneys) will be working on the instructions from their client. Where one of the parties fails to comply with the rules, the court may take such non-compliance into account and make an appropriate order in respect of costs.²⁶⁰

²⁵⁵ Family Law Rules 2004.

²⁵⁶ Rule 1.04 of the Family Law Rules 2004.

²⁵⁷ Rule 1.08 of the Family Law Rules 2004.

²⁵⁸ Rule 1.08 of the Family Law Rules 2004.

²⁵⁹ Sub rule 2 Rule 1.08 of the Family Law Rules 2004.

²⁶⁰ Rule 1.10 (adverse costs order for non-compliance against the parties) and Rule 19.10 (1) (costs order against the attorney for non-compliance) of the Family Law Rules 2004. (Also Rule 6.10 of Schedule 6 of the Family Law Rules 2004 – however this rule was applicable before 1 July 2008.)

For example of an adverse costs order being made against one of the parties, see the case of *Boxall v Boxall*²⁶¹ where the husband refused to participate in any further mediation discussions with his wife, and this was seen to be contrary to the Rules²⁶² and further seen as being “wholly unreasonable.”²⁶³ The effect of such behaviour, according to the court, was that the husband wasted time and money.²⁶⁴ As such, the refusal of the husband to resolve the matter in an amicable way forced the wife to incur extra expenses, caused inconvenience, delay, and stress and as such the husband was ordered to pay the wife’s costs.²⁶⁵ Furthermore, the husband did not comply with the requirements for disclosure, and as such was ordered to pay the wife’s costs on a reasonable solicitor/client basis.²⁶⁶

Furthermore the Regulations also require that certain criteria must be met for the parties to state that they have complied with the obligation requiring them to be informed of family dispute resolution. Part II of the Family Law Regulations²⁶⁷ states what information regarding non-court based family services must be given²⁶⁸ in order to comply with section 12B of the Family Law Act.²⁶⁹ The information required includes what the legal and social consequences of the process are (this includes what the consequences are for the person in whose care the children will be and their welfare and educational needs),²⁷⁰ what services are provided by the family counsellors,²⁷¹ the steps of the family dispute resolution processes,²⁷² and the role of family consultants.²⁷³

Furthermore, Regulation 8A²⁷⁴ states that the information that must be provided for the parties in terms of Part IIIA²⁷⁵ is information regarding family counselling and family dispute resolution procedures. This is to comply with section 12C of the Family Law Act.²⁷⁶

²⁶¹ *Boxall v Boxall (No 2)* [2008] FamCA 587.

²⁶² Family Law Rules 2004.

²⁶³ *Boxall v Boxall (No 2)* (n261) at para [33].

²⁶⁴ *Boxall v Boxall (No 2)* (n261) at para [34].

²⁶⁵ *Boxall v Boxall (No 2)* (n261) at para [37].

²⁶⁶ *Boxall v Boxall (No 2)* (n261) at para [16] and [39].

²⁶⁷ Family Law Regulations 1984.

²⁶⁸ Regulation 8 of the Family Law Regulations 1984.

²⁶⁹ Family Law Act 53 of 1975.

²⁷⁰ Regulation 8(a) of the Family Law Regulations 1984.

²⁷¹ Regulation 8(b) of the Family Law Regulations 1984.

²⁷² Regulation 8(c) of the Family Law Regulations 1984.

²⁷³ Regulation 8(d) of the Family Law Regulations 1984.

²⁷⁴ Family Law Regulations 1984.

²⁷⁵ Family Law Act 53 of 1975.

Lastly, Regulation 8B²⁷⁷ requires that the information that must be provided for Part VII²⁷⁸ proceedings (i.e. parenting orders and maintenance orders in respect of the child or children) must be regarding the family dispute resolution proceedings that are available to assist the parties where an order under Part VII²⁷⁹ is made. This is in compliance with Section 12D of the Family Law Act 53 of 1975.

As can be seen from the above, the Australian Legislature has provided for family dispute resolution (which includes mediation) and has made it compulsory, in certain instances for divorcing parties to attend. The aim of this is to provide divorcing parties with an amicable process where they are able to solve their disputes before attending court. It is clear from the above that the legislature wishes to encourage the parties to use mediation, counselling, and conciliation in the future where attempting to solve family disputes.²⁸⁰

2.9 Hague Convention on the Civil Aspects of International Child Abduction

In Australia the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (hereinafter referred to as ‘the Hague Convention’) has been included into the Family Law Act.²⁸¹ Young and Monahan describe its main function as follows:

‘[t]he objects of the [Hague] Convention are to secure the prompt return of the children wrongfully removed to, or retained in, any contracting state and to ensure that the rights of custody and access under the law of one contracting state are effectively respected in other contracting states’.²⁸²

The Hague Convention does not contain a specific provision or provisions that requires the parties to mediate the matter.²⁸³ However, regulation 13(4) of the Family Law (Child Abduction Convention) Regulations, 1986 requires that the parties seek an amicable solution regarding the child’s location and return to his or her country of origin (known as the place of habitual residence in terms of the Hague Convention). It is submitted that this was to encourage the parties to mediate in order to find an amicable solution before turning to apply for an order from

²⁷⁶ Family Law Act 53 of 1975.

²⁷⁷ Family Law Regulations 1984.

²⁷⁸ Family Law Act 53 of 1975.

²⁷⁹ Family Law Act 53 of 1975.

²⁸⁰ De Jong (n3) 297.

²⁸¹ Division 2 of Part XIII AA of the Family Law Act 53 of 1975.

²⁸² Young & Monahan (n3) 344.

²⁸³ See the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

the courts. One of the main problems with being required to seek an amicable solution is the time constraints as set out in the Hague Convention.²⁸⁴ Further problems are the language barriers that occur between the various countries involved (depending on each individual case), and that international mediation is also costly.²⁸⁵

Where the parties have attended family dispute resolution and this has been successful, they may have their agreement judicially reviewed and registered by the court. A discussion regarding this review process shall follow after an overview of where the family courts have included mediation as part of the final order. The courts, it is submitted, are supporting the view that parties should not approach the courts as their first port of call where there is a breakdown in the family relations but should rather attempt to resolve all possible future problems in an amicable forum, such as mediation.

3 The Courts

The courts (specifically the Family Courts) are encouraging parties to attend mediation before making their way into the adversarial environment. The reason for discussing the case law after the legislative framework is because, unlike as discussed in the South African Law Chapter²⁸⁶ where the Children's Act²⁸⁷ was either enacted after²⁸⁸ or was not considered²⁸⁹ in certain judgments; in Australia the Family Law Act was already in place before these cases were brought to the family courts and in some instances was referred to by the judges.

3.1 *Jakiemiec & Buckingham*

In the matter *Jakiemiec & Buckingham*,²⁹⁰ the Australian Family Court showed its support for mediation, where the court made an order that the parties deal with certain issues regarding either the minor child or the order or orders (of the court order) by way of family dispute resolution.²⁹¹

²⁸⁴ T Kruger *International Child Abduction: The Inadequacies of the Law* (2011) 157; 159.

²⁸⁵ Kruger (n284) 161.

²⁸⁶ Chapter 2 of this study.

²⁸⁷ Children's Act 38 of 2005.

²⁸⁸ *Van den Berg v Le Roux* 2003 (3) All SA 599 (NC); *Townsend-Turner v Morrow* [2004] 1 All SA 235 (C); 2004 (2) SA 32 (C).

²⁸⁹ *MB v NB* 2010 (3) SA 220 (GJS).

²⁹⁰ *Jakiemiec & Buckingham* [2007] FamCA 542.

²⁹¹ *Jakiemiec & Buckingham* (n290) para [17] of the Orders.

The parties were also ordered to attend family dispute resolution before attending court where they were seeking to vary the orders made by the court.²⁹² There was no discussion of mediation in this case.

3.2 Naczek & Dowler

In the case of *Naczek & Dowler*²⁹³ the judge also ordered that the parties attend mediation.²⁹⁴ In this instance the judge gave orders as to the costs of the mediation – that these should be shared by the parties.²⁹⁵ In his reasons for judgment, Justice Cronin felt that mediation between the parents would ultimately benefit the children and that this would be in their best interests.²⁹⁶ It is worth pointing out that the children and their parents originally lived in England, however with the separation of the parents the minor children lived with their mother and after a successful application, left England with the mother and moved to Australia. The father still remained in England.²⁹⁷ Despite this the judge felt that mediation was still worth a try:²⁹⁸ ‘I acknowledge the logistical problems of the husband’s international travel in respect of mediation, but I do not believe that that is a basis not to try it.’ The judge further maintained that the parties must have a positive attitude when approaching the mediation sessions.²⁹⁹ Only once the mediation had failed could the parties use the ‘traditional litigation approach’ to solve the matter between them.³⁰⁰ The court referred to its ability to make this order in terms of section 13C of the Family Law Act.³⁰¹ However, in the case of *Martin v Harding*,³⁰² the father was living in New Zealand and the mother lived with the children in Melbourne, Australia. Due to the father’s career demands and although he regularly travelled to Melbourne, it was not expected of the parties to attend family dispute resolution (mediation) in order to sort out the matters between them.³⁰³

²⁹² *Jakiemiec & Buckingham* (n290) para [17] of the Orders.

²⁹³ *Naczek & Dowler* [2007] FamCA 830. For further comparison, see the case of *Naczek & Dowler* [2008] FamCA 89 regarding the success of the court order from the 2007 judgment.

²⁹⁴ *Naczek & Dowler* (n293) at para [3] of the Orders.

²⁹⁵ *Naczek & Dowler* (n293) at para [3] of the Orders.

²⁹⁶ *Naczek & Dowler* (n293) at para [16] and [51] of the Judgment.

²⁹⁷ *Naczek & Dowler* (n293) at para [6] of the Judgment.

²⁹⁸ *Naczek & Dowler* (n203) at para [17] of the Judgment.

²⁹⁹ *Naczek & Dowler* (n293) at para [56] of the Judgment.

³⁰⁰ *Naczek & Dowler* (n293) at para [56] of the Judgment.

³⁰¹ Section 13C(1)(b) and (c) of the Family Law Act 53 of 1975; *Naczek & Dowler* (n293) at para [41] of the Judgment.

³⁰² *Martin v Harding* (n47).

³⁰³ Look at the discussion on *Martin v Harding* (n47) in the section titled ‘Exceptions to the requirement of Compulsory Mediation’ in this chapter.

3.3 Department of Community Services & Raddison

In *Department of Community Services & Raddison*³⁰⁴ the court discussed section 21 of the South African Children's Act 38 of 2005 (this section requires that mediation be used where attempting to solve a dispute between the parties regarding the acquisition of parental responsibilities and rights by unmarried fathers).³⁰⁵ The court made mention of the section because the main thrust of this matter was dealing with a matter in terms of the Convention on the Civil Aspects of International Child Abduction³⁰⁶ which was incorporated into Australia's legal system via the Family Law (Child Abduction Convention) Regulations 1986.³⁰⁷ The children were removed from their country of habitual residence, namely South Africa, by the mother.³⁰⁸ In this matter the court's main aim was to determine whether section 21 of the Children's Act would apply; the Family Law (Child Abduction Convention) Regulations 1986 require that 'the relevant law is that [in] force immediately before removal or retention.'³⁰⁹ As at the time of the removal of the children, the Children's Act was not in operation,³¹⁰ the court in this instance concluded that the Children's Act does not have retrospective effect.³¹¹

3.4 Robertson & Robertson

In the case of *Robertson & Robertson*³¹² the court once again stated that the parties must mediate on any future matters concerning their minor child via the Family Relationships Centre or a Family Dispute Resolution Practitioner.³¹³ In this matter there was evidence that the father of the minor child had endeavoured to mediate the issues (specifically the access to the child) between them, however the mother had twice refused.³¹⁴ There was further evidence that there had been a conference at the Legal Aid Board which had been arranged by the mother and she still refused

³⁰⁴ *Department of Community Services & Raddison* [2007] FmCa 1702 at paras [48] – [55] of the judgements.

³⁰⁵ See the 'Compulsory Mediation' section in Chapter 2 of the study.

³⁰⁶ Convention on the Civil Aspects of International Child Abduction which was concluded at The Hague on 25 October 1980.

³⁰⁷ See *Department of Community Services & Raddison* (n304) paras [1], [28] & [30] of the judgment.

³⁰⁸ *Department of Community Services & Raddison* (n304) para [1].

³⁰⁹ *Department of Community Services & Raddison* (n304) para [52].

³¹⁰ *Department of Community Services & Raddison* (n304) para [51]. The children were removed on 27 December 2005 and section 21 only came into operation on 1 July 2007.

³¹¹ *Department of Community Services & Raddison* (n304) para [54] & [55].

³¹² *Robertson & Robertson* [2008] FamCA 497.

³¹³ *Robertson & Robertson* (n312) para [2] of the Orders.

³¹⁴ *Robertson & Robertson* (n312) at para [9] of the judgment.

the father to have access to the child and there were still two more failed attempts to mediate the matter.³¹⁵ After these final failed attempts at mediation the father brought the present application to court,³¹⁶ which ended with the order that the parties attempt to mediate any major long-term decisions matters regarding the minor child.³¹⁷

3.5 Weldon & Sulter

In *Weldon & Sulter*³¹⁸ the court once again ordered the parties to attend mediation before they could bring an application to court in respect of any matters regarding their minor children,³¹⁹ as the court had in *Jakiemiec & Buckingham*.³²⁰ The court did not discuss mediation.

3.6 Sidorov & Sidorov

Just as in the cases of *Weldon & Sulter*³²¹ and *Jakiemiec & Buckingham*,³²² the judge in *Sidorov & Sidorov*³²³ also made the suggestion that the parties attend mediation in order to solve any future matters regarding the minor children. The court had ordered this on the basis of a recommendation made by the Family Consultant, Ms B.³²⁴

3.7 State Central Authority & Brume

The case of *State Central Authority & Brume*³²⁵ was a child abduction case in which the court ordered the parties to attend mediation in order to sort out the matters between them.³²⁶ The main reason for ordering the mediation to take place was discussed at paragraphs 11 to 15 of the judgment, namely that the mediation sessions were privileged, in other words the court was referring to the fact that when parties attend court, they are held in the public view and anyone may attend, mediation is a closed forum and only those people involved in the sessions will

³¹⁵ *Robertson & Robertson* (n312) at para [9] of the judgment.

³¹⁶ *Robertson & Robertson* (n312) at para [9] of the judgment.

³¹⁷ *Robertson & Robertson* (n312) at para [2] of the Orders.

³¹⁸ *Welson v Sultar* [2008] FamCA 459.

³¹⁹ *Weldon & Sultar* (n318) at para [11] of the Orders.

³²⁰ *Jakiemiec & Buckingham* (n290).

³²¹ *Weldon & Sultar* (n318).

³²² *Jakiemiec & Buckingham* (n290).

³²³ *Sidorov & Sidorov* [2008] FamCA 1101 under the 'Directions'.

³²⁴ *Sidorov & Sidorov* (n323) at para [13] under the 'Property Orders'.

³²⁵ *State Central Authority & Brume* [2010] FamCA 268.

³²⁶ *State Central Authority & Brume* (n325) at para [1] of the Orders and paras [7] & [8] of the judgment.

attend.³²⁷ The court's main submission regarding the fact that the mediation sessions would be privileged was as follows: '[m]ediation is not a spectator's sport'³²⁸ and that due to the private nature of mediation, that it would benefit the parties concerned.³²⁹ The main facts of this case were based on a matter brought in terms of the Family Law (Child Abduction Convention) Regulations 1986.

3.8 State Central Authority & Camden

In the case of *State Central Authority & Camden*³³⁰ the court in paragraph 12 of the judgment lamented that mediation would have been more beneficial to the parties and children in resolving the issues that arose in this case. The issues or matters were those dealing with the immediate return of the children to the United Kingdom and the further parenting arrangements in respect of the children, including with whom the children were to live and how frequently the children would have had contact with the other parent.³³¹ The main issue of the case was an application brought in terms of the Convention on the Civil Aspects of International Child Abduction³³² which was incorporated into Australia's legal system via the Family Law (Child Abduction Convention) Regulations 1986.³³³ The court made the suggestion that the parties attend mediation (or conciliation) whilst the court proceedings were being conducted.³³⁴ However, as it turned out the matter was not resolved in the mediation services as provided and as such the court had to resolve this case.³³⁵

3.9 Strahan & Strahan

On the other hand, in the case of *Strahan & Strahan*³³⁶ the court refused to grant an order that included that the parties attend mediation, as it felt that mediation would not assist the parties in

³²⁷ *State Central Authority & Brume* (n325).

³²⁸ *State Central Authority & Brume* (n325) at para [15].

³²⁹ *State Central Authority & Brume* (n325) at para [11] to [15].

³³⁰ *State Central Authority v Camden (No 2)* [2011] FamCA 666.

³³¹ *State Central Authority v Camden (No 2)* (n330) at para [12] of the judgment.

³³² Convention on the Civil Aspects of International Child Abduction which was concluded at The Hague on 25 October 1980.

³³³ *State Central Authority & Camden (No 2)* (n330) at paras [1] & [2] of the judgment.

³³⁴ *State Central Authority & Camden (No 2)* (n330) 666 at para [15] of the judgment.

³³⁵ *State Central Authority & Camden (No 2)* (n330) at para [15] of the judgment.

³³⁶ *Strahan & Strahan (No 6)* [2009] FamCA 1082.

reaching an agreement regarding the visiting rights of the father.³³⁷ The reason given for this was that the wife had not shown true co-operation in order to find a solution, despite the fact that she had suggested that the parties attend mediation.³³⁸ The child suffered from autism and counsel for the father pointed out that the initial reason why the husband left was because he felt overwhelmed with the demands of the mother in this situation and the demands that an autistic child has on his or her parents.³³⁹ The mother had conceded that it would be advisable for the child to spend time with his father.³⁴⁰ The court granted an order that the father sees the child, under certain conditions, namely that it was at school, and that a speech therapist was present with the teacher, when the child and father met.³⁴¹ Counsel for the Independent Children's Lawyer agreed with this proposal as it was in the best interests of the child.³⁴² The judge concluded by saying that he would encourage the parties 'to use any method at their disposal to resolve their differences, including mediation through an agency or group outside of the court.'³⁴³

Most of the above mentioned cases have not gone into the benefits of mediation, unlike in the South Africa,³⁴⁴ unless there was a specific reason or benefit for ordering the parties to attend mediation.³⁴⁵ The courts have in this instance acknowledged that mediation should be the first port of call before the parties attend court to litigate their divorce matters.

Over and above the fact that a court may have ordered the parties to attend mediation after the divorce where there may be disagreement over certain matters, specifically those that pertain to the minor child or children, the parties, where they have entered into an agreement after the initial mediation, may have their agreement judicially reviewed – where they so wish.

4 Judicial Review

³³⁷ *Strahan & Strahan (No 6)* (n336) at paras [24], [34] & [35] of judgment.

³³⁸ *Strahan & Strahan (No 6)* (n336) at paras [24], [34] & [35] of judgment.

³³⁹ *Strahan & Strahan (No 6)* (n336) at para [11] of judgment.

³⁴⁰ *Strahan & Strahan (No 6)* (n336) at para [31] of judgment.

³⁴¹ *Strahan & Strahan (No 6)* (n336) see the court order made and paras [25] & [33] of the judgment.

³⁴² *Strahan & Strahan (No 6)* (n336) at para [25] of the judgment.

³⁴³ *Strahan & Strahan (No 6)* (n336) at para [35] of the Judgment.

³⁴⁴ See *MB v NB* (n289).

³⁴⁵ *State Central Authority & Brume* (n325); *Strahan & Strahan (No 6)* (n336); *Naczek & Dowler* (n293).

Where parties wish to have enforceable parenting plans, they are required to obtain an order from the court.³⁴⁶ This may be in the form of a consent order.³⁴⁷ It is worth noting that it is not a formal requirement for the parenting plan to be registered, as in section 63B³⁴⁸ parents are merely encouraged to reach agreement as to what is best for their minor child or children. Parties are either able to obtain the consent order through an attorney or may approach the court directly using one of the ‘Consent Order Kits’ that they may download from the Family Court of Australia’s Website,³⁴⁹ alternatively they can order the kit – details are provided on the Family Court of Australia’s webpage.³⁵⁰ Where the order is made, all the parties will be bound by the terms of the order, even where this is made by consent.³⁵¹

Depending on the circumstances of the parties, they are required when negotiating or when appearing in court, to consider the best interests of the child.³⁵² The following is a brief discussion on the best interests of the child in terms of the Australian legal system.

5 The Best Interests of the Child/Paramountcy Principle

As was stated in the South African Law Chapter of this study, much the same can be said here, in that much emphasis has been placed on the best interests of the child standard.³⁵³ In Australia, the best interests of the child standard is often called the ‘paramountcy principle’.³⁵⁴

There has been much debate around the topic of the best interests of the child in Australian jurisprudence, and this debate has been summarised in the article by Crowe and Toohey.³⁵⁵ As in

³⁴⁶ The Family Court of Australia’s website, available at <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Court+Orders/What+are+orders/>, accessed on 19 July 2011.

³⁴⁷ The Family Court of Australia’s website (n346).

³⁴⁸ Family Law Act 53 of 1975.

³⁴⁹ The Family Court of Australia’s website, available at <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Children%27s+Matters/If+you+agree+on+arrangements/>, accessed 19 July 2011.

³⁵⁰ The Family Court of Australia’s website, available at http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Do-it+yourself+kits/FCOA_form_diy_App_Consent_Orders, accessed 19 July 2011.

³⁵¹ The Family Court of Australia’s website (n349).

³⁵² Section 60CA of the Family Law Act 53 of 1975.

³⁵³ See generally GN Barrie ‘The best interests of the child: Lessons from the first decade of the new millennium’ (2011) 1 *TSAR* 126.

³⁵⁴ Crowe & Toohey (n14) 391.

³⁵⁵ Crowe & Toohey (n14) 391.

the South African Law Chapter,³⁵⁶ only that which is applicable to the topic of family law mediation will be mentioned here.

The best interests of the child principle is found in section 60CA of the Family Law Act and it reads as follows: 'In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.'³⁵⁷ It is worth mentioning the arguments that have arisen around this principle and this may affect the way mediators deal with any of the issues raised that pertain to the children. In brief, one side of the argument states that the interests of the child or children should be an important factor but not the overriding factor to be considered in divorce proceedings (the 'weak view').³⁵⁸ However, the Family and Federal Magistrates' Court have taken a different view. They feel that the best interests of the child overshadows all other considerations (the 'strong view').³⁵⁹ This latter view is similar to the view taken by the South African courts, in that the best interests of the child are of absolute importance in all matters concerning him or her.³⁶⁰ The South African approach was discussed in the chapter dealing with South Africa's law.³⁶¹

The Family Law Act,³⁶² however does state that where parents are negotiating a parenting plan with a family dispute resolution practitioner, section 63B of the Family Law Act³⁶³ merely encourages (but it does not oblige) parents to consider what is best for their offspring. That is, it does not make it mandatory for the parents to place their rights and interests under that of the minor child. That said there are dispute resolution organisations that place a greater weight on the best interests of the child, instead of balancing the best interests of the child with the rights

³⁵⁶ Chapter 2 of the study.

³⁵⁷ Section 60I of the Family Law Act 53 of 1975.

³⁵⁸ *Morgan v Miles* (2007) 38 Fam LR 275; Crowe & Toohey (n14) 395 & 403.

³⁵⁹ *AMS v AIF* (1999) CLR 160; *A v A* (2000) 26 Fam LR 382; *W v J* (2006) 35 Fam LR 608; *C v B* (2007) 37 Fam LR 1; *H v H* (2007) 37 Fam LR 126; *Taylor v Baker* (2007) 37 Fam LR 461; *Mazorski v Albright* (2007) 37 Fam LR 518; *F v F* (2007) 38 Fam LR 52; *Jackiemiec v Buckingham* (n290); *MW v Director General of the Department of Community Services* (2008) 244 ALR 205; *Robertson v Robertson* (n312); *SS v AH* 2010 FamCAFC 13; Crowe & Toohey (n14) 395; 396 – 403. Mainly the recent cases have been cited here as they are the cases that deal with the paramountcy principle in its current form. Crowe and Toohey give a review of the cases before and after the enactment of the paramountcy principle in its current form in 2006. The pre-2006 cases mentioned are, according to Crowe and Toohey, cases that set out the guidelines for the courts favouring a 'strong' interpretation of the principle.

³⁶⁰ *J v J* 2008 (6) SA 30 (C). See generally Barrie (n353).

³⁶¹ Chapter 2 of the study.

³⁶² Family Law Act 53 of 1975.

³⁶³ Family Law Act 53 of 1975.

and interests of the parents.³⁶⁴ The reason for placing a heavy emphasis on the best interests of the child is due to the rulings of the Australian Courts. This in turn has made both family dispute resolution practitioners and parents feel obliged to do the same.³⁶⁵ Thus a more ‘child-focused’ mediation or dispute resolution process has formed, where the best interests of the child is the main focus, if not the only or paramount focus.³⁶⁶ It is worth pointing out that some parents are satisfied with a more child-focused approach.³⁶⁷ It is submitted that this may prove to be problematic in the long term, as parents may not be entirely satisfied with the arrangements made in respect of the divorce. The arrangements made should not only suit the children, but should suit the parents too. The reason for this is that the parents must be happy; otherwise their unhappiness with the situation may affect the children. It is submitted that this would not be in the best interests of the children.³⁶⁸

In terms of section 60CC of the Family Law Act,³⁶⁹ there are various primary³⁷⁰ and secondary³⁷¹ factors that need to be considered in order to determine what the best interests of the child will be in any given matter (whether one applies the weak or strong view).³⁷² This is not a closed list and other relevant factors may be considered, depending on the facts, alternatively circumstances of the case.³⁷³ This two-tiered approach brings clarity and focus in judicial deliberations.³⁷⁴

Furthermore, the needs of Aboriginal and Torres Strait Islander children are also specifically catered for in the Family Law Act.³⁷⁵ The study will take a look at mediation in terms of the Aboriginal and Torres Strait Islander communities after the short discussion on domestic partnerships which follows.

³⁶⁴ Crowe & Toohey (n14) 404.

³⁶⁵ McIntosh, Bryant & Murray (n15) 246.

³⁶⁶ Crowe & Toohey (n14) 404.

³⁶⁷ McIntosh, Bryant & Murray (n15) 246.

³⁶⁸ RH Mnookin & L Kornhauser ‘Bargaining in the shadow of the law: the case of divorce’ in *Australian Family Law in Context: Commentary & Materials* 4ed P Parkinson (ed) (2009) 216 – 217.

³⁶⁹ Family Law Act 53 of 1975.

³⁷⁰ Subsection 60CC(2) of the Family Law Act 53 of 1975.

³⁷¹ Subsection 60CC(3) of the Family Law Act 53 of 1975.

³⁷² *Robertson v Robertson* (n312) at para [34] – [36].

³⁷³ Crowe & Toohey (n14) 411.

³⁷⁴ Crowe & Toohey (n14) 411.

³⁷⁵ Subsection 60CC(3)(h) and subsection 60CC(6) and section 61F of the Family Law Act 53 of 1975.

6 Domestic Partnerships

In Australia, domestic partnerships are referred to in the Family Law Act ‘as de facto relationships’.³⁷⁶ These relationships may be defined as follows: as ‘two adults living together as a couple on a genuine domestic basis who have been living together for a reasonable period of time, or have had a child together.’³⁷⁷ There are specific provisions dealing with de facto relationships found in the Family Law Act.³⁷⁸ Partners within such a relationship may approach the Family Court and Federal Magistrates Service or Court to deal with any matters relating to their children.³⁷⁹ Most of the sections dealing with children and parenting plans in terms of section 60(I)³⁸⁰ have been dealt with in the section dealing with ‘Compulsory Mediation’ within this chapter. The same rules and procedures apply.³⁸¹

In respect of the property of the partners in a domestic relationship, the Domestic Partners Property Act, 1996 will apply.³⁸² This legislation is mainly applicable in South Australia.³⁸³ This will not be discussed further as this is not the focus of this study as it does not contain provisions regarding mediation. One further point to note is that at present in Australia, de facto relationship property disputes are dealt with in the State Courts or Territory Courts, whereas anything to do with children is dealt with in the Family Courts.³⁸⁴ In the rest of the Commonwealth, the parties to a domestic relationship need to approach the State Courts or Territory Courts for assistance in respect of any property disputes on separation in terms of the Family Law Act.³⁸⁵

The next section looks specifically at the needs of the Aboriginal and Torres Strait Islander communities in Australia.

³⁷⁶ The Family Court Website, available at <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Separation+and+Divorce/De+facto+relationships/>, accessed on 15 July 2011.

³⁷⁷ Section 4AA of the Family Law Act 53 of 1975. See Moore Law Website, available at <http://www.moorelaw.com.au/content/view/78/37/>, accessed 15 July 2011. The Moore Law web page is quoted to saying 3 years as the time for a couple to be considered as living in a genuine domestic relationship.

³⁷⁸ Part VIIAB of the Family Law Act 53 of 1975 sets out the financial matters relating to de facto relationships. This is beyond the scope of this study and shall not be discussed further.

³⁷⁹ The Family Court Website, (n376).

³⁸⁰ Family Law Act 53 of 1975.

³⁸¹ The Family Court Website (n376).

³⁸² See Moore Law Website, available at <http://www.moorelaw.com.au/content/view/24/41/>, accessed 15 July 2011.

³⁸³ See Moore Law Website (n382).

³⁸⁴ See Moore Law Website (n382).

³⁸⁵ See Part VIIAB of the Family Law Act 53 of 1975 and Moore Law Website (n377).

7 Aboriginal or Torres Strait Islander Families

The Family Law Act makes specific reference to children of Aboriginal or Torres Strait Island descent. If the child so wishes and it is in the best interests of the child, the child must be able to enjoy and experience his or her culture, and have contact with people from his or her culture, whatever the case may be.³⁸⁶ In terms of where the courts are dealing with parental responsibility, section 61F³⁸⁷ applies. This section states³⁸⁸ that courts must have regard to the cultural obligations and child-rearing practices, and must identify anyone who exercises parental responsibility over the child.

The above are considerations that the courts are required to look into when dealing specifically with children in matters where the parties are of Aboriginal or Torres Strait Islander descent.

Apart from what has been provided for in the Family Act, there are organisations that offer mediation services that are specifically structured for Aboriginal and Torres Strait Islander families.

According to Cunneen *et al*, mediating in the Indigenous³⁸⁹ family set up is a complex matter.³⁹⁰ The reason why Indigenous matters are more complex is due to their complicated family relationships (this may involve the extended family),³⁹¹ parties may be in jail, and there may be the presence of family violence, drug and alcohol abuse.³⁹² Indigenous mediations often take longer than non-Indigenous mediations due to the complexity of the situation.³⁹³ As Armstrong points out, the so-called ‘cultural fit’ of what is known as mainstream family mediation (or

³⁸⁶ Subsection 60CC(3)(h) and subsection 60CC(6) of the Family Law Act 53 of 1975.

³⁸⁷ Family Law Act 53 of 1975.

³⁸⁸ Section 61F of the Family Law Act 53 of 1975.

³⁸⁹ Term used in the literature by the Australian writers, see generally as an example C Cunneen, J Luff, K Menzies & N Ralph ‘Indigenous Family Mediation: The New South Wales ATSIFAM Program’ (2005) 9(1) *Australian Indigenous Law Reporter* 1 and S Ralph ‘Family dispute resolution services for Aboriginal and Torres Strait Islander families: Closing the gap?’ (2010) 17 *Family Relationships Quarterly* 14.

³⁹⁰ See generally the following article Cunneen, Luff, Menzies and Ralph (n389) 4; Ralph (n389) 14; S Armstrong ‘Enhancing access to family dispute resolution for families from culturally and linguistically diverse backgrounds’ (2010) 18 *AFRC Briefing* 1 10.

³⁹¹ See *Re CP* (1997) 21 FamLR 486 and B Fehlberg & J Behrens *Australian Family Law: The Contemporary Context* (2008) 146 – 149 on the significance of the extended family in the Australian Indigenous Law context.

³⁹² Cunneen, Luff, Menzies & Ralph (n389) 4.

³⁹³ Cunneen, Luff, Menzies & Ralph (n389) 4; Ralph (n389) 15.

mediation for non-Indigenous families) as it has been (and is) applied to Indigenous families has been challenged.³⁹⁴

At this point it is worth remembering that all references to ‘mediation’ have been removed from the Family Law Act³⁹⁵ and have been replaced with the term ‘family dispute resolution’.³⁹⁶ In this section the term ‘mediation’ will be used and not ‘family dispute resolution’ as this is the terminology used throughout most of the study and this is also the term that has been used by the academic sources from which this information has been obtained.

There are various aspects within mediation that are valued in non-Indigenous mediation, but these may not have as much importance placed on them by Indigenous population during mediation. These may include impartiality and neutrality, confidentiality, voluntary attendance, self-determination and empowerment.³⁹⁷ The reason for this is as follows: in respect of impartiality, neutrality, and confidentiality the only time where the community may consider this to be necessary or important to the negotiations is where there is a great amount of pressure placed on the mediator by the community or family (extended or nuclear).³⁹⁸ In such an instance, the use of an outside mediator would be warranted. Generally, the communities prefer someone to come from their own ranks to mediate a matter, as this person is able to command respect and will be familiar with the background of the community, its customs and each of its members.³⁹⁹ There is a fear that an outside mediator will not be sensitive towards the complex cultural ties of the communities in which the parties move.⁴⁰⁰ Furthermore, gossip and open discussion are an integral part of the community and may assist in settling a matter and later assisting the parties to follow through with the settlement agreement reached.⁴⁰¹ Socio-cultural norms may discourage the parties from seeking outside assistance in the form of mainstream mediation.⁴⁰² It is likely that the whole community will be involved where there is a dispute between two

³⁹⁴ Armstrong (n390) 3.

³⁹⁵ Family Law Act 53 of 1975.

³⁹⁶ Young & Monahan (n3) 54; Altobeli & Seriser (n40) 166.

³⁹⁷ See generally Cunneen, Luff, Menzies & Ralph (n389) 1.

³⁹⁸ See Cunneen, Luff, Menzies & Ralph (n389) 5 & 6; Ralph (n389) 14.

³⁹⁹ See Cunneen, Luff, Menzies & Ralph (n389) 5 & 6; Armstrong (n390) 8, 9, 10.

⁴⁰⁰ Armstrong (390) 9.

⁴⁰¹ Cunneen, Luff, Menzies & Ralph (n389) 6; Ralph (n389) 15 & 16.

⁴⁰² Armstrong (n390) 9.

parties.⁴⁰³ Parties wishing to separate may turn to family and friends (and in some instances to non-legal professionals) for assistance when seeking a suitable resolution, instead of to mainstream mediation.⁴⁰⁴ This is the case where, as described, the parties are members of a collectivist cultural community with certain hierarchies, and where there is a strong emphasis placed on the role of the family and the support of the community above the separate needs of the individual.⁴⁰⁵ Armstrong noted from a study that most parents worked out an arrangement by discussing it amongst themselves,⁴⁰⁶ with some of these turning to professional services for assistance.⁴⁰⁷

In terms of the Indigenous population mediation is considered to be compulsory, and not voluntary. Hence, there is not a high emphasis placed on the fact that by definition, mediation is voluntary.⁴⁰⁸ This is similar to the non-Indigenous context where mediation is compulsory. In terms of the Indigenous mediation if the disputing parties do not attend mediation it is viewed as being disrespectful towards the elders of the community, parties may be coerced into attending the mediation sessions.⁴⁰⁹

Furthermore, mediation is a process whereby self-determination and empowerment are encouraged.⁴¹⁰ In other words the parties are able to take control of the process.⁴¹¹ It allows for the flexibility that is needed in terms of the different Indigenous communities.⁴¹² Cunneen *et al*, feel that this is only a façade that does not allow for true empowerment and self-determination.⁴¹³ It gives the Indigenous communities a false consciousness that they have been ‘re-empowered’ in terms of their cultural rights on a system that has been imported from Western philosophy.⁴¹⁴

⁴⁰³ Ralph (n389) 15 & 16.

⁴⁰⁴ Armstrong (n390) 8.

⁴⁰⁵ Armstrong (n390) 8.

⁴⁰⁶ Armstrong (n390) 9. A reason for not turning towards the

⁴⁰⁷ Armstrong (n390) 8.

⁴⁰⁸ Cunneen, Luff, Menzies & Ralph (n389) 6 – 7.

⁴⁰⁹ Cunneen, Luff, Menzies & Ralph (n389) 6 – 7.

⁴¹⁰ Cunneen, Luff, Menzies & Ralph (n389) 8.

⁴¹¹ Cunneen, Luff, Menzies & Ralph (n389) 8.

⁴¹² Ralph (n389) 15; Cunneen, Luff, Menzies & Ralph (n389) 9

⁴¹³ Cunneen, Luff, Menzies & Ralph (n389) 9.

⁴¹⁴ Cunneen, Luff, Menzies & Ralph (n389)9.

A major difference between non-Indigenous mediation and Indigenous mediation is that in Indigenous mediation, matters that involve family violence are required to be mediated on.⁴¹⁵ Cunneen *et al* found that these were the very issues that Indigenous communities wanted to bring to the mediation sessions.⁴¹⁶ It is acknowledged in the literature that family violence is endemic to Indigenous communities and excluding it from mediation may be unrealistic.⁴¹⁷ It will often occur that where there has been violence within the family relationship the criminal justice system will feature and as such the matter will be dealt with in terms of the criminal process.⁴¹⁸

Furthermore, there are differences within the Indigenous communities.⁴¹⁹ These differences will have an impact on the type of venue to be chosen for the mediation – this is also dependent on the facts of each case and who will be present at the mediation.⁴²⁰ There may be certain restrictions placed on various topics and who may say what in respect of such restricted topics.⁴²¹ Further, there are differences in communication; verbal communication is not the only form of communication used within the communities.⁴²² In this respect it is strongly felt that Indigenous mediators should be trained and given the skills to mediate in such contexts in order to provide the best possible service for Aboriginal and Torres Strait Islander families.⁴²³ In other words, there is also uncertainty as to whether mainstream mediation is appropriate, specifically due to the fact that the mediator may not be familiar with the parties' cultural practices.⁴²⁴ This may lead to a lack of trust in mainstream mediation by the parties, as they believe that the mainstream mediator is likely to have preconceived ideas or stereotypes due to the mediator's lack of understanding of the cultural practices.⁴²⁵

⁴¹⁵ Cunneen, Luff, Menzies & Ralph (n389) 7.

⁴¹⁶ Cunneen, Luff, Menzies & Ralph (n389) 7.

⁴¹⁷ Cunneen, Luff, Menzies & Ralph (n389) 1 7.

⁴¹⁸ Ralph (n389) 15.

⁴¹⁹ Cunneen, Luff, Menzies & Ralph (n389) 7.

⁴²⁰ Cunneen, Luff, Menzies & Ralph (n389) 8.

⁴²¹ Ralph (n389) 15 – 16; Cunneen, Luff, Menzies & Ralph (n389) 8.

⁴²² Ralph (n389) 15 – 16; Cunneen, Luff, Menzies & Ralph (n389) 8, 10.

⁴²³ Ralph (n389) 14 – 16; Cunneen, Luff, Menzies & Ralph (n389) 8.

⁴²⁴ Armstrong (n390) 9.

⁴²⁵ Armstrong (n390) 9.

Within such cultural communities, it may be a taboo to get divorced, even where there is violence within the relationship.⁴²⁶ The parties will see this as a shameful act and the pressure from the community is such that the disputing parties are to reconcile themselves with one another.⁴²⁷ Studies have shown that there is a greater intolerance towards separation, than towards domestic violence and this creates an obstacle for the parties to voluntarily approach post-separation services.⁴²⁸ As such Armstrong suggests that a service offering mediation to assist the parties to attend to the problems within their relationship may be more effective than a post-separation service.⁴²⁹

Armstrong also points out that there are many misconceptions regarding mediation. Some believed that mediation or dispute resolution procedures actually forced parties to separate or divorce.⁴³⁰ This, she suggests, needs to be redressed so as to encourage mediation amongst the culturally diverse communities that are present in Australia.⁴³¹

To remedy some of the problems mentioned in this section, Armstrong suggests that some of the following ideas should be incorporated and acknowledged within the mainstream mediation programs as offered at the various mediation centres around Australia:⁴³²

‘[A]cknowledge difference within and between CALD [culturally and linguistically diverse] communities; acknowledge the importance of religious and cultural values concerning family, marriage and parenting, and the shame associated with separation and with domestic violence; identify the influence of structural factors on the migration and settlement experience and the impact of this experience on couple and family relationships; recognise the important gate keeping role played by community based services assisting CALD and faith communities; work in partnership with CALD communities and services to develop the most appropriate ways to promote and provide FDR [family dispute resolution] services to their community members; communicate more effectively with CALD communities and service providers about the nature, value and limits of mainstream family mediation and its difference to counselling and other relationship and dispute resolution services; supplement existing community dispute resolution processes; and ensure the development of culturally competent FDR services and professionals.’

⁴²⁶ Armstrong (n390) 6, 7.

⁴²⁷ Armstrong (n390)7.

⁴²⁸ Armstrong (n390) 7.

⁴²⁹ Armstrong (n390) 11 – 12.

⁴³⁰ Armstrong (n390) 9.

⁴³¹ Armstrong (n390) 11 – 17.

⁴³² Armstrong (n390) 11.

She further suggests that a ‘competent approach’ to the dilemma of providing mediation to the Indigenous and other communities of Australia should include the following features: The mediation needs to take a holistic view, in other words the mediator must show that he or she is competent to offer mediation to people of a different cultural background to him or her, by showing sensitivity and understanding to the disputing parties needs.⁴³³ The second important feature of mediators who show competence in mediating matters arising from persons in culturally and linguistically diverse communities, is that they continue showing interest in the way the communities develop and keep in contact with those members that may be seen as the ‘gatekeepers’ to such communities.⁴³⁴ And finally, these mediators should show that they are able to respond flexibly to the parties’ needs. This is done by ‘an ongoing process of conscious and critical reflection and learning, or reflexivity, about the relevance of cultures to their professional practice.’⁴³⁵ Armstrong suggests that this may include developing a model that does not exclude or is exclusive to one culture, the model that is developed (and revised from time to time, as the case may be) is flexible enough to respond to the various cultural and linguistical diverse communities needs.⁴³⁶

In order to implement the above features, Armstrong suggests that service providers of mediation wishing to attract and include more culturally and linguistically diverse communities should do the following:⁴³⁷

‘implement a policy and monitoring framework to engage CALD families; respond to CALD communities’ needs and contexts; engage CALD service providers and community leaders; develop partnerships and contribute to building community capacity; and foster a culturally competent workforce and processes that facilitate the effective participation of CALD clients.’

There are many potential benefits for developing a bond or link between those mediators that offer mainstream mediation services and those that focus on culturally and linguistically diverse communities:⁴³⁸ there is an increased understanding of the social structures and networks, including the key relationships of the various communities. This increased knowledge assists in

⁴³³ Armstrong (n390) 11.

⁴³⁴ Armstrong (n390) 12.

⁴³⁵ Armstrong (n390) 12.

⁴³⁶ Armstrong (n390) 12.

⁴³⁷ Armstrong (n390) 12.

⁴³⁸ Armstrong (n390) 14 – 15.

improving the skills and expertise of the mediators working either in the so-called mainstream mediation services and those working in culturally and linguistically diverse communities. Mainstream mediators are thus able to identify and address any barriers that hinder culturally and linguistically diverse communities from accessing mainstream mediation services as offered by most service providers. There is the ability to clear any misconceptions about mediation and form a basis of trust or confidence in culturally and linguistically diverse communities for mainstream mediation services.⁴³⁹

Many members of culturally and linguistically diverse communities have indicated that they would be prepared to use mainstream mediation services, if there were some changes to the current systems, in order to adapt them to the needs of culturally and linguistically diverse communities.⁴⁴⁰ Armstrong in her research indicates some of the changes that have already been implemented or that have been suggested by the various parties are as follows:⁴⁴¹

‘[S]upplementing existing community services, including community dispute resolution and traditional mediation processes; offering outreach services, or FDR services in CALD community services’ premises; providing community education about family separation, family dispute resolution, impact of separation on children, domestic violence, legal and support structures and consulting about how best to address these issues; adopting a “multi-sectoral or multi-tiered collaborative approach” to spread the cost and draw on wide expertise, and to “avoid consultation fatigue” by communities and by agencies; developing communication and information strategies that are “flexible and multi-faceted” and customised to the cultural, linguistic and educational needs and backgrounds of the participants, for example, offering gender-specific programs about parenting, or to modify such programs to reflect clientele languages and literacy levels; and adapting existing mainstream programs, such as parenting programs, for specific communities to reflect cultural parenting practices, as this may create “back door opportunities” to engage families so that they become familiar with and later utilise the service.’ (In text references removed.)

In Australia, there is a specific program in New South Wales that mediates in amongst the Aboriginal and Torres Strait Islander communities. This program has had successes in these communities.⁴⁴² The program will be discussed under the next section to follow, namely ‘Mediation services offered in Australia’.

⁴³⁹ Armstrong (n390) 15.

⁴⁴⁰ Armstrong (n390) 16.

⁴⁴¹ Armstrong (n390) 15 – 16.

⁴⁴² See generally Cunneen, Luff, Menzies & Ralph (n389).

It is worth pointing out that Armstrong not only speaks of Aboriginal and Torres Strait Islander communities where she mentions culturally and linguistically diverse communities. She includes within this phrase other ethnic minorities that have migrated to Australia, such as Islamic families and those of an Asian background.⁴⁴³ To date, there is no mention of a specific mediation service for Islamic families,⁴⁴⁴ there is however – as discussed in the article by Cunneen *et al* – one for Indigenous Australians, i.e. the Aboriginal and Torres Strait Islander communities.⁴⁴⁵ This is discussed in the section that follows.

A few of the positives and negatives regarding service delivery of family dispute resolution have already been outlined in the previous sections of this chapter. A direct example is the problems that are faced with regards to there not being enough Indigenous mediators to assist with the mediation within the Aboriginal and Torres Strait Islander communities.⁴⁴⁶ The following is a discussion of the mediation services that are currently available to Australians today and of some of the problems they face.

8 Mediation services offered in Australia

Despite the changes occasioned by the enactment of the Family Law Act, 1975 and the fact that there were family counsellors or those trained in the social services attached to the court, it was felt that too much litigation was still taking place in the family courts.⁴⁴⁷ In other words, there was an interest in using alternative methods of dispute resolution to settle family law disputes.

In Australia, mediation was seen as a new way to privatise and cut back on public expenditure.⁴⁴⁸ The reason for the promotion of mediation is that it is a cheaper and quicker mode of dispute resolution when compared to court litigation.⁴⁴⁹ With this aim in mind, the Family Court Rules require that the parties must attend ‘pre-action procedures’, i.e. the parties must attempt to resolve their dispute using alternative dispute resolution procedures, alternatively known as

⁴⁴³ See generally Armstrong (n390).

⁴⁴⁴ See generally Armstrong (n390).

⁴⁴⁵ See generally Cunneen, Luff, Menzies & Ralph (n389).

⁴⁴⁶ Cunneen, Luff, Menzies & Ralph (n389) 7 – 8.

⁴⁴⁷ De Jong (n3) 283.

⁴⁴⁸ De Jong (n3) 284.

⁴⁴⁹ De Jong (n3) 284.

family dispute resolution procedures. Family dispute resolution procedures include counselling and mediation.⁴⁵⁰ Non-compliance may lead to an adverse costs order for the offending party.⁴⁵¹

Since its inception, the family court has placed an emphasis on counselling and conciliation where parties wished to divorce.⁴⁵² Later the family court began to respond to the demand for mediation to be offered.⁴⁵³ The courts today offer mediation services at all of their registries, and furthermore the courts have concluded contracts with several community-based organisations that offer mediation services to offer their services on behalf of the family court in order to relieve the pressure of needing to conduct the mediations itself.⁴⁵⁴ There are various requirements that need to be met before the organisation will be seen as an ‘accredited’ mediation centre.⁴⁵⁵ The mediation services offered by the family court are generally available to those parties who have already proceeded with an application for divorce and have disputes relating solely to their minor children.⁴⁵⁶

Methods for mediation and various models have also been developed in the private sector, at community level and not merely in the family courts.⁴⁵⁷ The following is a discussion on the services that offer mediation to the communities which they serve, with a specific focus on the Family Relationships Centres and the Aboriginal and Torres Strait Islander Family Mediation Program in New South Wales.

Since the early 1990’s, in the private sector, mediation services and the training of mediators are regulated by various independent organisations, such as Lawyers Involved in Alternative Dispute Resolution (LEADR)⁴⁵⁸ and Mediate Today.⁴⁵⁹ These organisations offer mediation services to

⁴⁵⁰ Rule 1.05 of the Family Law Rules 2004; Young & Monahan (n3) 50.

⁴⁵¹ Rule 1.10(d) of the Family Law Rules 2004; Young & Monahan (n3) 50.

⁴⁵² De Jong (n34) 457; Parkinson (n145) 193 – 194.

⁴⁵³ De Jong (n3) 285; De Jong (n34) – 458.

⁴⁵⁴ De Jong (n3) 285; De Jong (n34) 457 – 458.

⁴⁵⁵ In terms of section 13B of the Family Law Act 53 of 1975 ‘The minister must be satisfied that ‘(a) the organization is willing and able to engage in family and child mediation; and (b) the whole, or a substantial part, of the organization’s activities consist, or will consist, of family and child mediation.’ See also De Jong (n3) 285 at footnote 35.

⁴⁵⁶ De Jong (n3) 285 – 286.

⁴⁵⁷ De Jong (n3) 284 – 286.

⁴⁵⁸ LEADR Homepage, available at <http://www.leadr.com.au/>, accessed on 12 July 2011.

⁴⁵⁹ Mediate Today homepage, available at <http://www.mediate.com.au/index.php>, accessed on 12 July 2011.

the public, through accredited independent mediators, professional as well as voluntary (i.e. people that do not work as mediators). These organisations not only train but also advertise the services of mediators. The mediators span a variety of professions throughout Australia and there are also trained mediators in the rural areas.⁴⁶⁰

In Australia several organisations that offer counselling and marriage guidance services at community level, now also offer mediation services. The community organisations, namely Relationships Australia,⁴⁶¹ Lifeworks,⁴⁶² Centacare Australia⁴⁶³ and Family Services Australia⁴⁶⁴ to name a few, offer these services free of charge to the public. These services are largely funded by the government and the government has invested millions in expanding and improving access to these services for the general public in Australia. An example of investing in these services is that the government has created a program that involves setting up family mediation services to assist separating families in cities and towns across Australia at these community based organisations.⁴⁶⁵ These ‘Family Relationship Centres’ were set up not only to mediate in family disputes but also to aid separating families by providing other forms of dispute resolution services and drawing up suitable parenting plans.⁴⁶⁶

8.1 Family Relationship Centres

The main aim of these Family Relationship Centres is to keep divorcing parents out of the courts with an emphasis placed on the children’s needs.⁴⁶⁷ The idea was that the Family Relationship Centres are used as an early-intervention mechanism to help parents ‘work out post-separation parenting arrangements’ and assist them to manage ‘the transition from parenting together to

⁴⁶⁰ About LEADR available at <http://www.leadr.com.au/aboutleadr.htm>, accessed 12 July 2011; About Mediate Today available at <http://www.mediate.com.au/about-mediate-today.php>, accessed 12 July 2011; De Jong (n3) 284; De Jong (n3) 457.

⁴⁶¹ The homepage for Relationships Australia available at <http://www.relationships.org.au/>, accessed on 20 July 2011.

⁴⁶² The homepage for Lifeworks available at <http://www.lifeworks.com.au/>, accessed on 12 July 2011.

⁴⁶³ The homepage for Centrecare Australia available at <http://www.centrecare.com.au/>, accessed on 12 July 2011.

⁴⁶⁴ The homepage for Family Services Australia available at <http://www.frsa.org.au/site/>, accessed on 12 July 2011.

⁴⁶⁵ Young & Monahan (n3) 50; De Jong (n3) 285; De Jong (n34) 457.

⁴⁶⁶ About Family Relationship Centres, available at <http://www.familyrelationships.gov.au/SERVICES/FRC/Pages/default.aspx>, accessed 12 July 2011; Young & Monahan (n3) 50. For Indigenous family mediation services see generally Ralph (n389) and Cunneen, Luff, Menzies & Ralph (n389) and the discussion on Aboriginal and Torres Strait Islander Families below; De Jong (n34) 457; Parkinson (n145) 187 – 193.

⁴⁶⁷ Young & Monahan (n3) 50; Dickey (n191) 77.

parenting apart.’⁴⁶⁸ The Centres were developed to assist families that are experiencing significant difficulties.⁴⁶⁹ The Centres assist the parents to sort out disputes, not only those that occur with or after separation or divorce, but also those that may arise with a change in circumstances.⁴⁷⁰ Parkinson states that these Centres do not merely provide assistance in family separation and divorce, but approach each matter with a holistic view.⁴⁷¹ The Centres may assist families in referring the participants to other social services, such as anger management courses or counselling against some form of addiction (such as gambling or alcohol), or assist the parents with giving them direction as to where they will be able to obtain mediation services where they are in conflict with their adolescent children, in order to assist the family to remain intact before taking the step towards divorce and/or separation.⁴⁷² The Family Relationship Centres are there to act as a gateway to other services that they are unable to provide.⁴⁷³ The extent of the services that are offered by the Centres will depend on each Centre’s organisation and the ‘demand for post-separation services in each community’. This is then largely based on the area in which these Centres are placed.⁴⁷⁴

Not only do the Family Relationship Centres offer support to the community, they also have an educational function over and above their counselling role. The goal of their educational aims is to point out to parents what the needs of their minor child or children are.⁴⁷⁵ The Centres give initial information on child support and welfare benefits.⁴⁷⁶ The Centres also function as a gateway ‘to services that help people cope with the emotional sequelae of relationship breakdown.’⁴⁷⁷

The Family Relationship Centres provide a holistic view to family problems and as such not merely parents but also grandparents are able to approach these Centres for assistance and

⁴⁶⁸ Parkinson (n145) 187.

⁴⁶⁹ Parkinson (n145) 188.

⁴⁷⁰ Parkinson (n145) 187.

⁴⁷¹ Parkinson (n145) 187.

⁴⁷² Parkinson (n145) 187 – 188.

⁴⁷³ Parkinson (n145) 188.

⁴⁷⁴ Parkinson (n145) 188.

⁴⁷⁵ Parkinson (n145) 188.

⁴⁷⁶ Parkinson (n145) 188.

⁴⁷⁷ Parkinson (n145) 188.

advice.⁴⁷⁸ To meet the requirements of the communities, the Australian government ensured that there was a broadening of the services offered in the communities where the Centres were situated.⁴⁷⁹

The Australian Government at the time of introduction ensured that there was a high level of awareness about these centres. There was a ‘major advertising campaign’, leaflets were distributed among the members of the communities, flyers were placed in doctor’s surgeries, after-care services and medical facilities, and attorneys also informed their clients about these centres.⁴⁸⁰ The Centres were expected to find a visible, central location i.e. a place in a shopping mall or business area, where many members of the community attend to their shopping or business.⁴⁸¹ By means of these steps the Centres achieved a high-level of awareness in a very short space of time.⁴⁸²

The important point to note in this regard is that in general Australians have confidence in the community-based organisations and the services offered by these Centres, including mediation.⁴⁸³

The aim of the Family Relationship Centres is to change the way people view separation and divorce.⁴⁸⁴ The Centres try to emphasise that separation and divorce is not a legal problem from the beginning but rather a relationship problem.⁴⁸⁵ Only once the parties have exhausted all avenues, should they approach the court system.⁴⁸⁶ As the Centres are only seen as a gateway to the services that provide mediation, etc., the parties meet with an adviser and discuss the various services that are offered to them, for example, where they need to apply for welfare support payments (if these are needed), or child support, or where one of the parties is concerned for his

⁴⁷⁸ Parkinson (n145) 188.

⁴⁷⁹ Parkinson (n145) 188.

⁴⁸⁰ Parkinson (n145) 188.

⁴⁸¹ Parkinson (n145) 188.

⁴⁸² Parkinson (n145) 188.

⁴⁸³ De Jong (n3) 284 – 285; Parkinson (n145) 192 – 193.

⁴⁸⁴ Parkinson (n145) 188 – 189.

⁴⁸⁵ Parkinson (n147) 189.

⁴⁸⁶ Parkinson (n145) 189.

or her personal safety. They are also able to direct parties to suitable mediation services. Mediation is also offered by trained mediators at the Centres.⁴⁸⁷

Mediation is one of the primary services offered by the Family Relationship Centres.⁴⁸⁸ The central strategy is to solve family disputes.⁴⁸⁹ Family mediation and other dispute resolution services have been offered by the Family Courts since their inception. In the beginning the court mediation services were able to provide mediation as an initial service before an application was launched with the court itself. However, due to a lack of funding and a cut in resources, the court mediation services are only able to assist those parties that have already launched an application with the courts. The Family Relationship Centres assist in filling the gap with the provision of ‘initial mediation’ services.⁴⁹⁰

The Family Relationship Centres have designed their own assessment program in which they screen the parties that are suitable to attend mediation.⁴⁹¹ In terms of this assessment, where there is a history of or a risk of family violence, these parties will not be required to attend mediation services.⁴⁹² Accordingly, pre-mediation screening is an integral and important part of the mediation services offered at the Centres.⁴⁹³ A possible further requirement for the parties, during this pre-mediation screening, will be to attend a parenting-after-separation seminar.⁴⁹⁴ As these seminars are beyond the scope of this study, they will not be discussed.

The main focus of these Family Relationship Centres is mediation, and specifically mediation in terms of parenting issues. The parties are able to mediate on financial matters at the Centres, but the main focus of the mediation must be on parenting issues. The reason behind this is that it is often possible to separate property matters from matters concerning children.⁴⁹⁵ Part of this focus, Parkinson points out, is for the Centres to offer continuous assistance with regards to

⁴⁸⁷ Parkinson (n145) 189.

⁴⁸⁸ Parkinson (n145) 189 – 192.

⁴⁸⁹ Parkinson (n145) 189.

⁴⁹⁰ Parkinson (n145) 189.

⁴⁹¹ Parkinson (n145) 190.

⁴⁹² Parkinson (n145) 190.

⁴⁹³ Parkinson (n145) 190.

⁴⁹⁴ Parkinson (n145) 190.

⁴⁹⁵ Parkinson (n145) 191.

family mediation. Parkinson states that '[t]he goal of the mediation [as offered by the Centres] is not to reach a final resolution of all long-term issues for the long term.'⁴⁹⁶ The reason put forward for the ongoing mediation is that circumstances in the lives of both the children as well as the parents change, therefore some of the arrangements made in the initial mediation sessions will probably not work in the future, depending on the circumstances of the parties concerned.⁴⁹⁷ This often makes the Centres invaluable where they assist to mediate in matters that deal with the contravention of court orders due to a change in circumstances, or where the consent order made is unworkable, etc.⁴⁹⁸ At the conclusion of a mediation, a certificate stating the outcome of the mediation is given to the parties to present to the court. What the mediator may state on the certificate has been discussed in the section dealing with compulsory mediation in this chapter.⁴⁹⁹

Parties are still able to choose where and with whom they would like their matter mediated, although the Family Relationship Centres generally offer free mediation to most members of the community⁵⁰⁰ i.e. completely free mediation is offered to those that 'pass' the means test. Generally the first three hours are free; this excludes the pre-mediation screening with each parent, thereafter, and based on the means test, the parties may need to make some sort of contribution towards the mediation sessions.⁵⁰¹ The free mediation sessions also include a further three hours that take place within two years after the initial mediation ends – but this has to deal with new matters.⁵⁰² The reason for the two year period was to allow the parties to 'reality test' and experiment with the actual mediation agreement and then deal with any matters that arose during the 'test period'.⁵⁰³ In 2010, the legislature announced a cut in the funds that the Centres would receive. This endangers the concept of free mediation. Despite this, the costs of the sessions will remain rather low, according to Parkinson.⁵⁰⁴

⁴⁹⁶ Parkinson (n145) 191.

⁴⁹⁷ Parkinson (n145) 191.

⁴⁹⁸ Parkinson (n145) 191.

⁴⁹⁹ Section 2.4 of this chapter.

⁵⁰⁰ Parkinson (n145) 190.

⁵⁰¹ Parkinson (n145) 191.

⁵⁰² Parkinson (n145) 191.

⁵⁰³ Parkinson (n145) 191.

⁵⁰⁴ Parkinson (n145) 191.

Parkinson points out that the Centres do not offer legal advice and those that are using the offered services may have not obtained any legal advice before accessing the mediation services at the Centres.⁵⁰⁵ Parkinson further points out that the legislator is seeking to incorporate a legal advice service within the Centres to assist in this regard, alternatively to form a linkage between lawyers and the Centres to remedy this problem.⁵⁰⁶ In this regard Parkinson states that lawyers are thus still an integral part of the system, i.e. they provide the separating or divorcing parties with the initial legal advice, they assist in reality testing the agreements and furthermore they set out the agreements in a legally acceptable manner to place before the court.⁵⁰⁷ Lawyers are thus required to work with not only the court staff but also with the mediators in finding practical resolutions to the problems that are faced by the parties on divorce (or separation – as the case may be).⁵⁰⁸ Lawyers are the people that will ‘take over’ the cases that should not or cannot be mediated, i.e. where there has been family violence or the parties are unable to mediate the matter, etc.⁵⁰⁹

Apart from the services offered by the Family Relationship Centres, this being used by the majority of Australians seeking mainstream mediation, there are also services that specifically cater for the needs of the Aboriginal and Torres Strait Islander communities. A discussion of one of these services follows.

8.2 ATSIFAM Program

This is a program that has been specifically designed to cater for the needs of the Indigenous communities of Australia. It was a pilot project that was implemented to assist divorcing or separating Aboriginal and Torres Strait Islander families after it was discovered that very few of them actually used the mainstream services offered in the region. ATSIFAM stands for the Aboriginal and Torres Strait Islander Family Mediation Program.⁵¹⁰

⁵⁰⁵ Parkinson (n145) 190.

⁵⁰⁶ Parkinson (n145) 190.

⁵⁰⁷ Parkinson (n145) 195.

⁵⁰⁸ Parkinson (n145) 194 – 196.

⁵⁰⁹ Parkinson (n145) 195 – 196.

⁵¹⁰ Cunneen, Luff, Menzies & Ralph (n389) 1.

At ATSIFAM mediators under go considerable training in the follow topics:⁵¹¹

‘Financial issues, School attendance, Power plays within the family, Blended families, Family violence, Couples separating, Problems in “mixed” marriages, Children’s residence, Grandparent’s care of children, Cultural issues, Parents and adolescent children (drugs, alcohol and violence), Roles and responsibilities within the families, and Family businesses.’

The model was designed to focus on the ‘complexities of the parties living within their communities’ rather than focusing on the individual person’s needs within the nuclear family.⁵¹²

This involved looking at a range of matters that are family and also non-family related (as seen by the afore mentioned list). Some of these matters are not seen as being ‘core “family” mediation [matters] within western models’ but are important matters within the Indigenous communities.⁵¹³

In training the mediators for the ATSIFAM, it was felt that such a task should be conducted by Indigenous trainers. The reason being that these trainers are more sensitive to the needs and ‘workings’ of the Aboriginal and Torres Strait Islander communities than non-Indigenous trainers. One of the important features of Indigenous mediation is that these communities prefer face-to-face mediation sessions and not video conferencing or telephonic mediations. The mediators generally felt that these last mentioned methods were not suited to Indigenous mediation.⁵¹⁴ The disputing parties found the mediation sessions helpful in reaching an agreement, as the mediators explained the process sufficiently.⁵¹⁵

One of the reasons why Indigenous mediation is far more complex than ‘non-Indigenous’ mediation is due to the fact the whole community will be involved. In this regard mediators need to listen to a range of people – not just those members that are a part of the nuclear family. There might also be a whole range of other issues involved, such as drugs, alcohol, family violence, illness, death of family members, extensive family breakdown (this could be due to a change in the socio-economic lives of the parties, forced changes to the family structures and cross cultural

⁵¹¹ Cunneen, Luff, Menzies & Ralph (n389) 3.

⁵¹² Cunneen, Luff, Menzies & Ralph (n389) 3.

⁵¹³ Cunneen, Luff, Menzies & Ralph (n389) 3.

⁵¹⁴ Cunneen, Luff, Menzies & Ralph (n389) 8.

⁵¹⁵ Cunneen, Luff, Menzies & Ralph (n389) 8.

conflict to name a few),⁵¹⁶ one of the parties is serving time in prison, differences of opinion within the community, and matters concerning children, to name a few.⁵¹⁷ Due to these complexities it may take some time for the mediator to explain to all the parties involved how the mediation will continue and what is expected of each of them.⁵¹⁸ Where domestic violence is present, it was felt that a more flexible approach should be used – it is impossible for the mediators not to deal with matters that contain domestic violence, due to the high prevalence of same within the community.⁵¹⁹

What adds to the complexity of the matter is that the mediator (as explained in the section discussing Aboriginal and Torres Strait Islander families) is that the parties do not consider mediator neutrality and impartiality of the utmost importance.⁵²⁰ Cunneen *et al* did note though that although neutrality and impartiality are not of the utmost importance within the Indigenous communities, the participants from the Indigenous communities were satisfied with the service they received and the overall comment was that it was fair.⁵²¹ Furthermore, with regards to confidentiality, although the Indigenous communities generally did not rank this as absolutely important, during the study conducted by Cunneen *et al* it was discovered that the parties were satisfied that the mediators at the ATSIFAM did keep the matter to themselves and did not discuss it with the other community members.⁵²²

Cunneen *et al* noted that most matters that the mediator dealt with were referred to the ATSIFAM and very few participants actually came to the program out of their own accord.⁵²³ This confirmed – as was discussed in the section on Aboriginal and Torres Strait Islander families – that voluntariness is not an important feature, and that parties attend mediation where they are ‘forced’ to go.⁵²⁴

⁵¹⁶ Armstrong (n390) 6 – 7.

⁵¹⁷ Cunneen, Luff, Menzies & Ralph (n389) 4.

⁵¹⁸ Cunneen, Luff, Menzies & Ralph (n389) 4.

⁵¹⁹ Cunneen, Luff, Menzies & Ralph (n389) 7.

⁵²⁰ See Cunneen, Luff, Menzies & Ralph (n389) 4 – 5 for the general discussion on neutrality and impartiality in this regard.

⁵²¹ Cunneen, Luff, Menzies & Ralph (n389) 6.

⁵²² Cunneen, Luff, Menzies & Ralph (n389) 6.

⁵²³ Cunneen, Luff, Menzies & Ralph (n389) 7.

⁵²⁴ Cunneen, Luff, Menzies & Ralph (n389) 6 – 7.

Cunneen *et al* pointed out that the ATSIFAM mediation program had been established in terms of a mainstream mediation service.⁵²⁵ The idea was that it was a service trying to overcome the lack of use of the mediation services to better suit the needs of the Indigenous communities. Due to the fact that Indigenous people were employed as mediators, they were able to apply a more practical approach (in terms of the Indigenous cultures) to the mediation sessions.⁵²⁶ It was important for the Indigenous communities that a service was offered that met their needs.⁵²⁷ The longer term impact of offering an Indigenous mediation service was that the disputing parties found that their agreements lasted longer, and that they were far more prepared to attend a mediation service that was tailor-made to their needs than to go to a mainstream mediation service.⁵²⁸ It was felt that the parties were better understood, especially where an Indigenous mediator was used.⁵²⁹

9 Conclusion

As can be seen from the above, the Australian legal system has been well set out and structured to give Australians plenty of encouragement to attend family dispute resolution (mediation) sessions. There is ample opportunity for the parties to attend family dispute resolution sessions throughout the divorce process.

There are many sections in various pieces of legislation that set out who is required to attend the mediation sessions and what must be covered in those sessions. Furthermore, they also set out the requirements that need to be met by the lawyers and their clients regarding family dispute resolution. There are those sections or rules that deal with compulsory mediation (or rather sections that state when parties are required to attend family dispute resolution before filing an application to the courts) and there are also sections that set out when the courts may compel the parties to attend family dispute resolution sessions. There are also provisions which look into the care and protection of a child, where this is necessary, and the possible use of mediation or counselling to resolve any matters concerning the abuse. Furthermore, parties may be required to seek an amicable solution to the matters that arise out of child abduction cases. There are

⁵²⁵ Cunneen, Luff, Menzies & Ralph (n389) 9.

⁵²⁶ Cunneen, Luff, Menzies & Ralph (n389) 9 – 10.

⁵²⁷ Cunneen, Luff, Menzies & Ralph (n389) 10.

⁵²⁸ Cunneen, Luff, Menzies & Ralph (n389) 11.

⁵²⁹ Cunneen, Luff, Menzies & Ralph (n389) 10 – 11.

possibilities that allow the parties to make their mediated agreements enforceable by way of court orders. There are instances when the courts will order the parties to attend dispute resolution after the divorce is finalised, especially where there are matters that concern the minor child or children of the divorcing parties. Furthermore, the chapter set out that in all instances, whether in court or in a family dispute resolution session (whatever the case may be), the interests of the child are taken into account as a paramount (if not the absolutely paramount) factor where there is a minor child (or where there are minor children) within the marriage relationship. Furthermore, a section of this chapter discussed with how mediation is approached in respect of the Aboriginal and Torres Strait Islander Communities. Lastly the chapter focused on the services that are offered by various organisations today in Australia and it showed that there are many different organisations (whether private or public) that offer mediation services.

Chapter 4: Comparative Study

1 Introduction

In this chapter, the legal systems of South Africa and Australia will be compared, in respect of what and how they have provided for mediation. This comparison will be based on the previous chapters where the legal systems have been set out. There will naturally be some repetition as the legal systems are compared, but explanations shall be kept to a minimum, i.e. there is no need in this chapter to refer to what the legislature or courts in each of the countries was trying to achieve – this has been dealt with in the previous chapters discussing each of the legal systems.

By way of introduction to this chapter, it is worth mentioning that both South Africa and Australia have similar definitions regarding what a ‘family’ constitutes. Furthermore, both the South African as well as the Australian legal systems are largely court based. In both legal systems, provision has been made by the legislature to encourage the parties to attend mediation when dealing with family law matters.¹ Furthermore, there have been court decisions that have advocated the use of mediation as the preferred method to use when dealing with family disputes – especially where children are involved.²

This chapter will show a comparison of the legislative instruments that are used to encourage mediation, setting out where mediation is a compulsory first step or where the courts compel the disputing parties to attend mediation or where it may be voluntary or implied. It will also show a comparison as to how each country has dealt with the ‘indigenous’ members of their respective societies. Furthermore, it will compare what each of the countries offer by way of mediation services. This chapter will also show any criticisms and/or recommendations in respect of each of the legal systems.

¹ South Africa: Mediation in Certain Divorce Matters Act 24 of 1987; Children’s Act 38 of 2005 (and regulations); Australia: Family Law Act 53 of 1975 (and regulations); Federal Magistrates Act 193 of 1999.

² South Africa: *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC); *Townsend-Turner v Morrow* [2004] 1 All SA 235 (C), 2004 (2) SA 32 (C); *MB v NB* 2010 (3) SA 220 (GSJ); Australia: *Nash v Nash* [1985] P. 266; *In the Marriage of Candlish* (1979) FLC 90-668; *Jakiemiec v Buckingham* [2007] FamCA 542; *State Central Authority & Brume* 2010 FamCa 268. Cases that discuss the admissibility of communications to a mediator and thereby assist in promoting open and fair mediation discussions (which promotes mediation) are *Marriage of Marshall* (1983) 9 Fam LR 43; *Re Wakely and Hanns*; *Director of Court Counselling (Intervener)* (1993) 17 Fam LR 215; *Relationships Australia v Pasternak* (1996) 20 Fam LR 604; *Centacare Central Queensland and Downing v G and K*; *Attorney-General of the Commonwealth (Intervener)* (1998) 23 Fam LR 476.

The starting point for the comparison will be the legislative framework. The discussion follows.

2 Legislative Framework

In both South Africa and Australia, the legislatures have created a legislative framework to encourage separating and divorcing parties to use mediation to resolve the disputes between them. The legislature has defined in their respective statutory instruments what 'types of mediation' will be used and when these are to be used, i.e. the types of mediation being compulsory mediation, court-compelled mediation, etc., and who is to monitor or deal with such mediation, etc.

The section of this chapter will at first compare the roll of the family advocate with that of the independent children's lawyer. It will further compare provisions made for compulsory mediation; court-compelled mediation, voluntary mediation and implied mediation.

2.1 Family Advocate/Independent Children's Lawyer

In South Africa there is the Office of the Family Advocate. The family advocate was created by the Mediation in Certain Divorce Matters Act 24 of 1987. The aim or idea of the Mediation in Certain Divorce Matters Act is to combine the best interests of the child with a court-like mediatory approach in divorce proceedings. To achieve this aim, the family advocate holds enquiries with all the parties concerned (this includes anyone who is able to assist in the matter by providing information). The family advocate is assisted by a family counsellor during these enquiries. During the enquiries the family advocate performs a mediatory-like function.³ Based on the findings from these enquiries, the family advocate sets up a report in which he or she makes recommendations to the presiding officer as to what would be in the best interests of the minor child. As mentioned earlier, there is one criticism and that is that the approach of the family advocate is more conciliatory and closer to

³ J Heaton *South African Family Law* 3ed (2010) 186; DSP Cronjé & J Heaton *South African Family Law* 2ed (2004) 183; N Grobler 'The Mediation in Certain Divorce Matters Act, 1987' (1990) October 3(2) *Consultus* 133; CH Cohen 'Divorce Mediation' *Dispute Resolution* P Pretorius (ed.) (1993) 73 at footnote 3; D Scott-MacNab 'Mediation in the family law context' (1998) 105(4) *SALJ* 709 719; L van Zyl 'Chapter 4: Family Mediation' in *Introduction to Child Law in South Africa* CJ Davel (ed) (2000) 94 – 95; A Skelton & M Carnelley (eds) *Family Law in South Africa* (2010) 346.

alternative dispute resolution than to the adversarial system; but this does not amount to true mediation as was originally envisaged by the Hoexter Commission Reports.⁴

In Australia the relevant body is the Attorney-General's Office. This body does not have the same functions as the family advocate in South Africa. In other words the Attorney-General merely monitors and administers the family law legislation. The Attorney-General's office does not mediate matters in terms of the Family Law Act. Where the child's interests need to be protected, an independent children's lawyer is appointed by the court in terms of Division 10 of Part 7 of the Family Law Act.⁵ It is important to note that there are various sections within the Family Law Act that require that an independent children's lawyer be appointed to assist the court in respect of protecting the minor child or children's interests.⁶ The independent children's lawyer has similar functions as those of the family advocate in South Africa.

Here is one example of where the law between Australia and South Africa differ in that South Africa has a dedicated officer, appointed in terms of the legislation to protect the best interests of the child and Australia does not. In Australia, the court needs to appoint a specific officer to attend to the best interests of the child. There is not a specific officer that fulfils such a function 'automatically' in terms of the Australian law. The person appointed by the court to do so is not initially involved in the matter. In both the Australian and South African legal systems, it is submitted, that the best interests of the child are adequately protected and provided for in terms of the law (whether it is during a court appearance or whether it is during a mediation session).

2.2 Compulsory Mediation

In South Africa, two sections of the Children's Act⁷ require that the parties attend mediation as a compulsory first step, before they bring the dispute to the courts, namely section 21 and section 33.⁸ These sections deal, respectively, with the acquisition of parental responsibilities and rights and with parenting plans, with respect to content and application⁹ where the co-

⁴ SA Law Commission *Commission of Inquiry into the Structure and Functioning of the Courts* (RP78/1983) vol III part 7.

⁵ Namely sections 68L to 68M of the Family Law Act 53 of 1975.

⁶ For example section 60CD of the Family Law Act 53 of 1975.

⁷ Children's Act 38 of 2005.

⁸ Children's Act 38 of 2005.

⁹ Section 21 of the Children's Act 38 of 2005.

holders of parental rights and responsibilities have difficulty in exercising these rights and responsibilities in terms of such parenting plan.¹⁰ The parties are expected to attend mediation first to sort out all problems between them and secondly to reach some form of agreement (depending on the circumstances) before approaching the courts. There are instances where the parties will not be required to attend mediation. This is the case where there are allegations of family violence or abuse towards the child.¹¹

Similarly in Australia, section 60I of the Family Law Act¹² requires that both parties attend compulsory mediation before approaching the courts for an order in terms of Part VII of the Act dealing with children. The section requires that a certificate from the dispute resolution practitioner must accompany an application for an order under Part VII. The section does set out instances that are exceptions to the requirement of attending mediation or dispute resolution.¹³

2.2.1 Exceptions to the requirement of attending compulsory mediation

Similarly to South Africa, in Australia where there are allegations of family violence or child abuse, the Australian courts may need to intervene and take prompt action in order to secure the best interest of the all the parties concerned.¹⁴ In other words there is no need for the parties to attend mediation before attending court.

Australian legislation further provides for other instances where the parties need not attend compulsory mediation: where there is a consent by the parties or the one party is responding to an application by the other party;¹⁵ the application made concerns the contravention of a Part VII order and the court is satisfied that there are reasonable grounds to believe that the contravening party has acted in such way so as to show disregard for the obligations set out in the Part VII order (mainly within the past 12 months preceding the application);¹⁶ the

¹⁰ Section 33 of the Children's Act 38 of 2005.

¹¹ Section 71(1) of the Children's Act 38 of 2005.

¹² Family Law Act 53 of 1975.

¹³ Section 60I(9) of the Family Law Act 53 of 1975.

¹⁴ Rule 1.05 of the Family Law Rules 2004; sections 60I(9)(b)(i) & (ii) 60J(1) & (2) of the Family Law Act 53 of 1975; L Young & G Monahan *Family Law of Australia* (7ed) (2009) 53. See also section 60J(3) and section 60I(9)(b)(iii) & (iv) of the Family Law Act 53 of 1975; A Dickey *Family Law* (5ed) (2009) 77.

¹⁵ Section 60I(9)(a)(i) & (ii) of the Family Law Act 53 of 1975; Young & Monahan (n14) 53; Dickey (n14) 77.

¹⁶ Section 60I(9)(c) of the Family Law Act 53 of 1975; Young & Monahan (n14) 53; Dickey (n14) 77.

application is urgent;¹⁷ and one or more of the parties is unable to effectively participate in the mediation, whether this is due to location, or some sort of incapacity, or some other reason.¹⁸

As can be seen by way of comparison, the Family Law Act in Australia sets out far more instances where the parties are not required to attend compulsory mediation. In South African family law, any agreement made between the parties to a dispute where minor children are involved, needs to be approved by the family advocate in terms of the Mediation in Certain Divorce Matters Act first before the court will accept the agreement.¹⁹

2.2.2 Critique regarding compulsory mediation

Both countries face similar problems regarding compulsory mediation. Firstly, despite being expected by the legislature (especially in Australia) to make a genuine effort and showing willingness to compromise, the parties may merely go through the motions in order to get it over with as soon as possible. Secondly, there is the problem that there may be an unequal power division (or imbalance) between the parties. This imbalance may be caused by various factors, such as personal wealth of each party to the mediation (especially spouses), or abuse within the marriage or between the parties, to name a few. Thirdly, compulsory mediation is a contradiction in terms; mediation has been defined as a voluntary process where a third neutral person assists the disputing parties to resolve the dispute between them in order to bring about agreement or settlement.

Although there is much criticism against compulsory mediation, the courts have supported it as such. The reason for this is that it keeps the court rolls down and does not clog the court system with unnecessary applications and matters; especially where these can be solved within the realms of mediation.²⁰

2.2.3 Recommendations

Apart from the above criticisms regarding compulsory mediation, the grounds set out in the Australian legislation regarded as exceptions to the rule of compulsory mediation are not

¹⁷ Section 60I(9)(d) of the Family Law Act 53 of 1975; *Martin v Harding* [2007] FamCA 1040 at para [10]; Young & Monahan (n14) 53.

¹⁸ Section 60I(9)(e) of the Family Law Act 53 of 1975; *Martin v Harding* (n17) at para [10]; Young & Monahan (n14) 53.

¹⁹ Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987.

²⁰ *MB v NB* (n2) at para [55].

spelt out by the South African law but are accepted, i.e. where settlement has been reached between the parties, the agreement – especially where there are minor children – must be approved by the family advocate. In the South African legislation, the parties that are unable to reach a prompt agreement must mediate the matter.²¹

South Africa, to bring about absolute certainty, should set out exactly where compulsory mediation may be dispensed with so as not to waste unnecessary time and money. Although in Australia the courts look over the agreements in order to make sure that the best interests of the child have been catered for, it may be useful for another individual (perhaps an independent lawyer appointed in terms of the Family Law Act) to look at the agreement and make any further recommendations. This may assist the courts in coming to a decision where the matter is complex, to have the views of another independent person to consider.

2.3 Court-compelled mediation

In both Australia and South Africa, there are instances where the court may compel the parties to attend mediation where this is appropriate. South Africa has various sections in the Children's Act that grant the court the capacity to order the parties to attend compulsory mediation. Sections 49 (lay-forum hearings), 69 (pre-hearing conferences), 70 (family group conferences), 71 (other types of lay-forum, including those chaired by a traditional leader or street community forum hearings) and 115(8) (where children are in need of care and protection, but are not placed in such a situation) of the Children's Act²² deal with the different types of mediatory approaches that the court may order the parties to attend, before it pronounces on a matter. Each of these sections have been discussed in the South African Law Chapter²³ and there is therefore no need to set them out again. Although it is important to note that the court may set out the conditions under which the mediation is to take place, including by whom and possibly where.

In Australia, there is only one section in the Family Law Act that deals with court-compelled mediation, namely section 13C.²⁴ Hereto the section must be invoked by the court before the court makes such order as it deems fit in the matter. The court may set out where and how and with whom the mediation (or dispute resolution) is to take place. This section may be

²¹ In terms of section 21 of the Children's Act 38 of 2005.

²² Children's Act 38 of 2005.

²³ Chapter 2 of this study.

²⁴ Family Law Act 53 of 1975.

invoked in all divorce matters – not just those pertaining to children (unlike in South Africa where these sections are found in the Children’s Act and thus this as one can conclude mainly pertains to children’s issues). Furthermore, according to the Federal Magistrates’ Court (i.e. in terms of the Federal Magistrates’ Act²⁵) all matters arising out of the Federal Magistrates’ Court may be mediated on in terms of Division 2 of Part 4²⁶ (and these relate to all matters that are not dealt with in terms of the Family Law Act and those relating to Child Support²⁷) and the court may adjourn a matter for the parties to attend mediation.

2.4 Sanctions where parties refuse to attend mediation

There are various remedies open to both the Australian and South African courts where parties have refused to attend mediation (some of these remedies are applicable where the parties were to attend compulsory mediation first.)

In South Africa the remedies include an adverse costs order being granted against the unwilling party (in terms of section 48(1) of the Children’s Act²⁸). In terms of sections 49, 69, 70 and 71 of the Children’s Act,²⁹ the unwilling party may be held in contempt of court where he or she has refused to attend mediation where this has been ordered by the court.³⁰ Furthermore, section 64(1) of the Children’s Act³¹ allows the court to adjourn a matter for up to 30 days in order to allow the parties to comply with the order for mediation. If the unwilling party still refuses, the proceedings may be suspended until such time as mediation has occurred.

In Australia, they have section 13D of the Family Law Act.³² This section is similar to the idea that the South African court may make an order for contempt, or like section 64(1),³³ adjourn the matter for mediation to take place. In terms of section 13D,³⁴ the Australian court may make such an order under its own initiative or in terms of an application brought by a

²⁵ Federal Magistrates Act 193 of 1999.

²⁶ Federal Magistrates Act 193 of 1999.

²⁷ Section 33 of Division 2 or Part 4 of the Federal Magistrates Act 193 of 1999; see Part III of the Family Law Act 53 of 1975.

²⁸ Children’s Act 38 of 2005.

²⁹ Children’s Act 38 of 2005.

³⁰ Note that this remedy is only available where the court has compelled the parties to attend mediation and not where mediation is a compulsory first step.

³¹ Children’s Act 38 of 2005.

³² Family Law Act 53 of 1975.

³³ Section 64(1) of the Children’s Act 38 of 2005.

³⁴ Section 13D of the Family Law Act 53 of 1975.

party to the proceedings or by an independent children's lawyer. In South Africa, such an order is generally made by application by one of the parties and not merely on the courts own initiative. Similarly to section 48(1),³⁵ Rule 1.10 of the Family Law Rules³⁶ allows for an adverse costs order to be made against a party where he/she does not attend compulsory mediation.

In the Australian legislation, the parties are required to make a 'genuine effort' where they are attending the mediation sessions.³⁷ Where the parties do not make a genuine effort, this is noted on the mediation certificate that is handed to the courts, and the family court is then, in terms of section 13D,³⁸ able to make such an order as it deems fit. In South Africa, the unwilling party to a mediation may receive an adverse costs order against him or her, where it can be proved that he or she did not make (to use the Australian term) a 'genuine effort' to resolve the issues brought up in the mediation.

2.5 Discretionary mediation with a social worker

In South Africa, in terms of sections 150(3) and 155(4) of the Children's Act,³⁹ where a social worker finds, after an investigation, that a child is not in need of care and protection, he or she must then explain in a report why such care and protection is not needed and recommend a suitable measure to assist the family, which may include mediation.

In Australia, there are instances where the child may be removed from the care of the parents, where there are allegations of child abuse. This is a measure of last resort if the problems within the family cannot be worked out via other means.⁴⁰ In other words, the state will encourage and provide the family with services such as family therapy or counselling in order to discuss and resolve the problem. It is submitted that this may include mediation – where this is appropriate. Where the child is not removed from the care of the perpetrator of the abuse, the family will be subjected to continuous monitoring by the Australian state authorities.⁴¹

³⁵ Section 48(1) of the Children's Act 38 of 2005.

³⁶ Family Law Rules 2004.

³⁷ Section 60I of the Family Law Act 53 of 1975.

³⁸ Family Law Act 53 of 1975.

³⁹ Children's Act 38 of 2005.

⁴⁰ Young & Monahan (n14) 776.

⁴¹ Young & Monahan (n14) 789. The greater commonwealth does not get involved – these matters are dealt with by the separate states of Australia. They are similar but certainly not the same as the provinces found in South Africa.

2.6 Implied Mediation

In South Africa, there are also sections that imply that the parties should mediate the matter (or attend some form of dispute resolution) before taking the matter to court. The sections that have this ‘implied mediation’ approach are found in the Children’s Act.⁴² These sections are as follows: section 22 (parental responsibility and rights agreements), section 30(3) (where co-holders wish to change their parental responsibilities and rights agreement), section 234(1) (post-adoption agreements) and section 292 (surrogate motherhood agreements). In all these instances a certain amount of negotiation is required to find a suitable solution. De Jong suggests that the parties may attend mediation to obtain any assistance in drafting a resolution to any problems that arise where necessary.⁴³ Australian law does not contain similar provisions. With regards to the Family Law Act,⁴⁴ specifically in terms of the Family Law Rules,⁴⁵ mediation is often compulsory.⁴⁶

2.7 The Hague Convention on the Civil Aspects of International Child Abduction

As stated in the Introduction, both South Africa and Australia are signatories to and have incorporated the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (hereinafter referred to as ‘the Hague Convention’) into their respective legal systems. Australia went a step further and in their regulations relating to the Hague Convention mandate the parties to, at first, attempt to find an amicable solution to the matter before approaching the courts.⁴⁷ This is in line with international trends. South Africa does not contain a similar provision in its law specifically dealing with the Hague Convention. In the case of *Department of Community Services & Raddison*⁴⁸ the Australian family court had to decide whether the South African Children’s Act was applicable or not. In this matter the child had been abducted from South Africa. The section that the family court was focusing on was section 21, which mandates the parties to mediate the matter before approaching the courts. The family court stated that the law applicable to the child is that that is in force at the time of abduction. The Children’s Act was only enacted after the child was abducted, and since it has no retrospective effect, it did not apply in that matter. It follows that, although

⁴² Sections 22, 30(3), 234(1) and 292 of the Children’s Act 38 of 2005.

⁴³ M De Jong ‘Opportunities for mediation in the new Children’s Act 38 of 2005’ (2008) 71 *THRHR* 630 639ff.

⁴⁴ Family Law Act 53 of 1975.

⁴⁵ Family Law Rules 2004.

⁴⁶ Rule 1.05 of the Family Law Rules 2004.

⁴⁷ Regulation 13(4) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁴⁸ *Department of Community Services & Raddison* [2007] FamCA1702 at paras [48] – [55] of the Judgment.

South Africa does not have a specific regulation or rule that specifically required mediation to take place in respect of the Hague Convention, the provisions mandating mediation will apply to child abduction matters. The parties are often reluctant to attempt to mediate the matter first due to the limited time frames as set out in the Hague Convention.⁴⁹

3 Judicial Review

In South Africa in terms of the Children's Act, all agreements reached between the parties via mediation, negotiation, etc., must be judicially reviewed by the Children's Court in terms of section 72.⁵⁰ The court will confirm, reject, or order that the parties reconsider certain parts of the agreement or settlement.

According to the Family Law Act in Australia, the corresponding section is 63C.⁵¹ It should be noted that it does not have the same mandatory requirement as section 72.⁵² Australians need not register a parenting plan; this will then make it simply an informal agreement between them. Where parents seek an enforceable arrangement, they must obtain a court order. This may be done by consent. The parenting plan will be registered with the court where the parties have applied for it to be registered.

4 Best Interests of the Child/Paramountcy Principle

In South Africa, the best interests of the child are of paramount importance and are always considered by our courts in all matters concerning the minor children.⁵³ The Children's Act has merely placed more emphasis on these rights.⁵⁴ Furthermore, section 7 of the Children's Act⁵⁵ sets out the relevant factors that need to be considered when dealing with the best interests of the child.

⁴⁹ T Kruger *International Child Abduction: The Inadequacies of the Law* (2011) 157; 159.

⁵⁰ Section 72 of the Children's Act 38 of 2005.

⁵¹ Section 63C of the Family law Act 53 of 1975.

⁵² Section 28(2) of the Constitution of South Africa, 1996; Section 72 of the Children's Act 38 of 2005.

⁵³ See generally GN Barrie 'The best interests of the child: Lessons from the first decade of the new millennium' (2011) 1 *TSAR* 126.

⁵⁴ Section 10 of the Children's Act 38 of 2005 sets out that the best interests of the minor child are of paramount importance in all matters concerning him or her.

⁵⁵ Children's Act 38 of 2005. In respect of this study the relevant section is section 7(n) of the Children's Act 38 of 2005 which requires that an action which would best avoid or minimize further legal or administrative proceedings should be followed, especially where the child is to voice his or her own opinion. The legislator may have had mediation in mind.

In Australia, as stated above, a debate has ensued in respect of what approach is best to use when considering the best interests of the minor child, i.e. the strong view or the weak view. In terms of this chapter, this debate goes beyond its scope. It is briefly summarised in the aforementioned chapter setting out the Australian legal position.⁵⁶ Similarly to South Africa's section 7,⁵⁷ section 60CC⁵⁸ sets out all the factors that need to be considered by the court when dealing with the best interests of the child. These factors are also considered during mediation or dispute resolution sessions. In both countries, the child's best interests are protected and catered for in the legislation and upheld during court and mediation sessions.

5 Domestic Partnerships

In South Africa, domestic partnerships are where unmarried couples live together in a 'marriage-like' relationship. Where there are children that result from these relationships, the parties must attend mediation in terms of the provisions set out in the Children's Act, where there is a problem regarding the parental responsibilities and rights of the unmarried father, or in terms of an existing parenting order in terms of sections 21 and 33 respectively.⁵⁹ In South Africa, domestic partnerships are not protected in terms of the law.⁶⁰

In Australia, domestic partnerships are called de facto relationships. There are numerous provisions that deal with de facto relationships,⁶¹ but none are applicable to the topic of family law mediation. Similarly to South Africa, these parties are required to attend mediation in terms of the provisions as promulgated in the legislation, in other words, where there are children and the parties wish to draft a parenting plan, etc.⁶²

⁵⁶ Chapter 3 of the study at section 5; J Crowe & L Toohey 'From good intentions to ethical outcomes: the paramourcy of children's interests in the Family Law Act.' (2009) 33 *Melbourne University Law Review* 391. Also note that section 63B of the Family Law Act 53 of 1975 only requires the parents to consider the child's best interests in mediation sessions, they need not take the same view point as the courts. However, due to the strong view taken by the courts, parents and dispute resolution practitioners feel obliged to place the child's best interests above their own and thus in Australia a more child-focused mediation has developed.

⁵⁷ Children's Act 38 of 2005.

⁵⁸ Section 60CC of the Family Law Act 53 of 1975. Section 60CC(3)(a) and section 60CD sets out specifically how to incorporate a child in

⁵⁹ Sections 21 and 33 of the Children's Act 38 of 2005.

⁶⁰ Domestic Partnership Bill *Government Gazette* No 30663 of 14 January 2008; P De Vos 'Still out in the cold? The Domestic Partnership Bill and the (non)protection of marginalized woman' in *Trial & Tribulations, Trends & Triumphs* J Sloth-Nielson & Z Du Toit (eds) (2008) 130.

⁶¹ Part VIIAB of the Family Law Act 53 of 1975.

⁶² In terms of section 60I of the Family Law Act 53 of 1975.

Despite the one difference between the two countries, i.e. the recognition of de facto relationships in Australia, and the non-recognition in South Africa, for both, the provisions regarding mediation will apply in terms of the existing legislation.

6 Customary/Islamic/Aboriginal Families

In both countries (namely Australia and South Africa) there are either regulations and legislation in place to assist with mediation where parties are in a customary/aboriginal marriage, or religious marriage, or the legislatures are in the process of drafting legislation that will assist the parties that are in an indigenous or religious marriage.

In South Africa, the spouses in a customary marriage are required to register their marriage, in terms of the Recognition of Customary Marriages Act,⁶³ if they want the marriage to be legally valid. The same will be a requirement for an Islamic marriage once the legislation is in place.⁶⁴ Once the marriage is registered, the parties to either a customary/religious marriage are able to obtain a divorce in terms of the applicable legislation, however even where this is the case, the parties may obtain assistance in mediation from a traditional leader⁶⁵ (for a customary marriage). In both the Aboriginal as well as the customary marriages, the parties are still very community orientated and where there is a problem between the husband and wife it is not merely dealt with by the nuclear family, the entire family (including the extended family) and in some instances the community will also be involved.⁶⁶ It must be noted that according to the Children's Act, only those sections that are compulsory for civil marriages will be compulsory for customary marriages and religious marriages registered in terms of civil, customary or religious law.⁶⁷ Islamic marriages, whether there are children or not, and when the Bill is promulgated, will be forced to attend mediation before approaching a court to grant a divorce order.⁶⁸

⁶³ Recognition of Customary Marriages Act 120 of 1998.

⁶⁴ Muslim Marriages Bill 2011.

⁶⁵ Section 71 of the Children's Act 38 of 2005.

⁶⁶ C Cunneen, J Luff, K Menzies & N Ralph 'Indigenous Family Mediation: The New South Wales ATSIFAM Program' (2005) 9(1) *Australian Indigenous Law Reporter* 1 5 and 6; S Armstrong 'Enhancing access to family dispute resolution for families from culturally and linguistically diverse backgrounds' (2010) 18 *AFRC Briefing* 1 8, 9, 10.

⁶⁷ Section 21 and 33(3) of the Children's Act 38 of 2005.

⁶⁸ Muslim Marriages Bill 2011.

Australia has no specific provisions or is at present drafting provisions for religious marriages in this regard.⁶⁹ Aboriginal communities in Australia are expected to attend mediation, i.e. it is more often than not compulsory for all parties. To note, this once again raises the problems concerning compulsory mediation.⁷⁰ In Australia, there are mediation services structured for Aboriginal and Torres Strait Islander communities. It is submitted that apart from the fact that there is the possibility for the use of traditional leaders when attending a mediation session,⁷¹ there are no other provisions made specifically for customary marriages by way of mediation services in South Africa. In both South Africa and Australia, there is the similar problem that amongst the customary and Aboriginal communities, there are various groups, each with its own language or cultural background or identity. The problem that arises in such a situation is that there may not be a competent mediator who is able to speak the mother tongue of the parties involved. A further alternative is that mediators are provided with the skills in order to mediate in such instances.

7 Mediation Services Offered in South Africa and Australia Today

Australia has a well established focus towards mediation. The Australians have incorporated the ideas of family law mediation since the inception of the family courts on 5 January 1976. They have generally well trained individuals in the field of mediation due to the long standing tradition of family law mediation and the many organisations that offer mediation services. The Australian Government is also prepared to spend money on furthering such services, e.g. the creation of the Family Relationship Centres, in order to promote the use of mediation.

Furthermore, there are also various websites that the Australians are able to access, e.g. the Family Court webpage, that provides information regarding their services and even possible guidelines and ‘kits’ where the parties have settled the matter on their own. South Africa as yet needs to provide a central webpage that provides assistance or basic explanations regarding the divorce process, as provided by the Australian Family Court.

The discussion in this section also focuses on the current services offered in South Africa and Australia. This discussion follows.

⁶⁹ See generally Armstrong (n66).

⁷⁰ These arguments have been dealt with in the previous chapters.

⁷¹ In terms of section 71 of the Children’s Act 38 of 2005.

Both countries have organisations that offer private mediation services. In South Africa there are: The South African Association of Mediators in Divorce and Family Matters (known as SAAM); Mediation Institute of South Africa (MISA); Family Mediators of the Cape (FAMAC); and the Family Life Centre: Johannesburg, as well as Ad Idem: Family and Divorce Settlement Mediation. In Australia there are Lawyers Involved on Alternative Dispute Resolution (LEADR) and Mediate Today.

In both countries there are community-based organisations that offer free mediation services. In South Africa an example is the access-to-justice initiative in the form of the People's Family Law Centre in Cape Town. Furthermore, there is limited assistance from the Legal Aid Board and university law clinics. The Office of the Family Advocate also assists with mediation.

In Australia there is a long list of community-based mediation centres that are found country wide and that offer free mediation, these include Family Relationship Centre (FRCs; they also have an Indigenous Family Law Programme); Relationships Australia; Lifeworks; Centrecare Australia; Family Services Australia and the Aboriginal and Torres Strait Islander Family Mediation Program (ATSIFAM; found specifically in the New South Wales region).

The reason why Australia has so many community-based organisations is because the Australians have confidence in the services that they offer, including the mediation services. In South Africa, the problem is that there is not much funding for such services and so, by comparison to the Australian community initiatives or organisations the South African equivalents have a limited number of resources due to budget constraints.

Furthermore, Australians are able to approach at one centre, namely the Family Relationship Centres and obtain information about mediation and other services that may be needed by the parties, such as welfare services, etc., depending on the circumstances of each case. The Family Relationship Centres act as a gateway – directing disputing parties to the various services that suit their needs. South Africa does not have such a central authority, although such information may be provided by the disputing parties' legal representatives or by the family advocate or the family court. It is submitted that South Africa needs to 'market' mediation towards the public with the use of a central authority to act as a gateway where

disputing parties are able to attend and find out more about the possible relationship dispute services, especially mediation services, and where the parties may go to obtain such services, where this is necessary. A possible solution would be to use the Office of the Family Advocate because it is well known within the society, alternatively the Legal Aid Board, so that communities may be made more aware of the possible services available.

Furthermore, in Australia the Family Courts offer mediation services and have contracted with the community-based services to relieve some of the pressure faced by the courts in respect of offering mediation services to the public.

Australia has also developed a program that specifically caters for the needs of the Indigenous communities, namely the ATSIFAM Program (the Aboriginal and Torres Strait Islander Family Mediation Program) which was successfully piloted in New South Wales.⁷² South Africa does not have a program that is specifically targeted to assist those in customary marriages, and, it is submitted that South Africa would do well to have a program that focuses on the needs of the majority living in the country. These members of the community, as seen in the ATSIFAM Program, often require mediation services to be conducted differently or to carry a different focus than that which is offered in the so-called 'mainstream' mediation services. These services would need to be more culturally sensitive in order to address the issues that arise between the disputing parties.

Similarly to South Africa, Australia does not have enough Indigenous people trained to conduct mediation services. It is submitted that in both countries there will need to be a drive to obtain people who are able to assist in mediating matters between disputing parties in the Indigenous populations. Also, there will need to be an educational drive to clear up any misconceptions that have occurred so as to encourage the parties to attend the mediation services that are offered.

8 Conclusion

In this chapter the South African and Australian positions in terms of mediation were discussed. It was also pointed out where there were problems with either system and where the systems could use ideas from each other and implement them in terms of each of the

⁷² See generally Cunneen, Luff, Menzies & Ralph (n66).

respective legal systems. This chapter compared the two legal systems in the following areas: in terms of the legislative framework, where the focus was on compulsory mediation and court-compelled mediation. There was a discussion of how each country ‘punishes’ those that do not attend compulsory mediation or court-compelled mediation. The Australian legislation mandates the parties to mediate, it does not have sections where mediation is implied – as was seen in the South African legislation (this included a look at how each country does or does not mediate in terms of the Hague Convention). There was also a comparison with regard to the functions and the role of the family advocate (in South Africa) and the independent children’s lawyer (in Australia). There was a further comparison on how in either country there is a possibility of judicial review regarding the mediated agreements. In South Africa, all agreements are subjected to the review process, whereas in Australia, it may not be necessary. There was also a comparison regarding the best interests of the child or paramountcy principle and how it is incorporated within the mediation sessions – where there are children involved in the divorce proceedings. There was also a comparison as to how Australia and South Africa mediate amongst their Indigenous or Customary or Islamic communities. South Africa, as was seen, is only beginning to deal with the problems of mediation in the Islamic community – this legislation is still only at the draft stage. In Australia, there is not specific legislative instrument that deals with the concerns of a particular cultural group. Both countries were not dissimilar in this area as they both have the problem of a language barrier and the need for the mediators to understand the cultural position of the parties, to name but a few problems. There was also a comparison in respect to the services offered in the respective countries at present. As was suggested, South Africa would do well to have a central authority to act as a possible gateway in order to assist the parties to obtain the services that would suite there needs.

As can be seen, both countries compare well with one another in respect of the legislative instruments in place to allow or encourage the parties to attend mediation and also by having services that offer mediation for the general public.

Chapter 5: Conclusion

This comparative study focused on family law mediation, and specifically how it has been implemented in South Africa and Australia. In the first chapter, the concept of mediation was defined and the advantages (such as the fact that it is cost effective, and is able to decipher and work through the emotional trauma of a breakdown to name a few) and disadvantages (it works from the [wrong] assumption that all parties are equally balanced, where the mediation is unable to resolve the issues between the disputing parties and come to a solution, it becomes even more expensive because the parties will now need to approach the court system) were discussed. It was also mentioned that we cannot simply do away with the court system as this is the forum where most of the divorce jurisprudence is established. Furthermore, there was a focus on whether it is possible to mediate in matters where there have been allegations or where there is actual family violence or abuse. On this point there were two trains of thought: The first consisted of those who suggested that due to criminalisation of family violence, and the power imbalances that often form as a result of the violence, such matters should directly go through the court systems and should not be mediated on. On the other hand there were those who argued that family violence matters should be subjected to the mediation process because mediation is able to isolate the cause of the violence and either encourage the parties to attend counselling or (where the mediator is skilled in this area) attempt to counsel the parties within the mediation sessions. There was a short discussion on how mediation may be applied in international family law, and the example used was in child abduction matters. It was mentioned that due to the fact that time is of the essence in such matters, mediation may cause further delays and problems instead of finding a solution. This is despite the need to find an amicable solution for the minor child. The Introduction concluded with an explanation on how the research was to be conducted and an outline of the study.

The South African Law and Australian Law chapters had a similar structure, mainly to lay the platform for the comparison to be drawn in the Comparative Study. Each chapter began with a short background or introduction setting out when the legislation was enacted and describing the overall 'family law landscape'. In the South African law chapter it was pointed out that the definition of 'family' has now changed to include same-sex or heterosexual domestic partnerships or life-partnerships. Similar changes to the definition of 'family' can be found in the Australian law. In both the South African Law Chapter and the Australian

Law Chapter the legislative framework was set out and then compared in the Comparative Chapter. In both countries there is the possibility to appoint an independent lawyer; alternatively there is a central authority (i.e. the family advocate) which sees to the best interests of the minor child where this is required. It is worth mentioning at this stage that in both countries the best interests of the child are of utmost importance or are paramount in every decision regarding him or her. Hence it is often known as the 'paramountcy principle'.

Both South Africa and Australia have, within their legislative instruments, provided for opportunities for the parties to attend mediation. In South Africa, the legislative instruments are the Mediation in Certain Divorce Matters Act 24 of 1987 and the Children's Act 38 of 2005. In Australia it is the Family Law Act 53 of 1975. These acts require that where the divorcing or separating parties have minor children, the parties will need to attend mediation. With respect to what has been said, and in terms of the legislative instruments mentioned, there are instances where the parties are to attend compulsory mediation. In both countries this was required where, for example, the parties are experiencing problems with a parental responsibilities and rights agreement (South Africa) or parenting plan (Australia). There are also exceptions to the rule of compulsory mediation; most notably this is where there is actual family violence or child abuse, or where there are allegations of family violence or child abuse. In this instance the parties will be expected to file an application at court and will therefore not need to attend mediation. There are also instances where the court will direct the parties to attend mediation where this is found to be necessary. There are also sanctions in place where the parties fail to attend mediation, either as a compulsory first step, or where the courts have directed them to do so. These sanctions may include an adverse costs order against the party not willing to attend mediation, being held in contempt of court, or a suspension of the court proceedings until mediation has been completed. In South Africa there are also instances where the parties are to attend mediation at the instance of a social worker. This is the case where there is an investigation as to whether the child is in need of care and protection. The social worker's report will indicate possible problems that will need to be solved. Solutions to these matters may be worked out during a mediation session. Furthermore, there are possible instances in South African law where there is a possibility that mediation is implied. This is the case where the parties are drafting an agreement, either a parental responsibilities and rights agreement or a surrogate motherhood agreement (to name a few examples). By way of comparison, Australia does not have provisions within its legislative framework where mediation is either at the instance of the social worker or is

implied. It was pointed out though, that where the child is in need of care and protection in Australia, the parties may be sent to mediation to resolve the cause of the abuse by state or territory officials. Furthermore, there was a comparison as to how each country does or does not mediate in terms of the Hague Convention. Australia has specific regulations that required the parties to use amicable means to resolve the matters arising out of the child abduction, whereas South Africa does not contain a similar provision.

Both South Africa and Australia have provided for the possibility that agreements that have resulted from mediation sessions may be reviewed by the courts. In some instances the review will be compulsory. The mediated agreement will thus become an order of court.

Where the parties in domestic partnerships (South Africa) or de facto relationships (Australia) have children and are planning to separate, these parties are to use the provisions that refer to unmarried parents. In this way the legislator has catered for the aforementioned families to use mediation where there is a breakdown that leads to separation.

South Africa and Australia have either provided for or are in the process of providing for mediation services that cater specifically for the customary or indigenous or religious marriages. In South Africa the Children's Act allows for mediation with a traditional leader for customary marriages and in Australia there is a specific program that provides mediation services for the Aboriginal and Torres Strait Islander communities. South Africa currently has tabled a draft Bill that would specifically allow Muslim marriages to attend mediation where the marriage has broken down and the parties are wishing to separate. Australia does not have an equivalent in their legislation. Both South Africa and Australia have the problem that there are not enough trained mediators that are either from the customary or indigenous community themselves or who speak indigenous languages or fully understand the indigenous customs.

There was in the South African and Australian Law Chapters a discussion on the mediation services that are available at present. These organisations offering mediation services are either in the private sector and may be lawyers, psychologists, or other trained professionals that have attended a course. They offer mediation services in exchange for a fee. There are also community-based organisations that offer free mediation or the disputing parties will need to make a small contribution, depending on the circumstances. It was specifically

highlighted in the Australian Law Chapter that there are Family Relationship Centres and that these do not merely offer mediation to the public (either free or at a minimal fee depending on how the disputing parties fared in the means test), but also acts as a gateway to guide the disputing parties to other organisations from where they are able to receive assistance. In other words the workers at these centres will guide the parties to go to the relevant government offices that provide child support grants, etc. It can therefore be said that the Family Relationship Centres provide all-round support to divorcing or separating families. Australians, it was noted, have faith in their community-based organisations.¹ In South Africa the family advocate is at present the main organisation that offers mediation to the public. In Australia the Family Courts also offer a mediation service.

Despite the problems that have surrounded mediation in both South Africa and Australia (a few have been mentioned in this chapter and the rest have been discussed elsewhere in this study), mediation is well catered for in the legislative frameworks of these two respective countries. There are many opportunities for divorcing and/or separating parties to embark on mediation to sort out the problems that will result from ‘parenting together’ to ‘parenting apart’,² the important issues being to find solutions for care (custody) and contact (access). There are trained professionals who are able to assist the parties during mediation where the disputing parties seek the assistance of a third neutral party to assist them in finding a resolution to the issues that have arisen out of separation.

In conclusion, the only comment that comes to mind regarding mediation in the use of family law (or within the law in general), is that of Tom Conway:³

‘Your good lawyers realize that a good settlement is worth more than a good ... judgment. They don't appeal the settlement, and you get it quicker. If you can get just as much in six months with mediation as you're going to get in two years with a two- or three-week trial, you'd be foolish not to mediate the case.’

¹ M De Jong ‘Divorce Mediation in Australia – valuable lessons for family law reform in South Africa’ (2007) 30 *CILSA* 280 284 – 285; P Parkinson *Family Law and the Indissolubility of Parenthood* (2011) 192 – 193.

² Parkinson (n1) 190.

³ Quote accessed from <http://www.famousquotesabout.com/quote/Your-good-lawyers-realize/561831>, on 24 October 2011.

6. List of Works Cited

Bibliography

Australia:

- Altobeli T & I Seriser *Practising Family Law* 2ed Chatswood, NSW: LexisNexis Butterworths, 2009.
- Armstrong S 'Enhancing access to family dispute resolution for families from culturally and linguistically diverse backgrounds' (2010) 18 *AFRC Briefing* 1 – 23.
- Astor H & C Chinkin 'Dispute Resolution in Australia' in *Australian Family Law in Context: Commentary & Materials* P Parkinson (ed) Pymont, NSW: Thomson Reuters 2009 224.
- Astor H 'Domestic violence and mediation (1990) 1 *Australian Dispute Resolution Journal* 143 – 153.
- Astor H 'Making a "genuine effort" in family dispute resolution: what does it mean?' in *Australian Family Law in Context: Commentary & Materials* 4ed P Parkinson (ed) Pymont, NSW: Thomson Reuters, 2009 234.
- Astor H 'Genuine effort in family dispute resolution' (2010) 16 *Family Relationships Quarterly* 3 – 6.
- Bates F *An Introduction to Family Law* Sydney: The Law Book Company Limited, 1987.
- Bickerdike A 'Implications for family dispute resolution practice: response from Relationships Australia (Victoria) to the "Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings Report"' in *Australian Family Law: The Contemporary Context: Teaching Materials* B Fehlberg & J Beherns South Melbourne, Victoria: Oxford University Press, 2009.
- Crowe J & L Toohey 'From good intentions to ethical outcomes: the paramountcy of children's interests in the Family Law Act' (2009) 33 *Melbourne University Law Review* 391 – 414
- Cunneen, C, J Luff, K Menzies and N Ralph 'Indigenous Family Mediation: The New South Wales ATSI-FAM Program' (2005) 9(1) *Australian Indigenous Law Reporter* 1 – 14.
- Dickey A *Family Law* 5ed. Pymont, NSW: Lawbook Co. 2009
- Fehlberg B & J Beherns *Australian Family Law: The Contemporary Context* South Melbourne, Victoria: Oxford University Press, 2008.
- Field R 'Using the feminist critique to explore 'the good, the bad and the ugly': implications for women of the introduction of mandatory family dispute resolution in Australia' in

Australian Family Law in Context: Commentary & Materials P Parkinson (ed)
Prymont, NSW: Thomson Reuters, 2009

Klug M 'ADR: trends and directions in commercial disputes' (1997) 8(3) *Australian Dispute Resolution Journal* 172 – 176.

McIntosh JE, Hon D Bryant & K Murray 'Evidence of a different nature: The child-responsive and less adversarial initiatives of the Family Court of Australia' in *Australian Family Law in Context: Commentary & Materials* 4ed P Parkinson (ed) Prymont, NSW: Thomson Reuters, 2009 245.

RH Mnookin & L Kornhauser 'Bargaining in the shadow of the law: the case of divorce' in *Australian Family Law in Context: Commentary & Materials* 4ed P Parkinson (ed) Prymont, NSW: Thomson Reuters, 2009 216 – 217.

Parkinson P *Family Law and the Indissolubility of Parenthood* New York: Cambridge University Press, 2011

Ralph S 'Family dispute resolution services for Aboriginal and Torres Strait Islander families: Closing the gap?' (2010) 17 *Family Relationships Quarterly* 14.

Young L & G Monahan *Family Law in Australia* 7th ed. Chatswood: LexisNexis Butterworths, 2009.

New Zealand:

Bridge C 'Family mediation and the legal process: an unresolved dilemma' (1997) 17 *New Zealand Universities Law Review* 231 – 253.

South Africa:

Barrie GN 'The best interests of the child: Lessons from the first decade of the new millennium' (2011) 1 *TSAR* 126 – 134.

Bennett TW *Customary Law in South Africa* Lansdowne: Juta, 2004.

Boniface A 'Revolutionary changes to the parent-child relationship in South Africa' in *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* J Sloth-Nielson & Z Du Toit (eds) Cape Town: Juta, 2008 151.

Bonthuys E 'What you don't know can't hurt you: The Supreme Court of Appeal and the presumptions of paternity' (2011) 128(3) *SALJ* 427 – 436.

Brand J & C Todd 'The swiftest, easiest (and cheapest) way to go' (2008) *March Without Prejudice* 37 – 38.

- Brand J 'Table of arbitration, court adjudication and mediation characteristics' in *Dispute Resolution* P Pretorius (ed) Kenwyn: Juta, 1993 100.
- Brand J 'The nature of the arbitration process' in *Dispute Resolution* P Pretorius (ed) Kenwyn: Juta 1993 93.
- Carnelley M 'The right to legal representation at state expense for children in care and contact disputes – A discussion of the South African legal position with lessons from Australia' (2010) *Obiter* 638 – 661.
- Clark B 'No holy cow – some caveats on family mediation (1993) 56 *THRHR* 454 – 462.
- Cohen CH 'Divorce Mediation' in *Dispute Resolution* P Pretorius (ed) Kenwyn: Juta, 1993 73.
- Cohen CH 'Mediation: giving law a human face' (1992) *De Rebus* 126 – 128.
- Cohen CH 'Mediation: terminology is important' (1993) *De Rebus* 221 – 222.
- Cronjé DSP & J Heaton *South African Family Law* 2ed. Durban: LexisNexis Butterworths, 2004.
- Davel T 'General Principles' in *Commentary on the Children's Act* (Looseleaf edition: Revision Service 1) CJ Davel & AM Skelton (eds) Cape Town: Juta, 2007 2-1 – 2-27.
- De Jong M 'An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation' (2005) 18(1) *TSAR* 33 – 47.
- De Jong M 'Judicial stamp of approval for divorce and family mediation in South Africa' (2005) 68 *THRHR* 95 – 102.
- De Jong M 'Divorce Mediation in Australia – valuable lessons for family law reform in South Africa' (2007) 40 *CILSA* 280 – 305.
- De Jong M 'Opportunities for mediation in the New Children's Act 38 of 2005' (2008) 71 *THRHR* 630 – 641.
- De Jong M 'Giving children a voice in family separation issues: a case for mediation' (2008) 4 *TSAR* 785 – 793.
- De Jong M 'International trends in family mediation – are we still on track?' (2008) 71 *THRHR* 454 – 472.
- De Jong M 'Child-focused Mediation' in *Child Law in South Africa* T Boezaart (ed) Claremont: Juta, 2009 112 – 132.
- De Jong M 'A pragmatic look at mediation as an alternative to divorce litigation' (2010) 3 *TSAR* 515 – 531.

- De Vos, P 'Still out in the cold? The Domestic Partnerships Bill and the (non)protection of marginalised women' in *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* J Sloth-Nielson & Z Du Toit (eds) Cape Town: Juta, 2008 129.
- Dlamini CRM 'Family Law' in *Introduction to Legal Pluralism in South Africa: Part 1: Customary Law* JC Bekker, JMT Labuschagne & LP Vorster (eds) Durban: Butterworths, 2002 35.
- Du Toit C 'Legal Representation of Children' in *Child Law in South Africa* T Boezaart (ed) Claremont: Juta, 2009 93 – 111.
- Ellis E 'Same-sex parents can raise family, says court' *The Star* 27 February 2003, sourced from Sabinet.
- Folb S 'Mediating in different contexts: Divorce and Family' 1998 17(1) *Track Two* 25.
- Gallinetti J 'The Children's Court' in *Commentary on the Children's Act* (Looseleaf edition: Revision Service 1) CJ Davel & AM Skelton (eds) Cape Town: Juta, 2007 4-1 – 4-37.
- Glasser N 'Taking children's rights seriously' (2002) December 35(2) *De Jure* 223 – 235.
- Goldberg V 'Family courts in South Africa and the implication of divorce mediation (1995)' *THRHR* 276 – 288.
- Goldberg V 'Family mediation is alive and well in the United States of America: A survey of recent trends and developments' 1996 *TSAR* 358 – 371.
- Goldberg V 'Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular' (1998) 25(4) *TSAR* 748 – 760.
- Grobler N 'The Mediation in Certain Divorce Matters Act, 1987' 1990 3(2) October *Consultus* 133.
- Hawkey K 'New Act means increased efficiency for civil matters' *The Sunday Times* 15 August 2010 available at <http://www.timeslive.co.za/sundaytimes/article/602049.ece/New-act-means-increased-efficiency-for-civil-matters> accessed on 2 February 2010.
- Heaton J 'Parental Responsibilities and Rights' in *Commentary on the Children's Act* (Looseleaf edition: Revision Service 1) CJ Davel & AM Skelton (eds) Cape Town: Juta, 2007 3-1 – 3-45.
- Heaton J *The South African Law of Persons* 3ed. Durban: Lexisnexis, 2008. (Formerly by DSP Cronjé and J Heaton)
- Heaton J *South African Family Law* 3ed. Durban: Lexisnexis, 2010. (Formerly by DSP Cronjé and J Heaton)

- Kavanagh K (ed) *South African Concise Oxford Dictionary* Cape Town: Oxford University Press Southern Africa, 2002.
- Kruger T *International Child Abduction: The Inadequacies of the Law* Oxford (UK) Portland (Oregon): Hart Publishing, 2011.
- Labuschagne JMT 'International parental abduction of children: Remarks on the overriding status of the best interests of the child in international law' (2000) 33 *CILSA* 333 – 347.
- Leppan D & J Gallinetti 'The increased jurisdiction of the children's courts and implications for family law practice in light of new mechanisms that promote alternative dispute resolution' in *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* J Sloth-Nielson & Z Du Toit (eds) Cape Town: Juta, 2008 164.
- Louw A "Surrogate Motherhood' in *Commentary on the Children's Act* (Looseleaf edition: Revision Service 1) CJ Davel & AM Skelton (eds) Cape Town: Juta, 2007 19-1 – 19-31.
- Manjoo R 'Making rights real: facing the challenges of recognising Muslim marriages in South Africa' in *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* J Sloth-Nielson & Z Du Toit (eds) Cape Town: Juta, 2008 119.
- Moodley S 'Mediation – the increasing necessity of incorporating cultural values and systems of empowerment' (1994) 27(1) *CILSA* 44.
- Moosa N 'Divorce' in *Introduction to Legal Pluralism in South Africa: Part 2: Religious Legal Systems* C Rautenbach & NMI Goolam (eds) Durban: Butterworths, 2002 39 – 74.
- Mosikatsana T & J Loffell 'Adoption' in *Commentary on the Children's Act* (Looseleaf edition: Revision Service 1) CJ Davel & AM Skelton (eds) Cape Town: Juta, 2007 15-1 – 15-29.
- Moult K 'Providing a sense of justice: Informal mechanisms for dealing with domestic violence' (2005) 12 *SA Crime Quarterly* 19 – 24.
- Mowatt JG 'The Mediation in Certain Divorce Matters Act 1987: new, but nothing new' (1987) *De Rebus* 611 – 613.
- Mowatt JG 'Some thoughts on mediation' (1988) 105(4) *SALJ* 727 – 739.
- Mowatt JG 'The family court and divorce mediation' (1991) 20(2) *TSAR* 289 – 300.

- Navsa MS 'Muslim personal law – an update' in *Trial & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* J Sloth-Nielson & Z Du Toit (eds) Cape Town: Juta, 2008 113.
- Nhlapo TR 'The African family and women's rights: friends or foes' 1991 *SALJ* 135.
- Oellermann I 'New civil courts roll-out' *The Witness* 4 September 2010 available at [http://www.witness.co.za/index.php?showcontent &global\[_id\]=46887](http://www.witness.co.za/index.php?showcontent &global[_id]=46887) accessed on 3 November 2010.
- Robinson R 'Children and Divorce' in *Introduction to Child Law in South Africa* CJ Davel (ed) Lansdowne: Juta, 2000 65.
- Robinson JA (ed) *Introduction to South African Family Law* 4ed. Printing Things CC, 2009.
- Schneider C 'Mediation in the Children's Act 38 of 2005, and mediation in family law' in *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* J Sloth-Nielson & Z Du Toit (eds) Cape Town: Juta, 2008 145 – 150.
- Schulze H 'Obligation to contribute to schooling of step child' in 'The law reports' (2010) July *De Rebus* 28.
- Scott-MacNab D & JG Mowatt 'Mediation and arbitration as alternative procedures in maintenance and custody disputes in the event of divorce' (1986) *De Jure* 313 – 324.
- Scott-MacNab D 'Mediation – the procedure of the future' 1989 *De Rebus* 211 – 214.
- Scott-MacNab D 'Mediation and family violence' (1992) 109(2) *South African Law Journal* 282 – 290.
- Scott-MacNab D 'Mediation in the family law context' (1998) 105(4) *South African Law Journal* 709 – 726.
- Sinclair J & E Bonthuys 'The Law of Persons and Family' 2003 *Annual Survey of South African Law* 144.
- Sinclair J & E Bonthuys 'The Law of Persons and Family' 2004 *Annual Survey of South African Law* 115.
- Skelton A 'Parental Responsibilities and Rights' in *Child Law in South Africa* T Boezaart (ed) Claremont: Juta, 2009 62 – 92.
- Skelton A and M Carnelley (eds) *Family Law in South Africa* Cape Town: Oxford University Press, 2010.
- Smith BS 'The interplay between registered and unregistered domestic partnerships under the draft Domestic Partnerships Bill, 2008 and the potential role of the putative marriage doctrine' (2011) 128(3) *SALJ* 560 – 593.

- South African Law Commission *Commission of Inquiry into the Structure and Functioning of the Courts* Pretoria 1983.
- South African Law Commission *Commission of Inquiry into the Rationalisation of Provincial and Local Divisions of the Supreme Court* Pretoria 1997.
- South African Law Reform Commission Project 106 *Islamic Marriages and Related Matters Report* Pretoria 2003.
- Van Heerden B 'Judicial Interference with the Parental Power: The Protection of the Child' in *Boberg's Law of Persons and the Family* 2ed. B Van Heerden, A Cockrell & R Keightley (eds) Kenwyn: Juta 1999 497 – 656.
- Van Zyl GJ 'The family advocate: 10 years later' (2000) 21(2) *Obiter* 372 – 393.
- Van Zyl L 'Family Law Mediation' in *Introduction to Child Law in South Africa* CJ Davel (ed) Lansdowne: Juta, 2000 87.
- Vivier S 'Black divorce courts to be de-racialised to form family courts' (1997) *De Rebus* 144.
- Walker DM *The Oxford Companion to Law* Oxford: Clarendon Press, 1980.
- Zaal N & C Matthias 'The Child in Need of Alternative Care' in *Introduction to Child Law in South Africa* CJ Davel (ed) Lansdowne: Juta, 2000 116.
- Zaal N & C Matthias 'The child in need of care and protection' in *Child Law in South Africa* T Boezaart (ed) Claremont: Juta, 2009 163.

Other Documents and Websites:

Australia:

- Centrecare Australia available at <http://www.centrecare.com.au/>, accessed on 12 July 2011.
- KM Bowie 'International application and interpretation of the Convention on the Civil Aspects of International Child Abduction' (March 2001) [1980] FamCA *Federal Judicial Scholarship* 2, available at [http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedJSchol/1980/1.html?stem=0&synonym_s=0&query=International child abduction](http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedJSchol/1980/1.html?stem=0&synonym_s=0&query=International%20child%20abduction), accessed on 3 October 2011.
- The Family Court of Australia's website, available at <http://www.familylawcourts.gov.au/>, accessed on 19 July 2011.
- Family Relationship Centres website, available at <http://www.familyrelationships.gov.au/>, accessed 12 July 2011.

Family Services Australia available at <http://www.frsa.org.au/site/>, accessed on 12 July 2011.
Fourth Report under the Convention on the Rights of the Child, Australia, October 2008,
available at <http://www.unicef.com.au/LinkClick.aspx?fileticket=ZlYJsPEEBoI=&tabid=445> accessed on 22 October 2010.

Holtring N *Mandatory Mediation in Australian Family Law* (Paper submitted for
postgraduate degree in dispute resolution to the Law Faculty of UTS June 2007) 5,
available at <http://www.leadr.com.au/articles/Mandatory%20Family%20Dispute%20Resolution.pdf>, accessed on 22 July 2011.

LEADR Homepage, available at <http://www.leadr.com.au/>, accessed on 12 July 2011.

Lifeworks Homepage available at <http://www.lifeworks.com.au/>, accessed on 12 July 2011.

Mediate Toady Homepage, available at <http://www.mediate.com.au/index.php>, accessed on
12 July 2011.

Moore Law Website, available at <http://www.moorelaw.com.au/>, accessed 15 July 2011.

International:

List of Countries which have Signed, Ratified/Acceded to the African Union Convention on
the African Charter on the Rights and Welfare of the Child available at
http://www.achpr.org/english/ratifications/ratification_child%20rights.pdf on 3
November 2010.

Tom Conway Quote, accessed from <http://www.famousquotesabout.com/quote/Your-good-lawyers-realize/561831>, on 24 October 2011.

South Africa:

Ad Idem website <http://www.adidem.co.za/home/>, accessed on 6 September 2011.

Divorce Mediation available at <http://www.divorcemediations.co.za/> accessed on 16
November 2010.

Family Life Centre: Johannesburg available at <http://familylife.co.za/> accessed on 16
November 2010.

Family Mediator's Association of the Cape (FAMAC), available at <http://www.famac.co.za/>
accessed on 16 November 2010.

Families South Africa (FAMSA), available at <http://www.famsa.org.za/> accessed on 16
November 2010.

'Regional Courts to get Powers to deal with Civil Cases' Department of Justice and Constitutional Development, available at http://www.justice.gov.za/docs/articles/20100810_reg-courts_dailysun_ad.html, accessed 2 February 2011

South African Association of Mediators (SAAM), available at <http://www.saam.org.za/> accessed on 16 November 2010.

Table of Cases

Australia:

A v A (2000) 26 Fam LR 382
Aiton v Transfield [1999] NSWSC 55020 of 1999
AMS v AIF (1999) 199 CLR 160
Boxall v Boxall (No 2) [2008] FamCA 587
C v B (2007) 37 Fam LR 1
Department of Community Services & Raddison [2007] FamCA 1702
F v F (2007) 38 Fam LR 52
H v H (2007) 37 Fam LR 126
Jakiemiec & Buckingham [2007] FamCA 542
Martin & Harding [2007] FamCA 1040
Mazorski v Albright (2007) 37 Fam LR 518
Morgan v Miles (2007) 38 Fam LR 275
MW v Director-General of the Department of Community Services (2008) 244 ALR 205
Naczek & Dowler [2007] FamCA 830
Naczek & Dowler [2008] FamCA 89
Re CP (1997) 21 FamLR 486
Robertson & Robertson [2008] FamCA 497
Sidorov & Sidorov [2008] FamCA 1101
State Central Authority & Brume [2010] FamCA 268
State Central Authority v Camden (No 2) [2011] FamCA 666
Strahan & Strahan (No 6) [2009] FamCA 1082
SS v AH 2010 FamCAFC 13
Taylor v Barker (2007) 37 Fam LR 461
W v J (2006) 35 Fam LR 608
Weldon & Sultar [2008] FamCA 459

England:

Egan v Motor Services (Bath) [2007] EWCA Civ 1002; [2008] 1 All ER 1156

South Africa:

Amod v Multilateral Motor Vehicle Accidents Fund 1999 (4) SA 1319 (SCA)

B v S 1995 (3) SA 571 (A)
Chodree v Vally 1996 (2) SA 28 (W)
Daniels v Campbell NO and Others 2004 (5) SA 331 (CC)
Du Toit v Minister of Population and Welfare Development 2003 (2) SA 198 (CC)
Fish Hoek Primary School v Welcome 2009 (3) SA 36 (C)
Fitschen v Fitschen [2007] JOL 1612 (C)
French v French 1971 (4) SA 298 (W)
Gory v Kolver NO 2007 (4) SA 97 (CC)
Greenshields v Wylie 1989 (4) SA 898 (W)
Hassam v Jacobs NO 2009 (5) SA 572 (CC)
J v J 2008 (6) SA 30 (C)
J and Another v The Director General, Department of Home Affairs, and Others 2003 (5) SA 621 (CC)
Johncom Media Investments Ltd v M 2009 (4) SA 7 (CC)
LB v YD 2009 5 SA 463 (T)
Lubbe v Du Plessis 2001 (4) SA 57 (C)
Manning v Manning 1975 (4) SA 659 (T)
Märtens v Märtens 1991 (4) SA 287 (T)
MB v NB 2010 (3) SA 220 (GSJ)
McCall v McCall 1994 (4) SA 201 (C)
Meyer v Gerber 1999 (3) SA 650 (O)
Minster of Home Affairs v Fourie 2006 (1) SA 524 (CC)
National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)
Ressell v Ressel 1976 (1) SA 289 (W)
Rylands v Edros 1997 (2) SA 690 (C)
S v J [2011] 2 All SA 299 (SCA) (also reported as *FS v JJ* 2011 (3) SA 126 (SCA))
Satchwell v President of the Republic of South Africa and Another 2002 (6) SA 1 (CC)
Satchwell v President of the Republic of South Africa and Another 2003 (4) SA 266 (CC)
Stock v Stock 1981 (3) SA 1280 (A)
T v M 1997 (1) SA 54 (A)
Townsend-Turner v Morrow 2004 1 All SA 235 (C); 2004 (2) SA 32 (C)
Van den Berg v Le Roux 2003 3 All SA 599 (NC)
Van Vuuren v Van Vuuren 1993 (1) SA 163 (T)

Wicks v Fisher 1999 (2) SA 504 (N)

YM v LB 2010 (6) SA 338 (SCA)

Table of Statutes

Australia:

Family Law Act 53 of 1975

Sections 4AA, 10A, 10F, 10G, 10H, 10J, 10K, 12B, 12C, 13C, 13D, 14F, 14G, 38BD, 38R, 60B, 60CA, 60CC, 60I, 60K, 61F, 63DA, 68L, 68LA, 68M

Part IIIA

Part VII

Part VIIAB

Divisions 2 and 3 of Part I

Division 2 of Part XIIIAA

Family Law Amendment (Shared Parental Responsibility) Act 46 of 2005

Family Law Reform Act 187 of 1995

Family Law (Dispute Resolution Practitioners) Regulations 2008, Select Legislative Instrument 2008 No. 183 as amended

Regulations 25, 28, 29, 30

Family Law Regulations 1984, Statutory Rules 1984 No 426 as amended

Regulation 8A

Part 5

Part II

Family Law Rules 1984

Family Law Rules 2004, Statutory Rules 2003 No. 375

Volume 1: Rules 1.01 to Rule 26.31; specifically rules 1.02, 1.04, 1.05, 1.06, 1.08, 1.10, 6.10, 19.10

Volume 2: Schedules 1 to 6; specifically Schedule 1 Rules 1, 2, 3, 4, 5, 6 of Parts 1 (financial matters) and 2 (parenting matters)

Federal Magistrates Act 193 of 1999

Sections 4, 21, 23, 24, 25, 26, 27, 33, 34, 35, 93D, 115(1A)

Marriage Act 12 of 1961

International:

African Union Convention on the African Charter on the Rights and Welfare of the Child,

<http://www.unhcr.org/refworld/docid/3ae6b38c18.html> accessed on 3 November 2010

Article 4

Hague Convention on the Civil Aspects of International Child Abduction, 1980, is available at <http://www.unhcr.org/refworld/docid/3ae6b3951c.html>, accessed 13 October 2011.

United Nations Convention on the Rights of the Child, available at <http://www2.ohchr.org/english/law/crc.htm> accessed on 21 October 2010

Articles 3, 12

South Africa:

Administration Amendment Act 9 of 1929

Section 10

Age of Majority Act 57 of 1972, repealed

Arbitration Act 42 of 1965

Section 2

Births and Deaths Registration Act 51 of 1992

Children's Act 38 of 2005

Sections 5, 6, 7, 9, 10, 14, 17, 21, 22, 26, 30, 31, 33, 34, 40, 48, 49, 61, 64, 69, 70, 71, 72, 150, 155, 156, 157, 234, 292, 293, 295

Civil Unions Act 17 of 2006

Consolidated Regulations Pertaining to the Children's Act, 2005 as published in Part 1 of 2 of the *Government Gazette* No 33076 dated 1 April 2010; Regulation Gazette No 9256

Regulation 7

Constitution of the Republic of South Africa, 1996

Section 28

Divorce Act 70 of 1979

Sections 4, 6

Domestic Violence Act 116 of 1998

Section 1

Jurisdiction of Regional Courts Amendment Act 31 of 2008

Magistrates' Court Act 32 of 1944

Section 2

Magistrates' Court Amendment Act 120 of 1993

Maintenance Act 99 of 1998

Section 3

Marriage Act 25 of 1961

Mediation in Certain Divorce Matters Act 24 of 1987

Section 4

Mental Health Act 18 of 1973

Natural Fathers of Children Born out of Wedlock Act 86 of 1997, repealed

Recognition of Customary Marriages Act 120 of 1998

Sections 1, 8

Regulations Relating to Children's Courts and International Child Abduction as published in

Government Gazette No 33067 dated 31 March 2010; Regulation Gazette No 250

Regulations 6, 12, 13, 14

Regulation 6 Regulation 13 Regulation 14 regulation 12

Social Service Professions Act 110 of 1978

Draft Legislation:

South Africa:

Draft Muslim Marriages Bill 2011

Clauses 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 15

Domestic Partnerships Bill *Government Gazette* No 30663 of 14 January 2008

Clause 17

South African Law Reform Commission *Project 106 Islamic Marriages and Related Matters*
Report 2003

Clause 14